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“To See or Not to See: the Supreme Court’s Constant Struggle with the Constitutionality of Race-Conscious Affirmation Action Policies Post-Brown.”

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TABLE OF CONTENTS

INTRODUCTION

In *Brown v. Board of Education*[1], the Supreme Court overturned *Plessy v. Ferguson*[2], holding that "separate but equal" segregation in schools violates the Equal Protection Clause[3] of the Fourteenth Amendment.[4] Two main interpretations have emerged regarding how to apply and interpret *Brown* when considering the constitutionality of affirmative action policies.[5] Those competing interpretations are the anti-subordination and anti-classification principles.[6] Proponents of each interpretation claim support from the Court's decision in *Brown*, but the principles are almost entirely antithetical.[7] The anti-subordination principle holds that policies that consider racial identity may be used with the goal of eliminating the current effects of past discrimination.[8] The anti-classification principle supports the idea that the Constitution is colorblind and that any policy based on race, for whatever purpose, is presumptively unconstitutional.[9]

Prior to 2023, when deciding affirmative action cases, the Court has alternated between the two principles, settling on an intermediate position that permits consideration of race as a factor to ensure racial diversity, but not if the consideration is quota-based or overly mechanical.[10] In 2023, the Court took a firm stance, embracing one principle entirely for the first time.[11] In *Students for*

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[1] Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954).
[2] Plessy v. Ferguson, 163 U.S. 537 (1896), overruled by Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483 (1954).
[3] The Equal Protection Clause of the Fourteenth Amendment states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend XIV, § 1.
[4] *Brown*, 347 U.S. at 495.
[5] Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 Harv. L .Rev. 1470, 1474 (2004).
[6] *Id.*
[7] Abigail Nurse, *Anti-subordination in the Equal Protection Clause: A Case Study*, 89 NYU L. Rev. 293, 304-07 2014.
[8] *Id.* at 301.
[9] *Id.* at 299.
[10] *Id.* at 307-14.
[11] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

Fair Admissions, Inc. v. University of North Carolina[12], the Court held that the Constitution is colorblind and considering race as a positive or negative to ensure diversity in applications violates the Equal Protection Clause of the Fourteenth Amendment.[13] It is essential to consider the trajectory of the Court's affirmative action decisions because the Court has never been consistent in its treatment of affirmative action policies. Before *Students for Fair Admissions*, it was constantly alternating between being more accepting of considering race and more disapproving of the idea of classifying in general. To be sure, in most instances, the Court adopted a hybrid of the two principles, tweaking its approach to the Equal Protection Clause rather than completely changing sides from case to case.[14]

This paper will examine the Court's history with affirmative action, going back to *Brown* and the theories that developed from that seminal decision. Section I will explain the two principles in more depth. Section II will examine *Brown* and how each principle developed from that case, with proponents of both principles claiming theirs is more loyal to the spirit of *Brown*. Section III will look at subsequent Supreme Court precedent and the extent to which the Court utilized the two principles when ruling on various affirmative action policies, without firmly taking a side. Finally, Section IV will address *Students for Fair Admissions,* concluding that it is the closest the Court has ever come to firmly embracing either principle and that the prevailing view—at least for now—is the anti-classification principle.

[12] *Id.*
[13] *Id.*
[14] *See e.g.* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989) (finding that the particular policy in question violated the Equal Protection Clause, but leaving the door open for the constitutionality of like-policies).

I. Two Principles for Ensuring Racial Equality: Anti-Subordination and Anti-Classification

In 1954, the Supreme Court in *Brown* overturned over fifty years of precedent, holding that "[s]eparate educational facilities are inherently unequal."[15] The outcome of *Brown* relating to school segregation was clear: the segregation of students in schools based on race violated the Equal Protection Clause.[16] What remained unclear, however, was whether the Court's decision in *Brown* advocated for or foreclosed the ability to consider race to ensure equality in schools. Those who argue that *Brown* endorsed considering race as a way to ensure racial equality and integration in schools and the workplace support an anti-subordination reading of the case.[17] In contrast, those who aver that *Brown* endorsed a colorblind reading of the Constitution align with the anti-classification principle.[18] Each theory *purports* to aim for racial equality within the United States, but both propose very different means for achieving that end.[19]

The anti-subordination principle holds that the Constitution, specifically the Equal Protection Clause, prohibits racial hierarchies.[20] Thus, policies in place to curb or prohibit any hierarchy from persisting are consistent with the Equal Protection Clause.[21] The anti-subordination principle focuses more on the disparate impact on a group as a whole rather than the effect certain policies may have on an individual.[22] Some scholars argue that this emphasis on group impact is

[15] *Brown,* 347 U.S. at 495.
[16] *Id.*
[17] Daniel C. Epstein, *Black and White and Gray All Over: How Anticlassification Theory Can Endorse Race-Based Affirmative Action Policies*, 20 U. PA. J. CONST. L. 433, 434 (2017).
[18] *Id.* at 433.
[19] Siegal, *supra* note 5 at 1472.
[20] *Id.* at 1534.
[21] Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 NYU L. Rev. 294, 301 (1986).
[22] Siegal, *supra* note 5 at 1473.

one of the reasons why the Court has been reluctant to fully adopt an anti-subordination justification of affirmation action policies.[23]

In a way, those who support the anti-subordination principle argue that not only does the Constitution allow policies that explicitly account for racial disparity, but that the Constitution *compels* such policies.[24] Further, supporters of the anti-subordination principle note that the history of racism and slavery in the United States supports considering race when dismantling racial inequities.[25] According to the anti-subordination principle, this pervasive history of discrimination, coupled with persistent present-day racial inequality supports policies that actively work against those systems by requiring more diversity.[26] When those in a particular racial group are unable to achieve equal status through their own political pull, those who have the power must be able to lift that group.[27] The only way to fix discrimination is by addressing it head-on. These central tenets of the anti-subordination principle boil down to the idea that the primary concern of the Fourteenth Amendment and the Constitution itself is ensuring equality through whatever means.[28]

Entirely contrary to the anti-subordination principle is the anti-classification principle. The anti-classification principle, otherwise known as the "colorblind approach," focuses more on the fact that a policy classifies someone at all, rather than the effect the policy may have on that person or general social structures.[29] The anti-classification principle also emphasizes a policy's impact on a particular individual rather than the inner workings of group social hierarchies in America.[30] Those who prefer the anti-classification principle believe that only the face of the policy should be

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[23] Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 Philosophy & Public Affairs 107, 108 (1976).
[24] *Id.*
[25] Siegel, *supra* note 5 at 1473.
[26] *Id.* at 1477.
[27] *Id.* at 1474.
[28] *Id.*
[29] *Id.* at 1513.
[30] *Id.* at 1514.

considered, regardless of historical contexts that support its implementation. [31] The underlying justification for the anti-classification principle is that the Equal Protection Clause requires equal treatment, not different treatment, in the hopes of equal results.[32] The idea is that continued equal treatment under the law results in equal opportunity across the board.[33] Put another way, discrimination was allowed to fester because the law at the time did not treat everyone equally.[34]

Some who advocate for this principle argue that the way to end racial discrimination is to stop racially discriminating, even if that discrimination serves an equitable purpose.[35] To an anti-classification supporter, the insistence on classifying people by race, regardless of purpose or intent, keeps society separated by race and makes equality impossible.[36] Therefore, anti-classification in its strictest form does not allow for affirmative action policies aimed at pursuing racial diversity. Notably, the anti-classification principle brushes past—by not acknowledging at all—the structures that have been in place for centuries in the United States to subordinate members of various racial minority groups.[37] That leaves the question of whether the Constitution licensing only racially neutral policies is enough to dismantle such a pervasive system of discrimination.

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[31] *Id.*
[32] Fiss, *supra* note 2 at 107.
[33] *Id.* at 111.
[34] *Id.*
[35] *Id.* at 108. (See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007) (implying that affirmative action policies perpetuated systemic racism by stating, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race").
[36] *Id.*
[37] *Id.*

II. How Each Principle Claims to be *Brown's* Heir

Even though each principle may be fully understood in theory, it is worth examining how two distinctly different principles evolved from the same ten-page opinion.[38] Advocates for both principles claim that their view is more faithful to the Court's holding and intention in *Brown*.[39] In *Brown*, the United States Supreme Court decided consolidated cases all dealing with the question of whether racial segregation in schools violated the Equal Protection Clause.[40] In determining that it did, the *Brown* Court overruled *Plessy*, holding that "separate educational facilities are inherently unequal."[41] To support its holding, the Court cited social science research, which indicated that segregation has a detrimental impact on racial minorities.[42] To the Court, these findings suggested that *Plessy's* central holding of "separate but equal" necessarily violated Equal Protection because separate could never be equal considering the mental and social effects.[43] *Brown's* holding, while clear on whether segregation was permissible, led to further debate on its implementation. This entailed determining the primary principles animating the *Brown* decision. What is the best method to ensure that educational or other public facilities are equal? Further, what is the best way to enforce *Brown*?

Supporters of the anti-classification principle stress *Brown's* insistence that segregating students "because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to be undone."[44] To such a supporter, giving people an opportunity solely or largely because of their race continues this feeling of

[38] *See generally Brown*, 347 U.S. at 486-95.
[39] Siegel, *supra* note 5 at
[40] *Brown*, 347 U.S. at 486-87.
[41] *Id.* at 495.
[42] *Id.* at 493-94.
[43] *Id.* at 493-95.
[44] Siegal, *supra* note 5 at 1476.

inferiority, giving them the idea—correct or not—that the only reason they got where they are is *because* of their race.[45] Here, at the core of *Brown* is the idea that it ended seeing people as merely members of groups, and set forth the principle that people should be treated as individuals within society.[46] Equality is, therefore, "committed to individuals rather than to groups."[47]

One particular passage in *Brown* is central to the anti-classification principle:

> Segregation of [W]hite and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [slow] the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.
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> Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.[48]

It is this statement that purports to show that the *Brown* Court intended the Fourteenth Amendment to prohibit policies that classify based on race.[49] To someone who agrees with an anti-classification approach, the quoted passage indicates that segregation was solely based on classification by race, and it is the *classification* of the student as a certain race that made them feel inferior.[50] In

[45] Jack M. Balkin and Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. Mia. L. Rev. 9, 12 (2003).
[46] Missouri v. Jenkins, 515 U.S. 70 (1995).
[47] Siegel, *supra* note 5 at 1472.
[48] *Brown*, 347 U.S. at 494-95.
[49] Siegel, *supra* note 5 at 1472.
[50] *Id.*

subsequent cases that align more closely with the anti-classification principle, the Court has quoted this passage in disavowing the use of racial classifications.[51]

Those who prefer the anti-subordination principle focus on the years immediately following *Brown*, where much of the conversation centered on discriminatory harm to certain racial groups in the United States.[52] *Brown* focused on the negative mental effect that segregated facilities have on members of a racial group, not on benign discrimination against an individual.[53] To these supporters, *Brown* was about the goal of Equal Protection in creating equality for all racial groups, not about the process taken to get there.[54]

Additionally, anti-subordination principle advocates argue that the passage from *Brown* cited to by anti-classification supporters never says anything regarding prohibiting classifications based on race.[55] In fact, many anti-subordination supporters see that as an intentional omission because language even mentioning "classification" is nowhere to be found in *Brown*.[56] *Brown* had nothing to do with classifying students as Black or White; instead, it had to do with preventing categorical prohibitions that barred them from attending the same educational facilities.[57] The passage and cited social science only disparages the negative mental impact and feelings of inferiority that result from segregation, which are the very same evils that the anti-subordination principle targets.[58]

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[51] *See* Toll v. Moreno, 458 U.S., 39-40 (1982).
[52] Siegel, *supra* note 5 at 1474.
[53] Fiss, *supra* note 2 at 108.
[54] Siegel, *supra* note 5 at 1474.
[55] *Id.*
[56] *Id.* at 1470 (noting that cases decided at the same did as *Brown* did include language of classification).
[57] *Id.*
[58] *Id.*

At only ten-pages, it is difficult to say which of the two principles the Court in *Brown* wanted to embrace.[59] What the Court meant, or whether it intended its holding to be ambiguous—to be shaped and refined in the cases that would inevitably follow—is unclear. What *is* clear is that in the decades post-*Brown*, the Court had not (until 2023) firmly adopted one of these principles.

III. Anti-Subordination Versus Anti-Classification after *Brown*

This Part examines how the Court has applied or taken ideas from each, and in some cases both, of the principles in affirmative action cases post-*Brown*. The term "affirmative action" originates from an Executive Order President Kennedy signed in 1961.[60] The Order required government contractors to "take affirmative action," and ensure that no one was excluded from the hiring process because of their race.[61] In the present day, affirmative action has come to mean any policy or regulation aimed at promoting or implementing racial diversity through inclusive means in a public setting, such as a school or an office.[62]

The Court has been addressing affirmative action issues since the 1970s.[63] The Court first stated that ensuring racial diversity in education was a compelling government interest in 1978.[64] Seven cases summarize the Court's inconsistent application of *Brown* and the principles to affirmative action policies. Those cases are: (1) *Regents of the University of California v. Bakke*[65]; (2) *City of Richmond v. J.A. Croson Co.*[66]; (3) *Metro Broadcasting, Inc. v. FCC*[67]; (4) *Adarand*

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[59] *See Brown*, 347 U.S. at 486-96.
[60] Exec. Order No. 10925, 13 C.F.R. 101 (1960).
[61] *Id.*
[62] Dorothy F. Garrison-Wade and Dr. Chance W. Lewis*, Affirmative Action: History and Analysis*, J. of College Admission (April 22, 2024, 10:03 PM), https://files.eric.ed.gov/fulltext/EJ682488.pdf.
[63] *Id.*
[64] See Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978).
[65] *Id.* at 314.
[66] *Croson*, 488 U.S. at 476-511.
[67] Metro Broad., Inc. v. F.C.C., 497 U.S. 547 (1990), overruled by Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

Constructors, Inc. v. Pena[68];(5) *Grutter v. Bollinger*[69]; (6) *Gratz v. Bollinger*[70]; and (7) *Fisher v. University of Texas*[71]. This Part will consider them each in turn.

A. Regents of the University of California v. Bakke

Bakke was the first time the Supreme Court considered the constitutionality of affirmative action programs.[72] The contested program in *Bakke* involved a medical school saving sixteen out of one hundred seats every class for minority applicants.[73] The sixteen seats were only reserved for *racially* minority applicants, so an applicant who was otherwise disadvantaged socially or monetarily but a member of a racial majority would not be qualified to fill one of those seats.[74] Plaintiff Allan Bakke, while arguably qualified for a seat in the class, was denied admission.[75] Bakke sued, claiming that the school's policy violated his rights under the Equal Protection Clause.[76] The California Supreme Court, in invalidating the policy, held that race could never be considered when evaluating an applicant for admission.[77] The University petitioned the Supreme Court, and it granted certiorari.[78]

In affirming the California Court's judgment only as far as it required Bakke's admission, the Supreme Court did not categorically ban the consideration of race in the admissions process.[79] Justice Powell, writing for the majority, held that the reserved number of seats for solely racial

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[68] Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).
[69] Grutter v. Bollinger, 539 U.S. 306 (2003).
[70] Gratz v. Bollinger, 539 U.S. 244 (2003).
[71] Fisher v. Univ. of Texas at Austin, 570 U.S. 297 (2013).
[72] Richard A. Posner, *The Bakke Case and the Future of Affirmative Action*, 67 Cal. L. Rev. 171, 171-72 (1979).
[73] *Bakke*, 438 U.S. at 279.
[74] Posner, *supra* note 1 at
[75] *Bakke*, 438 U.S. at 277.
[76] *Id.* at 277-78.
[77] Posner, *supra* note 1 at 171.
[78] *Id.*
[79] *Id.* at

minority candidates did violate the Equal Protection Clause.[80] Justice Powell further stated that it was the strict quota that violated the Constitution, not the general consideration of race for genuine diversity purposes.[81] The Court further compared the University of California's program with the admissions policies at Harvard University.[82] The Court noted that Harvard's policy, which evaluated the applicant as a whole, including their racial identity, did not violate the Constitution in the same way that a mechanical quota-based approach would.[83] Further, the Court found that increasing diversity in university campuses was a compelling government interest, just that this particular plan was in no way narrowly tailored to further that interest.[84]

In its first affirmative action decision, the Supreme Court pulled from tenets of both the anti-classification and anti-subordination principles. The idea that strict quotas will forever keep racial groups separated and reinforce negative stereotypes is more in line with the anti-classification principle. In contrast, the proposition that schools may consider an applicant's racial identity throughout the admissions process resembles the race-conscious means to pursue racial equality that are supported by the anti-subordination approach. This middle ground approach would set the tone for many of the rest of the Court's affirmative action opinions.[85]

B. City of Richmond v. J.A. Croson Co.

One of the next instances in which the Court considered affirmative action policies was in the employment context.[86] In *Croson*, the Court "confront[ed] once again the tension between the

[80] *Bakke*, 438 U.S. at 315.
[81] *Id.*
[82] *Id.* at 316.
[83] *Id.* at 316-18.
[84] *Id.* at 307-10 (striking down reducing the historic deficit of minorities, countering social effects of discrimination, and providing for more racially diverse doctors as illegitimate government interests)
[85] Posner, *supra* note 1 at
[86] *Croson*, 488 U.S. at 477.

Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society."[87] The policy in question was a Richmond, Virginia policy that required contractors with city-granted contracts to subcontract at least thirty percent of their business to minority owned businesses.[88] A contractor whose bid was revoked after failing to subcontract enough work to minority business enterprises sued, arguing that the Richmond regulation violated the Equal Protection Clause.[89]

The Court held that the regulation was unconstitutional.[90] Richmond defended the regulation by arguing that its purpose was to ameliorate the effects of past discrimination.[91] The Court stated that aim could be a compelling government interest only if Richmond were able to prove that it had recently been the perpetrator of racial discrimination.[92] Evoking *Bakke*-like reasoning, the Court emphasized that such strict quotas could not be used when no legitimate government interest for doing so exists.[93] Simply put, Richmond's plan could not pass judicial scrutiny without proving that it had recently participated in discriminatory practices.[94] The Court again noted that there could be instances in which cities or states would be able to benefit minority contractors, perhaps if a quota could be concretely "tied to any injury suffered" or achieved via a less rigid quota system.[95]

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[87] *Id.* at 476-77.
[88] *Id.* at 477.
[89] *Id.* at 482-83.
[90] *Id.* at 511.
[91] *Id.* at 486.
[92] *Croson*, 488 U.S. at 498.
[93] *Id.*
[94] *Id.* at 500.
[95] *Id.* at 499.

Croson implicated two issues: (1) why would any city or state who had participated in discrimination willingly admit so to be able to implement such policies; and (2) is it reasonable to think that places with such a recent discriminatory history would be the cities or states that would *want* to implement such policies? Disregarding the difficulty of these questions, the Court has never turned its back on *Croson*. Regarding which principle *Croson* more closely aligned with, it took the *Bakke* semi-anti-classification approach of presumptively disapproving of such classificatory regulations, while not foreclosing the idea that *some* regulation in *some* city might pass strict scrutiny.[96]

C. Metro Broadcasting, Inc. v. FCC.

Metro Broadcasting considered the constitutionality of two Federal Communications Commission ("FCC") policies that gave preferential treatment to racial minorities in the hiring process.[97] The first policy under consideration was the FCC's preference for racial minorities in licensing, *so long as all other relevant factors were more or less equal*.[98] The second policy reviewed was the FCC's "distress sale" program, which allowed a limited number of stations to be transferred to minority owned firms.[99] Both policies aimed to promote diversity and minority participation in broadcasting, bringing broader and more inclusive viewpoints to all listeners.[100]

The Court, applying intermediate scrutiny, held that the policies did not violate the Due Process Clause of the Fifth Amendment[101] because the policies were substantially related to

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[96] *Id.* at 505-06.
[97] *Metro Broad.*, 497 U.S. at 552.
[98] *Id.*
[99] *Id.*
[100] *Id.* at 552-53.
[101] The Due Process Clause of the Fifth Amendment requires the government to practice equal protection. The Due Process Clause of the Fifth Amendment applies against the federal government in the same way that the Equal Protection clause of the Fourteenth Amendment applies against the states. See Bolling v. Sharpe, 347 U.S. 497 (1954), supplemented sub nom. Brown v. Bd. of Educ. of Topeka, 349 U.S. 294 (1955).

promoting the FCC's interest in diverse perspectives.[102] The Court supported its decision using findings from Congress which showed that minorities had been historically underrepresented in mass media.[103] The Court also noted that such policies can pass intermediate scrutiny so long as they do not unduly burden any race.[104] The Court found that any impact or burden on White broadcasters was too minor to hold that the policies were unconstitutional.[105]

Thus far, *Metro Broadcasting* embraced the anti-subordination principle more than any other affirmative action case. The Court applied intermediate scrutiny, declining the proposition that strict scrutiny was warranted.[106] Further, the Court focused more on the effect the policies had on racial groups and social dynamics as a whole, seeing the importance of diverse voices and perspectives being heard.[107] Under this formula, it would not have been complicated to design a policy substantially related to that defined interest in diverse perspectives resulting from minority participation.[108] *Metro Broadcasting* was the first time the Supreme Court had found that policies put in place to eliminate systemic racism to be constitutional.[109]

D. Adarand Constructors, Inc. v. Pena

Metro Broadcasting's authority over affirmative action policies did not last long. In 1995, just five years after it was decided, *Adarand* overruled *Metro Broadcasting*.[110] In *Adarand*, the Court held that race-based affirmative action policies would now have to pass strict scrutiny.[111] The contested policy in *Adarand* was the federal government's practice of giving general

[102] *Metro Broadcasting*, 497 U.S. at 566.
[103] *Id.*at 566-67.
[104] *Id.* at 596-97.
[105] *Id.*
[106] *Id.* at 564.
[107] *Id.* at 567-68.
[108] *Metro Broadcasting*, 497 U.S. at 600.
[109] *Id.*
[110] *Adarand*, 515 U.S. at 227.
[111] *Id.*

contractors a financial incentive for hiring racially diverse sub-contractors.[112] The policy was challenged by a non-minority contractor who submitted a lower bid than another diverse subcontractor, but was not awarded the bid.[113]

The Court emphasized that the *Metro Broadcasting* Court either forgot or ignored the fact that the Equal Protection Clause "protect[s] persons, not groups."[114] The Court explained that policies that facially discriminate on the basis of race—regardless of the impact the policies may have on systemic racism as a whole—must be subject to judicial scrutiny of the highest degree to ensure that an individual's rights are not infringed upon.[115] Finally, *Adarand* put into question whether racial diversity standing alone could even be a compelling government interest.[116] *Adarand* represents the Court's return to the more anti-classification perspective seen in *Croson* and *Bakke*. The Court's insistence that the Equal Protection Clause is concerned with the individual rather than the group, coupled with the now presumptively unconstitutional nature of all policies which classify people by race, regardless of intent, demonstrated that the Court was no longer willing to accept as broad anti-subordination reasoning.

After *Adarand*, all state and federal policies that discriminated on the basis of race had to survive strict scrutiny.[117] What was not entirely clear was why the Court took such a quick and sharp turn away from *Metro Broadcasting*? At least some of *Adarand's* outcome can be explained by the Court's composition changing post-*Metro Broadcasting*. Between 1990 and 1995, the Court lost four of the five justice majority from *Metro Broadcasting*, including Justice Thurgood

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[112] *Id.* at 204.
[113] *Id.* at 209-10.
[114] *Id.* at 227.
[115] *Id.*
[116] *Adarand*, 515 U.S. at 226. (stating that "[M]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system.")
[117] *Id.* at 227.

Marshall.[118] Further, the Justice who replaced Justice Marshall, Clarence Thomas, was staunchly against affirmative action from the day he was elevated to the Supreme Court.[119]

Adarand was Justice Thomas's first opportunity to weigh in on the affirmative action debate as a Justice on the Court.[120] In his concurring opinion, Thomas argued that there is no constitutional difference between policies that intend to subordinate races, and policies that benefit racial minorities.[121] Equal Protection to Thomas means *equal* protection across the board, not "racial paternalism" aimed at minorities, which "stamp[s] [them] with a badge of inferiority."[122] To Justice Thomas, the Constitution does not care about the rationales underlying a specific policy; the Constitution cares about equality *under the law*.[123] Throughout his time on the Supreme Court—over thirty years as of 2024—Thomas as maintained his disdain for affirmative action policies and belief in the anti-classification principle's constitutional superiority.[124]

E. Grutter v. Bollinger

In its next major affirmative action case, the Court returned to affirmative action in the educational context.[125] In *Grutter*, a denied applicant contested the constitutionality of the University of Michigan law school's admissions policy that considered racial minority status as a factor in the admissions process.[126] The school's policy was to conduct an "individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might

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[118] Andre Douglas Pond Cummings, *Grutter v. Bollinger, Clarence Thomas, Affirmative Action and the Treachery of Originalism: "The Sun Don't Shine Here in this Part of Town"*, 21 Harv. BlackLetter L.J. 1, 10 (2005).
[119] *Id.*
[120] Lia A. Fazzone, *Raise High the Roof Beam: Adarand Constructors, Inc. v. Pena and the New Level of Scrutiny for Affirmative Action*, 73 Denv. U. L. Rev. 599, 610-11 (1996).
[121] *Id.* at 611.
[122] *Id.*
[123] Cummings, *supra* note 1 at 10.
[124] *Id.*
[125] *Grutter*, 539 U.S. at 311.
[126] *Id.* at 316-17.

contribute to a diverse educational environment."[127] Additionally, race was not the only factor that could elevate an applicant who may contribute to diversity.[128]

The Court, applying strict scrutiny, upheld the admissions policy.[129] Echoing Justice Powell's opinion in *Bakke*, the Court held that pursuing racial diversity was a compelling government interest.[130] The Court also emphasized that because the law school considered many factors that may contribute to educational diversity, no applicant was being granted or denied admission solely based on race.[131] Additionally, the Court outright rejected the argument that the law school could have used other completely race-neutral policies.[132] Whereas the Court in *Adarand* found that the monetary incentives did not satisfy strict scrutiny, here the law school's individual consideration of each applicant and multiple factors that may contribute to diversity *did* constitute narrow tailoring for pursuit of a compelling interest.[133] *Grutter* was the first time in the affirmative action context that the Court was able to show that strict scrutiny was not "strict in theory, but fatal in fact."[134]

Grutter represented the Court applying strict scrutiny in a way that appeared open to the anti-subordination principle. Of course, the fact that strict scrutiny must be used in the first place means that the Court cannot fully embrace the anti-subordination principle. Policies that an anti-subordination supporter may approve of, such as a quota, will never be considered narrowly tailored for the purposes of strict scrutiny. However, allowing educational diversity as a

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[127] *Id.* at 337.
[128] *Id.*at 338 (noting that other factors considered included community service, employment experience, language fluency, and personal background).
[129] *Id.* at 343.
[130] *Id.* at 325.
[131] *Grutter*, 539 U.S. at 338.
[132] *Id.* at 337.
[133] *Id*.
[134] *Grutter*, 539 U.S. at 326. (quoting *Adarand*, 515 U.S. at 237).

compelling interest and dismissing the fact that the University could have chosen race-neutral policies means that the Court was willing to accept more anti-subordination justifications.[135] Curiously, the opinion set out a timeline for how long the Court expected such affirmative action policies to be necessary.[136] It stated, "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[137] Perhaps this was the Court's way of embracing the anti-subordination principle's value of equity until equality, hoping the latter would be achieved in twenty-five years. Or maybe it was the Court curtailing the anti-subordination principle's ability to have lasting weight as the premier interpretation of *Brown*.

F. Gratz v. Bollinger

In *Gratz*, the Court once again dealt with the constitutionality of a University of Michigan admissions plan, this time holding that the undergraduate points-based system violated the Equal Protection Clause.[138] With this system, the undergraduate admissions office would assign automatic points to several factors including grades, familial alumni relationship, extra-curricular activities, and underrepresented minority status.[139] The issue was that for the other factors, applicants would only receive a few points, but an applicant who was considered an underrepresented minority automatically received twenty points.[140] That meant a racial minority applicant would automatically be one-fifth of the way to the necessary "score" for admission.[141]

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[135] *See Grutter*, 539 U.S. at 337.
[136] *Id.* at 343.
[137] *Id.* (noting that it had been twenty-five years since Justice Powell wrote that student body diversity is a compelling government interest.)
[138] *Gratz*, 539 U.S. at 249-50.
[139] *Id.*at 255-56
[140] *Id.*
[141] *Id.*

The Court held that the points-based system was not narrowly tailored to meet the University's compelling government interest in a diverse student body.[142] The Court mainly took issue with the automatic allocation of twenty percent of the score for admission to anyone who was an underrepresented minority, which did not allow for any sort of individualized review.[143] The main, and fatal, difference between the policies in *Gratz* and *Grutter* is that *Gratz*'s mathematical formula awarding the highest number of points for racial diversity did not amount to the sort of holistic review the Court found permissible in *Grutter*.[144] All the same factors were considered, but they were measured in a mechanical rather than individualized way.[145]

Gratz does not represent a huge shift from *Grutter* towards firm anti-classification ideals. In fact, it is unsurprising that the Court decided the way it did in *Gratz*. One of the main reasons the Court approved of the plan in *Grutter* was because it considered each applicant as a person, evaluating how all of that applicant's attributes would contribute to the ultimate goal of educational diversity.[146] But to the *Gratz* Court, the undergraduate admissions office was not doing that at all. The undergraduate plan completely stripped the individualization away, resorting to mathematics rather than looking at an applicant as a person. *Gratz* is not an ultra anti-classification application of affirmative action doctrine. It is more so the Court doubling down on why it approved the law school plan in *Grutter* to begin with, standing by its intermediate view.[147]

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[142] *Id.* at 270.
[143] *Id.* at 271-72.
[144] *See Gratz*, 539 U.S. at 272; *Grutter*, 539 U.S. at 337.
[145] *See Gratz*, 539 U.S. at 272; *Grutter*, 539 U.S. at 337.
[146] *Grutter*, 539 U.S. at 337.
[147] *Compare Gratz*, 539 U.S. at 272 *with Grutter*, 539 U.S. at 337.

G. Fisher v. University of Texas at Austin

In its last major affirmative action ruling pre-*Students for Fair Admissions*, the Court upheld a University of Texas admissions policy that considered race one of many factors in the admissions process.[148] The underlying problem with the plan was that the University also employed the Top Ten Percent Law, which meant that any Texas high school student who graduated in the top ten percent[149] of their high school class would automatically earn admission into the University of Texas.[150] The Top Ten Percent Law meant that only about a quarter of the available seats in a class remained for those who were not granted admission via the Law.[151]

Fisher did not challenge the constitutionality of the Top Ten Percent Law, and only argued that the University's consideration of race as one of many factors in admissions violated her rights under the Equal Protection Clause.[152] The Court upheld its previous decisions holding that race may be used as a factor for admissions, but any plan that considers race must survive strict scrutiny.[153] The Court yet again reaffirmed that each applicant must be considered individually, but that an applicant's race could be taken into account to evaluate how individuals contribute to educational diversity and bring different perspectives.[154] The Court decided *Fisher* only ten years ago, and for the fourth time now upheld racial diversity as a compelling government interest that could survive strict scrutiny.[155]

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[148] *Fisher*, 570 U.S. at 297.
[149] Although facially neutral, the purpose of the Top Ten Percent Law was also to certify that more diverse applicants would be admitted into the university.
[150] *Fisher*, 570 U.S. at 303.
[151] *Id.*at 305.
[152] *Id.* at 306.
[153] *Id.*at 310-13.
[154] *Id.*
[155] *Id.*

IV. *Students for Fair Admissions*: Embracing Anti-Classification

In 2022, the Court granted certiorari to once again reconsider the constitutionality of university affirmative action policies.[156] The contested admissions policies all more or less mirrored the policy the Court explicitly approved in *Grutter*.[157] Still, the Court—reversing twenty years of precedent—held that race could no longer be considered as a factor in admissions decisions.[158] This resulted in the Court settling on a principle for the first time since it considered the constitutionality of affirmative action policies in the 1970s.[159]

A. Students held that race based affirmative action policies violate the Equal Protection Clause

The majority opinion in *Students for Fair Admissions* begins by explaining Harvard and the University of North Carolina's ("UNC") admissions processes.[160] The processes included "admissions office readers" considering "race and ethnicity . . . as one factor" for admissions.[161] Other factors included grades, extracurricular activities, standardized tests, and the student's own background.[162] The readers then decided if a particular applicant should be admitted.[163] This determination was sometimes based on a "plus" that a particular applicant would be given because of their race.[164] While a committee did review every reader's decision, in most cases the first reader's decisions were "provisionally final."[165]

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[156] *Students*, 600 U.S. at 190-91.
[157] *Id.* at 194-97.
[158] *Id.* at 230-31.
[159] *Id.*
[160] *Id.* at 194.
[161] *Id.* at 195.
[162] *Id.* at 196.
[163] *Students*, 600 U.S. at 196.
[164] *Id.*
[165] *Id.*

The Court then briefly addressed a standing issue proposed by UNC.[166] UNC argued that the Petitioner, Students for Fair Admissions, Inc. ("SFFA"), lacked standing to bring the claim because it was not a "genuine" organization for organizational standing purposes.[167] The Court stated that organizational standing can be satisfied in two ways: (1) the organization can claim that it suffered an injury itself; or (2) the organization can claim it has standing as a "representative of its members."[168] UNC claimed that SFFA could not establish organizational standing because it was not a "genuine 'membership organization,'" as it was not funded and run by its members when it filed suit.[169] The Court quickly shut down UNC's argument, stating that SFFA is a voluntary membership organization with legitimate members.[170] Further, the Court noted that when SFFA filed suit initially it was already incorporated as a 501(c)(3) nonprofit with over forty identifiable members.[171] Therefore, the Court concluded that said members were acting in good faith and did in fact have standing to pursue the claim.[172]

Next, the Court began its discussion of SFFA's main claim regarding Harvard and UNC's purported violations of the Equal Protection Clause.[173] The Court examined the history of the Fourteenth Amendment and the Supreme Court's initial interpretation of it. It reiterated the Court's failure in *Plessy*, noting that it "failed to live up to the Clause's core commitments" of equality[174]. The Court then turned to *Brown*, noting its insistence that "separate but equal" could never be equal.[175] Here, the Court quoted language from the plaintiffs in Brown, who stated: "That the

[166] *Id.* at 198.
[167] *Id.*
[168] *Id.* at 199-200.
[169] *Students*, 600 U.S. at 200.
[170] *Id.* at 201.
[171] *Id.*
[172] *Id.*
[173] *Id.* at 201-02.
[174] *Id.* at 202-03.
[175] *Students*, 600 U.S. at 204.

Constitution is colorblind is our dedicated belief."[176] Additionally, it stated affirmatively that Brown marked the end of making distinctions based on race.[177]

Moving on from the discussion of *Brown*, the Court then turned its attention to the decades post-*Brown*, where the it grappled with how to apply *Brown* to other aspects of public life.[178] These decisions applied *Brown*'s holding of outlawing segregation to commercial property, beaches, busing, parks, and other public facilities.[179] To the Court, the point here is that these post-*Brown* decisions all reflect what is deems the "core purpose" of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race."[180] The Court doubles down here.[181] Harkening back to an earlier Roberts quote, the Court is emphatic that the only way to eliminate discrimination is to eliminate *all* discrimination.[182] Here, the Court also reaffirmed that any exception to equal protection must survive strict scrutiny.[183] Further, the Court examined all of its relevant affirmative action precedent before scrutinizing the Harvard and UNC policies at issue.[184]

When directly looking into the admissions policies, the Court says that they have failed three major criteria: (1) strict scrutiny analysis; (2) not using race as a negative or stereotype; and (3) a logical end point.[185] Those three failures will be discussed in turn.

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[176] *Id.*
[177] *Id.*
[178] *Id.* at 204-06.
[179] *Id.*
[180] *Id.*at 206.
[181] *Students*, 600 U.S. at 206.
[182] *Id.*
[183] *Id.* at 214.
[184] *Id.* at 208-13.
[185] *Id.* at 213.

The Court noted that the contested policies could not satisfy strict scrutiny analysis because such interests as "training future leaders[,] preparing graduates 'to adapt to an increasingly pluralistic society[,] and better educating [] students through diversity" are unable to be subjected to proper judicial review.[186] The Court stated that even though the aforementioned goals may be laudable, it is unclear how any court is supposed to measure those goals and at what point schools achieve them.[187] To the majority, it would be hard for a judge to determine whether Harvard and UNC students have been sufficiently trained as future leaders or better educated via a diverse environment.[188] The Court further worried how—even if a court could measure these goals—anyone is to know when these goals have been met.[189] The Court noted that the asserted goals are far more elusive than other goals found to be compelling.[190] For example, in the context of school segregation, courts can ask and affirmatively answer whether a race-based remedial policy "produces a distribution of students 'compar[able] to what it would have been in the absence of such constitutional violations.'"[191] To summarize the Court's concern, it saw these policies and asserted goals as "standardless" and "inescapably imponderable."[192]

Even if the Court found these asserted goals to be sufficiently measurable for judicial review, the Court notes that the universities fail to narrowly tailor the policies to those goals.[193] The Court primarily took issue with the actual racial categories used by both the schools.[194] Those categories were: "(1) Asian; (2) Native Hawaiian or Pacific Islander; (3)Hispanic; (4) White; (5)

[186] *Id.* at 214.
[187] *Students*, 600 U.S. at 214-16.
[188] *Id.* at 214-15.
[189] *Id.*
[190] *Id.*
[191] *Id.* at 215.
[192] *Id.*
[193] *Id.*at 215-16.
[194] *Students*, 600 U.S. at 216.

African-American; and (6) Native American."[195] The Court believed those categories were impermissibly overbroad, arbitrary, or underinclusive.[196] To the Court, categories such as "Asian" are overbroad because there is only one category for all Asian students with "apparently" no interest in "whether *South* Asian or *East* Asian students are adequately represented."[197] The Court labeled the category "Hispanic" as "undefined and arbitrary" because there is a constantly changing idea of who is technically "Hispanic," and the general category does nothing to resolve that discrepancy.[198] Finally, the categories are underinclusive because the universities could not answer where or in what category Middle Eastern students would be considered.[199] Simply put, when analyzing the plans using strict scrutiny, the Court noted that there was a "mismatch" between the goals asserted and the means employed, making the policies impossibly incomprehensible for competent judicial analysis.[200]

Moving on, the Court stated that the policies violate the "twin commands" of the Equal Protection Clause because they use race as a negative and a stereotype.[201] The Court noted that the relevant precedent emphasized that any applicant's race may not be used against them by a school.[202] To the majority, Harvard and UNC's plans did use race as a negative.[203] For example, Harvard's affirmative action policies had "led to an 11.1% decrease in the number of Asian-Americans admitted to Harvard."[204] The Court further stated that the Universities' arguments in

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[195] *Id.*
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Id.*
[200] *Students*, 600 U.S. at 217.
[201] *Id.* at 218 (stating that the "twin commands" of the Equal Protection Clause are: (1) never using race as a negative; and (2) never using race as a stereotype).
[202] *Id.*
[203] *Id.* at 218-19.
[204] *Id.* at 218.

response to this assertion are "hard to take seriously."[205] The Universities argued that considering one applicant's race as a positive for diversity purposes does not mean that the school considers a racial majority applicant's race as a negative.[206] Harvard in particular relied on analogizing its affirmative action considerations to an applicant who plays an instrument versus an applicant with no musical background.[207] The Court did not focus on this argument much, simply stating that any benefit given to one applicant and not other is necessarily a disadvantage to those who do not receive the benefit.[208]

Additionally, the Court found paradoxical the universities' argument that considering race as a factor does not impact many admissions.[209] The Court essentially says that the schools cannot have it both ways. They cannot at the same time state that to ensure diversity it is necessary to consider race during the admissions process, and simultaneously argue that their considering race does not impact a large number of admissions decisions.[210] Plus, the universities themselves admitted that in at least some cases an applicant's race is determinative.[211] How can these policies not have a negative impact on some races if "in [their] absence, members of some racial groups would be admitted in greater numbers[?]"[212]

Regarding the stereotype problem here, the Court believed that the universities were admitting diverse applicants under the assumption that such applicants would hold a particular viewpoint or perspective because they were members of certain racial groups.[213] The Court stated

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[205] *Id.*
[206] *Students*, 600 U.S. at 218.
[207] *Id.*
[208] *Id.*
[209] *Id.* at 219.
[210] *Id.*
[211] *Id.* at 196.
[212] *Students*, 600 U.S. at 219.
[213] *Id.* at 219-220.

that this is the very stereotyping that *Grutter* expressly forbade.[214] The idea that there is an "inherent benefit [] in race for race's sake" goes against the entire meaning of the Equal Protection Clause.[215] The Court echoed *Brown* here by stating that such racial classifications and assumptions are demeaning to the dignity of someone who may now feel as though their worth is derived solely from the color of their skin.[216] These racial determinations eliminate any sort of individual consideration of an applicant regarding merit or other personal qualities. The Court noted that the Equal Protection Clause prohibits universities admitting an applicant because the school believes they may think a certain way because of their race.[217] To the Court, the Equal Protection Clause requires determinations made on the basis of an individual person's qualities and attributes that actually contribute to different perspectives. Bare racial determinations "can only cause continued hurt and injury."[218]

Finally, the Court elaborates on the third reason why the affirmative action policies must fail: they have no end date in sight.[219] The universities contend that the programs will end when campuses achieve diversity without the use of such policies, which, to the schools, does not require any sort of mathematical quota or determination.[220] The universities, however, do make admissions decisions based on the racial breakdown of the previous classes, giving more weight to applicants from a racial group that was underrepresented in the classes prior.[221] From this information, the Court determined that there is a numerical commitment underlying the decisions.[222] Therefore, the

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[214] *Id.* at 220.
[215] *Id.*
[216] *Id.*
[217] *Id.* at 220-21.
[218] *Students*, 600 U.S. at 221.
[219] *Id.* at 221-22.
[220] *Id.*
[221] *Id.*
[222] *Id.*

Court sees this commitment as the very type of racial balancing that the Court had already found "patently unconstitutional" in multiple instances[223] The Court has time and time again disallowed such racial balancing because the Equal Protect Clause requires the government to treat citizens individually, not merely as members of a racial group.[224]

The universities' last argument advocating for the programs continuing was that it has not yet been twenty-five years since *Grutter*.[225] But the Court says that this twenty-five year assumption more so reflected the *Grutter* Court's view that the policies would not be necessary by 2028, not a command that the Court must continue to allow them for the entire twenty-five years. Even further, the universities themselves periodically reviewing the necessity of the programs did not ease the Court's worry. Periodic review cannot "make unconstitutional conduct constitutional," and *Grutter* explicitly stated that at some point affirmative action policies had to end, regardless of periodic review.[226] Therefore, the fact that the *Grutter* Court mentioned it expected such policies would no longer be necessary in twenty-five years does not matter much to the majority, especially given its fear that neither university could pinpoint an exact expected end date.[227]

The Majority then spent some time directly addressing the dissenting opinions.[228] It acknowledged that the dissent's view of the Equal Protection Clause is that it permits policies which expressly consider race-based solutions to address systemic racial inequities.[229] Again, the Court examined its affirmative action precedent stating that ameliorating societal discrimination has never constituted a compelling government interest.[230] The majority chided the dissent for

[223] *Id.* at 223.
[224] *Students*, 600 U.S. at 223.
[225] *Id.* at 224.
[226] *Id.* at 225.
[227] *Id.*
[228] *Id.*at 226-31.
[229] *Id.* at 226.
[230] *Students*, 600 U.S. at 226-28.

failing to adequately cire to any precedent supporting its view.[231] To the majority, all relevant precedent is firmly on its side.[232] The dissent's wish that the law be another way is one thing; to claim that the law *supports* that wish is another.[233] The majority believes that the dissent improperly advocates for "a judiciary that picks winners and losers based on the color of their skin."[234] The majority argued that the dissent was twisting *Brown* into saying that "separate but equal" is only "inherently unequal" when it disadvantages racial minorities.[235] Such a view, in the majority's opinion, is remarkably wrong.[236] Quoting from Justice Harlan's dissent in *Plessy*, the majority ended its discussion by stating the Constitution is colorblind, and such affirmative action policies simply cannot be reconciled with the Equal Protection Clause.[237]

In response, the dissent went through its own historical journey from the founding of the nation, through slavery, to the reconstruction era, and passage of the Fourteenth Amendment.[238] To the dissent, this history and the relevant case law support policies which implement the ultimate goal of *Brown*: "achiev[ing] a system of integrated schools that ensured racial equality of opportunity, not to impos[ing] a formalistic rule of race-blindness."[239] The dissent argued that the Constitution is not and never has been colorblind.[240] The majority's insistence that it is, the dissent says, "cements a superficial rule . . . as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter."[241] To the dissent, race-blindness has

[231] *Id.* at 227.
[232] *Id.*
[233] *Id.*
[234] *Id.* at 229.
[235] *Id.*
[236] *Students*, 600 U.S. at 229-30.
[237] *Id.* at 230.
[238] *Id.* at 318 (Sotomayor, J., dissenting).
[239] *Id.* at 328.
[240] *Id.*
[241] *Students*, 600 U.S. at 318 (Sotomayor, J., dissenting).

never been enough to eliminate *de facto* segregation.[242] The goal should not be bare equality even if that results in inequitable results.[243] The goal should be equality of opportunity, which in many cases cannot be achieved without policies considering race on their face.[244]

Regarding the majority's invocation of *Brown*, the dissent was more than skeptical.[245] The majority, the dissent noted, partook in "revisionist history" by recharacterizing *Brown* and "distorting" Justice Harlan's renowned dissent in *Plessy*.[246] To the dissent, *Brown* did not and was never previously understood to support a "race-ignorant conception of equal protection."[247] *Brown* endorsed the idea that race conscious measures could be utilized to ensure equality, and the decades of post-*Brown* cases rejected arguments to the contrary.[248] Further, cases like *Bakke*, *Grutter*, and *Fisher*, (cases that, at the very least, support the proposition that racially conscious policies in the interest of diversity may be constitutional) extend the true spirit of *Brown* by recognizing the importance of racially integrated and culturally diverse schools.[249]

Concluding, the dissent noted that race-based affirmative action policies are and have been consistent with the Equal Protection Clause.[250] In support of this contention, the dissent argued that every single one of the majority's arguments can be found in the dissent of the Court's prior affirmative action cases.[251] Why now do those arguments suddenly become those that hold the winning weight?[252] The dissent does not believe that strength in numbers applies to constitutional

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[242] *Id.* at 328.
[243] *Id.*
[244] *Id.* at 330.
[245] *Id.*
[246] *Id.* at 330-31.
[247] *Students*, 600 U.S. at 330 (Sotomayor, J., dissenting).
[248] *Id.*
[249] *Id.* at 331.
[250] *Id.*
[251] *Id.* at 352.
[252] *Id.*

supremacy.[253] Under the precedent that the majority forgoes, UNC and Harvard's policies would of course pass strict scrutiny.[254] They nearly mirror the admission program upheld in *Grutter*.[255] The dissent was greatly worried that this decision would impact the Court's legitimacy.[256] For the dissent, people should not have to worry that a shift in the Court's composition should overrule over fifty years of precedent.[257]

Finally, the dissent finds it worrisome that the now constitutionally mandated indifference to an applicant's race cannot quash racial inequities that still pervade American society.[258] To the dissent, racially diverse educations are of the utmost importance, and the policies deemed unconstitutional in *Students for Fair Admissions* were a permissible means to achieve that.[259] Race neutrality is and has been "inadequate to achieve the constitutional guarantee of racial equality in a Nation where the effects of segregation persist."[260]

B. The Court's firm embrace of the anti-classification principle

The majority opinion in *Students for Fair Admissions* is vastly different from all prior affirmative action precedent.[261] Previously, when considering whether affirmative action programs comply with the Equal Protection Clause, the Court upheld programs which individually considered an applicant's race along with other qualities for the purposes of ensuring a diverse educational environment.[262] In the past, even when the Court struck down policies, it did so

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[253] *Students*, 600 U.S. at 352-53 (Sotomayor, J., dissenting).
[254] *Id.* at 360-61.
[255] *Id.*
[256] *Id.* at 353.
[257] *Id.*
[258] *Id.*
[259] *Students*, 600 U.S. at 383-84. (Sotomayor, J., dissenting).
[260] *Id*.
[261] Id.; *contra Grutter*, 539 U.S. at 337.
[262] *See Grutter*, 539 U.S. at 337.

because *that particular policy* did not survive strict scrutiny, not because no like-policy could. Regarding the two principles specifically, the Court had never fully endorsed one over the other.[263] Rather, the Court had pulled from the central tenets of both, settling on its intermediary position that lasted for decades.[264]

Even though the ultimate outcome of invalidating an affirmative action policy may have been the same as in some prior cases, the implications in *Students for Fair Admissions* are far different.[265] For the first time, the Court foreclosed the idea that programs that consider race in the application process are constitutionally permissible.[266] Throughout the opinion, the Court seems to firmly embrace the ideals and goals of the anti-classification principle.[267] The majority opinion makes clear that schools may no longer consider an applicant's race during the admissions process.[268] *Students for Fair Admissions* marks the first time that the Court fully adopted one of the aforementioned competing principles.[269]

Firstly, the Court's insistence and affirmation that the Equal Protection Clause is universal in its application regardless of a program's purpose or intent invokes a central tenet of the anti-classification principle.[270] Supporters of the anti-classification principle firmly believe that the Equal Protection Clause must be applied to all members of all races on an individual basis.[271] Multiple times in the opinion, the majority emphasizes that it does believe the proffered good intentions behind the policies, and it does find them to be admirable.[272] The problem, to the

[263] *e.g. Gratz*, 539 U.S. at 272; *Croson*, 488 U.S. at 477.
[264] *e.g. Gratz*, 539 U.S. at 272; *Croson*, 488 U.S. at 477.
[265] *Students*, 600 U.S. at 229-30.
[266] *Id.*
[267] *Id*; *see also* Nurse, *supra* note 2 at 304-07.
[268] *Students*, 600 U.S. at 229-30; Nurse, *supra* note 2 at 304-07.
[269] *Students*, 600 U.S. at 229-30.
[270] *Id.* at 206.
[271] *Id.*
[272] *Id.* at 206, 213.

majority, is that the Equal Protection Clause does not care about intentions or end goals: it cares about equal application amongst all persons.[273] That is classic anti-classification reasoning for the application of the Equal Protection Clause. Equality means equal *under* the law, not equal *after* it.[274]

Further, the majority opinion (not curiously written by Justice Roberts) echoes earlier quotes made by Justice Roberts himself in *Parents Involved in Community Schools v. Seattle School District Number One*.[275] In *Students for Fair Admissions*, the Court stated that "[e]liminating racial discrimination means eliminating all of it."[276] In *Parents Involved*, Roberts, writing for the majority, wrote, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[277] Again, supporters of the anti-classification principle aver that racial discrimination exists because society insists on separating people according to their race.[278] To those supporters, race-neutral policies are the only way to ensure equality and further the Equal Protection Clause.[279] For the first time, in *Students for Fair Admissions*, the Court is outright requiring such race-neutrality.[280] To the Court in *Students for Fair Admissions* and a general supporter of the anti-classification principle, the entire thrust of the Equal Protection Clause is that treating someone differently solely or mainly because of their race is *not* like treating someone differently because of their other attributes or experiences.[281] Only the latter is permissible, and *Students for Fair Admissions* cements that.[282]

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[273] *Id.* at 206.
[274] Siegel, *supra* note 5 at 1472.
[275] *Parents Involved*, 551 U.S. at 748.
[276] *Students*, 600 U.S. at 206.
[277] *Parents Involved*, 551 U.S. at 748.
[278] Siegel, *supra* note 5 at 1472.
[279] *Id.*
[280] *Students*, 600 U.S. at 229-30.
[281] *Id.* at 220.
[282] *Id.*

The anti-classification principle sees inherent problems with using any policy that classifies someone based on their race.[283] *Students for Fair Admissions* doubles down on that belief by quoting language from *Grutter* where the Court expressed skepticism and discomfort over racial classifications regardless of the goal behind them.[284] The inherent worry, to both the classic anti-classification supporter and the Court in *Students for Fair Admissions*, is the harm that those classifications have on the applicant who does not receive the "plus" because of their race.[285] Again, the Equal Protection Clause warrants individual protection, not group consideration.[286]

The majority's multiple references to the *Brown* litigation and ultimate decision it its way of tying the anti-classification principle to precedential supremacy and legitimacy.[287] By stating that this result is what the *Brown* Court would have wanted, and the *Brown* Plaintiffs advocated for, gives the ultimate decision of overturning decades worth of precedent a constitutional and precedential basis.[288] The Court's aim here is likely to emphasize why the anti-classification approach is the more constitutionally consistent one.[289] Such language includes the *Brown* plaintiffs' argument that "no state has any authority under the [E]qual [P]rotection [C]lause . . . to use race as a factor in affording educational opportunities among its citizens," and "[t]hat the Constitution is color blind is our dedicated belief." These quotes are directly consistent with the anti-classification principle's belief that the Constitution does not see race and must be applied evenly against all.[290]

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[283] Siegel, *supra* note 5 at 1472.
[284] *Students*, 600 U.S. at 212 (quoting *Grutter*, 539 U.S. at 342).
[285] *Students*, 600 U.S. at 212.
[286] *Id.*
[287] *Id.* at 204
[288] *Id.*
[289] *Id.*
[290] Id. (quoting Tr. of Oral Arg. in *Brown I*, O. T. 1952, No. 8, p. 7 (Robert L. Carter, Dec. 9, 1952)).

Finally, the Court's emphasis on the idea that such classifications reinforce negative stereotypes reflects the anti-classification principle's theory that it is racial classifications which keep society separated.[291] Again, here comes the supposed constitutional de-emphasis on racial group membership and the impermissibility of assuming someone has certain viewpoints because they are a member of a certain group.[292] The anti-classification principle submits that the Constitution requires individual consideration, and the Court in *Students for Fair Admissions* adopts that viewpoint by stating, "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit."[293] To both the anti-classification principle and the *Students for Fair Admissions* majority, an applicant receiving a benefit because of their race is offensive to the individual character of that applicant, and is based on the faulty assumption that they will contribute a certain perspective to the university.[294]

Ultimately, the Court holds that the Equal Protection Clause mandates a colorblind approach to school admissions, and that holding encapsulates the entire sentiment of the anti-classification principle.[295] Again, whether this outcome is what the Brown Court foresaw or intended is impossible to say. Clearly, the majority and dissent of *Students for Fair Admissions* disagree on what method best encapsulates and furthers the spirit of *Brown*.[296] What is incredibly clear is that—for at least the foreseeable future—colleges must assess applications on an individual

[291] *Students*, 600 U.S. at 218.
[292] *Id.* at 218-19.
[293] *Id.* at 220.
[294] *Id.*
[295] *Id.* at 230-31.
[296] *See generally Students*, 600 U.S. 190.

and race-neutral basis. After an over half-a-century battle, the anti-classification principle has won, be it by its own merit or the benefit of a favorable Court.

CONCLUSION

Students for Fair Admissions was monumental in many aspects. It overruled nearly fifty years of precedent, marked the first time the Court stated that admissions decision must be race-neutral, and sharply divided the nation. What effect *Students for Fair Admissions* will have on the level of diversity in college campuses is unclear. Further, how *Students for Fair Admissions* will impact the Court's legitimacy remains to be seen. As the majority in another landmark case noted, "the legitimacy of the Court must be earned over time."[297] The same could be true of its destruction. What is abundantly clear is that, at least for now, the anti-classification principle reigns superior in the mind of America's highest Court. In Students for Fair Admissions, the Court abandoned its middle ground approach once and—supposedly—for all.

[297] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 868 (1992), overruled by Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).