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### Evading a Race-Conscious Constitution

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## EVADING A RACE-CONSCIOUS CONSTITUTION

Cara McClellan\*

*“There is a world of difference between the situation this Court confronted in *Brown*, the separate but equal doctrine that was designed to exclude African Americans based on notions of racial inferiority and subjugate them, which, as this Court recognized, the school children affected their hearts and minds in a way unlikely ever to be undone . . . and the university policies at issue in this case.”<sup>1</sup>*

### ABSTRACT

*The idea of a “colorblind” Constitution is front and center in cases before the Supreme Court this term, including *Students for Fair Admissions v. President & Fellows of Harvard College*, and *Students for Fair Admissions v. University of North Carolina (UNC)*. In these cases, the same plaintiff organization, *Students for Fair Admissions (“SFFA”)*, has asked the Supreme Court to rule that the Equal Protection Clause and Title VI of the Civil Rights Act of 1964 prohibit universities from considering race as one of many factors in admissions to pursue the educational benefits that flow from diversity. In support of this argument, SFFA invokes the Supreme Court’s landmark decision in *Brown v. Board of Education of Topeka* to support its colorblind approach. This essay argues that SFFA’s reliance on *Brown* ignores the role of courts enforcing desegregation in the face of white resistance through the use of racial classifications. *Brown* and its progeny thus made clear that racial classifications are a necessary remedy for addressing racial discrimination in K-12 public education. Moreover, while SFFA and other conservative plaintiff organizations claim to be opposed to the use of racial classifications—and not the broader goal of pursuing racial diversity and equity in education—these same organizations are simultaneously opposing attempts to pursue diversity and equity through race-neutral means in K-12 education, demonstrating a broader agenda of maintaining the*

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<sup>1</sup> Transcript of Oral Argument at 122:1-24, *SFFA v. President & Fellows of Harvard Coll.*, No. 20-1199 (2022). (Solicitor General Elizabeth Prelogar).

*existing racial hierarchy and segregation in schools, while relying on the formal legal principle of colorblindness.*

## INTRODUCTION

The idea of a “colorblind” Constitution is front and center in cases before the Supreme Court this term, including *Students for Fair Admissions v. President & Fellows of Harvard College*, and *Students for Fair Admissions v. University of North Carolina* (UNC).<sup>2</sup> In these cases, the same plaintiff organization, Students for Fair Admissions (“SFFA”), has asked the Supreme Court to rule that race may not be considered as one of many factors in university admissions. SFFA argues the use of racial classifications is per se unconstitutional. In fact, counsel for SFFA opened the *SFFA v. UNC* argument, by asserting: “Racial classifications are wrong. That principle was enshrined in our law at great cost following the Civil War.”<sup>3</sup>

As others have argued, a colorblind,<sup>4</sup> or more precisely, a color-evasive<sup>5</sup> interpretation of Congress’s authority under the Reconstruction Amendments<sup>6</sup> contradicts the legislative history and debates of the Amendments and the statutes they were intended to constitutionalize.<sup>7</sup> Indeed, during arguments in *Merrill v. Milligan*,<sup>8</sup> a case heard at the start of the 2022-2023 term, Justice Ketanji Brown Jackson explained why a color-evasive interpretation of the Fourteenth Amendment should fail as matter of history. Questioning

<sup>2</sup> *Students for Fair Admissions, Inc. v. Univ. of N. Carolina*, No. 21-707 (S. Ct. filed Nov. 11, 2021); *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, No. 20-1199 (S. Ct. filed Feb. 25, 2021).

<sup>3</sup> Transcript of Oral Argument at 4:12-13, *SFFA v. Univ. of N. Carolina*, No. 21-707 (2022). Counsel for SFFA went on to assert that “a general understanding of the broad scope of the Fourteenth Amendment when it was enacted is that it would prohibit legal distinctions based on race or color.” Transcript of Oral Argument at 179:5-10, *SFFA v. Univ. of N. Carolina*, No. 21-707 (2022).

<sup>4</sup> See generally Neil Gotanda, *A Critique of Our Constitution is Color-Blind*, STANFORD L. REV. 44, 1–68 (1991) (arguing that an ideology of color-blindness served to maintain white supremacy by preserving “the social, economic, and political advantages that whites hold over other Americans”).

<sup>5</sup> Where possible, I prefer to use the term color-evasive because the term colorblind wrongly “conflates blindness with ignorance” and “implies passivity . . . that ignores the power of white supremacy, and whiteness situated within it, to actively evade discussions on race.” Subini Ancy Annamma, Darrell D. Jackson, & Deb Morrison, *Conceptualizing Color-Evasiveness: Using Dis/ability Critical Race Theory to Expand a Color-Blind Racial Ideology in Education and Society*, 20 RACE ETHNICITY AND EDUC., 147, 154 (2017), <https://doi.org/10.1080/13613324.2016.1248837>.

<sup>6</sup> The Reconstruction Amendments refer to Amendments XIII, XIV, and XV of the United States Constitution passed to protect the rights of formerly enslaved people. See H.R. Rep. No. 30, 39th Cong., 1st Sess., XIII—XIV (1866).

<sup>7</sup> See, e.g., James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901, 903–04 (1985).

<sup>8</sup> *Merrill v. Milligan*, No. 21-1086 (2022).

how the Fourteenth Amendment could prohibit remedial action under Section 2, Justice Jackson stated: “I don’t think that the historical record establishes that the founders believed that race neutrality or race blindness was required, right? They drafted the Civil Rights Act of 1866, which specifically stated that citizens would have the same civil rights as enjoyed by white citizens.”<sup>9</sup> She went on to observe that “when there was a concern that the Civil Rights Act wouldn’t have a constitutional foundation, that’s when the Fourteenth Amendment came into play.”<sup>10</sup> Still, color evasion continues to do powerful work in reframing actions taken to remedy racial inequality as somehow in conflict with the purposes of the Reconstruction Amendments. “Colorblindness” is the basis upon which advocates ask courts to ignore or avoid consideration of pervasive and deeply entrenched structural racism in many aspects of American life.

In advocating for a “colorblind” interpretation of the Equal Protection Clause of the Fourteenth Amendment, plaintiff organization SFFA has repeatedly invoked the Supreme Court’s landmark decision in *Brown v. Board of Education of Topeka*<sup>11</sup> for the principle that the Fourteenth Amendment requires that universities not consider race as one of many factors in admissions.<sup>12</sup> Ironically, while SFFA relies on *Brown* for a principle of “colorblindness,” school desegregation litigation is in fact one of the areas of law in which the Supreme Court has repeatedly and unambiguously held that the use of racial classifications is justified. During the *SFFA v. Harvard* argument, Justice Barrett recognized this reality stating: “when you look at the originalist evidence . . . some race-conscious measures were permitted at least in a remedial sense, right? Desegregation is an example of that.”<sup>13</sup>

This essay discusses the ways that *Brown v. Board of Education* and its progeny made clear that racial classifications are a necessary remedy for addressing racial discrimination in K-12 public education. A closer examination of the case law interpreting *Brown* reveals how SFFA’s reliance on this case is inaccurate as it ignores the roles that courts have played for decades in enforcing *Brown* in the face of white resistance through the use of racial classifications. Moreover, while SFFA and other conservative plaintiff organizations claim to be opposed to the use of racial classifications—and not the

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<sup>9</sup> Transcript of Oral Argument at 58-61, *Merrill v. Milligan*, No. 21-1086 (2022).

<sup>10</sup> *Id.* at 60.

<sup>11</sup> 347 U.S. 483 (1954).

<sup>12</sup> Brief for Petitioner at 1-3, 4-6, 47, 51, 55, 66-68, 82, *SFFA v. President & Fellows of Harvard Coll.*, No. 20-1199 (2022).

<sup>13</sup> Transcript of Oral Argument at 173:2-6, *SFFA v. Univ. of N. Carolina*, No. 21-707 (2022).

broader goal of pursuing racial diversity and equity in education—these same organizations are simultaneously working to dismantle attempts to pursue diversity and equity through race-neutral means, demonstrating a broader agenda of maintaining the existing racial hierarchy and segregation in schools, while relying on a formal legal principle of colorblindness.

## II. THE INVENTION OF A COLORBLIND CONSTITUTION

Race-consciousness and racial classifications are deeply embedded in American law.<sup>14</sup> Throughout our country’s history, courts have created and enforced racial classifications and a social caste system based upon race.<sup>15</sup> As early as 1619, when 19 enslaved Black men were first brought to this country, courts were routinely asked to interpret laws that defined who was Black, and thus enslavable,<sup>16</sup> laws that prohibited Black people and immigrants of color from becoming citizens, voting, or receiving an education,<sup>17</sup> laws that prohibited Black people from owning or inheriting property,<sup>18</sup> laws that defined what constituted a crime based on the race of the victim and the defendant, laws that prevented Black people from bringing legal actions or testifying in court, and myriad other societal regulations.<sup>19</sup>

The Constitution, as originally adopted, was explicitly race-conscious. Article 1, Section 2, Clause 3 of the Constitution, which constitutionalized the Three-Fifths Compromise,<sup>20</sup> assigned a Black person 3/5 the count of a white person in determining political representation in the House.<sup>21</sup> The different treatment that subordinated Black people was further entrenched by the Supreme Court’s infamous *Dred Scott v. Sandford*<sup>22</sup> decision in 1857, in

<sup>14</sup> For further discussion, see Erika K. Wilson, *The Legal Foundations of White Supremacy*, 11 DEPAUL J. FOR SOC. JUST. 1, 7 (2018) (arguing that “much of American law for much of this country’s history was indeed very race-conscious”).

<sup>15</sup> See, e.g., Justin Simard, *Citing Slavery*, 72 STAN. L. REV. 79, 85-87 (2020).

<sup>16</sup> Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1718 (1993) (“By the 1660s, the especially degraded status of Blacks as chattel slaves was recognized by law”).

<sup>17</sup> See generally Martha S. Jones, *Citizenship* in THE 1619 PROJECT: A NEW ORIGIN STORY (Nikole Hannah-Jones ed., 2021).

<sup>18</sup> Dorothy Roberts, *Race* in THE 1619 PROJECT: A NEW ORIGIN STORY (Nikole Hannah-Jones ed., 2021) at 51-52.

<sup>19</sup> See generally A. HIGGINBOTHAM, IN THE MATTER OF COLOR: RACE IN THE AMERICAN LEGAL PROCESS (1978) (detailing the legal enforcement of racially disparate treatment in courtrooms and under the law during the colonial period in Virginia, Massachusetts, New York, South Carolina and Pennsylvania).

<sup>20</sup> African American Registry, *The “Three-Fifths Compromise” in America, A Story*, <https://aaregistry.org/story/the-three-fifths-compromise/>.

<sup>21</sup> U.S. CONST. art. I, § 2, cl. 3.

<sup>22</sup> 60 U.S. 393 (1857).

which the Court clarified that under the Constitution, Black people, whether free men or slaves, could not be considered American citizens. Writing for the Court, Chief Justice Taney concluded that in the eyes of the framers, slaves “[were] not included, and were not intended to be included” as citizens,<sup>23</sup> and thus, under the Constitution, a Black man had “no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.”<sup>24</sup>

The Constitution, as readopted during Reconstruction, was designed to prevent the subordination of recently freed Black people. In 1865, after President Abraham Lincoln issued the Emancipation Proclamation, an executive order that declared all enslaved persons in Confederate territory to be forever free,<sup>25</sup> Congress constitutionalized emancipation when it adopted the Thirteenth Amendment officially banning slavery.<sup>26</sup> However, slavery was still permitted for those sentenced for a crime to penal servitude.<sup>27</sup> Resistance to the Thirteenth Amendment’s prohibition of slavery and use of the loophole came swiftly. In 1865 and 1866, state legislatures in the Deep South passed laws known as Black Codes that restricted the movement, property and voting rights of Black people.<sup>28</sup> Recently freed slaves were often returned to conditions of forced labor through indentureship, sharecropping, and convict leasing.<sup>29</sup>

In response, Congress passed the Civil Rights Act of 1866, which defined Black men as citizens.<sup>30</sup> The principles of the Civil Rights Act of 1866 were later codified in 1868 under the Fourteenth Amendment, which constitutionalized birth right citizenship, protected the life, liberty, and property of *all* persons against deprivations without due process, and guaranteed equal protection of the laws.<sup>31</sup> Section 2 of the Fourteenth Amendment fully superseded the terms of the 3/5 Clause when it provided that “representatives

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<sup>23</sup> *Id.* at 404.

<sup>24</sup> *Id.* at 407.

<sup>25</sup> Emancipation Proclamation (1863).

<sup>26</sup> U.S. CONST. amend. XIII (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction . . . Congress shall have power to enforce this article by appropriate legislation.”)

<sup>27</sup> *Id.*

<sup>28</sup> W.E.B. DuBois, *Black Reconstruction in America: Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860-1880*, 260 (Harcourt, Brace and Co., 1935).

<sup>29</sup> *See generally* Douglas A. Blackmon, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008).

<sup>30</sup> Civil Rights Act of 1866, Ch. 31, 14 Stat. 27 (1866).

<sup>31</sup> U.S. CONST. amend. XIV.

shall be apportioned . . . counting the whole number of persons in each State.”<sup>32</sup>

Despite the explicitly race-conscious focus of the Reconstruction Amendments, the invention of the colorblind Constitution began as early as the *Civil Rights Cases*,<sup>33</sup> in which just two decades after Emancipation, the Supreme Court held that Congress lacked constitutional authority to remedy laws that segregated newly freed slaves based on race. The underlying lawsuits involved the claims of Black people denied accommodations in a hotel, a train, a dress store, and an opera house.<sup>34</sup> Writing for the eight-justice majority, Justice Joseph Bradley held that the Civil Rights Act of 1875 prohibiting racial discrimination in public accommodations, exceeded the scope of the “equal protection” clause of the Fourteenth Amendment, which the Court held applied only to actions taken by state actors and not private individuals.<sup>35</sup> Notably, Justice Bradley questioned the need for any remedial legislation under Congress’s power to legislate under the Reconstruction Amendments because, as he put it, formerly enslaved people could not continue to be the “special favorite of the laws.”<sup>36</sup>

Reacting to the decision, Frederick Douglass observed that the Court had “constructed the Constitution in defiant regard of what was intended” by Congress, and the *Philadelphia Inquirer* reported that the Court had “practically overturned the Constitutional amendments.”<sup>37</sup> The white Republican Robert G. Ingersoll stated that the Court had “undervalued” the Fourteenth Amendment such that “the law became color blind.”<sup>38</sup> Thus, as applied at the time of the *Civil Rights Cases*, the term “colorblind” was used not to suggest that the Reconstruction Amendments imposed a duty to ignore race, but instead to criticize the Court for its reasoning that disregarded the impact of race in contravention of its known meaning.

In the decade following the *Civil Rights Cases*, the Supreme Court adopted an approach that willfully disregarded the real-life impact of segregation and the ways it served to subordinate Black people and maintain white supremacy. In the infamous *Plessy v. Ferguson* case, the Court was asked to decide whether a Louisiana law that required that all railway passenger cars be

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<sup>32</sup> *Id.* § 2.

<sup>33</sup> 109 U.S. 3 (1883).

<sup>34</sup> *Id.* at 4.

<sup>35</sup> *Id.* at 3.

<sup>36</sup> *Id.* at 25.

<sup>37</sup> ERIC FONER, *THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION* 157 (2019).

<sup>38</sup> *Id.* at 155.

segregated by race violated the Fourteenth Amendment. The eight-justice majority concluded: “[W]e think the enforced separation of the races . . . neither abridges the privileges or immunities of the colored man, . . . nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment. . . .”<sup>39</sup> In reaching this conclusion, the Court ignored the violence and social intimidation that were necessary to upholding segregation.<sup>40</sup>

In dissent, Justice Harlan invoked the idea of a “colorblind” Constitution to argue that the Fourteenth Amendment prohibited *de jure* segregation, writing: “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”<sup>41</sup> At the same time, Justice Harlan acknowledged the reality of an existing social order based on race.<sup>42</sup> His dissent began by recognizing that, in his view, the white race was “the dominant race in this country. . . . in prestige, in achievements, in education, in wealth, and in power.”<sup>43</sup> He went on to observe: “So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to the principles of constitutional liberty.”<sup>44</sup> Thus, Justice Harlan’s description of the Constitution as colorblind recognized a formal legal principle that admittedly did not challenge the existing material circumstances and racial hierarchy.<sup>45</sup> Even in espousing colorblindness, Justice Harlan simultaneously recognized the continued reality of a racial caste system.<sup>46</sup> Thus, from the beginning, a colorblind legal ideology was consistent with the persistence of white supremacy.

### III. RACE CONSCIOUS ENFORCEMENT OF *BROWN V. BOARD*

It would take over 55 years before the Court in *Brown v. Board* overturned *de jure* segregation in public schools, concluding that *de jure* racial segregation in public schools violates the Fourteenth Amendment. In *Brown*, the Supreme Court overturned *Plessy* and recognized that separate is inherently

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<sup>39</sup> *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896), *overruled by* *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483 (1954).

<sup>40</sup> *See, e.g.*, Equal Justice Initiative, *LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR* (3d ed. 2017), (documenting over 4400 racial terror lynchings in America between Reconstruction and World War II as part of a campaign to enforce racial terror and segregation).

<sup>41</sup> *Id.* at 559.

<sup>42</sup> *See* Randall Kennedy, *Colorblind Constitutionalism*, 82 *FORDHAM L. REV.* 1, 5 (2013).

<sup>43</sup> 163 U.S. at 559.

<sup>44</sup> *Id.*

<sup>45</sup> *See* Brandon Hasbrouck, *The Antiracist Constitution*, 102 *B.U. L. REV.* 87 (2022). (“[I]n its debut in Supreme Court jurisprudence, colorblind constitutionalism promised that facially discriminatory laws were unnecessary for the perpetuation of white supremacy.”).

<sup>46</sup> Goodwin Liu, *The First Justice Harlan*, 96 *CAL. L. REV.* 1383, 1391 (2008).



unequal.<sup>47</sup> In so holding, the Court explicitly acknowledged that racial segregation subordinates Black people by imposing a badge of inferiority and denying them full status as citizens.<sup>48</sup> *Brown* implicitly recognized that the Fourteenth Amendment was primarily designed to protect newly freed Black people, noting that it contains a right “most valuable to the colored race” that includes “exemption from unfriendly legislation against them distinctively as colored” and “discriminations which are steps towards reducing them to the condition of a subject race.”<sup>49</sup>

To remedy the illegal conduct and enforce *Brown*, the Supreme Court ordered federal district courts to supervise local officials in desegregating school systems.<sup>50</sup> But desegregation was met with fierce resistance.<sup>51</sup> In March of 1965, 101 of 128 congressmen in the South signed “The Southern Manifesto” an agreement to defy the constitutional duty to desegregate. Also in 1956, Senator Harry Byrd of Virginia issued the call for “Massive Resistance” — a collection of laws passed in response to the *Brown* decision that attempted to impede integration, for example by eliminating state funding for schools that integrated. School closures were not merely a threat.<sup>52</sup> On May 1, 1959, in response to an order to integrate its schools, officials in Prince Edward County, Virginia closed its entire public school system for five years.<sup>53</sup> Even more common was resistance to desegregation through intimidation and mob violence.<sup>54</sup> In August 1967, the U.S. Commission on Civil Rights noted that “violence against Negroes continues to be a deterrent to school desegregation.”<sup>55</sup>

The United States Department of Justice<sup>56</sup> and private plaintiffs represented by the NAACP Legal Defense Fund, brought lawsuits against school

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<sup>47</sup> *Brown*, 347 U.S. at 493.

<sup>48</sup> *Id.* at 494, 495 n.10, 495. See also Brief for NAACP Legal Defense & Educational Fund on Behalf of NAACP as Amici Curiae Supporting Respondents, at 6, *SFFA v. Univ. of N. Carolina*, No. 21-707 (2022).

<sup>49</sup> *Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 492 n.5 (1954), (quoting *Strauder v. West Virginia*, 100 U.S. 303, 307-08 (1879)).

<sup>50</sup> See *Lockett II*, 111 F.3d at 842 (citing *Brown v. Bd. of Educ.*, 349 U.S. 294, 301 (1955) (*Brown II*)).

<sup>51</sup> Equal Justice Initiative, “*Massive Resistance*” in SEGREGATION IN AMERICA, <https://segregationinamerica.eji.org/report/massive-resistance.html>.

<sup>52</sup> *Id.*

<sup>53</sup> NAACP Legal Defense & Educational Fund, *The Southern Manifesto and “Massive Resistance” to Brown*, <https://www.naacpldf.org/brown-vs-board/southern-manifesto-massive-resistance-brown/>.

<sup>54</sup> *Id.*

<sup>55</sup> Equal Justice Initiative, *Resistance to School Desegregation*, (Mar. 1, 2014), <https://eji.org/news/history-racial-injustice-resistance-to-school-desegregation/>.

<sup>56</sup> See Department of Justice, Educational Opportunities Section, <https://www.justice.gov/crt/educational-opportunities-section> (describing the office’s enforcement of *Brown v. Board of Education*).

districts across the country that continued to defy the law under *Brown*. Through decades of litigation to enforce compliance with *Brown*, the Supreme Court developed case law defining the duty of a school system that was previously segregated by law to remedy its constitutional violation. In *Green v. School Board of New Kent County*, the Court held that a *de jure* segregated school district has a “continuing” and “affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.”<sup>57</sup> This means that “school authorities should make every effort to achieve the greatest possible degree of actual desegregation.”<sup>58</sup>

Under *Green*, in order to assess whether desegregation has been achieved, a district court must explicitly consider the race of students, faculty, and staff.<sup>59</sup> The Supreme Court has also been clear that determining whether schools are desegregated is not merely a question of whether Black and white students are now in the same building; a district must also demonstrate that students are not still segregated into different courses, on different buses, in different extracurricular activities, assigned different teachers,<sup>60</sup> or discriminated against based on other “ancillary” factors.<sup>61</sup> The case law enforcing *Brown* thus relies explicitly on racial classifications. In *Parents Involved in Community Schools v. Seattle School District No. 1 (PICS)*, the Supreme Court reiterated that under *Brown* and its progeny, it is permissible to use racial classifications to remedy *de jure* segregation and the vestiges of discrimination.<sup>62</sup>

Without the use of racial classifications, there would be no way of meaningfully assessing whether schools remain segregated by race or whether the history of discrimination has been remedied. Indeed, litigation to enforce *Brown* continues across the country to this day where school districts are still resisting the mandate to desegregate under *Brown* or have not “eliminated the vestiges of discrimination to the extent practicable”<sup>63</sup> with regard to one or more factors.

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<sup>57</sup> *Green v. Cnty. Sch. Bd. of New Kent Cnty.*, 391 U.S. 430, 440, 437-38 (1968).

<sup>58</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 26 (1971).

<sup>59</sup> *Id.*

<sup>60</sup> *Green*, 391 U.S. at 435-42.

<sup>61</sup> *Freeman v. Pitts*, 503 U.S. 467, 473 (1992); *Bd. of Educ. of Okla. City Pub. Sch. v. Dowell*, 498 U.S. 237, 245 (1991).

<sup>62</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 736 (2007) (plurality opinion).

<sup>63</sup> *Freeman v. Pitts*, 503 U.S. 467, 492 (1992).

#### IV. THE COOPTATION OF *BROWN* TO PURSUE A COLORBLIND AGENDA TODAY

At the heart of *SFFA v. Harvard* and *SFFA v. UNC* is the question of whether the Fourteenth Amendment supports race-consciousness. Under controlling Supreme Court precedent, a university may consider race as part of its admissions process so long as it is narrowly tailored to serve a compelling interest in pursuing the educational benefits of diversity.<sup>64</sup> SFFA's brief before the Supreme Court primarily focuses on its argument that the Court should overrule *Grutter v. Bollinger*<sup>65</sup> and hold that institutions of higher education cannot use race as a factor in admissions. SFFA argues that colorblindness is required by the Fourteenth Amendment and *Brown v. Board of Education*, asserting that:

Because *Brown* is our law, *Grutter* cannot be. Just as *Brown* overruled *Plessy's* deviation from our 'colorblind' Constitution, this Court should overrule *Grutter's*. That decision has no more support in constitutional text or precedent than *Plessy*.<sup>66</sup>

In short, SFFA's position is that any consideration of race is discriminatory and violates the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.<sup>67</sup> SFFA seeks a "permanent injunction requiring Harvard to conduct all admissions in a manner that does not permit those engaged in the decision process to be aware of or learn the race or ethnicity of any applicant for admission . . . ."<sup>68</sup>

SFFA's brief goes even further in arguing that race-conscious admissions is equivalent to racial segregation.<sup>69</sup> During oral argument in *SFFA v. Harvard*, counsel for SFFA made a statement that betrays the fallacy of relying on *Brown* for a principle of colorblindness. In responding to Justice Barrett's question regarding when the consideration of race in university admissions should end, counsel for SFFA, Mr. Cameron Norris stated: "I think the only

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<sup>64</sup> See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Texas*, 570 U.S. 297 (2013); *Fisher v. Univ. of Texas*, 136 S. Ct. 2198 (2016).

<sup>65</sup> 539 U.S. 306, 335-36 (2003).

<sup>66</sup> Brief for Petitioner at 47, *SFFA v. President & Fellows of Harvard Coll.*, No. 20-1199 and *SFFA v. Univ. of N. Carolina*, No. 21-707 (U.S. May 2, 2022).

<sup>67</sup> 42 U.S.C. §2000d.

<sup>68</sup> Complaint at 119, *SFFA v. President & Fellows of Harvard Coll.*, No. 1:14-cv-14176-DJC (D. Mass. Nov. 17, 2014).

<sup>69</sup> Brief for Petitioner at 6, *SFFA v. President & Fellows of Harvard Coll.*, No. 20-1199 and *SFFA v. Univ. of N. Carolina*, No. 21-707 (U.S. May 2, 2022).

legal standard this Court has ever recognized for when do you stop using race in education is in *Brown* with —with deliberate speed.”<sup>70</sup>

This misstates the law. As the previous section discussed, under *Brown v. Board* and its progeny, the standard for determining whether it is no longer necessary to consider race is whether a school district has complied with its duty to desegregate such that the “vestiges of past discrimination ha[ve] been eliminated to the extent practicable.”<sup>71</sup> *Brown II* recognized that school districts have a duty *to desegregate* with all deliberate speed. This includes a duty to explicitly consider race for the purpose of desegregating and complying with the Constitution. Thus, all deliberate speed actually refers to the use of remedial action, including racial classifications, to end discrimination in education, and not color evasion.

Solicitor General Elizabeth Prelogar responded to SFFA’s attempt to conflate *Brown* and race-conscious admissions during the *Harvard* arguments on not only legal, but also moral grounds. As she put it, “There is a world of difference between the situation this Court confronted in *Brown*, the separate-but-equal doctrine that was designed to exclude African Americans based on notions of racial inferiority and subjugate them . . . and the university policies at issue in this case.” She went on to observe that to conflate affirmative action designed to bring people of different races together with the separate-but-equal doctrine “trivializes the grievous moral and legal wrongs of state-sponsored segregation and the enormous harms that millions of Americans suffered under it.”<sup>72</sup>

## V. OPPOSITION TO RACIAL DIVERSITY, THROUGH RACE-NEUTRAL MEANS

The Supreme Court has distinguished considering race for the remedial purpose of addressing *de jure* segregation or discrimination from the diversity rationale. This distinction makes even more clear that SFFA’s attempt to apply the language of *Brown* to support its argument for colorblindness in higher education admissions is misplaced. By relying on *Brown* to challenge the diversity rationale under *Grutter*, SFFA not only misstates the law, but conflates the legal principles that control K-12 education with the diversity rationale in higher education. Most concerningly, although SFFA suggests

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<sup>70</sup> Transcript of Oral Argument at 40:11-14, SFFA v. Univ. of N. Carolina, No. 21-707 (2022).

<sup>71</sup> *Freeman v. Pitts*, 503 U.S. 467, 492 (1992).

<sup>72</sup> Transcript of Oral Argument at 122:1-24, SFFA v. President & Fellows of Harvard Coll., No. 20-1199 (2022).

that race-conscious admissions in higher education should be replaced with efforts to address racial equity in K-12 education,<sup>73</sup> SFFA and other conservative legal organizations have repeatedly opposed efforts to diversify schools and ensure racial equity through race neutral means. This represents an even more radical form of color evasion.

Several justices of the Court during the Harvard and UNC arguments pressed counsel for SFFA as to how colleges and universities might use race-neutral means to pursue the educational benefits of diversity if *Grutter* were to be overruled. Counsel for SFFA responded that: “If the only reason to adopt a particular admissions policy . . . was for racial diversity alone, we think that would probably raise problems under that precedent, but, of course, it’s a fact-intensive inquiry under *Arlington Heights*.”<sup>74</sup> In other words, SFFA’s position is that strict scrutiny should apply even to efforts to pursue racial diversity through race-neutral alternatives and that courts should examine whether a university attempting to pursue diversity would have adopted the policy for other reasons, and if not, strike the policy down as intentional discrimination.<sup>75</sup>

For the Supreme Court to adopt this position and apply strict scrutiny to any attempt to pursue racial diversity would be a radical change in law and would nearly eviscerate the ability of universities and K-12 public school districts to ensure racial equity. In *Parents Involved in Community Schools v. Seattle School District No. 1 (PICS)*, the Court distinguished between the use of racial classifications,<sup>76</sup> and the use of race-neutral means to pursue racial diversity.<sup>77</sup> Justice Kennedy’s plurality opinion acknowledged that diversity is a compelling interest that a school district may pursue,<sup>78</sup> but held that when there is no finding of unremedied *de jure* segregation, school districts may pursue the goal of racial diversity through race-neutral means, for example through “strategic [school] site selection,” “targeted” student and faculty recruitment, and “[re]drawing attendance zones [to recognize neighborhood]

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<sup>73</sup> See, e.g., Brief for Petitioner at 60, *SFFA v. President & Fellows of Harvard Coll.*, No. 20-1199 and *SFFA v. Univ. of N. Carolina*, No. 21-707 (U.S. May 2, 2022) (“Disparities at the K-12 level must be solved at the K-12 level. Lowering academic standards at the university level comes too late and, if anything, creates a false sense of complacency about the real disparities in K-12 education.” (citing *Grutter*, 539 U.S. at 376-77) (Thomas, J., concurring in part and dissenting in part)).

<sup>74</sup> Transcript of Oral Argument at 12:8-25, *SFFA v. Univ. of N. Carolina*, No. 21-707 (2022).

<sup>75</sup> *Id.* at 15:4-12.

<sup>76</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 736 (2007) (plurality opinion).

<sup>77</sup> *Id.* at 788-89 (Kennedy, J., concurring in part and concurring in the judgment).

<sup>78</sup> *Id.* at 783.

demographics.”<sup>79</sup> Justice Kennedy explained that “[t]hese mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible.”<sup>80</sup>

Troublingly, conservative organizations advocating for a “colorblind” interpretation of the Fourteenth Amendment are already mounting a systemic attack on this precedent in the K-12 setting by challenging attempts to ensure equal access to educational opportunity through race-neutral policies in school districts including Fairfax County, New York City, and Philadelphia.

For example, in December 2020, the Fairfax County School Board in Virginia sought to address racial inequities in the admissions process at its flagship magnet school, Thomas Jefferson School, by adopting a new evaluation process.<sup>81</sup> Instead of relying on standardized tests that tend to produce racial disparities, the new evaluation process considered a student’s GPA, a series of problem solving and short answer essays, and demographics factors that are correlated with race, such as eligibility for free and reduced price meals, whether students are English language learners, whether students have special education needs, and whether students attended a middle school deemed historically underrepresented.<sup>82</sup> The school board also implemented a percentage plan that guaranteed seats for 1.5 percent of eighth graders at each participating middle school, with seats offered first to the highest-evaluated applicants from each school.<sup>83</sup> Plaintiffs represented by the Pacific Legal Foundation,<sup>84</sup> brought a lawsuit challenging the new admissions policy as a violation of the Equal Protection Clause.<sup>85</sup> The plaintiffs argued that the school board is engaged in racial balancing, despite the fact that no student is classified based on race.

In another case, in June 2018, the New York City Department of Education (DOE) decided to change its admission process for its eight prestigious specialized high schools where Black and Latinx students have been historically underrepresented.<sup>86</sup> For example, at Stuyvesant High School, the

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<sup>79</sup> *Id.* at 788–89.

<sup>80</sup> *Id.* at 789.

<sup>81</sup> Brief for Thomas Jefferson Alumni for Racial Justice, et al. as Amici Curiae, Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 1:21-cv-00296 (E.D. Va. Sept. 14, 2021).

<sup>82</sup> Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 1:21CV296, 2022 WL 579809, at \*1 (E.D. Va. Feb. 25, 2022).

<sup>83</sup> *Id.* at \*2. Brief for Defendant-Appellant at 6-12, Coal. for TJ v. Fairfax Cnty. Sch. Bd., No. 1:21-cv-00296 (E.D. Va. May 6, 2022).

<sup>84</sup> Pacific Legal Foundation, <https://pacificlegal.org> (last visited Mar. 1, 2023).

<sup>85</sup> See Brief for Plaintiffs, *McAuliffe v. de Blasio*, 364 F. Supp. 3d 253 (S.D.N.Y. Dec. 13, 2018).

<sup>86</sup> See *McAuliffe I*, 364 F. Supp. 3d at 266.

second largest of the schools, the racial makeup was 73.5% Asian American, 17.8% white, 2.8% Hispanic, and 0.7% Black, while the racial makeup of New York City's public high schools at that time was 40% Hispanic, 26% Black, 16.1% Asian American, and 15% white.<sup>87</sup> Per state legislation, the schools admit applicants solely on the basis of a standardized test and a Discovery Program through which disadvantaged students who score just below the lowest overall score of all admitted students and are certified by their current school as being "high potential" can gain admissions by passing a summer preparatory program.<sup>88</sup> In spring 2018, a DOE working group recommended changing the Program's eligibility criteria to increase the racial, ethnic, geographic, and socio-economic diversity of the schools by expanding the Discovery program to 20% of the seats at each school and modifying the term "disadvantaged" to consider whether a student attends a school that serves a high proportion of students from economically needed backgrounds.<sup>89</sup> Plaintiffs represented by the Pacific Legal Foundation argued that these changes violate the Equal Protection Clause because according to the plaintiffs, the DOE is engaged in racial balancing, even without using a racial classification.<sup>90</sup>

In yet another case, the School District of Philadelphia sought to diversify the city's selective admissions magnet high schools where Black and Latinx students are historically underrepresented.<sup>91</sup> District officials established a plan that would eliminate racially disparate admissions criteria, including standardized test scores, letters of recommendation, and applicant interviews.<sup>92</sup> Under the new admissions system, students who meet certain cut-offs with respect to grades, attendance, and test scores are entered into a lottery for admissions to the city's magnet schools, with preference given to

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<sup>87</sup> *Id.*

<sup>88</sup> See N.Y. Educ. L. § 2590-g(12)(b) (1997). See *McAuliffe II*, 2020 WL 1432213 at \*1; *McAuliffe I*, 364 F. Supp. 3d at 264; *McAuliffe I*, 364 F. Supp. 3d at 265.

<sup>89</sup> *Id.* at \*2.

<sup>90</sup> See Brief for Plaintiffs at 19-24, *McAuliffe v. de Blasio*, 364 F. Supp. 3d 253 (S.D.N.Y. Dec. 13, 2018). "Plaintiffs submit that Defendants' admitted racial purpose in enacting the Discovery changes are sufficient to trigger strict scrutiny, just as if this were a typical case involving racial preferences." *Id.* at 15 (citing *Lewis v. Ascension Parish Sch. Bd.*, 662 F.3d 343, 348 (5th Cir. 2011)) (citing *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)).

<sup>91</sup> Kristen A. Graham, *New Philadelphia School District Data Show More Students Qualified for Special-Admissions High Schools*, PHILA. INQUIRER (Mar. 21, 2022), <https://www.inquirer.com/news/philadelphia-magnet-school-admissions-criteria-results-eligibility-20220321.html>.

<sup>92</sup> *Id.*

students from six zip codes that have traditionally been underrepresented.<sup>93</sup> A group of plaintiffs represented by America First Legal<sup>94</sup> sued the School District of Philadelphia and its board, alleging violations of Title VI, the Equal Protection Clause, and the Pennsylvania Constitution.<sup>95</sup> Specifically, the plaintiffs alleged that the new admissions system is racially discriminatory against “non-Black and non-Latinx students” who would have otherwise maintained a high probability of receiving admission to one of the district’s magnet schools.<sup>96</sup>

In short, we don’t have to guess whether conservative organizations will challenge race-neutral alternatives for creating racial diversity and equity. They already are. Regardless of whether a racial classification is used, conservative legal organizations are challenging attempts to ensure diversity and equal access to educational opportunity as a violation of Equal Protection through a color-evasive theory of constitutional interpretation.

## VI. CONCLUSION

Absent from SFFA’s analysis is the inequality in resources and opportunity that the Court found to be inherent in a racially segregated caste system designed to subordinate Black citizens.<sup>97</sup> A race-conscious analysis reveals that skin color continues to have a significant impact in structuring opportunity in students’ K-12 educational experience in this country. Black students today are six times as likely as white students to attend a high-poverty school, and nearly 75 percent of black K-12 students attend racially segregated schools.<sup>98</sup> High-poverty schools and racially segregated schools are more likely to have inadequate facilities and fewer classroom resources.<sup>99</sup> Adopting SFFA’s approach would mean that race would continue to significantly impact students’ experiences from kindergarten through high school, but could not be considered when students are evaluated by colleges seeking

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<sup>93</sup> For the 2021-2022 criteria chart, see *District Announces School Selection Information 2022-2023*, THE SCH. DIST. OF PHILA. (Aug. 16, 2022), <https://www.philasd.org/blog/2022/08/16/schoolselectioninformation20222023/>.

<sup>94</sup> America First Legal, [aflegal.org](http://aflegal.org) (last visited Mar. 1, 2023).

<sup>95</sup> Complaint at 11, *Sherice Sargent v. The School District of Philadelphia*, No. 22-CV-1509, 2022 (E.D. Pa. Apr. 19, 2022).

<sup>96</sup> *Id.* at 8.

<sup>97</sup> *Brown*, 347 U.S. at 495.

<sup>98</sup> U.S. Dep’t of Educ., Nat’l Ctr. For Educ. Statistics, *The Condition of Education 2018* 82 (May 2018), <https://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2018144>.

<sup>99</sup> B. Tatum, *WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?: AND OTHER CONVERSATIONS ABOUT RACE* 7-8 (3d ed. 2017).



to admit the most talented students from every background. The practical impact would be significant; ending affirmative action would lead to increased exclusion of Black students and other students of color in higher education, by as much as 50% for Black and Latinx students at Harvard for example.<sup>100</sup>

Too often, the concept of “colorblindness” has been adopted by courts as a basis to avoid grappling with the complex and deep-seated problems of racial inequality that show up in the record or in the historical background of a case by equating race-conscious remedial action with racial discrimination. Judicial decisions that rely on color evasion and omit a racial analysis of facts and law are an erasure of history and denial of the real lived experiences of marginalized communities that undermines the legitimacy of the legal system.

Today, as much as ever, our country needs courageous judges who will not avoid “constitutional history and social reality,”<sup>101</sup> even when the impact of race feels intractable or overwhelming. The Reconstruction Amendments demand a race-conscious analysis of social justice problems and their remedies. This means courts cannot evade the challenging work of remedying racial inequality, but must be willing to honestly discuss our nation’s history and the ways that inequity persists today.

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<sup>100</sup> See Brief for NAACP Legal Defense & Educational Fund on Behalf of 25 Harvard Student and Alumni Organizations as Amicus Curiae at 18-19, *SFFA v. President & Fellows of Harvard Coll.*, No. 20-1199 (U.S. July 25, 2022) (noting that the end of race-conscious admissions “would result in the loss of almost one-half of Harvard’s Black, Latinx, Native/Indigenous, Hawaiian, and Pacific Islander 19 students.”).

<sup>101</sup> See *City of Richmond v. J.A. Croson*, 488 U.S. 469, 558 (1989) (Marshall, J., dissenting).