

## The Strange Career of Antisubordination

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*Constitutional scholars have long construed the Equal Protection Clause as containing two dueling visions: anticlassification and antisubordination. Scholars advancing the first view contend that the Clause prohibits the government from racially classifying people. But scholars promoting the second view argue that racial classifications are permissible—provided that the government does not engage in racial subjugation. On no issue have these competing perspectives clashed more intensely than affirmative action. Where the anticlassification view deems those policies unconstitutional for exhibiting race consciousness, the antisubordination view finds them permissible because they do not racially subjugate anyone. Conventional antisubordination scholars portray the concept's support for affirmative action as one part of its larger intellectual program that inexorably champions racial egalitarianism.*

*This Article challenges that conventional account by demonstrating that anti-subordination's career has been far more protean, complex, and—above all—strange than scholars typically allow. Some of the most reviled opinions in Supreme Court history were predicated upon antisubordination rhetoric, as that concept has been used both to challenge and to maintain racist regimes. Legal luminaries from across the ideological spectrum, moreover, have often contended that affirmative action marks Black and brown people as substandard. Indeed, it is impossible to understand last Term's decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* without foregrounding antisubordination's multiplicity. That decision introduced "antisubordination" into the U.S. Reports, reframed how affirmative action subjugates racial minorities, and witnessed the Justices talking past each other by wielding the concept in divergent fashions. Grappling with anti-subordination's complexity remains urgent today because the theory has been exported to an ever-growing, astonishingly diverse array of legal domains.*

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*This Article contends neither that antisubordination must be abandoned nor that affirmative action should have been invalidated. To the contrary, it explores arguments designed to shore up antisubordination and to provide alternate grounds for affirmative action's constitutionality. It will no longer do, however, simply to ignore antisubordination's considerable complexity. By tracing the winding, peculiar path of antisubordination, this Article not only recasts Justice Clarence Thomas's much-debated jurisprudence but also clarifies our nation's garbled constitutional discourse.*

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## INTRODUCTION

For a long season, sophisticated scholars of constitutional law have contended that the Fourteenth Amendment's Equal Protection Clause contains two competing visions. The first theory views the Clause as prohibiting the government from engaging in racial classification.<sup>1</sup> The second theory, in contrast, construes the Clause as prohibiting the government from perpetuating racial

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<sup>1</sup> See, e.g., Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFFAIRS 107, 108–09, 147 (1976) (identifying two competing Equal Protection Clause visions while generally employing different terminology).

subordination.<sup>2</sup> In some cases, jurists traveling via these two theories would arrive at precisely the same destination. Thus, *Brown v. Board of Education*<sup>3</sup> would have invalidated school segregation regardless of whether the Justices subscribed to an anticlassification or an antisubordination theory of equal protection. Separate schools both treated students differently on a racial basis (that is, it classified them) and perpetuated racism by suggesting that Black people were inferior (that is, it subordinated them).<sup>4</sup> The centrality of these concepts to modern constitutional law is virtually impossible to overstate, as they form the very axis upon which the Equal Protection Clause turns.<sup>5</sup>

This theoretical debate looms large today because it holds quite tangible consequences for assessing the constitutionality of affirmative action, long among the most incendiary subjects in American law and life.<sup>6</sup> Whereas theories of anticlassification and

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<sup>2</sup> *Id.* at 155–57.

<sup>3</sup> 347 U.S. 483 (1954).

<sup>4</sup> *See id.* at 494.

<sup>5</sup> *See, e.g.*, SANFORD LEVINSON, JACK M. BALKIN, AKHIL REED AMAR, REVA B. SIEGEL & CRISTINA M. RODRÍGUEZ, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 1110 (8th ed. 2022) (explaining the difference between “the *antisubordination* principle and . . . the *anticlassification* principle” (emphasis in original)); *id.* at 1149–54 (elaborating upon this distinction); JESSE H. CHOPER, MICHAEL C. DORF, RICHARD H. FALLON, JR. & FREDERICK SCHAUER, CONSTITUTIONAL LAW: CASES, COMMENTS, AND QUESTIONS 1455 (13th ed. 2019) (weighing whether “all race-based classifications [are] inherently objectionable, or only those that subordinate or stigmatize on the basis of race”); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 811–13 (7th ed. 2023) (same); MICHAEL STOKES PAULSEN, MICHAEL W. MCCONNELL, SAMUEL L. BRAY & WILLIAM BAUDE, THE CONSTITUTION OF THE UNITED STATES 1476, 1506–07 (5th ed. 2023) (same); NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 696 (21st ed. 2022) (contrasting “[*color-blindness*” theory with “[*caste*” theory (emphasis in original)); *id.* at 706 (offering further questions and suggested readings on the difference between “racial *subordination*” and “racial *classification*” (emphasis in original)); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 1514–16 (2d ed. 1988) (explaining the difference between an “antidiscrimination principle” and “an “antisubjugation principle” (footnotes omitted)); GEOFFREY R. STONE, LOUIS MICHAEL SEIDMAN, CASS R. SUNSTEIN, MARK V. TUSHNET, PAMELA S. KARLAN, AZIZ Z. HUQ & LEAH LITMAN, CONSTITUTIONAL LAW 475–76 (9th ed. 2023) (introducing arguments that “[t]he central concern of the equal protection clause involves preventing the subordination of groups, rather than simply the mistreatment of individuals” (emphasis omitted)); ERNEST A. YOUNG, THE SUPREME COURT AND THE CONSTITUTION 1272–73 (2017) (noting the “basic disagreement over the meaning of the Equal Protection Clause” between a “[*colorblindness*” reading and an “anti-subordination reading”).

<sup>6</sup> MELVIN I. UROFSKY, THE AFFIRMATIVE ACTION PUZZLE: A LIVING HISTORY FROM RECONSTRUCTION TO TODAY xvi (2020) (“The literature on affirmative action is immense, and continues to grow, because, as some scholars argue, no other issue divides Americans more.”).

antisubordination view *Brown* together as fast friends, those theories quickly become bitter, even ferocious enemies at the first sight of affirmative action. The anticlassification school—associated overwhelmingly with constitutional conservatives—holds that affirmative action violates the Constitution because the programs treat students differently based on race.<sup>7</sup> But the anti-subordination school—identified predominantly with legal liberals—contends that affirmative action passes constitutional muster because the programs treat no one as racially inferior. To the contrary, antisubordination theorists suggest that race-conscious admissions policies are designed to combat the racial stratification that has defined U.S. society, with Black and brown people forming a racialized underclass.<sup>8</sup>

In 1976, Professor Owen Fiss published the foundational article advancing what came to be termed the antisubordination theory.<sup>9</sup> “[W]hat the Equal Protection Clause prohibits,” Fiss instructed, is “the state law or practice [that] aggravates [ ]or perpetuates [ ]the subordinate position of a specially disadvantaged group.”<sup>10</sup> Fiss’s timing was hardly accidental, as the Supreme Court’s first, inconclusive brush with affirmative action occurred two years before his article debuted,<sup>11</sup> and its momentous decision

<sup>7</sup> See, e.g., Antonin Scalia, *The Disease as Cure: “In Order to Get Beyond Racism, We Must First Take Account of Race”*, 1979 WASH. U. L.Q. 147, 153–54; Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part):

To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

See also *Students for Fair Admissions, Inc. (SFFA) v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023) (“Eliminating racial discrimination means eliminating all of it.”).

<sup>8</sup> See Fiss, *supra* note 1, at 160–61.

<sup>9</sup> *Id.* at 147 (introducing the “group-disadvantaging principle”); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9 (2003) (contending “Fiss inaugurated the antisubordination tradition in legal scholarship”); Pamela S. Karlan, *What Can Brown® Do for You?: Neutral Principles and the Struggle Over the Equal Protection Clause*, 58 DUKE L.J. 1049, 1061 (calling Fiss’s article “foundational”); David A. Strauss, “Group Rights” and the Problem of Statistical Discrimination, *ISSUES IN LEGAL SCHOLARSHIP*, 2002, at 1 (stating that Fiss’s article “is usually viewed, with justification, as the leading statement of what has come to be called the anti-subordination principle”); Evan D. Bernick, *Antisubjugation and the Equal Protection of the Laws*, 110 GEO. L.J. 1, 7 (2021) (“Antisubordination as a formal theory can be traced to Owen Fiss’s 1976 publication of *Groups and the Equal Protection Clause*.” (emphasis in original)).

<sup>10</sup> See Fiss, *supra* note 1, at 157.

<sup>11</sup> See *DeFunis v. Odegaard*, 416 U.S. 312, 319–20 (1974) (declining to reach the merits due to mootness).

in *Regents of the University of California v. Bakke*<sup>12</sup> would appear two years later. Fiss made no secret that his alternative vision of the Equal Protection Clause was driven by a desire to ensure that judges did not invoke the anticlassification theory to invalidate the then-fledgling affirmative action programs.<sup>13</sup>

What may have started out as an alternative theory of equal protection has become thoroughly mainstream. Prominent liberal legal scholars have, tipping their academic caps toward Fiss, articulated numerous theories elaborating upon the foundational work. Thus, to name only two major approaches, Professor Laurence Tribe offered “an antisubjugation principle,”<sup>14</sup> and Professor Cass Sunstein advanced “the anticaste principle.”<sup>15</sup> In 2004, Professor Reva Siegel produced an influential piece in this scholarly tradition, offering a notably crisp definition of the antisubordination principle as “the conviction that it is wrong for the state to engage in practices that enforce the inferior social status of historically oppressed groups.”<sup>16</sup> Although these theories certainly diverge in their nuances, they are nonetheless united by the overarching commitment that—whatever the terminology—emphasizing antisubordination values means viewing affirmative action as constitutionally permissible.<sup>17</sup> It is not too much to say that this idea serves as *the* central pillar of modern legal liberalism.

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<sup>12</sup> 438 U.S. 265 (1978).

<sup>13</sup> See Fiss, *supra* note 1, at 159–60.

<sup>14</sup> TRIBE, *supra* note 5, at 1514–15.

<sup>15</sup> Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2428–29 (1994) (“The controlling principle is that no group may be made into second-class citizens.”); see also Paul R. Dimond, *The Anti-Caste Principle—Toward a Constitutional Standard for Review of Race Cases*, 30 WAYNE L. REV. 1, 3 (1983) (“The article posits, as a core mandate of the equal protection clause, an anti-caste principle—each person has the right to be free from the continuing effects of caste discrimination in the laws, programs, official decisions, government, and community affairs of these United States.”); Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 21 (1977) (“*Brown* is now much more than a schools case, or even a desegregation case. It stands as our leading authoritative declaration that the Constitution forbids a system of caste.”); cf. Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 266–67 (1996) (“If the equal protection clause means anything, it means that the government cannot pass caste legislation: it cannot create or sanction outcast groups.”).

<sup>16</sup> Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472–73 (2004); see also Balkin & Siegel, *supra* note 9, at 9 (“Antisubordination theorists contend that guarantees of equal citizenship cannot be realized under conditions of pervasive social stratification and argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups.”).

<sup>17</sup> See, e.g., Sunstein, *supra* note 15, at 2452 (“If a basic goal is opposition to caste, affirmative action policies are ordinarily permissible.”).

As Professor Mari Matsuda has contended: “Progressive legal theorists seek to include antisubordination ideology in the law.”<sup>18</sup>

This Article contends that antisubordination is a far more protean concept than my fellow legal liberals typically allow. Although liberals since the 1970s have overwhelmingly promoted an equal protection dichotomy notable for its tidiness, the constitutional reality is messy, chaotic, and—perhaps above all—strange. The career of antisubordination has been strange, I contend, for two central reasons.<sup>19</sup> First, its origins date not to the 1970s, but instead stretch back much further into U.S. constitutional history. Indeed, some of the earliest Supreme Court opinions interpreting the Equal Protection Clause availed themselves of antisubordination theory, but in ways that bolstered rather than challenged racism.<sup>20</sup> Recovering antisubordination’s forgotten roots succeeds in casting new light on some of constitutional law’s most notorious opinions—including *Plessy v. Ferguson*<sup>21</sup> and *Korematsu v. United States*<sup>22</sup>—both of which at least purported to engage in what can be understood as antisubordination argumentation. This historical insight sets the stage for understanding antisubordination’s malleability—and, indeed, its manipulability—in our contemporary constitutional order.

Second, and more importantly, pledging allegiance to antisubordination in no way requires saluting affirmative action. To the contrary, many conservatives who detest affirmative action have often contended that the programs themselves subordinate Black people. By lowering typical admissions standards, critics contend, affirmative action policies perpetuate the odious myth of Black intellectual inferiority.<sup>23</sup> Although arguments contending that antisubordination values undermine rather than support affirmative action have been articulated in high places, traditional antisubordination scholars have steadfastly refused to treat these arguments with the seriousness that they deserve—or even any

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<sup>18</sup> Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1398 (1991).

<sup>19</sup> This Article’s title pays homage to a classic work of U.S. history: Professor C. Vann Woodward’s *The Strange Career of Jim Crow*. Woodward troubled predominant assumptions about both the origins and the timing of Jim Crow. See C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* 17–18, 25–29 (2d rev. ed. 1966). This Article pursues those aims for antisubordination and attempts to demonstrate how antisubordination’s meaning has been severely destabilized.

<sup>20</sup> See *infra* Part I.B.

<sup>21</sup> 163 U.S. 537 (1896).

<sup>22</sup> 323 U.S. 214 (1944).

<sup>23</sup> See *infra* Part II.B.

seriousness at all. The dominant approach has been to acknowledge the challenge ever so briefly, and then to bat it away with blunt, conclusory force. Early on, Fiss exhibited the technique: “If the court truly believed that a state policy—even if called ‘benign’—impaired the status of blacks then the policy would be invalid. But I doubt whether anyone believes that preferential admissions to law schools for blacks impairs the status of the group.”<sup>24</sup> Compared to some of his contemporaries, though, Fiss’s treatment was downright expansive, as they often managed to shoo away the objection in a single sentence or buried it in a footnote.<sup>25</sup> More recently, liberal scholars working in the antisubordination tradition have tended to simply ignore arguments contending that affirmative action subjugates and demeans Black and brown people.

Liberal antisubordination scholars’ refusal to grapple in a sustained fashion with the competing arguments regarding their chief concept is deeply perplexing. Even before Fiss published his seminal article, Justice William O. Douglas wrote an opinion employing antisubordination arguments to attack affirmative action policies. Those policies, Justice Douglas stated, conveyed “stigma and caste,” and placed “a stamp of inferiority” on Black and brown students by suggesting they “cannot make it on their individual merit.”<sup>26</sup> In so arguing, Justice Douglas telegraphed arguments that Justice Thomas has repeatedly invoked against affirmative action, as he has suggested: “These programs stamp minorities with a badge of inferiority.”<sup>27</sup> Many other legal luminaries have advanced similar antisubordination claims against race-conscious admissions policies, including then-Professors Richard Posner, Antonin Scalia, and J. Harvie Wilkinson III.<sup>28</sup> Strikingly, several preeminent left-of-center scholars—including Professors Stephen Carter and Randall Kennedy—have voiced similar

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<sup>24</sup> Fiss, *supra* note 1, at 160.

<sup>25</sup> See, e.g., Karst, *supra* note 15, at 53 n.290 (contending that “the concern for stigmatic harm to members of racial minority groups seems misplaced”); Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 18 (1976) (“It is conceivable, but not likely, that . . . preferential . . . admissions policies might reflect assumptions that minorities are innately inferior and therefore in need of special aid.”); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 379–80 n.294 (1987) (burying the question of whether affirmative action programs flunk his own “racial meaning” test).

<sup>26</sup> *DeFunis*, 416 U.S. at 343 (Douglas, J., dissenting).

<sup>27</sup> *Gutter v. Bollinger*, 539 U.S. 306, 373 (2003) (Thomas, J., concurring in part and dissenting in part) (quoting *Adarand*, 515 U.S. at 241).

<sup>28</sup> See *infra* Part II.B.

critiques of affirmative action.<sup>29</sup> Perhaps most surprisingly, Professor Derrick Bell in 1979—one year after *Bakke*—contended that affirmative action “envelop[es] minority applicants in a cloud of suspected incompetency,” and “reinforce[s] the presumption of inferiority.”<sup>30</sup> Antisubordination, it seems, is a coat of many colors.<sup>31</sup>

This Article endeavors to embrace rather than elide antisubordination’s complexity, which has, over the last few years, grown more complex still. Although interrogating antisubordination’s multiple meanings is an intellectual task long overdue, the Supreme Court’s decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*<sup>32</sup> endows the matter with even greater urgency.<sup>33</sup> Fully understanding that cataclysmic legal dispute is impossible, in my view, without placing antisubordination’s multiplicity at center stage. Students for Fair Admissions’s (SFFA) primary argument can be viewed as sounding in antisubordination logic. Although SFFA occasionally suggested that lowered admission standards tarnished Black and brown students, its primary antisubordinating argument presented a different focus. By imposing lower personal ratings on Asian Americans and artificially capping their enrollment, SFFA maintained, Harvard demeaned that racial group by construing them as nerdy, narrow, and perpetually foreign.<sup>34</sup> Antisubordination served as a throughline for various Justices’ opinions in *SFFA v. Harvard*, but liberals and conservatives utilized that concept in radically divergent fashions.<sup>35</sup> In addition, liberal and conservative Justices in *SFFA* waged a bizarre battle over which side could more faithfully claim Justice John Marshall Harlan’s dissent in *Plessy v. Ferguson*, even though that opinion subordi-

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<sup>29</sup> See *infra* Part II.C.

<sup>30</sup> Derrick A. Bell, Jr., *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 8, 18 (1979).

<sup>31</sup> Cf. Bd. Of Educ. v. Allen, 392 U.S. 236, 249 (1968) (Harlan, J., concurring) (“Neutrality is [ ] a coat of many colors.”).

<sup>32</sup> 600 U.S. 181 (2023).

<sup>33</sup> This case was consolidated with *Students for Fair Admissions, Inc. v. University of North Carolina*, No. 21-707. Though as a formal matter Harvard, as a private institution, is governed by Title VI of the 1964 Civil Rights Act, the Supreme Court framed the question as whether Harvard and the University of North Carolina (UNC) violated the Equal Protection Clause because the statutory and constitutional provisions are deemed coextensive. See *SFFA*, 600 U.S. at 197–98.

<sup>34</sup> See *infra* text accompanying notes 246–49.

<sup>35</sup> See *infra* Part III.D.



nated people of Asian descent by construing them as paradigmatic non-Americans.<sup>36</sup> In the most engrossing *SFFA* opinion of all, Justice Thomas used the term “antisubordination,” the first time that the word ever appeared in the *U.S. Reports*, and just the second time that a federal court at any level had used it.<sup>37</sup> In a fascinating turn, while Justice Thomas explicitly purported to reject antisubordination, he simultaneously availed himself of the concept in condemning affirmative action.<sup>38</sup> *SFFA* may have inflicted a mortal blow on race-conscious admission policies, but antisubordination theories will not disappear anytime soon.<sup>39</sup>

Examining antisubordination’s theoretical moorings remains urgent because legal scholars have imported the concept into an astonishingly wide range of constitutional and policy arenas. What began with the Equal Protection Clause’s implications for racial equality, in other words, has now traveled to virtually every legal setting under the sun. Even a partial listing of antisubordination’s various legal domains boggles the mind, as scholars have applied the concept to: the First Amendment;<sup>40</sup> the Second Amendment;<sup>41</sup> the Thirteenth Amendment;<sup>42</sup> the Fourteenth Amendment’s Due Process Clause;<sup>43</sup> the Fourteenth Amendment’s Equal Protection Clause regarding sex;<sup>44</sup> the Nineteenth

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<sup>36</sup> *Plessy*, 163 U.S. at 561 (Harlan, J., dissenting); see *infra* text accompanying notes 334–36.

<sup>37</sup> *SFFA*, 600 U.S. at 246–51 (Thomas, J., concurring); see *infra* notes 298–99 and accompanying text.

<sup>38</sup> *Id.* at 2197–98.

<sup>39</sup> For a thoughtful article examining looming equal protection battles regarding admissions at elite public schools, see generally Sonja B. Starr, *The Magnet-School Wars and the Future of Colorblindness*, 76 STAN. L. REV. 161 (2024).

<sup>40</sup> See Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2122–24, 2153 (2018).

<sup>41</sup> See Danny Y. Li, Note, *Antisubordinating the Second Amendment*, 132 YALE L.J. 1821, 1869 (2023).

<sup>42</sup> See Rebecca E. Zietlow, *Free at Last! Anti-Subordination and the Thirteenth Amendment*, 90 B.U. L. REV. 255, 265–68 (2010).

<sup>43</sup> See Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 102 (2007) (contending that “concerns about group subordination have profoundly influenced the doctrinal growth of substantive due process”).

<sup>44</sup> See Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1058 (1986); Denise C. Morgan, *Anti-Subordination Analysis After United States v. Virginia: Evaluating the Constitutionality of K-12 Single-Sex Public Schools*, 1999 U. CHI. LEGAL F. 381, 405; Mary Anne Case, “The Very Stereotype the Law Condemns”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1475 (1999) (contending “the main proponent on the Court of the anti-subordination strand in the current constitutional law of sex discrimination is Chief Justice Rehnquist”).

Amendment;<sup>45</sup> marriage equality;<sup>46</sup> reproductive justice;<sup>47</sup> separation of powers;<sup>48</sup> disability rights;<sup>49</sup> civil procedure;<sup>50</sup> national security;<sup>51</sup> employment law;<sup>52</sup> technology law;<sup>53</sup> and local government law.<sup>54</sup> Understanding that antisubordination's meaning has been deeply disputed in its country of origin invites innumerable legal scholars to revisit whether the concept can be quite so readily exported into more far-flung lands.

Before fully delving into these arguments, I wish to make unmistakably clear at the outset that I do not advance these arguments as one of affirmative action's many, many detractors. To the contrary, I have expended considerable effort seeking to preserve a policy that has, in my view, served as a significant engine of mobility in American life, and thereby dramatically improved our nation.<sup>55</sup> In no sense, then, do I welcome the Supreme Court's misbegotten decision in *SFFA*. Rather, I abhor it. In addition, nothing herein should be taken as concluding that antisubordination must be abandoned. I do believe, however, that it will no longer do for proponents of antisubordination to close their eyes

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<sup>45</sup> See Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J. F. 450, 486 (2020) (arguing that “[t]he institutional history of the Nineteenth Amendment can guide the application of *Virginia*’s anti-caste or anti-subordination principle”).

<sup>46</sup> Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 174 (2015) (“What emerges from *Lawrence* and *Obergefell* is a vision of liberty that I will call ‘antisubordination liberty.’”).

<sup>47</sup> See Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 370 (1992) (contending that “abortion-restrictive regulation has historically functioned as caste legislation.”).

<sup>48</sup> See generally Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78 (2021).

<sup>49</sup> See Samuel R. Bagenstos, *Subordination, Stigma, and “Disability”*, 86 VA. L. REV. 397, 445 (2000).

<sup>50</sup> See Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 108 (1994) (emphasizing “the racial subordination inherent in the heightened pleading standard”).

<sup>51</sup> See generally Gil Gott, *The Devil We Know: Racial Subordination and National Security Law*, 50 VILL. L. REV. 1073 (2005).

<sup>52</sup> See Catherine L. Fisk, *The Anti-Subordination Principle of Labor and Employment Law Preemption*, 5 HARV. L. & POL’Y REV. 17, 37 (2011).

<sup>53</sup> See Jonas Lerman, *Big Data and Its Exclusions*, 66 STAN. L. REV. ONLINE 55, 60–61 (2013) (advancing a principle of “data antisubordination”).

<sup>54</sup> See Christopher J. Tyson, *From Ferguson to Flint: In Search of an Antisubordination Principle for Local Government Law*, 34 HARV. J. RACIAL & ETHNIC JUST. 1, 26–30 (2018).

<sup>55</sup> See, e.g., Adam Chilton, Justin Driver, Jonathan S. Masur & Kyle Rozema, *Assessing Affirmative Action’s Diversity Rationale*, 122 COLUM. L. REV. 331, 398–99 (2022); Justin Driver, Opinion, *Think Affirmative Action is Dead? Think Again.*, N.Y. TIMES (Oct. 26, 2022), <https://www.nytimes.com/2022/10/26/opinion/supreme-court-case-for-affirmative-action.html>.

to the substantial claims—advanced by formidable legal theorists of various stripes—in the hopes that those complications will somehow magically disappear. That intellectual strategy seldom pays dividends. Therefore, although the bulk of this Article explores antisubordination’s deeply contested nature, I fervently hope that it sparks dialogue among traditional antisubordination theorists regarding how the concept might be defended, refined, and elaborated. Later, I sketch some arguments in this vein, but these efforts seek to begin that long-overdue conversation, not end it.

The balance of this Article unfolds as follows. Part I sets the stage by briefly rehearsing the standard antisubordination theory, and then demonstrating how anticanonical Supreme Court opinions—including *Plessy* and *Korematsu*—complicate the conventional account. Turning to affirmative action, Part II examines pervasive claims that the programs do not ameliorate racial subordination, but instead perpetuate it, as articulated in judicial opinions, conservative commentary, and—surprisingly—some liberal commentary. With that background established, Part III identifies how antisubordination formed a leitmotif in *SFFA v. Harvard*, shaping the briefs, oral arguments, and, of course, the opinions themselves. Part IV explores various methods that liberal antisubordination scholars could use to counteract these persistent efforts to claim that affirmative action policies subjugate various racial minorities. Part V pivots to contemplate implications flowing from antisubordination’s contested meaning for affirmative action, by recasting prominent scholarly understandings of Justice Thomas, and exploring integration as an alternative justification. A brief conclusion follows.

## I. ANTISUBORDINATION IN JUDICIAL OPINIONS

This Part sets the scene by briefly establishing the conventional scholarly understanding of antisubordination as exemplified in canonical Equal Protection Clause opinions. The dominant view extols celebrated decisions—including *Strauder v. West Virginia*,<sup>56</sup> *Brown v. Board of Education*, and *Loving v. Virginia*<sup>57</sup>—as invalidating legal approaches that subordinate Black people. Next, this Part complicates that dominant understanding by demonstrating that two of the most detested

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<sup>56</sup> 100 U.S. 303 (1880).

<sup>57</sup> 388 U.S. 1 (1967).

decisions in the Supreme Court's history—*Plessy* and *Korematsu*—can also be readily construed as endorsing antisubordination theories. If revered and reviled opinions both espouse antisubordination values, that commonality underscores the concept's intense pliability.

#### A. The Standard Account

Scholars advancing the standard account of antisubordination have identified several prominent judicial opinions that articulate their preferred vision of the Equal Protection Clause.<sup>58</sup> The standard account typically begins in the late nineteenth century, with the Supreme Court's opinion in *Strauder*. There, the Court invalidated a statute that prohibited Black people from serving on juries, reserving that honor for white citizens.<sup>59</sup> Justice William Strong, writing for the Court, utilized classic antisubordination rhetoric, reasoning that the statute acts as “practically a brand upon [Black people], . . . an assertion of their inferiority, and a stimulant to that race prejudice.”<sup>60</sup> The Fourteenth Amendment, Justice Strong maintained, was fundamentally designed to prohibit both “discriminations which are steps towards reducing [Black people] to the condition of a subject race,” and “legal discriminations, implying [their] inferiority.”<sup>61</sup>

While acknowledging that *Brown* certainly contained some anticlassification reasoning, antisubordination scholars highlight the iconic decision's language condemning school segregation because it perpetuated notions of Black inferiority.<sup>62</sup> Chief Justice Earl Warren—in *Brown*'s most resonant passage—contended: “To separate [Black students] from others of similar age and qualifications solely 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 ever to be undone.”<sup>63</sup> In this same vein, Chief Justice Warren quoted from a lower court decision, which emphasized that school segregation “has a detrimental effect upon the colored children,” and that Jim Crow laws

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<sup>58</sup> See, e.g., David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 941–42 (1989) (sketching the standard antisubordination account).

<sup>59</sup> *Strauder*, 100 U.S. at 310–12.

<sup>60</sup> *Id.* at 308.

<sup>61</sup> *Id.*

<sup>62</sup> See, e.g., Siegel, *supra* note 16, at 1480–89.

<sup>63</sup> *Brown*, 347 U.S. at 494.

are “usually interpreted as denoting the inferiority of the negro group.”<sup>64</sup>

*Loving’s* invalidation of state bans on interracial marriage is also a canonical antisubordination decision.<sup>65</sup> *Loving* embraced antisubordinationist reasoning, the standard account holds, by finding that statutes cannot lawfully elevate whiteness as superior. Writing for the Court in *Loving*, Chief Justice Warren found that “[t]he fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications . . . [are] measures designed to maintain White Supremacy.”<sup>66</sup> Chief Justice Warren further observed that, though Virginia’s statute was styled “An Act to Preserve Racial Integrity,” it was wholly unconcerned with maintaining the racial integrity of nonwhite peoples.<sup>67</sup> Thus, Virginia’s statute preserved and uplifted whiteness, simultaneously lowering and demeaning nonwhiteness.

*Palmer v. Thompson’s*<sup>68</sup> legitimization of the decision in Jackson, Mississippi, to close its municipal swimming pools, rather than to integrate them, can be viewed as illustrating constitutional perils that flow from refusing to apply antisubordination values. In one of the most reviled racial decisions in modern U.S. history,<sup>69</sup> Justice Hugo Black’s majority opinion in *Palmer* applied a rigid anticlassification rule, framing the case as involving “whether black citizens in Jackson *are* being denied their constitutional rights when the city has closed the public pools to black and white alike.”<sup>70</sup> So framed, Justice Black had little difficulty concluding that because Jackson had not racially classified residents, it also had not violated the Equal Protection Clause.<sup>71</sup>

Had *Palmer* embraced an antisubordination approach, however, it would have reached the opposite outcome, finding that Jackson’s swimming pool closures were driven by a view of the Black body as undesirable, even contaminated.<sup>72</sup> Justice Byron

<sup>64</sup> *Id.* (internal quotation marks omitted).

<sup>65</sup> See Strauss, *supra* note 54, at 941.

<sup>66</sup> *Loving*, 388 U.S. at 11.

<sup>67</sup> *Id.* at 11 n.11.

<sup>68</sup> 403 U.S. 217 (1971).

<sup>69</sup> For a recent repudiation, see generally Randall Kennedy, *Reconsidering Palmer v. Thompson*, 2018 SUP. CT. REV. 179 (2019) [hereinafter Kennedy, *Reconsidering Palmer*].

<sup>70</sup> *Palmer*, 403 U.S. at 226 (emphasis in original).

<sup>71</sup> *Id.*

<sup>72</sup> See Kennedy, *Reconsidering Palmer*, *supra* note 69, at 189–91. For a helpful examination of the swimming pool as a site of racialized conflict, see generally JEFF WILTSE, *CONTESTED WATERS: A SOCIAL HISTORY OF SWIMMING POOLS IN AMERICA* (2007).

White's dissenting opinion in *Palmer* repeatedly evinced antisubordination logic. While pool closures to avert integration might treat all races equally, he observed, they also express "an . . . official policy that Negroes are unfit to associate with whites."<sup>73</sup> Furthermore, Justice White reasoned that "the closed pools stand as mute reminders to the community of the official view of Negro inferiority,"<sup>74</sup> and that "[t]he Equal Protection Clause is a hollow promise if it does not forbid [ ] official denigrations of the race the Fourteenth Amendment was designed to protect."<sup>75</sup> For many liberal scholars, then, *Palmer's* wrongheaded outcome demonstrates how constitutional interpretation goes awry when antisubordination goes missing.

## B Complications

While antisubordination rhetoric appears in some widely revered Supreme Court decisions and is eschewed in some widely repudiated decisions, that rhetoric also arises in more confounding, more surprising parts of U.S. constitutional law. Indeed, the majority opinions in two cases that have been identified as belonging in the anticanon of U.S. constitutional law prominently feature antisubordination reasoning.<sup>76</sup> The two notorious opinions in question are Justice Henry Billings Brown's majority opinion in *Plessy v. Ferguson* and Justice Black's majority opinion in *Korematsu v. United States*. Given that the anticanon includes only four opinions, that means that fully half of the cases that any respectable lawyer must deem not merely incorrect, but dead wrong were nevertheless driven by an antisubordination rationale.<sup>77</sup>

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<sup>73</sup> *Palmer*, 403 U.S. at 240–41 (White, J., dissenting) (describing a hypothetical town's pool closure policy that is "little, if any, different from" Jackson, Mississippi's).

<sup>74</sup> *Id.* at 268.

<sup>75</sup> *Id.* at 241.

<sup>76</sup> See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 385–404 (2011) (surveying legal materials in a comprehensive fashion to identify *Dred Scott v. Sanford*, 60 U.S. 393 (1857), *Plessy v. Ferguson*, 163 U.S. 537 (1896), *Lochner v. New York*, 198 U.S. 45 (1905), and *Korematsu v. United States*, 323 U.S. 214 (1944), as anticanonical cases); J. M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018–20 (1998) (identifying the anticanon phenomenon). See generally Richard A. Primus, *Canon, Anti-Canon, and Judicial Dissent*, 48 DUKE L.J. 243 (1998) (exploring the phenomenon).

<sup>77</sup> See Greene, *supra* note 76, at 386 ("In parallel to the canon, [the anticanon] is the set of legal materials so wrongly decided that their errors . . . we would not willingly let die. It remains important for us to teach, to cite, and to discuss these decisions, [ ] as examples of how not to adjudicate constitutional cases.").

Before demonstrating how these anticanonical cases availed themselves of antisubordination reasoning, I wish to emphasize that I, of course, do not find persuasive the social meaning either that *Plessy* attributed to Jim Crow or that *Korematsu* attributed to Japanese American internment camps. To the contrary, I wholeheartedly reject those contrived social meanings. But we make a profound mistake by turning a blind eye to how judicial opinions of yesteryear invoked antisubordination principles to maintain racist regimes. Recovering the antisubordination rhetoric—if not the reality—animating both *Plessy* and *Korematsu* helps to underscore the phenomenon’s deep malleability.

Although contemporary legal scholars often dispute whether anticlassificationists or antisubordinationists can more faithfully lay claim to Justice Harlan’s celebrated dissenting opinion in *Plessy*,<sup>78</sup> Justice Brown’s majority opinion typically receives much less scrutiny. That relative lack of attention is entirely understandable. After all, *Plessy* validated Louisiana’s “separate but equal” railcar statute, and the very vileness of that holding seems almost to repel analysis.<sup>79</sup> Yet when one expends even a modest amount of energy examining—if not admiring—Justice Brown’s majority opinion in *Plessy*, it quickly becomes plain that antisubordination, not anticlassification forms its driving rationale.

If Justice Brown believed that the Equal Protection Clause prohibited racial classifications, of course, *Plessy* would have invalidated Louisiana’s measure, which facially required race-based railcars.<sup>80</sup> But Justice Brown did not believe that equal protection principles banned racial classification; instead, he contended that equal protection banned something else: racial subordination. Justice Brown made plain his rejection of anticlassification when he observed that the Fourteenth Amendment required “the absolute equality of the two races before the law, but in the nature of things *it could not have been intended to abolish distinctions based upon color.*”<sup>81</sup>

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<sup>78</sup> See WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S LANDMARK CIVIL RIGHTS DECISION 10–14 (Jack M. Balkin ed., 2002). Where anticlassificationists emphasize Justice Harlan’s language observing “[o]ur Constitution is color-blind,” antisubordinationists instead emphasize the immediate prior sentence, contending “[t]here is no caste here.” *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

<sup>79</sup> *Plessy*, 163 U.S. at 551–52.

<sup>80</sup> *Id.* at 540–41.

<sup>81</sup> *Id.* at 544 (emphasis added).

After establishing that equal protection did not demand colorblindness, Justice Brown's opinion can be construed as proceeding in three basic steps. First, Justice Brown contended that not all racially distinct treatment by the state amounted to subordination. Racial segregation, he maintained, "do[es] not necessarily imply the *inferiority* of either race to the other," and such practices have been almost universally upheld.<sup>82</sup> Justice Brown identified school segregation as the paradigmatic example of racially distinct treatment that was permissible under the Fourteenth Amendment.<sup>83</sup> Second, Justice Brown turned to precedent, and interpreted *Strauder's* invalidation of white juror requirements as hinging on antisubordination. The problem with West Virginia's juror statute, Justice Brown explained, was that it "implied a legal inferiority in civil society, which lessened the security of the right of the colored race, and was a step toward reducing them to a condition of servility."<sup>84</sup> Note here, in rapid succession, *Plessy's* invocation of language involving racial diminution: "legal *inferiority* . . . *lessen[s]* . . . the colored race . . . *reducing* them to . . . *servility*."<sup>85</sup> Finally, Justice Brown concluded that Louisiana's railroad statute passed constitutional muster because it did not subordinate Black people. "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority," he asserted. "If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."<sup>86</sup>

Nor was *Plessy* the only nineteenth-century Supreme Court decision to use antisubordination logic to bolster racial segregation. In 1899, three years after *Plessy*, the Supreme Court in *Cumming v. Board of Education of Richmond County*<sup>87</sup> confronted a lawsuit challenging a Georgia school district's decision to close its high school for Black students while continuing to operate its high school for white students.<sup>88</sup> At first blush, this case may seem

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<sup>82</sup> *Id.* (emphasis added).

<sup>83</sup> *Id.* at 544–45.

<sup>84</sup> *Plessy*, 163 U.S. at 545.

<sup>85</sup> *Id.* (emphasis added).

<sup>86</sup> *Id.* at 551.

<sup>87</sup> 175 U.S. 528 (1899). For background and analysis of *Cumming*, including the fact that Justice Harlan (the sole dissent in *Plessy*) authored the majority decision, see JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 31–37 (2018).

<sup>88</sup> *Cumming*, 175 U.S. at 544.



to present a straightforward violation of not only the Equal Protection Clause, but even *Plessy's* upholding of the “separate but equal” regime. Richmond County had, of course, abandoned any pretense of equality by preventing Black students from obtaining a public high school education. *Cumming* thus raised the question of what has evocatively been termed “separate-and-unequal.”<sup>89</sup> The Court, however, refused to invalidate Georgia’s inequality, reasoning that relatively few Black people in Richmond County wished to obtain a high school education compared to the many Black people who sought primary education. Shutting the Black high school, *Cumming* concluded, was a reasonable allocation of finite resources.<sup>90</sup>

Crucially, *Cumming* often employed antisubordination logic, asserting that it would be impermissible to regard the school board as having “any desire or purpose . . . to discriminate against any of the colored school children of the county on account of their race.”<sup>91</sup> But the board plainly did “discriminate” against aspiring Black high school students in the sense that it treated them differently, affording no public educational opportunity. *Cumming* here invoked the term “discriminat[ion]” to mean subordination, as it found that the board’s decision to close the Black high school was not animated by “hostility to the colored population because of their race.”<sup>92</sup> Had the board “acted in hostility to the colored race,” *Cumming* concluded, Richmond County may well have violated the Equal Protection Clause.<sup>93</sup> But because the County did not aim to subordinate Black people, *Cumming* suggested, its action passed constitutional muster.

In 1944, the Supreme Court in *Korematsu* infamously upheld the U.S. military’s banishment of persons of Japanese descent—

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<sup>89</sup> MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 43, 45–47 (2004) (emphasis in original); see also Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461, 1468 (2003) (emphasizing the persistence of segregated schooling in the United States nearly a half-century after *Brown*).

<sup>90</sup> *Cumming*, 175 U.S. at 544.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 545.

<sup>93</sup> *Id.* For yet another nineteenth-century example of the Supreme Court using a type of antisubordination logic to bolster racial segregation, consider *Pace v. Alabama*, 106 U.S. 583 (1883). There, the Court refused to invalidate an antimiscegenation statute because the measure punished both Black and white transgressors of the sexual color line equally. *Id.* at 585. Nevertheless, *Pace* reasoned: “[T]he purpose of [the Equal Protection Clause] . . . was to prevent hostile and discriminating State legislation against any person or class of persons.” *Id.* at 584.

including many U.S. citizens—from the West Coast, and its accompanying requirement that they report to internment camps.<sup>94</sup> Justice Black’s majority opinion in *Korematsu* announced that racial classifications “are immediately suspect,” and draw “the most rigid scrutiny.”<sup>95</sup> Importantly, though, Justice Black—echoing Justice Brown in *Plessy*—eschewed any requirement of constitutional colorblindness, stating: “That is not to say that all [legal] restrictions [of a single racial group] are unconstitutional.”<sup>96</sup> Rather, *Korematsu* can be viewed as embracing the notion that equal protection principles forbid race-based subordination.<sup>97</sup> Equal protection, Justice Black insisted, invariably prohibited not racial classification, but instead “racial antagonism.”<sup>98</sup> Justice Black further contended: “To cast this case into outlines of racial prejudice . . . merely confuses the issue. *Korematsu* was not excluded from the [West Coast] because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire.”<sup>99</sup> Had the military’s dislocation determination been driven by raw anti-Japanese hostility and antagonism, Justice Black suggested, those subjugating actions would have violated the Constitution. This analysis—with its focus on racial hostility—mirrors *Cumming*.

Again, it bears stressing here that I find *Plessy*’s and *Korematsu*’s efforts to contend that racial segregation and internment camps did not in fact subordinate African Americans and Japanese Americans not merely unpersuasive, but preposterous. I am far from alone in so believing, as prominent legal figures have correctly skewered the dubious social meanings offered in both opinions.

Regarding *Plessy*, Professor Charles Black in 1960 aimed to defend *Brown v. Board of Education* from Professor Herbert Wechsler’s withering skepticism by observing that Jim Crow was

<sup>94</sup> *Korematsu*, 323 U.S. at 216–17.

<sup>95</sup> *Id.* at 216. It is often stated that while *Korematsu* may have *announced* strict scrutiny, it did not *apply* strict scrutiny. See, e.g., Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 232 & n.83 (1991).

<sup>96</sup> *Korematsu*, 323 U.S. at 216.

<sup>97</sup> *Korematsu* involved actions taken by the federal government, not state governments; therefore, it implicated what *Bolling v. Sharpe*, 347 U.S. 497 (1954), deemed the equal protection component of the Fifth Amendment’s Due Process Clause, rather than the Fourteenth Amendment’s Equal Protection Clause. See *Korematsu*, 323 U.S. at 234–35 (Murphy, J., dissenting); *Bolling*, 347 U.S. at 499.

<sup>98</sup> *Korematsu*, 323 U.S. at 216.

<sup>99</sup> *Id.* at 223 (emphasis in original).

predicated on notions of racial inferiority.<sup>100</sup> In so doing, Professor Black memorably countered *Plessy's* assertion that if African Americans perceived segregation as somehow denoting their subjugation, the problem was of their own creation. In this assertion, Black claimed, “[t]he curves of callousness and stupidity intersect at their respective maxima.”<sup>101</sup> Professor Black further contended that the Equal Protection Clause should be viewed as outlawing racial caste. “[I]f a whole race of people finds itself confined within a system which is set up and continued for the very purpose of keeping it in an inferior station,” Black wrote, “and if the question is then solemnly propounded whether such a race is being treated ‘equally,’ I think we ought to exercise one of the sovereign prerogatives of philosophers—that of laughter.”<sup>102</sup> *Plessy's* effort to construe Jim Crow as compatible with racial equality is, Black insisted, nothing less than risible.

In *Korematsu*, Justice Frank Murphy’s dissenting opinion had no difficulty comprehending that internment stemmed from anti-Japanese animus. The banishment was fueled by “racial and economic prejudices” against people of Japanese descent, Justice Murphy observed, and permitted the government to “fall[ ] into the ugly abyss of racism.”<sup>103</sup> Murphy understood that stereotyped notions of the supposedly unassimilable Japanese created the internment camps, not a neutral evaluation of the actual threat: “Individuals of Japanese ancestry are condemned because they are said to be a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion.”<sup>104</sup> If racism were not the driving force behind internment, it might reasonably be asked, why were citizens of Japanese ancestry singled out for special treatment, when citizens of Italian and German descent (two other enemy nations during World War II) were spared the indignity?<sup>105</sup> General John DeWitt, a leading architect of internment, publicly testified that

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<sup>100</sup> See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424–27, 421 n.3 (1960); see also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 33 (1959) (“[I]s there not a point in *Plessy* in the statement that if ‘enforced separation stamps the colored race with a badge of inferiority’ it is solely because its members choose ‘to put that construction upon it?’”).

<sup>101</sup> Black, *supra* note 100, at 422 n.8.

<sup>102</sup> *Id.* at 424. Sunstein has contended that Professor Black’s invocation of laughter “ranks among the best sentences ever written by an American law professor.” Cass R. Sunstein, *Black on Brown*, 90 VA. L. REV. 1649, 1651 (2004).

<sup>103</sup> *Korematsu*, 323 U.S. at 233, 239 (Murphy, J., dissenting).

<sup>104</sup> *Id.* at 237 (internal quotation marks omitted).

<sup>105</sup> See *id.* at 240.

concerns about the allegedly inscrutable Japanese drove the policy. “A Jap’s a Jap,” Dewitt averred, with naked racism.<sup>106</sup> “It makes no difference whether he’s an American citizen or not. There is no way to determine their loyalty.”<sup>107</sup> The subordinating attitudes directed toward people of Asian descent would, of course, play a central role in the *SFFA* litigation.

## II. AFFIRMATIVE ACTION COMPLICATIONS

This Part foregrounds antisubordination’s surprisingly complex relationship with affirmative action, demonstrating that many prominent jurists and legal theorists have contended that the programs impose a type of racial taint on Black and brown people. Significantly, none of these authors style themselves as refuting an ascendant theory of constitutional interpretation, in no small part because several of these claims preceded Fiss’s innovation. Perhaps partially for that reason, then, these statements have not penetrated the traditional antisubordination mindset. Whatever the precise explanation for this oversight, though, it is important to assemble these claims that affirmative action subjugates racial minorities because they reveal the phenomenon’s underappreciated complexity. It would be exceedingly difficult to locate a significant issue that unites legal minds as varied as Justices Douglas and Thomas; Professors Derrick Bell and Alexander Bickel; and Justice Scalia and Professor Randall Kennedy. But they all agree that affirmative action can be viewed as carrying the unpleasant aroma of racial subordination. This Part explores these challenges to the conventional view in the context of judicial opinions, conservative commentary, and even some liberal commentary. By amassing these challenges, I hope to make conspicuous what has thus far somehow managed to remain hidden in plain sight.

### A. Judicial Opinions

Liberal scholars have routinely highlighted Supreme Court opinions—including, most prominently, *Grutter v. Bollinger*<sup>108</sup>—suggesting that affirmative action combats subordination, by incorporating substantial numbers of Black students into elite educational environments from which they had previously been

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<sup>106</sup> ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 313 (1994).

<sup>107</sup> *Id.*

<sup>108</sup> 539 U.S. 306 (2003).

excluded.<sup>109</sup> Far too frequently disregarded, however, are the numerous opinions suggesting that affirmative action programs themselves subordinate Black people. Bringing these oft-overlooked antisubordination opinions to center stage complicates the notion that jurists concerned with caste must invariably believe that affirmative action programs pass constitutional muster.

In 1974, the Supreme Court weighed the constitutionality of affirmative action for the first time in *DeFunis v. Odegaard*.<sup>110</sup> Although *DeFunis* has now largely been forgotten in constitutional law circles, it generated enormous public attention at the time.<sup>111</sup> The case involved a challenge to the University of Washington Law School admissions program brought by Marco DeFunis, a white student who contended that Washington rejected his application in favor of less qualified racial minorities.<sup>112</sup> At the Supreme Court, the lawsuit largely fizzled, as it declined to reach the merits on grounds of mootness.<sup>113</sup> But Justice Douglas disagreed with the Court's mootness determination in *DeFunis*, and he alone addressed the merits in a dissenting opinion that highlighted affirmative action's stark potential for subordinating racial minorities.<sup>114</sup> It may be tempting to believe that the fact that this first substantive Supreme Court opinion on affirmative action wielded antisubordination values against the program would have posed profound difficulties for that theory being widely used to defend the program. But things, of course, did not turn out that way.

Writing exactly two decades after he joined the Court's unanimous opinion in *Brown*, Justice Douglas used highly charged language in *DeFunis* to invoke that legacy. "A segregated admissions process creates suggestions of stigma and caste no less than a segregated classroom," Justice Douglas wrote, "and in the end [ ] may produce that result despite its contrary intentions."<sup>115</sup> Justice Douglas further suggested that the existence of affirmative action programs could lend credence to the misguided notion

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<sup>109</sup> See, e.g., Siegel, *supra* note 16, at 1538–40 (contending that *Grutter* "explicitly embraces antisubordination values").

<sup>110</sup> 416 U.S. 312 (1974).

<sup>111</sup> See UROFSKY, *supra* note 6, at 136.

<sup>112</sup> *DeFunis*, 416 U.S. at 314–15.

<sup>113</sup> *Id.* at 319–20.

<sup>114</sup> *Id.* at 320 (Douglas, J., dissenting). Justice Brennan also dissented from the Court's mootness determination in *DeFunis* but did not address the underlying merits. See *id.* at 348–50 (Brennan, J., dissenting).

<sup>115</sup> *Id.* at 343 (Douglas, J., dissenting).

“that blacks or browns cannot make it on their individual merit. That is a stamp of inferiority that a State is not permitted to place on any lawyer.”<sup>116</sup> In this remarkable passage, Justice Douglas utilizes many hallmarks of antisubordination language, expressing concerns about “stigma and caste,” stereotyped beliefs of racial inadequacy, and, of course, the dreaded “stamp of inferiority.”<sup>117</sup> Although Justice Douglas’s dissent may have been the first time that a Supreme Court Justice used antisubordination reasoning to question affirmative action, it was far from the last.

Indeed, four years after *DeFunis*, Justice Lewis Powell’s controlling opinion in *Bakke* briefly cited and elaborated upon Justice Douglas’s view entertaining how affirmative action could harm Black and brown students.<sup>118</sup> In *Bakke*, Justice Powell famously cast the decisive vote in a Court split 4–1–4. He concluded that university admissions offices may in some instances consider race without violating the Constitution, but he also prohibited them from implementing the sort of naked quota adopted by University of California (U.C.) Davis Medical School.<sup>119</sup> While Justice Powell refused to ban considerations of race in admissions, he nevertheless allowed: “[T]here are serious problems of justice connected with the idea of [racial] preference itself.”<sup>120</sup> One of those serious problems—Justice Powell contended, citing Justice Douglas—was that “preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection.”<sup>121</sup> Justice Powell did not, of course, view affirmative action’s potentially subordinating effects as disqualifying, but he did concede that they existed.<sup>122</sup>

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<sup>116</sup> *Id.*

<sup>117</sup> *DeFunis*, 416 U.S. at 343.

<sup>118</sup> *Bakke*, 438 U.S. at 297–98, 297 n. 37 (Powell, J., writing for the Court).

<sup>119</sup> *Id.* at 319–20.

<sup>120</sup> *Id.* at 298.

<sup>121</sup> *Id.* (citing *DeFunis*, 416 U.S. at 343 (Douglas, J., dissenting)).

<sup>122</sup> In *Bakke*, Justices who supported affirmative action without Justice Powell’s hesitations also engaged with arguments about racial subordination. Justice Brennan rejected the notion that U.C. Davis’s admissions “program [can] reasonably be regarded as stigmatizing the program’s beneficiaries or their race as inferior.” *Id.* at 375 (Brennan, J., concurring in part and dissenting in part). Justice Brennan contended this affirmative action-as-subordinating interpretation would be inaccurate because all of the students admitted to U.C. Davis Medical School were qualified. *Bakke*, 438 U.S. at 375–76. Critics of affirmative action, however, retorted that students of color, as a whole, had markedly lower qualifications than white students. See Scalia, *supra* note 7, at 154 (highlighting lower MCAT scores and college GPAs for students of color admitted to U.C. Davis Medical School). For his part, Justice Marshall’s opinion in *Bakke* emphasized the long, ongoing traditions of the United States looking down upon its Black citizens: “The experience of

In recent years, Justice Thomas has amplified this concern that programs designed to help Black people actually end up subordinating them. He pursued this theme with notable vigor in two different cases decided on the same day in 1995: *Adarand Constructors, Inc. v. Peña*<sup>123</sup> and *Missouri v. Jenkins*.<sup>124</sup> Although neither case arose from the context of higher education, they both illuminate Justice Thomas's appeals to antisubordination values. In *Adarand*, the Court declared that an affirmative action program enacted by the federal government that rewarded construction companies for working with minority subcontractors must be subjected to strict scrutiny.<sup>125</sup> Justice Thomas wrote a concurring opinion that strongly echoed Justice Douglas's *DeFunis* dissent. "These programs stamp minorities with a badge of inferiority," Justice Thomas asserted.<sup>126</sup> That badge, Justice Thomas contended, stemmed from affirmative action's central lesson: "that because of chronic and apparently immutable handicaps, minorities cannot compete with [whites] without their patronizing indulgence."<sup>127</sup> Just as affirmative action communicated Black inferiority, Justice Thomas continued, it also "engender[ed] attitudes of [white] superiority" among the "racial paternalis[ts]" who administer these "poisonous and pernicious" programs.<sup>128</sup>

In *Missouri v. Jenkins*, the Supreme Court held that a district court exceeded its remedial authority when it ordered the state to fund magnet schools in Kansas City with an eye toward promoting racial desegregation.<sup>129</sup> The program devised by the district court aimed to attract white students from the suburbs to attend school in the disproportionately Black city. While the majority concluded that the desegregation approach violated *Milliken v. Bradley*'s<sup>130</sup> admonition against interdistrict remedies,<sup>131</sup> Justice Thomas wrote a concurrence maintaining that the program should fall because the sheer desire for integration succeeded in

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Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured." *Bakke*, 438 U.S. at 400 (Marshall, J., concurring in part and dissenting in part).

<sup>123</sup> 515 U.S. 200 (1995).

<sup>124</sup> 515 U.S. 70 (1995). Both cases were decided on June 12, 1995.

<sup>125</sup> *Adarand*, 515 U.S. at 205, 224.

<sup>126</sup> *Id.* at 241 (Thomas, J., concurring in part and concurring in the judgment).

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Jenkins*, 515 U.S. at 98.

<sup>130</sup> 418 U.S. 717 (1974).

<sup>131</sup> *Jenkins*, 515 U.S. at 92–94.

subordinating African Americans.<sup>132</sup> Justice Thomas stated with a note of incredulity: “It never ceases to amaze me that the courts are so willing to assume that anything that is predominantly black must be inferior.”<sup>133</sup> He continued:

“Racial isolation” itself is not a harm; only state-enforced segregation is. After all, if separation itself is a harm, and if integration therefore is the only way that blacks can receive a proper education, then there must be something inferior about blacks. Under this theory, segregation injures blacks because blacks, when left on their own, cannot achieve. To my way of thinking, that conclusion is the result of a jurisprudence based upon a theory of black inferiority.<sup>134</sup>

In *Jenkins*, Justice Thomas at times struck anticlassification chords,<sup>135</sup> but the dominant theme sounded in antisubordination, as he was primarily concerned with law conveying that Black people lack intellectual capacities and are therefore lesser human beings.

Justice Thomas’s magnum opus of antisubordination is his dissenting opinion in *Grutter v. Bollinger*, where he excoriated the Court’s decision upholding the University of Michigan Law School’s race-conscious admissions policy. “I believe blacks can achieve in every avenue of American life without the meddling of university administrators,” Justice Thomas opined, not so subtly intimating that his colleagues in the majority believed that Black students needed affirmative action to flourish.<sup>136</sup> Justice Thomas further noted that some Black applicants would be admitted to Michigan’s Law School even in the absence of race-conscious policies. But, he maintained, there was no way to distinguish Black students “who belong[ed]” at Michigan on the merits and those who gained admission due to the boost of affirmative action.<sup>137</sup> “The majority of blacks are admitted to the Law School because of discrimination, and because of this policy all are tarred as

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<sup>132</sup> *Id.* at 114 (Thomas, J., concurring).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 122.

<sup>135</sup> *See id.* (stating that the Fourteenth Amendment aims “to ensure that blacks and whites are treated equally by the State without regard to their skin color”).

<sup>136</sup> *Grutter*, 539 U.S. at 350 (Thomas, J., concurring in part and dissenting in part).

<sup>137</sup> *Id.* at 373. The notion of merit in higher education (and beyond) is, of course, highly contested. *See generally* Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113 (2003).



undeserving,” he wrote.<sup>138</sup> “This problem of stigma does not depend on determinacy as to whether those stigmatized are actually the ‘beneficiaries’ of racial discrimination.”<sup>139</sup> Justice Thomas contended that affirmative action casts a long shadow over virtually all of Black achievement. “When blacks take positions in the highest places of government, industry, or academia, it is an open question today whether their skin color played a part in their advancement,” he vented.<sup>140</sup> “The question itself is the stigma—because either racial discrimination did play a role . . . or it did not, in which case asking the question itself unfairly marks those blacks who would succeed without discrimination.”<sup>141</sup> In this ardent passage, Justice Thomas thus availed himself of quintessential antisubordination logic, contending that affirmative action “tar[s],” “stigmat[izes],” and “marks” Black people as substandard, and therefore violates the Equal Protection Clause.<sup>142</sup>

In the Supreme Court’s first encounter with the University of Texas admissions program, Justice Thomas returned to this antisubordination melody. *Fisher v. University of Texas (Fisher I)*<sup>143</sup> considered whether admissions officers could—after accepting the overwhelming majority of the incoming class with students whose academic records placed them within a top percentile of their high schools—use explicit racial classifications in rounding out the class.<sup>144</sup> Although *Fisher I* declined to determine whether Texas’s express racial classifications violated the Equal Protection Clause,<sup>145</sup> Justice Thomas wrote a separate opinion warning of the “insidious consequences” that result from “racial engineering.”<sup>146</sup> Anticipating the formation of SFFA, Justice Thomas noted the University’s policy “injures . . . Asian applicants who are denied admission because of their race.”<sup>147</sup>

Justice Thomas reserved his greatest concern, however, for Black and brown students, who he believed were most harmed by affirmative action. Not only did the underrepresented minorities who were admitted with express racial classifications have their

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<sup>138</sup> *Grutter*, 539 U.S. at 373.

<sup>139</sup> *Id.* at 373 (Thomas, J., concurring in part and dissenting in part).

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> 570 U.S. 297 (2013).

<sup>144</sup> *Id.* at 306.

<sup>145</sup> *Id.* at 314–15.

<sup>146</sup> *Id.* at 331 (Thomas, J., concurring).

<sup>147</sup> *Id.*

achievements “taint[ed],” Justice Thomas insisted that the taint applied to every member of those racial groups at Texas.<sup>148</sup> “[I]t taints the accomplishments of all those who are the same race as those admitted as a result of racial discrimination,” Justice Thomas contended. “In this case, for example, most blacks and Hispanics attending the University were admitted without discrimination under the Top Ten Percent plan, but no one can distinguish those students from the ones whose race played a role in their admission.”<sup>149</sup> Again, Justice Thomas alleged that affirmative action subjugates underrepresented racial minorities, stigmatizing even those who did not need any assistance from the program to win admission. No matter how accomplished Black and brown students were in high school—Justice Thomas intimates—valedictorians, National Merit Scholars, United States Presidential Scholars alike walk around the Austin campus with “a badge of inferiority” pinned to their chests solely as a result of having the wrong color skin.<sup>150</sup> In this sense, receiving a letter offering admission to the flagship university in Texas becomes ineluctably transformed into a booby prize—at least for Black and brown students.<sup>151</sup> If that is not racial subordination, one can almost hear Justice Thomas asking rhetorically, then tell me: what is?

Although Justices who support affirmative action and Justices who oppose affirmative action both invoke antisubordination rationales to bolster their competing positions, liberal and conservative Justices seem to talk right past each other when doing so—even when they are using the rationale (though not the label) within the same legal dispute. This phenomenon appeared most clearly in *Schuette v. Coalition to Defend Affirmative Action*.<sup>152</sup> That case considered whether the Equal Protection Clause prohibited states from banning affirmative action in education.<sup>153</sup> The Court, in a 6–2 decision written by Justice Anthony Kennedy, held that states could do so without running afoul of the

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<sup>148</sup> *Id.* at 333.

<sup>149</sup> *Id.*

<sup>150</sup> *Fisher I*, 570 U.S. at 333 (quoting *Adarand*, 515 U.S. at 241 (Thomas, J., concurring in part and concurring in the judgment)).

<sup>151</sup> See *Booby Prize*, OXFORD ENGLISH DICTIONARY (3d ed. 2010) (defining the term as “[a] prize or reward (frequently consisting of something ridiculous or undesirable) given as a joke to the competitor coming in last place in a contest, race, etc.”).

<sup>152</sup> 572 U.S. 291 (2014).

<sup>153</sup> *Id.* at 300–01.

Constitution.<sup>154</sup> In an impassioned dissent, Justice Sonia Sotomayor excoriated her colleagues in the majority for ignoring that “[r]ace matters” in myriad ways, including the nation’s “racial caste” system, and the “persistent racial inequality in [American] society.”<sup>155</sup> Justice Sotomayor also construed the majority as unwisely pledging allegiance to constitutional colorblindness and tweaked Chief Justice John Roberts by reformulating the most famous sentence that he has ever written, when he intoned: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>156</sup> Justice Sotomayor retorted: “The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.”<sup>157</sup> Justice Sotomayor’s antisubordination-inflected opinion also identified various ways that “race matters” for people of color in the United States, including those suffering from acute forms of impostor syndrome: “Race matters because of the slights, the snickers, the silent judgments that reinforce that most crippling of thoughts: ‘I do not belong here.’”<sup>158</sup>

Chief Justice Roberts felt compelled to write a brief concurring opinion in *Schuette* that responded to Justice Sotomayor’s critique by saying, in effect: *just so*. Chief Justice Roberts, that is, fought antisubordination with antisubordination, reasoning that one significant reason that Black and brown students might doubt whether they “belong” at an elite college is due to affirmative action itself. “[I]t is not ‘out of touch with reality’ to conclude that racial preferences may themselves have the debilitating effect of reinforcing precisely that doubt, and—if so—that the preferences do more harm than good,” he explained.<sup>159</sup> “To disagree with the dissent’s views on the costs and benefits of racial preferences is not to ‘wish away, rather than confront,’ racial inequality.”<sup>160</sup> Chief Justice Roberts, with perhaps a nod toward Justice Thomas, suggested that affirmative action programs exacerbate racial inequality rather than remediate it by teaching the lesson

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<sup>154</sup> *Id.* at 310. Justice Elena Kagan recused herself from participating in *Schuette*.

<sup>155</sup> *Id.* at 380–81 (Sotomayor, J., dissenting) (internal quotation marks and citations omitted).

<sup>156</sup> *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion).

<sup>157</sup> *Schuette*, 572 U.S. at 381 (Sotomayor, J., dissenting).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 315 (Roberts, C.J., concurring).

<sup>160</sup> *Id.*

that Black and brown students are not quite up to snuff. If Justice Sotomayor appreciated the import of Chief Justice Roberts's antisubordination rejoinder, her opinion gave no such indication.

## B. Conservative Commentary

Beyond the Supreme Court, conservative voices have often condemned affirmative action by arguing that the policy tarnishes racial minorities. These critics do not explicitly invoke the antisubordination theory of the Equal Protection Clause, but it is not difficult to grasp how their criticisms militate in favor of invalidating affirmative action programs on that basis. Critics expressing this viewpoint are in no way obscure. To the contrary, conservatives writing in this vein include many eminent nonlawyer public intellectuals (including Linda Chavez, Thomas Sowell, and Shelby Steele), prominent law professors (including Alexander Bickel and Lino Graglia), and a few legal scholars who would go on to become revered jurists (including Richard Posner, Antonin Scalia, J. Harvie Wilkinson III, and, of course, Clarence Thomas). This roster reads like nothing less than a Who's Who of conservative intellectuals, making the relatively modest imprint of their antisubordination arguments in legal scholarship all the more confounding.

Even before the Supreme Court decided *Bakke* in 1978, conservatives contended that affirmative action harmed the very racial groups that it was designed to help. In one of the earliest law review articles that grappled with affirmative action, Professor Lino Graglia in 1970 cautioned law schools against adjusting their admissions standards with an eye toward producing a cadre of Black and brown lawyers. Law students who lacked the standard qualifications, Graglia warned, "will disserve the cause of minority group equality . . . [and] in the long run reinforce stereotypes of incompetence."<sup>161</sup> Clients who sought "a *real* lawyer," Graglia wrote, would conclude they needed a white attorney.<sup>162</sup> "[O]ne of the most serious disservices done by lowered academic standards for Negroes in institutions of higher learning is to call into question the legitimacy of every Negro graduate," Graglia contended.<sup>163</sup> "Neither individuals nor institutions should become

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<sup>161</sup> Lino A. Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351, 355–56 (1970).

<sup>162</sup> *Id.* at 356 (emphasis in original).

<sup>163</sup> *Id.*

accustomed to believe that Negroes cannot meet usual standards.”<sup>164</sup> Here, of course, Graglia telegraphed with precision Justice Thomas’s contention in *Grutter* that affirmative action “tarred” all Black students as “undeserving.”<sup>165</sup>

Economist Thomas Sowell, whom Justice Thomas has lavishly praised and cited as a pivotal intellectual influence,<sup>166</sup> voiced similar concerns to Graglia’s in a book published in 1972. “What all the arguments and campaigns for quotas are really saying, loud and clear, is that *black people just don’t have it*,” Sowell maintained, “and that they will have to be *given* something . . . . [Excellent Black students] will be completely undermined, as black becomes synonymous—in the minds of black and white alike—with incompetence, and black achievement becomes synonymous with charity or payoffs.”<sup>167</sup> While *Bakke* was pending before the Court, Sowell returned to this notion in an article titled *Are Quotas Good for Blacks?*<sup>168</sup> Sowell’s negative response to his titular query asserted that the prohibitive costs of affirmative action exceeded any meager benefits. Affirmative action’s message, Sowell contended, was “that minorities are losers who will never have anything unless someone gives it to them. The destructiveness of this message—on society in general and minorit[ies] [ ] in particular—outweighs any trivial gains that may occur here and there.”<sup>169</sup> In more recent years, Linda Chavez and Shelby Steele have both sung from Sowell’s songbook.<sup>170</sup>

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<sup>164</sup> *Id.*; see also Lino A. Graglia, *Racially Discriminatory Admission to Public Institutions of Higher Education*, 9 SW. U. L. REV. 583, 593 (1977) (“One of the most serious harms resulting from the use of racial preference is that it casts doubt and aspersion upon the achievement of every member of the preferred racial and ethnic groups.”).

<sup>165</sup> *Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and dissenting in part). In 1970, Graglia also articulated a protomismatch argument against affirmative action, contending because of the policy “many students [who are] fully qualified for other schools, attend institutions for which they are ill-equipped.” Graglia, *supra* note 161, at 360.

<sup>166</sup> Justice Thomas has stated that encountering Sowell’s writing “was manna from heaven,” and reading his work “was like pouring half a glass of water on the desert [in that] I just soaked it up.” Bill Kauffman, *Freedom Now II: Interview with Clarence Thomas*, REASON (Nov. 1987), <https://perma.cc/GC5K-5BHY>. Justice Thomas further averred: “I consider [Sowell] not only an intellectual mentor, but my salvation as far as thinking through these issues.” *Id.*

<sup>167</sup> THOMAS SOWELL, *BLACK EDUCATION: MYTHS AND TRAGEDIES* 292 (1972) (emphasis in original).

<sup>168</sup> Thomas Sowell, *Are Quotas Good for Blacks?*, COMMENTARY, June 1, 1978, at 39, 39.

<sup>169</sup> *Id.* at 43.

<sup>170</sup> See Linda Chavez, *Who Needs the Stigma of Affirmative Action?*, CHI. TRIB., Feb. 3, 1999, at 15 (“Proponents of affirmative action don’t want to talk about the stigma of affirmative action, and some even deny it exists. But its effects can be every bit as pernicious as old-fashioned racial prejudice.”); SHELBY STEELE, *THE CONTENT OF OUR*

On the heels of *DeFunis*'s nondecision, Professor Alexander Bickel in 1975 also contended that affirmative action programs succeed in subordinating their supposed beneficiaries. "The history of the racial quota is a history of subjugation, not beneficence," Bickel maintained.<sup>171</sup> "Its evil lies not in its name but in its effect; a quota is a divider of society, a creator of castes, and it is all the worse for its racial base, especially in a society desperately striving for an equality that will make race irrelevant."<sup>172</sup> Bickel contended that "a racial quota derogates the human dignity and individuality of all to whom it is applied," as "it is invidious in principle as well as in practice."<sup>173</sup>

Following *Bakke*'s invalidation of U.C. Davis Medical School's admissions program, moreover, then-Judge Richard Posner debuted a critique that would become a staple of conservative argumentation: the specter of being a patient treated by a physician who had been admitted to medical school under an affirmative action program. "[S]ince people feel a natural anxiety about the qualifications of the doctors who treat them, the idea of an 'affirmative action' doctor is particularly troubling," Posner stated.<sup>174</sup> "True, the students admitted under the special program

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CHARACTER: A NEW VISION OF RACE IN AMERICA 134 (1990) ("[Affirmative action] reinforces the myth of [intellectual] inferiority by implying that blacks are not good enough to make it into college on their own"); *id.* at 117 (connecting affirmative action to "the cultural myth of black inferiority that blacks have always lived with," and mistaken attitudes about "intellectual ineptness"); *see also* CONDOLEEZZA RICE, DEMOCRACY: STORIES FROM THE LONG ROAD TO FREEDOM 66 (2017) (contending "every admitted minority student faces a kind of stigma due to affirmative action, no matter what universities argue to the contrary"); Amy Harmon, *How It Feels to Have Your Life Changed by Affirmative Action*, N.Y. TIMES (June 22, 2023), <https://www.nytimes.com/2023/06/21/us/affirmative-action-student-experiences.html> (noting that Ward Connerly, who spearheaded California's successful campaign to eliminate affirmative action during the 1990s, recently stated that Black students "[b]eing told they need a preference to succeed" "reinforces the idea that they're inferior"); Thomas Curtis, *A Demand for Racial Neutrality*, WASH. POST, May 27, 1978, at A19 (contending that affirmative action "institutionalize[s] black subordination," and attests that "we black people . . . are by definition inferior").

<sup>171</sup> ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 133 (1975).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* This language initially appeared in an amicus brief that Bickel and Professor Philip Kurland jointly filed in *DeFunis* opposing affirmative action. *See* Brief of the Anti-Defamation League of B'nai B'rith Amicus Curiae at 31, *DeFunis v. Odegaard*, 416 U.S. 312 (1974) (No. 73-235); *see also* CARL COHEN & JAMES P. STERBA, *AFFIRMATIVE ACTION AND RACIAL PREFERENCE: A DEBATE* 110–11 (2003) (emphasizing affirmative action's racially "humiliating" component because observers cannot distinguish who received special treatment in order to win admission, and stating more broadly that "[r]ace preference has been an utter catastrophe for the ethnic minorities it was intended to benefit").

<sup>174</sup> Richard A. Posner, *The Bakke Case and the Future of "Affirmative Action,"* 67 CALIF. L. REV. 171, 187 (1979).

had, in theory, to meet the same academic standards for graduation as the regular entrants. But at least some universities will, if necessary, bend their standards to assure that not too many of their special students flunk out.”<sup>175</sup> By placing a spotlight on Black doctors, Judge Posner emphasized that affirmative action degrades the accomplishments of even the nation’s most esteemed Black professionals.

Then-Professor Antonin Scalia also wrote a post-*Bakke* article exploring the plight of the Black physician. Scalia contended that affirmative action, rather than counteracting the myth of Black intellectual ineptitude, guaranteed its perpetuation by “establish[ing] a second-class, ‘minority’ degree, which is a less certain certificate of quality.”<sup>176</sup> Highlighting that racial minorities who were admitted to U.C. Davis Medical School earned significantly lower grades and standardized test scores than their white colleagues, Scalia noted “the very ability of minority group members to distinguish themselves and their race has been dreadfully impaired” by affirmative action.<sup>177</sup> “To put the issue . . . in its starkest form: If you must select your brain surgeon from among recent graduates of Davis Medical School and have nothing to go on but . . . pictures, would you not be well advised—playing the odds—to eliminate all minority group members?”<sup>178</sup> Scalia contended affirmative action served to subordinate *all* Black physicians: “The person who was so ignorant as to say ‘a Negro simply cannot become a truly outstanding doctor’ can now plausibly add ‘—and the fact that he obtained a degree from one of the best medical schools in the country doesn’t prove a thing.’”<sup>179</sup> If even Black members of a learned profession like medicine can have their

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<sup>175</sup> *Id.*

<sup>176</sup> Scalia, *supra* note 7, at 155.

<sup>177</sup> *Id.* at 154.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 155. In this same vein, Scalia contended that affirmative action in effect establishes “a regime reminiscent of major league baseball in the years before Jackie Robinson: a separate ‘league’ for minority students, which makes it difficult for the true excellence of the minority star to receive his or her deserved acknowledgment.” *Id.* The anxiety surrounding the topic of Black physicians and affirmative action appeared in an episode of comedian Larry David’s *Curb Your Enthusiasm*. In the episode, titled simply “Affirmative Action,” David and his friend, Richard Lewis, run into Lewis’s dermatologist, who happens to be Black. When Lewis introduces the two men, David—in, he insists, a misguided attempt at affability—questions why Lewis would see a Black doctor in light of “the whole affirmative action thing.” Predictably, the remark generates profound irritation, rather than the laugh that David sought. See *Curb Your Enthusiasm: Affirmative Action* (HBO Dec. 10, 2000).

competence questioned, one can imagine Scalia reasoning, where—precisely—does that leave the Black janitor?

In a book published on the heels of *Bakke*, then-Professor J. Harvie Wilkinson III also highlighted how affirmative action could be viewed as a tool of racial subordination. Affirmative action, Wilkinson posited, affixed a “presumption of second-ratedness” to all Black people because even those “succeeding without a racial preference were, because of their skin color, assumed to have benefited from one.”<sup>180</sup> Wilkinson deemed the “condescending” policy “insult[ing]” to African Americans because they were presumed incapable of making the grade.<sup>181</sup>

Before he was elevated to the Supreme Court in 1991, now-Justice Clarence Thomas repeatedly stressed in interviews that affirmative action subjugated Black people. Thomas used deeply personal terms to inform one interviewer in the 1980s that he detested preferential treatment because “it assumes that I am not the equal of someone else, and if I’m not equal, then I’m inferior . . . . I know what it feels like.”<sup>182</sup> Thomas contended that his experiences as a Black student at Yale Law School in the 1970s afforded him intimate, painful familiarity with people doubting his cognitive capacities due to affirmative action. “You had to prove yourself every day [as a Black student] because the presumption was that you were dumb and didn’t deserve to be there on merit,” he stated in 1980.<sup>183</sup> “Every time you walked into a law class at Yale, it was like having a monkey jump down on your back from the Gothic arches.”<sup>184</sup> In 1987, journalist Juan Williams profiled then-Equal Employment Opportunity Commission Chair

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<sup>180</sup> J. HARVIE WILKINSON III, FROM *BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978*, at 297 (1979).

<sup>181</sup> *Id.* at 294. Wilkinson would go on to become an esteemed judge on the U.S. Court of Appeals for the Fourth Circuit. In the immediate aftermath of *Bakke*, it was not yet clear that Wilkinson believed that race-conscious admissions policies failed to pass constitutional muster. *See id.* at 303 (observing that Justice Powell’s invocation of the diversity rationale was his “master stroke,” and “his healing gesture,” because diversity “was the most acceptable public rationale for affirmative action”). Whatever his views on race-conscious admissions policies in the 1970s, Wilkinson eventually became a full-throated critic of such policies. *See* J. Harvie Wilkinson III, *The Seattle and Louisville School Cases: There Is No Other Way*, 121 HARV. L. REV. 158, 168–69 (2007).

<sup>182</sup> Nell Perry, *Clarence Thomas: Protecting People’s Rights*, MINORITIES & WOMEN IN BUSINESS, Sept./Oct. 1989, at 24 (cited in *Nomination of Judge Clarence Thomas to Be an Associate Justice of the Supreme Court of the United States, Hearings Before the S. Comm. on the Judiciary*, 102d Cong. 748 (1991)).

<sup>183</sup> Kevin Merida & Michael A. Fletcher, *Clarence Thomas’ Years at Yale Law School*, J. BLACKS IN HIGHER EDUC., no. 56, 2007, at 82, 82.

<sup>184</sup> *Id.*



Thomas in *The Atlantic*, and Williams both quoted and paraphrased Thomas attesting to the subordinating aspects of affirmative action. Williams noted: “[Thomas] remembers feeling the ‘monkey was on my back’ [at Yale] because classmates believed that he and the dozen or so other blacks in his class were there to satisfy the school’s social-policy goals, not because of their academic qualifications.”<sup>185</sup> Williams further wrote of Thomas, who sounded as though he were channeling Sowell: “[Affirmative action] puts the federal imprimatur on the idea that educated blacks can’t compete, and therefore lends credence to it—a loss that isn’t worth the gain.”<sup>186</sup>

Since Justice Thomas joined the Court, moreover, his extracurricular writings and speeches have continued to portray affirmative action as racially subordinating. In his memoir, Justice Thomas revealed that he felt so besmirched by affirmative action’s stain that he “sought to vanquish the perception that I was somehow inferior to my white classmates by obtaining special permission to carry more than the maximum number of credit hours” and eschewed courses that smacked of civil rights by focusing on “corporate law, bankruptcy, and commercial transactions.”<sup>187</sup> But Justice Thomas ultimately concluded: “[I]t was futile for me to suppose that I could escape the stigmatizing effects of racial preference, and I began to fear that it would be used forever after to discount my achievements.”<sup>188</sup>

Most recently, in a volume collecting his public statements, Justice Thomas asserted that affirmative action (and the attacks of his views of affirmative action) were driven by liberal paternalism and white elitism. Paternalistic elites “want to maintain a sense of superiority,” Justice Thomas contended, because they believe “there’s no way I could be their equal.”<sup>189</sup> Justice Thomas continued in this vein, asserting that the white elite support of affirmative action is driven by a desire to keep Black people in

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<sup>185</sup> Juan Williams, *A Question of Fairness*, ATLANTIC (Feb. 1987), <https://www.theatlantic.com/magazine/archive/1987/02/a-question-of-fairness/306370>.

<sup>186</sup> *Id.*; see also *id.* (“[Thomas] did not want to be identified as a black student [at Yale]—one who perhaps had been admitted and must be coddled precisely because he was black.”).

<sup>187</sup> CLARENCE THOMAS, *MY GRANDFATHER’S SON: A MEMOIR* 75 (2007).

<sup>188</sup> *Id.*

<sup>189</sup> MICHAEL PACK & MARK PAOLETTA, *CREATED EQUAL: CLARENCE THOMAS IN HIS OWN WORDS* 100 (2022). For this same idea, see STEELE, *supra* note 170, at 120 (“Racial preferences implicitly mark whites with an exaggerated superiority just as they mark blacks with an exaggerated inferiority.”).

their lowly places. “[White elites] are the stereotypers,” Justice Thomas declared. “They are the ones who have taken the superior position, ‘Oh, let’s just help these little people, these minority kids, to give you the pat on the head and we’ll give you your affirmative action.’ Yeah, well, give me an old coat, too, while you’re at it. It’s nonsense.”<sup>190</sup> Antisubordination, like beauty, often rests in the eye of the beholder.

It may be tempting to dismiss the foregoing statements that feature affirmative action’s subordinating effects as simply insincere efforts to muddy the waters. On this theory, conservatives despise affirmative action, and they would use any available tool to attack the policy. If they could challenge affirmative action by contending that its supposedly greatest virtue (Black uplift) was in fact a hideous vice (Black descent), well, then, so much the better. Perhaps. But that explanation must be dramatically incomplete. After all, it fails to explain why many liberals—even those who support affirmative action from both constitutional and political perspectives—nevertheless have suggested that the policy can plausibly be viewed as communicating a message of Black inferiority. It is thus to liberal acknowledgement of affirmative action’s subordinating effects that we next turn.

### C. Liberal Commentary

One of the foremost left-of-center theorists who have contended that affirmative action amounts to Black subordination is none other than Professor Derrick Bell, widely regarded as a founder of Critical Race Theory.<sup>191</sup> In 1970, not long after the nation’s leading universities adopted affirmative action programs,

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<sup>190</sup> Pack & Paoletta, *supra* note 189, at 101. In 1998, Justice Thomas delivered a major address to a Conference of Black attorneys where he portrayed suggestions that he simply followed Justice Scalia’s lead as being driven by a belief that Black people are intellectually deficient. “Though being underestimated has its advantages,” Justice Thomas stated, “the stench of racial inferiority still confounds my olfactory nerves.” KEN FOSKETT, *JUDGING THOMAS: THE LIFE AND TIMES OF CLARENCE THOMAS* 290–92 (2004). Elsewhere in that same speech, Justice Thomas reaffirmed the centrality of his opposition to racial subordination: “Any effort, policy or program that has as a prerequisite the acceptance of the notion that blacks are inferior is a non-starter with me.” *Id.*

<sup>191</sup> See, e.g., Fred A. Bernstein, *Derrick Bell, Pioneering Law Professor And Civil Rights Advocate, Dies at 80*, N.Y. TIMES (Oct. 6, 2011), <https://www.nytimes.com/2011/10/06/us/derrick-bell-pioneering-harvard-law-professor-dies-at-80.html> (labeling Bell “a pioneer of critical race theory”); Richard Delgado & Jean Stefancic, *Living History Interview*, 19 TRANSNAT’L L. & CONTEMP. PROBS. 221, 225 (2010) (calling Bell the “intellectual godfather” of Critical Race Theory); Justin Driver, *Rethinking the Interest-Convergence Thesis*, 105 NW. U. L. REV. 149, 152–53 n.18 (2011) (describing Bell “as the

Bell immediately identified this feature. Anticipating criticisms that would be leveled by Judge Posner and then-Professors Scalia and Wilkinson (among others), Bell contended: “[Black students] are, by reason of the altered admissions criteria, denied the signal of their competence which students admitted under traditional qualifications receive.”<sup>192</sup> Bell expressed particular concern about the pall that affirmative action casts over the achievement of Black students, particularly the most accomplished. “Whatever arguments are used to justify such a policy,” Bell stated, “there is little denying that it robs those black students who have done well of receiving real credit and the boost in confidence that their accomplishments merit.”<sup>193</sup>

Over time, Bell advanced this subjugating critique with even greater intensity. Following the Court’s decision in *Bakke*, Bell contended that affirmative action “envelop[ed] minority applicants in a cloud of suspected incompetency.”<sup>194</sup> The programs, Bell asserted, emitted the unmistakable odor of Black inferiority. “Minority students admitted under a dual admissions policy . . . carry a heavy and undeserved burden of inferior status,” Bell maintained. “Too frequently, the minority victory won in the admissions office is lost in the classroom. Minority students, reminded constantly in ways both subtle and gross that they are viewed as inferior, are hard-pressed to perform at a standard higher than is expected.”<sup>195</sup> Bell—prefiguring Thomas Sowell and Justice Thomas—expressed further misgivings about affirmative action because it made even accomplished Black students—“the recipient class”—seem as though they were receiving a handout: “[Affirmative action] sounds in *noblesse oblige*, not legal duty, and suggests the giving of charity rather than the granting of relief.”<sup>196</sup> Bell went so far as to conclude that affirmative action programs may contain anti-Black racism.<sup>197</sup>

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most prominent black law professor of his era”); Jelani Cobb, *The Man Behind Critical Race Theory*, NEW YORKER (Sept. 13, 2021), <https://perma.cc/LP59-DALK> (contending that Bell’s influence extended to “generations of thinkers”).

<sup>192</sup> Derrick A. Bell, Jr., *Black Students in White Law Schools: The Ordeal and the Opportunity*, 2 U. TOL. L. REV. 539, 551 (1970).

<sup>193</sup> *Id.* at 552.

<sup>194</sup> Bell, *supra* note 30, at 8.

<sup>195</sup> *Id.* at 8, 18; *see id.* at 18 (lamenting “the presumption of inferiority inherent in dual admissions standards”).

<sup>196</sup> *Id.* at 8 (emphasis in original).

<sup>197</sup> *See id.* at 9 (“The presence of racism in policies intended to remedy racism is not generally recognized.”).

In *Reflections of an Affirmative Action Baby*, Professor Stephen Carter defended affirmative action, but he also took great pains to acknowledge that the policy often has destructive, subordinating effects.<sup>198</sup> Indeed, Black subordination formed the focal point in Carter's book. "To be black and an intellectual in America is to live in a box," Carter opened. "So I live in a box, not of my own making, and on the box [are] label[s], not of my own choosing."<sup>199</sup> The labels affixed to Carter's box included, most ominously: "WARNING! AFFIRMATIVE ACTION BABY! DO NOT ASSUME THAT THIS INDIVIDUAL IS QUALIFIED!"<sup>200</sup> A central, "stultifying" dimension of "racism holds that black people are intellectually inferior," Carter maintained.<sup>201</sup> Yet he contended that some affirmative action programs reinforce the "demeaning stereotype of black people as unable to compete [intellectually] with white ones. . . . Successful black students and professionals have repeatedly disproved the proposition that the best black minds are not as good as the best white ones, but the stereotype lingers."<sup>202</sup>

In a passage that vividly embodied Justice Thomas's concern that no Black person—no matter how accomplished—could fully escape the yoke of affirmative action, Carter made the matter personal: "Affirmative action has been with me always. . . . [N]o matter what my accomplishments, I have had trouble escaping an assumption that . . . black people cannot compete intellectually with white people."<sup>203</sup> In the age of affirmative action, Carter maintained that this assumption of Black inferiority haunted *all* Black people.<sup>204</sup> Perhaps the most insulting dimension of affirmative action, Carter averred, was the wrongheaded belief that the policy was necessary to prop up a racial group cursed with an inferior cast of mind: "[W]hat a shortsighted notion it is to imagine that

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<sup>198</sup> STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* 66–69, 71–72, 84–88 (1991) (expressing support for affirmative action, albeit with major qualifications and reservations).

<sup>199</sup> *Id.* at 1.

<sup>200</sup> *Id.* at 2.

<sup>201</sup> *Id.* at 53.

<sup>202</sup> *Id.* at 50.

<sup>203</sup> Carter, *supra* note 198, at 47.

<sup>204</sup> See *id.* at 57 ("[I]f you're black, you can't escape it! It's everywhere, this awkward set of expectations. No matter what you might accomplish (or imagine yourself to have accomplished), the label follows you.").

we who have survived so much will collapse if the crutch of preferences is removed!”<sup>205</sup>

Professor Randall Kennedy has embraced a similar position, expressing limited support for some forms of affirmative action while simultaneously acknowledging the policy’s potential for Black subordination. Like Carter, Kennedy’s writing has foregrounded the fact that “of [ ] the many racially derogatory comments about people of color, particularly Negroes, none has been more hurtful, corrosive, and influential than the charge that they are intellectually inferior to whites.”<sup>206</sup> In Kennedy’s book-length exploration of affirmative action, *For Discrimination*, he emphasized that the policy could well perpetuate such commentary.<sup>207</sup> “Some defenders of affirmative action, fearful of making any concessions, argue as if affirmative action poses no costs, entails no risks, involves no dangers,” Kennedy wrote. “The reality is far different.”<sup>208</sup>

Chief among those “weighty” dangers, Kennedy suggested, “is that affirmative action cripplingly stigmatizes its beneficiaries and, indeed, anyone affiliated with groups that are perceived as eligible for affirmative action assistance.”<sup>209</sup> Kennedy observed that numerous affirmative action beneficiaries—both real and imagined—have noted “their sense of being diminished, underestimated, devalued, or condescended to at least in part because” of the policy.<sup>210</sup> “Perhaps the most poignant reflection of the affirmative action stigma is the indignation with which some beneficiaries (or merely perceived beneficiaries) respond when identified as recipients, or even potential recipients, of affirmative action assistance,” Kennedy contended. “A black student at the University of California in the early 1990s complained: ‘I feel like I have AFFIRMATIVE ACTION stamped on my forehead.’”<sup>211</sup>

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<sup>205</sup> *Id.* at 135. Today, Carter continues to support affirmative action, more than three decades after he published *Reflections of an Affirmative Action Baby*. See Stephen L. Carter, *Affirmative Action Ruling’s Half-Baked Logic*, BLOOMBERG L. (June 29, 2023), [https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XA8P83G4000000?bna\\_news\\_filter=us-law-week#jcite](https://www.bloomberglaw.com/bloomberglawnews/us-law-week/XA8P83G4000000?bna_news_filter=us-law-week#jcite).

<sup>206</sup> Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1751 (1989) [hereinafter Kennedy, *Racial Critiques*].

<sup>207</sup> See RANDALL KENNEDY, FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW 115–27 (2013) [hereinafter KENNEDY, FOR DISCRIMINATION].

<sup>208</sup> *Id.* at 115.

<sup>209</sup> *Id.*; see also *id.* at 117–21 (noting the stigmatic effects of affirmative action).

<sup>210</sup> *Id.* at 119.

<sup>211</sup> KENNEDY, FOR DISCRIMINATION, at 120.

Such student laments stretched back a long time, even if the notion has seldom been expressed so pithily. Indeed, when affirmative action remained in its infancy, some liberal law students bemoaned affirmative action's subordinating meaning. Consider, for example, James Alan McPherson's article that appeared in *The Atlantic* in 1970. McPherson, who would go on to become the first Black author to win the Pulitzer Prize in fiction, had graduated from Harvard Law School in 1968.<sup>212</sup> Even though the Black law student possesses the "drive to compete with his white classmates, there is a presumption that he lacks the ability to function on his own," McPherson maintained.<sup>213</sup> He expressed pointed concern about the "pain[ ] for the black student who has a competitive college record and a fair LSAT score" because affirmative action's "presumption" may succeed in "push[ing] [that student], unfairly, into an intellectually embarrassing category."<sup>214</sup>

### III. *SFFA* V. *HARVARD*

When the Supreme Court assembled to issue *Bakke* in June 1978, Justice Powell opened his hand-down statement by acknowledging how thoroughly the opinion had captured the nation's attention. "The facts in this case are well known," Powell began. "Perhaps no case in modern memory has received as much media coverage and scholarly commentary."<sup>215</sup> Forty-five years later in *SFFA*, Chief Justice Roberts declined to follow suit. But it was not for want of material, as *SFFA* generated a torrent of media and scholarly analysis.

In order to understand fully what occurred in *SFFA*, however, we need to situate the dispute within the context of the fundamental scholarly debate regarding the Equal Protection Clause during the last five decades. Antisubordination—in its various guises—forms the skeletal key for understanding last Term's most momentous decision, as it shaped the briefing, the oral arguments, and the opinions themselves. Before analyzing *SFFA* in earnest, though, it is helpful to provide some historical context for

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<sup>212</sup> See Sam Roberts, *James Alan McPherson Is Dead at 72; Overcame Segregation to Win Pulitzer*, N.Y. TIMES (July 27, 2016), <https://www.nytimes.com/2016/07/28/books/james-alan-mcpherson-pulitzer-prize-winning-writer-dies-at-72.html>.

<sup>213</sup> James Alan McPherson, *The Black Law Student: A Problem of Fidelities*, ATLANTIC, Apr. 1, 1970, at 98.

<sup>214</sup> *Id.*

<sup>215</sup> JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 494 (1994).

how allegations that elite universities subordinated Asian Americans emerged over time. Claims of subordination against Asian Americans are not identical to those against Black and brown people. But ignoring them as a species of antisubordination claims—with its own distinct backstory—is profoundly misguided.

#### A. The Backstory

The notion that Asian Americans were the Model Minority became prevalent in the mid-1960s.<sup>216</sup> That timing was, of course, hardly coincidental. When many Black citizens began violently rebelling against racism in urban areas—perhaps most notably in Watts, California, in 1965—it became essential to establish that being a racial minority in the United States did not invariably yield alienation and impoverishment.<sup>217</sup> A spate of newspaper articles soon appeared praising people hailing from various Asian nations—most commonly China and Japan—who had managed to overcome racial discrimination by dint of hard work and sound values to realize success in America.<sup>218</sup>

Lest the implication be missed, these articles often juxtaposed the industrious Asian American with the shiftless African American. Thus, for example, *U.S. News & World Report* in 1966 observed: “At a time when it is being proposed that hundreds of billions be spent to uplift Negroes . . . , the nation’s 300,000 Chinese-Americans are moving ahead on their own—with no help from anyone else.”<sup>219</sup> Unlike the lessons being delivered in Black households, *U.S. News* explained, “[s]till being taught in Chinatown is the old idea that people should depend on their own efforts—not a welfare check—in order to reach America’s ‘promised land.’”<sup>220</sup> Chinese Americans are a “law-abiding and industrious people” who are “ambitious to make progress on their own,”

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<sup>216</sup> For an insightful overview of the Model Minority concept and its origins, see Philip Lee, *Rejecting Honorary Whiteness: Asian Americans and the Attack on Race-Conscious Admissions*, 70 *EMORY L.J.* 1475, 1494–98 (2021).

<sup>217</sup> See generally ELIZABETH HINTON, *AMERICA ON FIRE: THE UNTOLD HISTORY OF POLICE VIOLENCE AND BLACK REBELLION SINCE THE 1960S* (2021) (providing a long history of urban unrest in the United States).

<sup>218</sup> See, e.g., William Petersen, *Success Story, Japanese-American Style*, *N.Y. TIMES MAG.*, Jan. 9, 1966, at 20.

<sup>219</sup> *Success Story of One Minority Group in U.S.*, *U.S. NEWS & WORLD REP.*, Dec. 26, 1966, at 73.

<sup>220</sup> *Id.*

and have thereby overcome “hardship and discrimination to become a model of self-respect and achievement in today’s America.”<sup>221</sup>

In the mid-1980s, the Model Minority notion made its way onto college campuses, as the media simultaneously chronicled—and entrenched—the stereotype of Asian Americans not just as intensely hardworking, but also as incandescently brilliant. In April 1984, two different newsmagazines published substantial articles chronicling this new breed of super-students. *U.S. News & World Report* called Asian Americans “Academic Marvels,” observing that “Asians are . . . flocking to top colleges,” and that “ethnic Asians have been steadily marching into the ranks of the educational elite.”<sup>222</sup> The article noted the disproportionately large percentages of Asian Americans enrolled at Berkeley, Harvard, and Juilliard, and also depicted Asian Americans as a relentlessly ambitious people: “Nowhere is the strong ambition of Asians more evident than in the classroom.”<sup>223</sup> *U.S. News* rounded out this portrait of monomaniacal Asian American excellence with the most stereotypical quotations imaginable, including from one 16-year-old of Taiwanese descent: “My mother pushes me tremendously. I’m worried because my grades are in the low-to-mid 90s. If I’m not at the top at this school, how can I be on top in an Ivy League School? If I went to any other school, my mother would kill me.”<sup>224</sup>

But the *ne plus ultra* of Asian American student stereotyping appeared in a *Newsweek on Campus* cover story titled: *Asian-Americans: The Drive to Excel*.<sup>225</sup> “They say that Asian-American students are brilliant,” the article noted. “They say that Asian Americans behave as a model minority, that they dominate mathematics, engineering and science courses—that they are grinds who are so dedicated to getting ahead that they never have any fun.”<sup>226</sup> While one might think that this language erects the stereotype with an eye toward demolishing it, the bulk of the article

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<sup>221</sup> *Id.* at 73, 76.

<sup>222</sup> Susanna McBee, George White, Joseph L. Galloway, Sarah Peterson, Pat Lynch, & Michael Bosc, *Asian-Americans: Are They Making the Grade?*, U.S. NEWS & WORLD REP., Apr. 2, 1984, at 41.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*; see also *id.* (“What drives these students? Experts trace the push to succeed academically to culture, social background and, especially, family pressures.”).

<sup>225</sup> *Asian-Americans: The Drive to Excel*, NEWSWEEK ON CAMPUS, Apr. 1984, at 4.

<sup>226</sup> *Id.*



in fact seems designed primarily to cement the stereotype's accuracy. Asian Americans "do flock to the sciences," *Newsweek on Campus* explained, and "frighten many other students with their academic interests and prowess."<sup>227</sup> Students are so intimidated by Asian American brainpower, the article asserted, that "[o]ther students speak of dropping courses if they walk into a classroom and see too many Oriental faces."<sup>228</sup> It further noted: "On one issue, no one disagrees—the willingness of Asian-American students to pay almost any price to get ahead."<sup>229</sup>

The article bolstered this claim with breathless quotations from professors at leading universities attesting to Asian Americans' superhuman capacity for work. One Georgetown physics professor attested: "They'll work you into the ground. They aren't out on Saturday nights getting drunk—they're hitting the books."<sup>230</sup> Not to be outdone, a Johns Hopkins chemistry professor stated: "A large percentage of our Asian students are much more serious, more goal-oriented, more unidimensional than our other students."<sup>231</sup>

*Newsweek* did allow that Asian Americans do not only dominate the classroom; they also dominate the concert hall. "If practice were sure to make perfect," *Newsweek* explained, "the concert stage might soon be dominated by Asian-American musicians."<sup>232</sup> The article featured an accompanying quotation from Julliard's director of admissions, who stated flatly: "Asian students are willing to work harder from a very early age."<sup>233</sup>

Predictably, some Asian American college students repudiated *Newsweek's* blatant stereotyping. Writing in the *Harvard Crimson*, Vincent Chang and Amy Han in an article titled *Newsweek's Asian-American Stereotypes* condemned the "one-dimensional, technical supermen" that the magazine created.<sup>234</sup> "Such blanket generalizations are belied by the far more complex reality," Chang and Han wrote. "Asians, no more than

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<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 8; *see also id.* (reporting without rebuking a Stanford senior majoring in mathematics who contended that his Asian American classmates were "very nerdy—just very stereotypical").

<sup>229</sup> *The Drive to Excel*, *supra* note 225, at 7.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 11.

<sup>232</sup> *Id.* at 8.

<sup>233</sup> *Id.*

<sup>234</sup> Vincent T. Chang & Amy C. Han, *Newsweek's Asian-American Stereotypes*, HARVARD CRIMSON (Apr. 23, 1984), <https://perma.cc/PY7K-XCSF>.

any other race, are not a monolithic group and cannot be characterized by facile, sweeping generalities.”<sup>235</sup> Rather than acknowledging the diversity among the Asian American community—including the “poverty of the Chinatowns and other Asian ghettos”—*Newsweek* contented itself with “invit[ing] resentment against the supposed domination of universities and technical fields by Asian-Americans,” Chang and Han wrote.<sup>236</sup>

By the late 1980s, allegations that elite universities were artificially capping the percentage of Asian American students received widespread media attention. In 1987, an article in the *New York Times* reported Professor Ling-Chi Wang of Berkeley contending that “[a]s soon as admissions of *Asian* students began reaching 10 or 12 percent, suddenly a red light went on,” and that since 1983 “at Berkeley, Stanford, M.I.T., Yale, in fact all the Ivy League schools, admission of *Asian-Americans* has either stabilized or gone down.”<sup>237</sup> Wang also suggested that just as the nation’s leading universities suddenly “realized they had what used to be called a ‘Jewish problem,’” prompting them to limit the enrollment of Jewish students, they now realized they had what might be termed an Asian American problem, “and they began to look for ways of slowing down the admissions of *Asians*.”<sup>238</sup> These allegations were nothing less than explosive. Indeed, shortly after the *Times* article appeared, the four leading news networks all contacted Wang for interviews.<sup>239</sup>

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> Robert Lindsey, *Colleges Accused of Bias to Stem Asians’ Gains*, N.Y. TIMES, Jan. 19, 1987, at A10 (emphasis in original).

<sup>238</sup> *Id.* (emphasis in original).

<sup>239</sup> See JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* 502 (2005) (noting the media response to Wang’s claims, and that “[f]or the first time, allegations of anti-Asian discrimination were in the mass media”). For many observers, Harvard’s personal ratings—which scored Asian American applicants lower than applicants from other races—strongly resembled the “character” assessments that Ivy League schools wielded in the early twentieth century to depress the enrollment of Jewish students. See *id.* at 500–05, 130–31 (discussing the adoption of nonacademic criteria in admissions by Harvard, Yale and Princeton, and noting “[t]he key code word here was ‘character’—a quality thought to be frequently lacking among Jews but present almost congenitally among high-status Protestants”). For a claim that the Jewish quotas at elite universities perpetuated the stereotype of Jewish hyperintelligence, see COHEN & STERBA, *supra* note 173, at 125 n.169 (“Not long ago, the quota for Jewish students . . . was tiny; those who made the cut had to be exceedingly able. The myth of the Jews as supersmart was given support by the rational inference, then, that any Jew enrolled at Harvard, or Columbia, must indeed have been very brainy!”).

Also in 1987, Professors John Bunzel and Jeffrey Au published an article in *The Public Interest* supporting the notion that elite universities discriminated against Asian American applicants. In a series of interviews, university officials routinely trafficked in subordinating racial stereotypes about Asian American students, which the authors suggested could lead to reduced admission rates. “One would think industriousness would be regarded favorably in the college admissions process,” Bunzel and Au wrote. “However, this might not be the case for Asian Americans. When asked what personality traits might account for lower admission rates among Asian Americans, one admissions officer responded that they tend to be ‘driven.’”<sup>240</sup> The authors also detected a series of other stereotypes that targeted Asian American applicants:

One admissions director, for example, expressed the view that Asian Americans are “taught to be humble and obedient” at home. An official from another institution stated that the university was concerned about admitting students who had greater interests in “public service.” He speculated that this might be inconsistent with Asian cultural values . . . . Another common stereotype is that because of cultural reasons, Asian Americans tend to be interested only in science and technical fields and lack an appreciation for a “well-rounded liberal education.”<sup>241</sup>

If admissions officers were willing to engage in such overt stereotyping in public, one could only imagine how such stereotypes operated behind closed doors.

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<sup>240</sup> John H. Bunzel & Jeffrey K.D. Au, *Diversity or Discrimination? Asian Americans in College*, PUB. INT., Spring 1987, at 49, 56.

<sup>241</sup> *Id.* at 59; see also James S. Gibney, *The Berkeley Squeeze: The Future of Affirmative Action*, NEW REPUBLIC, Apr. 11, 1988, at 15 (noting that “[Asian Americans] claim that discrimination is keeping their number artificially low”). Surprisingly, observers first noted more than five decades ago the potential adverse effect on Asian American enrollment flowing from affirmative action programs designed to benefit Black and brown students. Macklin Fleming & Louis Pollak, *The Black Quota at Yale Law School*, PUB. INT., no. 19, 1970, at 44, 47 (noting that Asian Americans made up “roughly 1 per cent of the [California] population, [but] comprise[d] in some instances 30 per cent of the enrollment in certain engineering and technical schools,” and that if “a quota system [were] to be introduced . . . to favor black and Mexican-American applicants, the first losers would be applicants from the presently disproportionately represented oriental group”).

## B. The Briefs

Affirmative action's defenders and opponents both invoked arguments sounding in antisubordination in their briefs filed at the Supreme Court, but they did so in dramatically divergent fashions. Those defending Harvard's and UNC's admissions policies suggested that universities had not violated the Equal Protection Clause because, unlike racial segregation, their actions were in no sense predicated on a notion of Black inferiority. That defense, of course, espoused the standard scholarly account of antisubordination. Affirmative action's opponents, in contrast, contended that the universities' policies did in fact subordinate a racial minority—Asian Americans. In so arguing, the opponents challenged the standard antisubordination account, and subtly suggested, in effect, that regardless of whether one embraces an anticlassification or an antisubordination theory of the Fourteenth Amendment, affirmative action policies must fall. Thus, although the two sides spoke of racial subordination, they seemed to be talking right past each other.

Briefly consider how affirmative action's defenders invoked antisubordination. Harvard's brief, for example, framed its defense by rejecting SFFA's efforts to equate race-conscious admissions with the bad old days of Jim Crow. Such comparisons were "utterly inapt," Harvard contended, because "[t]he laws in *Plessy* and *Brown* excluded and separated African Americans solely on the basis of race, relegating them to an inferior caste for no reason other than race."<sup>242</sup> The Solicitor General's amicus brief articulated this same anticaste view. "[N]othing in *Brown*'s condemnation of laws segregating the races to perpetuate a caste system calls into question admissions policies adopted to promote greater integration and diversity," the brief asserted. "And [SFFA]'s persistent attempts to equate this case with *Brown* trivialize the grievous legal and moral wrongs of segregation."<sup>243</sup> The Solicitor General further contended that *Brown* and Justice Harlan's dissent in *Plessy* were driven not by colorblindness, but by the need to condemn laws that "subordinate a disfavored minority" or "perpetuat[e] a racial caste system."<sup>244</sup> Similarly, the National Association for the Advancement of Colored People

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<sup>242</sup> Brief for Respondent at 3, *SFFA v. Harvard*, 600 U.S. 181 (No. 20-1199).

<sup>243</sup> Brief for the United States as Amicus Curiae Supporting Respondent at 5–6, *SFFA v. Harvard*, 600 U.S. 181 (No. 20-1199).

<sup>244</sup> *Id.* at 26–27.

(NAACP) Legal Defense Fund’s brief argued “*Brown* explained how the racial caste system established through chattel slavery demeans and subordinates Black people,” concerns not raised by affirmative action.<sup>245</sup>

While SFFA’s brief certainly invoked anticlassification principles, it is important to appreciate that a leitmotif of the brief contended that university admissions policies (especially at Harvard) subordinate Asian American applicants.<sup>246</sup> Citing *Yick Wo v. Hopkins*<sup>247</sup> and *Korematsu*, SFFA emphasized that Asian Americans have been subjected to overt, brutal racial discrimination within the United States, and that animus directed toward the group is hardly a thing of the past.<sup>248</sup> To the contrary, modern admissions policies that artificially depress Asian American acceptance rates are driven by racist tropes. Asian Americans are, SFFA maintained, “stereotyped as timid, quiet, shy, passive, withdrawn, one-dimensional, hard workers, perpetual foreigners, and ‘model minorities.’”<sup>249</sup> In the admissions process, this “anti-Asian stereotyping” holds that students of Asian descent “are interested only in math and science.”<sup>250</sup> Rather than construing affirmative action as a program *elevating* Black and brown applicants, SFFA suggested that the program should be viewed as *lowering* Asian American applicants, as “race [works] *against* Asian Americans—putting the lie to the notion that this discrimination is somehow ‘benign.’”<sup>251</sup>

The effects of these subordinating attitudes directed toward Asian Americans, SFFA maintained, warped the entire admissions process. At the application stage, the “discrimination” facing “Asian-American high-schoolers” has given rise to “[a]n entire industry . . . help[ing] them appear ‘less Asian’ on their college

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<sup>245</sup> Amici Curiae Brief of the NAACP Legal Defense & Educational Fund, Inc. et al. in Support of Respondents at 3, *Students for Fair Admissions, Inc. v. Univ. of N.C. (SFFA v. UNC)*, 600 U.S. 181 (2023) (No. 21-707). The Congressional Black Caucus’s brief adopted this same line, contending: “*Brown* was premised in large part on the principle of anti-subordination.” Brief of Robert C. “Bobby” Scott, Member of Congress, et al., as Amici Curiae Supporting Respondents at 7–8, *SFFA v. Harvard & SFFA v. UNC*, 143 S. Ct. 2141 (No. 20-1199 & 21-707).

<sup>246</sup> See Brief for Petitioner at 47, 51, *SFFA v. Harvard & SFFA v. UNC*, 600 U.S. 181 (Nos. 20-1199 & 21-707) (invoking colorblindness).

<sup>247</sup> 118 U.S. 356 (1886).

<sup>248</sup> See Brief for Petitioner, *SFFA v. Harvard & SFFA v. UNC*, *supra* note 246, at 25–26 (citing *Yick Wo*, 118 U.S. 356, and *Korematsu*, 323 U.S. 214).

<sup>249</sup> *Id.* at 25; *see id.* at 63 (“Every day, Asian Americans are stereotyped as shy, passive, perpetual foreigners, and model minorities.”).

<sup>250</sup> *Id.* at 48, 63.

<sup>251</sup> *Id.* at 48 (emphasis in original).

applications.”<sup>252</sup> *Princeton Review*, the brief noted, has admonished “[i]f you are an Asian American . . . you need to be careful about what you do and don’t say in your application,” explicitly instructing “[d]on’t say you want to be a doctor,” “don’t say you want to major in math or the sciences,” and even “don’t attach a photograph.”<sup>253</sup> Such advice to “de-Asian” applications was prudent, SFFA observed, because of the penalty imposed upon applicants of Asian descent.

At the recruitment stage, SFFA noted that Harvard required Asian American high school students living in certain states to earn higher standardized test scores than students from other racial groups in order to receive targeted outreach soliciting an application. Harvard implemented this racialized recruitment approach in areas where it typically received few applications, regions that Harvard dubbed “sparse country.”<sup>254</sup> When Harvard’s Dean of Admissions William Fitzsimmons sought to explain the racial discrepancy, SFFA observed, he trafficked in “a stereotype” that Asian American students may have lived in sparse country for only “a year or two,” whereas white students presumably “lived [in sparse country] for their entire lives.”<sup>255</sup> This subordinating stereotype, SFFA suggested, otherizes Asian Americans, construing them as forever foreign, no matter how long they (and their ancestors) have called the United States home.

Finally, at the decision stage, SFFA observed that Harvard assigned Asian American applicants substantially lower personal ratings than it did applicants from other racial backgrounds. Through its personal rating, the Harvard admissions office purported to measure applicants’ “self-confidence,” “likeability,” “leadership,” and “kindness,” among other attributes.<sup>256</sup> The diminished personal ratings of Asian American students, SFFA argued, were driven by vicious “anti-Asian stereotypes” construing that ethnic group as possessing less pleasing personalities.<sup>257</sup>

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<sup>252</sup> Brief for Petitioner, *SFFA v. Harvard & SFFA v. UNC*, *supra* note 246, at 63.

<sup>253</sup> *Id.* at 63–64 (quoting *PRINCETON REVIEW, CRACKING COLLEGE ADMISSIONS* 174 (2d ed. 2004)).

<sup>254</sup> *Id.* at 21.

<sup>255</sup> *Id.* (quoting 2 Joint Appendix at 562, *SFFA v. Harvard*, 143 S. Ct. 2141 (No. 20-1199)).

<sup>256</sup> *Id.* at 16, 63.

<sup>257</sup> Brief for Petitioner, *SFFA v. Harvard & SFFA v. UNC*, *supra* note 246, at 63, 73. SFFA noted that such stereotypes have a long, sordid history at Harvard. More than three decades ago, in 1990, “the U.S. Department of Education’s Office of Civil Rights . . . found that similarly qualified Asian American students were admitted to Harvard at a significantly lower rate than whites.” *Id.* at 26 (internal quotation marks omitted). SFFA noted

“Why does Harvard assign Asian-American applicants significantly lower personal ratings?,” SFFA queried. “Either Asian Americans really do lack ‘integrity,’ ‘courage,’ ‘kindness,’ and ‘empathy.’ Or Harvard is discriminating against them. Because the first conclusion is racist and false, the second must be true.”<sup>258</sup> An amicus brief filed on behalf of an Asian American advocacy group drove home this subordinating point in even starker language. Contending that Harvard’s personal rating system “demeans and dehumanizes members of this ethnic group by labeling them as somehow deficient in character,” this amicus brief asserted that the practice “reinforces negative stereotypes historically used to justify discrimination and even violence against the Asian American community.”<sup>259</sup>

### C. Oral Argument

Discussions of antisubordination also figured prominently throughout the *SFFA* oral arguments. But, once again, critics and supporters of affirmative action invoked the concept in sharply competing manners. Moreover, attorneys and Justices alike at times seemed to experience profound difficulty apprehending even basic implications of the varied claims sounding in antisubordination.

Cameron Norris—who represented SFFA in the lawsuit against Harvard—invoked antisubordination from soup to nuts. He did so, that is: immediately after opening with the traditional “May it please the Court”; at the tail end of his rebuttal (right before Chief Justice Roberts noted the case had been submitted); and frequently in between. Although *Grutter* presumed that the status of being a racial minority would be exclusively a plus factor in admissions decisions, Norris began, “race is a minus for Asians,

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that “OCR found that Harvard’s [admissions] officers were deploying ‘recurring characterizations attributed to Asian-American applicants,’ such as ‘quiet/shy, science/math oriented, and hard workers,’” and “[h]e’s quiet and, of course, wants to be a doctor.” *Id.* at 26–27 (quoting 3 Joint Appendix at 1367, *SFFA v. Harvard*, 600 U.S. 181 (No. 20-1199)).

<sup>258</sup> Reply Brief for Petitioner at 20, *SFFA v. Harvard*, 600 U.S. 181 (No. 20-1199) (citation omitted). For a law review article anticipating the claim in *SFFA* that affirmative action subordinates Asian Americans, though avoiding “antisubordination” terminology, see Cory R. Liu, *Affirmative Action’s Badge of Inferiority on Asian Americans*, 22 TEX. REV. L. & POL. 317, 330 (2018) (contending affirmative action makes “Asians . . . feel like second-class citizens and perpetual foreigners,” and that such “stereotyping is incompatible with the logic . . . of *Brown*”).

<sup>259</sup> Brief of Amici Curiae the Asian American Coalition for Education et al. in Support of Petitioner at 7, 8, *SFFA v. Harvard*, 600 U.S. 181 (No. 20-1199).

a group that continues to face immense racial discrimination in this country.”<sup>260</sup> Norris continued: “Asians should be getting into Harvard more than whites, but they don’t because Harvard gives them significantly lower personal ratings,” deeming “Asians less likable, confident, and kind.”<sup>261</sup> Although Norris focused primarily on the subordinating effects of affirmative action on Asian American applicants, he also noted the policy can subjugate even Black and brown students who are admitted. “[Affirmative action programs] stigmatize their intended beneficiaries,” Norris stated.<sup>262</sup>

Finally, Norris’s peroration—what nowadays might be termed a mic drop—observed that the very terminology used to describe Asian American students during the foregoing oral argument succeeded in subordinating that group, furthering the notion that they are somehow not fully American, but instead remain forever foreign. “[W]e keep saying Asians,” Norris said, his voice slightly rising with emotion. “These are not Asians. They’re not from Asia. These are people who are Americans. They were born in Texas, California, Ohio, Tennessee . . . . They were born in 2005, the people who are applying to college now. They should not be the victims of Harvard’s racial experimentation. Thank you.”<sup>263</sup> For those who may be skeptical that truncating “Asian Americans” to “Asians” is troublesome, and suggestive of foreignness, take a moment to contemplate the outrage that would ensue if a jurist or an attorney shortened “African Americans” to simply “Africans.”

Patrick Strawbridge—who represented SFFA opposite UNC—began his argument by advancing a strong colorblindness position, but he also fused that anticlassification argument with antidisubordination claims. This fusion came through most clearly in Strawbridge’s introductory statement. “Racial classifications are wrong,” Strawbridge opened, as he proceeded to suggest that *Brown* vindicated that colorblindness principle and *Grutter* betrayed it.<sup>264</sup> But Strawbridge then quickly shifted gears to contend that *Grutter*’s approval of affirmative action serves to subordinate

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<sup>260</sup> Transcript of Oral Argument at 3, *SFFA v. Harvard*, 600 U.S. 181 (No. 20-1199); see *id.* at 119 (emphasizing the “statistically significant relationship between being Asian and getting a low personal rating”).

<sup>261</sup> *Id.* at 3–4.

<sup>262</sup> *Id.* at 117.

<sup>263</sup> *Id.* at 120; cf. Thomas K. Nakayama, “Model Minority” and the Media: Discourse on Asian America, 12 J. COMMUN INQUIRY 65, 68 (1988) (“The systematic referral of Asian Americans as ‘Asians’ reinforces the importance of Asia.”).

<sup>264</sup> Transcript of Oral Argument at 4–5, *SFFA v. UNC*, 600 U.S. 181 (No. 21-707).



racial minorities in two distinct fashions. First, Strawbridge contended: “Some applicants are incentivized to conceal their race.”<sup>265</sup> Here, Strawbridge plainly invoked the experience of Asian American high school students who are advised to decrease their “Asian”-ness to increase their odds of admission. Second, Strawbridge noted: “Others who were admitted on merit have their accomplishments diminished by assumptions that their race played a role in their admission.”<sup>266</sup> Here, of course, Strawbridge suggested affirmative action subordinates Black and brown students, who are all tarnished as nonmeritorious admits, regardless of their underlying merits. That Strawbridge voiced these two distinct notions of subordination in two successive sentences in his prepared remarks is no accident. Rather, it is a testament to how the conservative legal movement has grown increasingly comfortable claiming the mantle of antisubordination.

Conservative Justices embraced these antisubordination claims to undermine affirmative action during oral argument. When Strawbridge suggested that it was permissible for a student of Asian descent to write an application essay about visiting, say, his grandmother’s native country, Chief Justice Roberts interjected that such an essay would betray a stunning lack of sophistication. After all, he noted that topic would reveal a “not very savvy applicant . . . [b]ecause the one thing his essay is going to show is that he’s Asian American, and those are the people who are discriminated against.”<sup>267</sup> During Harvard attorney Seth Waxman’s presentation, moreover, Chief Justice Roberts distilled the legal dispute to its essence: “[I]sn’t that what th[is] case is about, the discrimination against Asian Americans?”<sup>268</sup> Similarly, while questioning Waxman, Justice Samuel Alito focused upon the fact that Harvard inflicted “the lowest personal scores” upon Asian American applicants. “What accounts for that?” Justice Alito asked, as he echoed SFFA’s brief in strikingly similar language. “[I]t has to be one of two things. It has to be that [Asian Americans] really do lack integrity, courage, kindness, and empathy to the same degree as students of other races, or there has to be something wrong with this personal score.”<sup>269</sup>

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<sup>265</sup> *Id.* at 5.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 29.

<sup>268</sup> Transcript of Oral Argument, *SFFA v. Harvard*, *supra* note 260, at 63.

<sup>269</sup> *Id.* at 53–54; *see supra* note 258 and accompanying text (noting that SFFA’s merits brief stated: “Why does Harvard assign Asian-American applicants significantly lower

For their part, the attorneys defending affirmative action also invoked notions of subordination. In contrast to their conservative colleagues, they emphasized that *Brown* was designed to eradicate African American subordination, and that affirmative action programs were meant to advance that same mission. Thus, David Hinojosa, who argued on behalf of UNC students, stated: “*Brown* attempted to shut down this nation’s terrible caste system, but stark racial inequalities persisted and stunted this nation’s growth. Enter *Bakke* and *Grutter*, which have helped universities open the doors of opportunities to highly qualified students of color, who are often overlooked in [the] process . . . .”<sup>270</sup> Solicitor General Elizabeth Prelogar pressed this same distinction. “There is a world of difference between the situation this Court confronted in *Brown*,” Prelogar said, “[as] the separate but equal doctrine [ ] was designed to exclude African Americans based on notions of racial inferiority and subjugate them, . . . and the university policies at issue in this case, which are . . . designed to bring individuals of all races together so that they can all learn.”<sup>271</sup>

Perhaps the most intriguing moments of oral argument occurred, however, when those attempting to bolster affirmative action appeared to struggle grasping fully how antisubordination could be wielded to destroy the admissions programs. One such moment arose when Waxman sought to answer Justice Alito’s question regarding why Harvard assigned lower personal ratings to Asian American applicants. This dreaded question—from the perspective of affirmative action’s supporters—must have occupied a significant percentage of Waxman’s time preparing for oral argument. Here is how Waxman responded:

The fact that Asian Americans got a marginally—on average, a marginally lower personal rating score is no more evidence of discrimination against them than the fact that they got a marginally higher rating . . . on academics and extracurriculars. It doesn’t mean that they’re either smarter or people think they’re smarter.<sup>272</sup>

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personal ratings? Either Asian Americans really do lack ‘integrity,’ ‘courage,’ ‘kindness,’ and ‘empathy.’ Or Harvard is discriminating against them.”).

<sup>270</sup> Transcript of Oral Argument, *SFFA v. UNC*, *supra* note 264, at 116–17.

<sup>271</sup> Transcript of Oral Argument, *SFFA v. Harvard*, *supra* note 260, at 112.

<sup>272</sup> *Id.* at 60–61.

Waxman liked this answer enough to offer a slightly modified version of it elsewhere during oral argument.<sup>273</sup>

The problem with this evidently well-rehearsed talking point is that Waxman's rebuttal can easily be construed as further entrenching ugly stereotypes about Asian Americans. Just as the lower personal ratings can be attributed to stereotypes holding that Asian Americans lack winning personalities, the higher extracurricular and academic ratings can be viewed as the opposite side of that same coin. On this objectionable, subordinating theory, the very reason that Asian Americans do not possess lively personalities is because they are too busy grinding away at schoolwork and extracurriculars. One intent on portraying Harvard as discriminating against Asian Americans would view these disparate ratings as being driven by the grand unified theory of the violin-playing, exam-crushing Asian American nerd, a person seldom perceived as the most charming student in school. Thus, while Waxman contended that the higher ratings in some categories for Asian Americans served to exonerate Harvard against charges that it discriminated, from at least one antisubordination perspective, those elevated ratings ended up making matters only worse.

Relatedly, Justice Sotomayor posed a question during oral argument that, from the vantage point of affirmative action's conservative antagonists, could undermine the program's constitutionality. "Sometimes race does correlate to some experiences . . . . If you're black, you're more likely to be in an underresourced school. . . . You're more likely to be viewed as less academic—as having less academic potential."<sup>274</sup> But as should by now be evident, many antisubordinationists would contend that affirmative action itself plays a large role in instilling the misguided notion that Black people have diminished intellectual capacities. For these antisubordinationists, of course, one of the most pressing steps to uprooting this wrongheaded notion is to abolish affirmative action.

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<sup>273</sup> Waxman acknowledged that while "there is a slight numerical disparity with respect to the personal rating of Asian Americans, [there is] also a slight numerical disparity to the advantage of Asian Americans with respect to the extracurricular rating and the academic rating." *Id.* at 54.

<sup>274</sup> Transcript of Oral Argument, *SFFA v. UNC*, *supra* note 264, at 8 (emphasis added).

#### D. The Opinions

Chief Justice Roberts's opinion for the Court in *SFFA* has been broadly understood as imposing constitutional colorblindness in college admissions.<sup>275</sup> Abundant language certainly supports that reading of *SFFA*. Even setting apart its citations to Justice Harlan's *Plessy* dissent trumpeting "colorblindness,"<sup>276</sup> the majority opinion, for example, summarized the cases as addressing "whether a university may make admissions decisions that turn on an applicant's race."<sup>277</sup> In answering that question presented in the negative, the Court can be viewed as vindicating anticlassification considerations. The Court's most resonant sentence, moreover, speaks in the colorblindness register. "Eliminating racial discrimination means eliminating all of it," Chief Justice Roberts wrote.<sup>278</sup>

*SFFA*'s embrace of anticlassification was, however, considerably more equivocal than such sweeping language suggests. For one thing, *SFFA*'s footnote four expressly exempted the nation's military academies from complying with its holding.<sup>279</sup> For another thing, *SFFA* closed by noting that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."<sup>280</sup> This concession, though derided by one dissent as "an attempt to put lipstick on a pig,"<sup>281</sup> made clear *SFFA* did not require universities to abandon race-conscious admissions altogether.

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<sup>275</sup> See, e.g., Jamelle Bouie, Opinion, *No One Can Stop Talking About Justice John Marshall Harlan*, N.Y. TIMES (July 7, 2023), <https://www.nytimes.com/2023/07/07/opinion/harlan-thomas-roberts-affirmative-action.html> ("If nothing else, the Supreme Court's decision in [*SFFA*] is a victory for the conservative vision of the so-called colorblind Constitution—a Constitution that does not see or recognize race in any capacity, for any reason."); Noah Feldman, Opinion, *Affirmative Action Is High Court's Latest Casualty*, BLOOMBERG L. (June 29, 2023), <https://news.bloomberglaw.com/us-law-week/affirmative-action-is-high-courts-latest-casualty-noah-feldman> (attributing *SFFA* to colorblind constitutionalism).

<sup>276</sup> See *infra* notes 326–37 and accompanying text.

<sup>277</sup> *SFFA*, 600 U.S. 208.

<sup>278</sup> *Id.* at 2161. For a similar formulation, see *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

<sup>279</sup> See *SFFA*, 600 U.S. at 213 n.4. Justice Jackson parried that carving out an exception for military academies puts the majority in the "awkward place" of indicating that it was acceptable to "prepare Black Americans and other underrepresented minorities for success in the bunker, not the boardroom." *Id.* at 411 (Jackson, J., dissenting).

<sup>280</sup> *Id.* at 230.

<sup>281</sup> *Id.* at 362 (Sotomayor, J., dissenting).

More significant for present purposes, however, Chief Justice Roberts's majority opinion in *SFFA* also repeatedly used language and concepts that are compatible with antisubordination. For example, *SFFA* construed a 1950 Supreme Court opinion as rejecting Jim Crow conditions in graduate school courses because such arrangements "worked to subordinate the afflicted [Black] students."<sup>282</sup> And while Harvard and UNC preferred to view themselves as offering a "plus"<sup>283</sup> to applicants from underrepresented racial backgrounds, Chief Justice Roberts reasoned, the admissions systems must fall because they "fail to comply with the twin commands of the Equal Protection Clause that race may never be used as a 'negative' and . . . may not operate as a stereotype."<sup>284</sup> These "twin commands" were so significant that *SFFA* employed noticeably similar language regarding the Fourteenth Amendment's prohibitions on negative racial treatment and racial stereotyping in multiple other instances.<sup>285</sup>

So, who did the admissions programs, on racial grounds, penalize and stereotype? *SFFA* was careful to avoid outright declaring that the courts below erred in stopping short of finding that the universities had in fact discriminated against Asian American applicants. Yet, *SFFA* nevertheless also made plain that the universities' treatment of Asian Americans stood top of mind. Chief Justice Roberts heaped disapproval on what he deemed the universities' comically capacious "Asian" category, as both Harvard and UNC "are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other."<sup>286</sup> *SFFA* emphasized that even the U.S. Court of Appeals for the First Circuit, which upheld Harvard's admission program, allowed that "consideration of race has led to an 11.1% decrease in the number of Asian-Americans admitted."<sup>287</sup> Along similar

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<sup>282</sup> *Id.* at 203.

<sup>283</sup> *SFFA*, 600 U.S. at 196.

<sup>284</sup> *Id.* at 218.

<sup>285</sup> See, e.g., *id.* at 230 (contending Harvard and UNC "unavoidably employ race in a negative manner [and] involve racial stereotyping"); *id.* at 213 (stating university admissions offices "may never use race as a stereotype or negative"); *id.* at 219 ("How else but 'negative' can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been?").

<sup>286</sup> *SFFA*, 600 U.S. at 216 (emphasis in original).

<sup>287</sup> *Id.* at 218; see also *id.* (observing that the district court acknowledged "that Harvard's policy of considering applicants' race . . . overall results in fewer Asian American . . . students being admitted" (internal quotation marks omitted)).

lines, *SFFA* noted that at Harvard: “[A]n African American [student] in [the fourth lowest academic] decile has a higher chance of admission (12.8%) than an Asian American in the *top* decile (12.7%).”<sup>288</sup> While *SFFA* stated that “[t]he universities’ main response . . . is, essentially, ‘trust us,’”<sup>289</sup> it also made plain that their treatment of Asian American applicants warranted deep distrust.

Justice Neil Gorsuch’s concurring opinion also prominently featured arguments contending that the admissions programs subordinated Asian Americans. The universities’ policies, Justice Gorsuch noted, were driven by “incoherent,” “irrational stereotypes” attached to the “the ‘Asian’ category.”<sup>290</sup> Extending a point raised by the majority opinion regarding the expansiveness of the Asian American category, he observed: “[O]ne [plausible] effect of lumping so many people of so many disparate backgrounds into the ‘Asian’ category is that many colleges consider ‘Asians’ to be ‘overrepresented’ in their admission pools.”<sup>291</sup> This racial misconception would, of course, incentivize universities to cull the Asian American herd. “Given all this, is it any surprise that members of certain groups sometimes try to conceal their race or ethnicity?” Justice Gorsuch asked. “Or that a cottage industry has sprung up to help college applicants do so?”<sup>292</sup> He noted that paid college consultants boast of helping applicants “appear less Asian,” and advise such applicants to avoid supplying optional photos for racial reasons.<sup>293</sup> As if such exercises in racial erasure were not bad enough, Justice Gorsuch argued that students from humble backgrounds would lack the financial wherewithal to even engage in the racial subterfuge.<sup>294</sup> For Justice Gorsuch, the bottom line was that, despite talk of benign racial preferences, “Harvard and UNC

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<sup>288</sup> *Id.* at 197 n.1 (alteration and emphasis in original) (internal quotation marks omitted) (quoting Brief for Petitioner, *SFFA v. Harvard & SFFA v. UNC*, *supra* note 246, at 24); *see id.* (noting “black applicants in the top four academic deciles are between four and ten times more likely to be admitted to Harvard than Asian applicants in those deciles”) (citing 4 Joint Appendix at 1793, *SFFA v. Harvard*, 600 U.S. 181 (No. 20-1199)).

<sup>289</sup> *SFFA*, 600 U.S. at 217.

<sup>290</sup> *Id.* at 291–92 (Gorsuch, J., concurring) (quotation marks in original).

<sup>291</sup> *Id.* at 293 (quotation marks in original).

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*; *see* Amy Qin, *Applying to College, and Trying to Appear “Less Asian”*, N.Y. TIMES (last updated June 20, 2023), <https://www.nytimes.com/2022/12/02/us/asian-american-college-applications.html> (noting a college consultant who often encouraged “Asian American students . . . to shift away from ‘classically Asian activities’ to improve their chances of getting into the country’s elite universities”).

<sup>294</sup> *SFFA*, 600 U.S. at 293–95.

choose to treat some students worse than others in part because of race,” and that “[t]o suggest otherwise . . . is to deny reality.”<sup>295</sup>

No judicial opinion of our modern constitutional era better exemplifies antisubordination’s strange career than Justice Thomas’s concurrence in *SFFA*. On its face, Justice Thomas’s concurring opinion concerned itself with first confronting and then repudiating antisubordination as a viable theory of the Equal Protection Clause. Justice Thomas identified antisubordination as the handiwork of Professors Owen Fiss and Reva Siegel, and suggested that Justice Sotomayor’s dissent in *SFFA* carries water for this misguided understanding of the Fourteenth Amendment<sup>296</sup>—one that he portrayed as providing an impoverished substitute for his beloved colorblind constitutionalism.<sup>297</sup> Yet, even as Justice Thomas styled himself as coming to bury antisubordination, he nonetheless ended up praising antisubordination—or at least utilizing it, anyway. This turn for antisubordination—cast as the villain, but somehow appearing in a heroic light within the course of a single opinion—is its most improbable turn of all.

Justice Thomas portrayed anticaste theories of the Equal Protection Clause as an alarming fad, like parachute pants or rap metal bands, as he contended “it appears increasingly in vogue to embrace an ‘antisubordination’ view of the Fourteenth Amendment: that the Amendment forbids only laws that hurt, but not help, blacks.”<sup>298</sup> Surprisingly, this sentence marked the first time that a Supreme Court opinion had ever used the term “antisubordination,” and only the second time that a federal court at any level had done so in a published opinion.<sup>299</sup> But “antisubordination” would not have long to absorb its initial moment in the sun.

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<sup>295</sup> *Id.* at 304 (Gorsuch, J., concurring). Justice Gorsuch supported this contention by quoting some UNC admissions officers suggesting that members of differing racial groups were held to divergent standards. *See id.* at 303 n.8 (quoting UNC officers as stating, *inter alia*, “I’m going through this trouble because this is a bi-racial (black/white) male,” and “stellar academics for a Native Amer[ican]/African Amer[ican] kid”).

<sup>296</sup> *Id.* at 250 (Thomas, J., concurring).

<sup>297</sup> *Id.* at 251–52.

<sup>298</sup> *SFFA*, 600 U.S. at 246 (Thomas, J., concurring).

<sup>299</sup> A Westlaw search reveals that, prior to *SFFA*, the only time that a federal court has ever used the term “antisubordination”—using the search terms “antisubord!” and “anti-subord!”—occurred just three years ago. In 2020, the Fourth Circuit cited a law review article using that term in its title, and then included an accompanying parenthetical using the words “anticlassification” and “antisubordination.” *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020). Simply because federal judges have conspicuously eschewed the terminology of antisubordination does not, of course, indicate they have disregarded its theoretical underpinnings.

After introducing the term to the *U.S. Reports*, Justice Thomas quickly lambasted it. Justice Sotomayor was profoundly mistaken, Justice Thomas insisted, to believe “that the Fourteenth Amendment was contemporaneously understood to permit differential treatment based on race, prohibiting only caste legislation while authorizing antisubordination measures.”<sup>300</sup> While some nineteenth-century state and federal measures may have expressly provided particularized relief to Black people, Justice Thomas contended these measures must be viewed as providing discrete relief for contemporaneous harms, not enshrining anti-subordination forevermore.<sup>301</sup>

Despite these expressed doubts about antisubordination, Justice Thomas—as he has so often done previously—also claimed in *SFFA* that race-conscious measures work to subordinate racial minorities. In this sense, Justice Thomas can be understood as arguing in the alternative; that is, even if jurists subscribe to antisubordination, Justice Thomas suggests that they should nonetheless find affirmative action programs unconstitutional. Though supporters of race-conscious admissions policies contend that the programs “accomplish positive social goals,”<sup>302</sup> Justice Thomas insisted that “[w]e cannot now blink reality to pretend . . . that affirmative action should be legally permissible merely because the experts assure us that it is ‘good’ for black students.”<sup>303</sup> To the contrary, he insisted, “what initially seems like aid may in reality be a burden, including for the very people it seeks to assist.”<sup>304</sup> Remixing some of his greatest hits on affirmative action, Justice Thomas noted that, even when Black and brown university students “succeed academically,” race-conscious policies “stamp [Blacks and Hispanics] with a badge of inferiority”<sup>305</sup> and “tain[t] the accomplishments of all” such students.<sup>306</sup> Justice Thomas stressed that he did not believe that Black students needed the help of affirmative action to achieve intellectually because those programs were produced by nothing less than

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<sup>300</sup> *SFFA*, 600 U.S. at 250 (citing Fiss, *supra* note 1, at 147; Siegel, *supra* note 16, at 1473 n.8); see also *id.* at 271 (contending that “[t]he antisubordination view [ ] has never guided the Court’s analysis”).

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 266.

<sup>303</sup> *Id.* at 268.

<sup>304</sup> *SFFA*, 600 U.S. at 268.

<sup>305</sup> *Id.* at 270 (quoting *Adarand*, 515 U.S. at 241).

<sup>306</sup> *Id.* (quoting *Fisher I*, 570 U.S. at 333) (alterations in original) (internal quotation marks and citations omitted).



racial bigotry. “[M]eritocratic systems have long refuted bigoted misperceptions of what black students can accomplish,” he contended.<sup>307</sup>

In addition to subordinating Black and brown students, Justice Thomas further insisted that Harvard and UNC subordinated Asian American students. “How . . . [can affirmative action supporters] explain the need for race-based preferences to the Chinese student who has worked hard his whole life, only to be denied college admission in part because of his skin color?” Justice Thomas asked. “If such a burden would seem difficult to impose on a bright-eyed young person, that’s because it should be.”<sup>308</sup> There can be no doubt, he maintained, that Asian Americans are forced to “make sacrifices . . . for this new phase of racial subordination.”<sup>309</sup> Justice Thomas suggested that this neosubordination of Asian Americans was particularly noxious because that group had deep familiarity with the older phase of racial subordination: “Given the history of discrimination against Asian Americans, especially their history with segregated schools, it seems particularly incongruous to suggest that a past history of segregationist policies toward blacks should be remedied at the expense of Asian American college applicants.”<sup>310</sup> To clinch the point that “Asian Americans can hardly be described as the beneficiaries of historical racial advantages,” Justice Thomas invoked the Supreme Court’s own sordid decisions validating governmental actions that oppressed people of Asian descent.<sup>311</sup>

Not to be outdone, Justice Sotomayor’s dissent advanced the most full-throated view of the Equal Protection Clause as prohibiting subordination ever to appear in a Supreme Court opinion. She began by noting that “a foundational pillar of slavery was the racist notion that Black people are a subordinate class with intellectual inferiority,” and that “[a]bolition alone could not repair centuries of racial subjugation.”<sup>312</sup> Next, Justice Sotomayor insisted that “the Fourteenth Amendment was intended to undo the effects of a world where laws systematically subordinated Black people and created a racial caste system.”<sup>313</sup> *Brown v. Board of*

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<sup>307</sup> *Id.* at 284.

<sup>308</sup> *Id.* at 283.

<sup>309</sup> *SFFA*, 600 U.S. at 283.

<sup>310</sup> *Id.* at 273.

<sup>311</sup> *Id.* (citing *Korematsu*, 323 U.S. 214, and *Gong Lum v. Rice*, 275 U.S. 78, 81–82, 85–87 (1927)).

<sup>312</sup> *Id.* at 319–20 (Sotomayor, J., dissenting).

<sup>313</sup> *Id.* at 329 n.3.

*Education*, Justice Sotomayor wrote, embodied this vision of the Fourteenth Amendment, as it demonstrated awareness “of the harmful effects of entrenched racial subordination on racial minorities and American democracy,” and “recognized the constitutional necessity of a racially integrated system of schools where education is available to all on equal terms.”<sup>314</sup> Completing this constitutional picture, Justice Sotomayor contended that the Court’s preceding affirmative action jurisprudence in the “*Bakke*, *Grutter*, and *Fisher* [decisions] . . . exten[d] [ ] *Brown*’s legacy” to higher education.<sup>315</sup>

In addition to an elaborate embrace of antisubordination, Justice Sotomayor took sharp exception to Justice Thomas’s claims that the affirmative action programs under review racially subordinated anyone. Regarding Black and brown students, Justice Sotomayor contended that her colleague “cit[ed] nothing but his own long-held belief . . . that racial preferences in college admissions stamp [Black and Latino students] with a badge of inferiority.”<sup>316</sup> Supporting her general claim, Justice Sotomayor turned personal, emphasizing “the most obvious data point available” to the Supreme Court about affirmative action: “The three Justices of color on this Court graduated from elite universities and law schools with race-conscious admissions programs, and achieved successful legal careers, despite having different educational backgrounds than their peers.”<sup>317</sup> Furthermore, she rejected Justice Thomas’s efforts to equate the Jim Crow regime outlawed in *Brown* with affirmative action. Where “[s]chool segregation ha[d] a detrimental effect on Black students by denoting [their] inferiority,” Justice Sotomayor posited, “race-conscious college admissions ensure that higher education is visibly open to . . . talented and qualified individuals of every race and ethnicity.”<sup>318</sup>

Justice Sotomayor further contended that Justice Thomas “cit[ed] no evidence . . . suggest[ing] that race-conscious admissions programs discriminate against Asian American students.”<sup>319</sup> While it is true that SFFA asserted that universities adversely treated Asian American applicants, Justice Sotomayor stated, “a lengthy trial to test those allegations [occurred], which SFFA

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<sup>314</sup> *SFFA*, 600 U.S. at 328 (internal quotation marks omitted).

<sup>315</sup> *Id.* at 332.

<sup>316</sup> *Id.* at 372 (alterations in original) (internal quotation marks omitted).

<sup>317</sup> *Id.*

<sup>318</sup> *Id.* at 373 (internal quotation marks omitted).

<sup>319</sup> *SFFA*, 600 U.S. at 374

lost.”<sup>320</sup> Harvard’s hotly contested personal rating was “a facially race-*neutral* component” of its admissions policy, she insisted, and therefore strict scrutiny should not even apply.<sup>321</sup> Underscoring the centrality of antisubordination to her jurisprudential framework, Justice Sotomayor sought to reframe affirmative action as working to counteract the vicious racial stereotypes that plague Asian Americans. “There is no question that the Asian American community continues to struggle against potent and dehumanizing stereotypes in our society,” she contended. “It is precisely because racial discrimination persists in our society, however, that the use of race in college admissions to achieve racially diverse classes is critical to improving cross-racial understanding and breaking down racial stereotypes.”<sup>322</sup>

Justice Ketanji Brown Jackson dedicated much of her dissent to challenging the wisdom of constitutional colorblindness in a world suffused with color-consciousness. In the most memorable sentences that she produced during her first Term, Justice Jackson contended, “With let-them-eat-cake obliviousness, today, the majority . . . announces ‘colorblindness for all’ by legal fiat. But deeming race irrelevant in law does not make it so in life.”<sup>323</sup>

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<sup>320</sup> *Id.* at 374.

<sup>321</sup> *Id.* (emphasis in original).

<sup>322</sup> *Id.* at 375. Justice Sotomayor criticized Justice Thomas’s concurrence for invoking the “mismatch” theory, which suggests that affirmative action harms student outcomes by permitting some racial minorities to attend educational institutions that are too advanced for their academic skills. *See id.* at 372–73. As Justice Sotomayor contended, the empirical evidence that Justice Thomas relied upon for this mismatch idea has been challenged convincingly. *See id.*; *see also, e.g.*, Daniel E. Ho, *Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 *YALE L.J.* 1997, 2004 (2005) (critiquing Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 *STAN. L. REV.* 367 (2004)). *See generally* Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 *STAN. L. REV.* 1807 (2005) (same). In this Article, I set aside claims advancing the mismatch claim. In addition to resting on a shaky empirical foundation, issues of academic performance within institutions rest downstream from the central issues addressed here.

<sup>323</sup> *SFFA*, 600 U.S. at 407 (Jackson, J., dissenting). Justice Jackson’s invocation of Marie Antoinette calls to mind an exchange that occurred during *Bakke*’s oral argument in 1977. Justice Marshall asked the attorney opposing U.C. Davis’s race-conscious admissions program: “You are talking about your client’s rights. Don’t these underprivileged people have some rights?” When the attorney began to respond, “They certainly have the right to . . .,” Justice Marshall interjected with obvious disdain: “To eat cake.” Transcript of Oral Argument at 66, *Regents of Univ. of Cal. V. Bakke*, 438 U.S. 265 (1978) (No. 76-811); *see also* WILKINSON, *supra* note 180, at 262 (identifying Justice Marshall as the questioner). Although Justice Jackson did not expressly cite the first Black Supreme Court Justice’s bon mot, it seems plausible that she was paying homage to her heroic predecessor. For an early appraisal of Justice Jackson’s contributions to the Court, see Adam Liptak, *In First Term, Justice Ketanji Brown Jackson ‘Came to Play,’* *N.Y. TIMES* (July

In addition to critiquing anticlassification, Justice Jackson also intimated that affirmative action programs could be squared with antisubordination, as she contended that the nation's history of caste had effects in the present. "Given the lengthy history of state-sponsored race-based preferences [for white people] in America," she wrote, "to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented intergenerational transmission of inequality that still plagues our citizenry."<sup>324</sup> Today's affirmative action programs, Justice Jackson insisted, do not subordinate anyone. To the contrary, Justice Jackson maintained that "ensuring a diverse student body in higher education helps *everyone*, not just those who, due to their race, have directly inherited distinct disadvantages with respect to their health, wealth, and well-being."<sup>325</sup>

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The oddest commonality of various *SFFA* opinions was their spirited, competing, and relentless efforts to claim that Justice Harlan's dissent in *Plessy* supported their preferred outcomes. Indeed, it would be difficult to exaggerate how large Justice Harlan loomed in these opinions, as he was invoked by name no fewer than *twenty-nine* times across five different opinions.<sup>326</sup> Even in a distended set of slip opinions running some 229 pages, that rate of invocation is staggering. But perhaps even more remarkable than the sheer number of citations to Justice Harlan's *Plessy* dissent is how discordant those citations were given that the gravamen of the underlying dispute involved discrimination against people of Asian descent.

It should by now arrive as no surprise that conservative and liberal Justices invoked differing portions of Justice Harlan's

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7, 2023), <https://www.nytimes.com/2023/07/07/us/supreme-court-ketanji-brown-jackson.html>.

<sup>324</sup> *SFFA*, 600 U.S. at 385 (Jackson, J., dissenting) (internal quotation marks omitted).

<sup>325</sup> *Id.* at 405 (emphasis in original).

<sup>326</sup> See, e.g., *id.* at 205, 230 (invoking Justice Harlan); *id.* at 230, 244, 264 (Thomas, J., concurring) (same); *id.* at 307–08 (Gorsuch, J., concurring) (same); *SFFA*, 600 U.S. at 320–21, 326–28 (Sotomayor, J., dissenting) (same); *id.* at 388, 393 (Jackson, J., dissenting) (same). Justice Kavanaugh alone refrained from invoking Justice Harlan in *SFFA*. *Id.* at 311–17 (Kavanaugh, J., concurring).

iconic dissent. Where conservatives tended to focus on anticlassification aspects of the *Plessy* dissent, of course, liberals elevated its antisubordination elements. Thus, in one of Justice Thomas's many Harlan quotations regarding anticlassification, he wrote in heroic terms: "Only one Member of the Court adhered to the equality principle; Justice Harlan, standing alone in dissent, wrote: 'Our constitution is color-blind . . .'"<sup>327</sup> In contrast, Justice Sotomayor, for example, rejected such distillations of Harlan's dissent as hopelessly misleading: "It distorts the dissent in *Plessy* to advance a colorblindness theory."<sup>328</sup> The genuine insight in Harlan's *Plessy* dissent, Justice Sotomayor contended, was its antisubordination understanding that racial segregation "perpetuated a 'caste' system," one animated by a belief that "colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens."<sup>329</sup> The battle for Justice Harlan's soul became so intense that Justice Jackson's dissent at one point stated: "Justice Harlan knew better."<sup>330</sup> In response, Chief Justice Roberts's majority opinion quoted his colleague's dissent for that proposition, and then stated: "Indeed he did," and proceeded to excerpt Harlan's *Plessy* dissent, including both its anticlassification and antisubordination sections.<sup>331</sup>

Evidently overlooked amid the blizzard of competing Harlan citations was a basic, antecedent question: Did the *Plessy* dissent actually merit claiming? While the dissenting view in *Plessy* has, of course, a good deal more to commend it than the majority position upholding Jim Crow, I have for many years held the view that it is "the single most overrated opinion [in Supreme Court history] and—not incidentally—the most misunderstood."<sup>332</sup> When one places Justice Harlan's opinion in its nineteenth-century context, it was not the absolutist, ringing condemnation of racial segregation that many modern readers perceive. Instead,

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<sup>327</sup> *Id.* at 264 (Thomas, J., concurring) (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

<sup>328</sup> *Id.* at 330 (Sotomayor, J., dissenting).

<sup>329</sup> *SFFA*, 600 U.S. at 326–27 (quoting *Plessy*, 163 U.S. at 559–60 (Harlan, J., dissenting)).

<sup>330</sup> *Id.* at 388 (Jackson, J., dissenting). To be sure, Justice Jackson's dissent in *SFFA* here invoked Justice Harlan's opinion in the *Civil Rights Cases*, 109 U.S. 3 (1883), rather than his opinion in *Plessy*. Nevertheless, the perceived need to claim the mantle of Justice Harlan's legacy today surely stems in no small part from the halo that surrounds Harlan's *Plessy* dissent.

<sup>331</sup> *Id.* at 230.

<sup>332</sup> DRIVER, *supra* note 87, at 36.

Justice Harlan advanced a comparatively modest claim, consistent with the fragmented understanding of the Fourteenth Amendment's Equal Protection Clause that dominated at the time.<sup>333</sup>

Even more troublingly, Justice Harlan's much ballyhooed *Plessy* dissent featured not only overt white supremacy, but also naked hostility toward people of Asian descent. As to the former, Justice Harlan contended that "[t]he white race" was quite correct "deem[ing] itself to be the dominant race in this country," and he asserted that white dominance would "continue to be for all time."<sup>334</sup> As to the latter, Justice Harlan noted "the Chinese race" is "so different from our own that we do not permit those belonging to it to become citizens of the United States."<sup>335</sup> Justice Harlan approved of these bans on U.S. citizenship, and then noted with dismay that the Court's decision in *Plessy* meant that Black people could be excluded from Louisiana railcars, even though "a Chinaman can ride in the same passenger coach with white citizens of the United States."<sup>336</sup> Even as Justice Harlan's dissent can thus be viewed as combatting anti-Black subordination, it undoubtedly reinforced anti-Asian subordination.

It has thus long been past time to retire Justice Harlan's dissent in *Plessy*. While he viewed the matter in a more persuasive light than did his colleagues, that dissent was in no sense a progenitor of modern racial attitudes. At least, we should all hope it was not. But *SFFA* has succeeded, if in nothing else, of dimming prospects for the opinion being laid to rest anytime soon. After all, if Harlan's dissent—with its animus hurled at the innately exotic "Chinaman"—was invoked even in a case where one of the plaintiff's central claims alleged that Asian Americans are treated as "perpetual foreigners," it would seem that virtually all such hopes are lost.<sup>337</sup> That *SFFA* would rely on the *Plessy* dissent—which employed standard issue Asian-as-foreigner tropes—is yet another odd turn in the exceedingly strange career of antisubordination.

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<sup>333</sup> See *id.* at 36–37 (contextualizing Justice Harlan's dissent within the contemporaneous constitutional framework).

<sup>334</sup> *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).

<sup>335</sup> *Id.* at 561.

<sup>336</sup> *Id.*

<sup>337</sup> Brief for Petitioner, *SFFA v. Harvard & SFFA v. UNC*, *supra* note 246, at 63.

## IV. COUNTERARGUMENTS

Committed proponents of the traditional antisubordination view could conceivably make numerous counterarguments to the foregoing complications of their preferred equal protection theory. Some of those responses carry considerable weight. Therefore, it seems worthwhile to identify some of these counterarguments, for they help to illuminate further antisubordination's strengths and limitations.

## A. Bad Faith

The most obvious response traditional antisubordination theorists might muster is to assert that those who contend that affirmative action actually harms racial minorities—and therefore that the programs perpetuate racial subordination—operate in bad faith.<sup>338</sup> On this theory, critics of affirmative action wield subordinating arguments to undermine the policy in a type of debater's trick, noisily declaring that opponents of racial subordination harm the very cause that they seek to promote.<sup>339</sup> This technique may be helpful for scoring points in a debate, but critics do not legitimately believe the creative argument that they press.

The bad faith assertion has, in my view, little to commend it. Although it is tempting (and depressingly commonplace) to believe that someone with whom you disagree about something important simply must be arguing from a place of insincerity, that is seldom the case in sustained intellectual disputes. Scholars, rather, tend to write what is on their minds—for better and for worse.<sup>340</sup> But an even greater difficulty with the bad faith assertion in this discrete context is that it responds only to conservative critics who oppose affirmative action. This bad faith claim, that is, ignores theorists who have contended that affirmative action imposes significant subordination costs on racial minorities, and nevertheless support the policy—even if their support concedes greater ambivalence than most liberal supporters of affirmative action. As discussed above, Professors Carter and

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<sup>338</sup> See generally David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 884 (2016) (examining accusations of bad faith within U.S. constitutional practice).

<sup>339</sup> See ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* 11–12 (1991) (discussing arguments that sound in “perversity”). For an argument examining Hirschman's ideas in a legal context, see generally Justin Driver, *Reactionary Rhetoric and Liberal Legal Academia*, 123 YALE L.J. 2616 (2014).

<sup>340</sup> See Pozen, *supra* note 338, at 946–47.

Kennedy—among others—have both emphasized the subordinating angle, and still believe that affirmative action has a place in modern U.S. society.<sup>341</sup> What motivation would those scholars possibly have to make an argument that they do not actually believe?

## B. Social Meaning

Another, more promising counterargument is that those who claim that affirmative action policies subordinate various groups simply misapprehend the fundamental social meaning of these programs. This form of response cannot be dismissed out of hand. After all, as established in Part I, the now-dominant understandings of the Supreme Court's majority opinions in both *Plessy* and *Korematsu* hold those decisions as faulty primarily because they misperceived the actual meaning of segregation and internment.<sup>342</sup>

Although those decisions appeared many decades ago, it is important to appreciate that claims about social meaning need not be considered persuasive—or even plausible—simply because contemporary actors advance them. Some figures have contended, for example, that affirmative action programs convey that white applicants are unwanted, disfavored, and stigmatized.<sup>343</sup> But this claim is patently absurd, as it is predicated on a notion that white people in the United States cannot catch a break.

Esteemed scholars have repeatedly—and, in my view, correctly—derided this asserted social meaning as implausible in the extreme. In 1977, for example, Professor Kenneth Karst stated: “The white who is turned away from a racially preferential government program is not degraded or stigmatized; there is no

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<sup>341</sup> See *supra* note 198 and accompanying text; DEREK BOK & WILLIAM G. BOWEN, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 264–65 (1998) (contending that “[t]he very existence of a process that gives explicit consideration to race can raise questions about the true abilities of even the most talented minority students”).

<sup>342</sup> See *supra* Part I.B.

<sup>343</sup> See STEVEN FARRON, *THE AFFIRMATIVE ACTION HOAX: DIVERSITY, THE IMPORTANCE OF CHARACTER AND OTHER LIES* 1 (2005) (asserting that a “vicious anti-White discrimination . . . has pervaded American society since the 1960s,” and viewing affirmative action through that prism); cf. *Grutter*, 539 U.S. at 369 (Thomas, J., concurring in part and dissenting in part) (contending that University of Michigan Law School's admissions process suggests that “it would have ‘too many’ whites if it could not discriminate,” and comparing Michigan's affirmative action policy to the Ivy League's anti-Jewish quotas of the 1920s).



denial of her humanity.”<sup>344</sup> Chief among the many, many reasons that we can here “exercise one of the sovereign prerogatives of philosophers”<sup>345</sup> is because white policymakers have overwhelmingly held authority in implementing affirmative action programs. Would those white policymakers actually have enacted admissions programs contending white people are lesser than, and second-class citizens?<sup>346</sup>

Conventional antisubordination scholars could make claims contesting assertions that affirmative action subjugates racial minorities along two distinct dimensions. First, they might contend that affirmative action programs do not communicate a message of Black and brown inferiority. Second, they might contend that nor do such programs subordinate Asian Americans. Each of these overarching claims contain multiple subarguments nestled beneath them.

1. Black and brown students.

Regarding underrepresented racial minorities, defenders of traditional antisubordination theories can effectively dispute efforts to equate affirmative action programs with the openly oppressive racial segregation regimes of American Jim Crow and South African apartheid. Those vile regimes were designed both to keep nonwhite people away from white people and to ensure that nonwhite people remained on the bottom of society. Affirmative action programs, in stark contrast, were intended to usher nonwhite people into the upper echelon of society and thus to combat race stratification. Despite these glaring differences, some opponents of affirmative action assert that *no moral distinction whatsoever* can be drawn among these widely varying race-conscious regimes. Justice Thomas offered a version of this argument in 1995: “In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial

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<sup>344</sup> Karst, *supra* note 15, at 52–53 (1977); *see also* KENNEDY, FOR DISCRIMINATION, *supra* note 207, at 111 (“[I]t strains credulity to contend that affirmative action . . . is a form of racial subordination [for white people].”); Fiss, *supra* note 1, at 134 (“I am willing to assume that the preferential policy does not stigmatize the rejected [white] applicants.”); J. M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2352–53 (1997) (“Admission preferences that attempt to increase the number of historically disadvantaged minorities . . . do not single whites out as social inferiors.”).

<sup>345</sup> Black, *supra* note 100, at 424.

<sup>346</sup> *See* John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 (1974) (answering that rhetorical query with a resounding “no”).

discrimination, plain and simple.”<sup>347</sup> Ten years earlier, when Thomas chaired the EEOC, he put the matter even more bluntly: “I bristle at the thought . . . that it is morally proper to protest against minority racial preferences in South Africa while arguing for such preferences here.”<sup>348</sup>

This equivalence is not just false, but farcical. Opponents of affirmative action discredit their cause by suggesting they are incapable of appreciating any meaningful distinctions between such different regimes. Professor Carter memorably dispatched any mathematical proof even purporting to deduce: *affirmative action* = *Jim Crow*. “To pretend . . . that the issue presented in *Bakke* was the same as the issue in *Brown*,” Carter instructed, “is to pretend that history never happened and that the present doesn’t exist.”<sup>349</sup> Even if affirmative action may nevertheless contain significant subordinating elements—as Carter has also emphasized—it could still aid the traditional antisubordination cause to highlight this comparative point.

Traditional antisubordination scholars might also profitably contest assertions that the existence of affirmative action justifies the presumption that Black and brown candidates were invariably admitted to elite universities because of that program. Justice Thomas, as discussed above, has repeatedly asserted that affirmative action brands all underrepresented minorities as undeserving admitted students—regardless of how sterling their credentials. This presumption of nonmeritoriousness applies, Justice Thomas has insisted, because even though *some* Black and brown students would be admitted even absent racial considerations, race is the dispositive factor for some admitted students, and it is impossible to distinguish “merit” admits from “non-merit” admits.<sup>350</sup> Justice Thomas is not alone in contending that affirmative action reinforces what might be termed *the presumption of Black and brown incompetence*. In the 1980s, a white undergraduate at

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<sup>347</sup> *Adarand*, 515 U.S. at 241 (Thomas, J., concurring). Before his volte-face on affirmative action, Justice Stevens likened affirmative action to the genocidal efforts of Nazi Germany. See *Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting).

<sup>348</sup> Clarence Thomas, *The Equal Employment Opportunity Commission: Reflection on a New Philosophy*, 15 STETSON L. REV. 29, 35 (1985).

<sup>349</sup> Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 434 (1988).

<sup>350</sup> See, e.g., *Grutter*, 539 U.S. at 373 (Thomas, J., concurring in part and dissenting in part); *Fisher I.*, 570 U.S. at 333–34 (Thomas, J., concurring). I reemphasize that many scholars contest the prevailing notion of academic “merit.” See Guinier, *supra* note 137, at 131, 142.

the U.C. Berkeley revealed: “Every time I see a black person, *not an Asian*, but any other person of color walk by, I think, affirmative action. It’s like that’s your first instinct. It’s not, maybe that person was smart; it’s gotta be Affirmative Action. They don’t even belong here.”<sup>351</sup>

While that view is certainly possible, traditional antisubordination theorists should contest such assertions by noting that other, more compelling approaches exist. Instead of establishing a default rule of Black and brown intellectual incompetence, traditional antisubordinationists should maintain, this racial default should be inverted.<sup>352</sup> After all, given that some Black and brown students would be admitted to every major academic institution even under the most stringently applied traditional criteria, why should the presumption not run that all students belong on campus—at least until confronted with overwhelming evidence that the presumption of belonging is unwarranted? As is so often the case in law as well as life, the question here becomes: How do we want to be wrong? Should Black and brown students who would have obtained admission in the absence of racial considerations be wrongly presumed recipients of an affirmative action boost? Or should Black and brown students who received an affirmative action boost be wrongly presumed to have satisfied the standard admissions criteria? In my view, presuming Black and brown competence better advances the cause of racial egalitarianism. The contrary presumption—as articulated by the Berkeley undergraduate—seems not just incompatible with racial egalitarianism, but affirmatively racist. Given the hoary, durable presumption of Black intellectual inferiority that has existed for centuries, it seems to me that incorrectly believing (in the absence of any evidence) that all Black students on campus—including strangers—lack the intellectual goods is a grave mistake, one that should be studiously avoided.<sup>353</sup>

While I believe that this presumption of competence should apply in all academic settings, it seems to me that it holds overpowering—indeed, undeniable—force in settings like the *Fisher*

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<sup>351</sup> UROFSKY, *supra* note 6, at 408 (emphasis in original).

<sup>352</sup> See generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (exploring the default rule concept).

<sup>353</sup> I would extend a similar presumption of competence at elite universities to students who were admitted and were eligible for other sorts of boosts, including being a legacy or a recruited athlete.

cases, which involved the University of Texas at Austin.<sup>354</sup> In that pair of cases, recall that the Supreme Court presumed that the vast majority of underrepresented racial minorities were admitted through a meritorious system (for example, the Top Ten Percentage program), while a comparatively small percentage of underrepresented racial minorities were admitted through a system that involved overt racial classifications.<sup>355</sup> Even when confronted with that regime, however, Justice Thomas nevertheless continued to insist that students would be justified in believing that *all* Black and brown students had been admitted through what he would deem the backdoor of race-conscious admissions.<sup>356</sup> But even if one were simply playing the probabilities, that presumption of incompetence would have been overwhelmingly incorrect.<sup>357</sup>

Relatedly, traditional antisubordination scholars might contend that any presumption of incompetence attached to underrepresented racial minorities stems not from affirmative action policies, but instead from the nation's deep-seated racism. Judge Harry Edwards of the U.S. Court of Appeals for the D.C. Circuit made a version of this argument following *Grutter*, drawing upon his personal experiences as a member of the University of Michigan Law School's Class of 1965. When Edwards entered law school in 1962, he noted, "[e]ven before affirmative action existed, merit was thought of as something that a *typical* Black person did not possess."<sup>358</sup> Edwards graduated near the very top of his law school class, and received several accolades, including a *Michigan Law Review* editorship, Order of the Coif, and multiple best-in-the-class awards.<sup>359</sup> Nevertheless, when Edwards interviewed with leading law firms in several of the nation's larg-

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<sup>354</sup> See generally *Fisher I*, 570 U.S. 297; *Fisher v. University of Texas (Fisher II)*, 579 U.S. 365 (2016).

<sup>355</sup> See *Fisher I*, 570 U.S. at 333.

<sup>356</sup> See *supra* notes 148–51 and accompanying text.

<sup>357</sup> Given that approximately 87% of Black and brown students were admitted through the Top Ten Percentage Program and only 13% were admitted through race-conscious process in 2008, the presumption of incompetence would have been wrong nearly nine in ten times. *Implementation and Results of the Texas Automatic Admissions Law (HB 588) at the University of Texas at Austin*, U. TEX. AUSTIN 6–7 (Oct. 28, 2008), <https://perma.cc/8MZ4-CRJD>.

<sup>358</sup> Harry T. Edwards, *The Journey from Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity*, 102 MICH. L. REV. 944, 955 (2004) (emphasis in original).

<sup>359</sup> *Id.*

est legal markets, Edwards did not receive an offer and was informed by some of the more candid partners that their firms would not hire any Black candidate regardless of how dazzling the record. “[D]espite my qualifications on the law firms’ own measures of merit,” Edwards noted, “I was rejected *because of my race*.”<sup>360</sup> This searing experience led Edwards to conclude:

While some may fault affirmative action for casting a cloud over the accomplishments of African Americans, I view that cloud as a remnant of the pathology that has long conflated racial bigotry with judgments about merit. And that pathology certainly did not (and does not now) justify abandoning affirmative action.<sup>361</sup>

White Americans affixed racial stigma to their Black countrymen long before the advent of affirmative action, Edwards suggested, and that racial stigma will persist regardless of affirmative action’s existence. Several notable scholars have marshaled variants of Judge Edwards’s stigma-infused argument to defend affirmative action.<sup>362</sup>

Some scholars would, however, respond that arguments emphasizing the permanence of stigma ignore the considerable strides that have been made in transforming racial attitudes in the United States over the last six decades. One need not believe that the United States has become a post-racial society to understand that a Black law school graduate from a top law school—even one who achieved far less than a young Harry Edwards—today would be an intensely coveted candidate in the law firm hiring market.<sup>363</sup> Given this transformation, some would question whether noting that overt, virulent racism pervaded corporate America of yesteryear sheds meaningful light on the question of whether the affirmative action ethos stigmatizes Black students and professionals of today.<sup>364</sup>

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<sup>360</sup> *Id.* at 956 (emphasis in original).

<sup>361</sup> *Id.* at 958.

<sup>362</sup> See, e.g., R. A. Lenhart, *Understanding the Mark: Race, Stigma, and Equality in Context*, 79 N.Y.U. L. REV. 803, 911 (2004); cf. Angela Onwuachi-Willig, Emily Houh & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CALIF. L. REV. 1299, 1339 (2008).

<sup>363</sup> NAT’L ASS’N FOR L. PLACEMENT, 2022 REPORT ON DIVERSITY IN U.S. LAW FIRMS 6 (2023) (showing a notable increase in the percentage of Black associates at U.S. law firms).

<sup>364</sup> Perhaps, though, Judge Edwards has a more modest aim in recounting his history: to refute the assertions of Justice Thomas that the stigma of affirmative action prevented him from obtaining a job at a leading law firm in the early 1970s. See THOMAS, *supra* note 187, at 87 (“Now I knew what a law degree from Yale was worth when it bore the

## 2. Asian American students.

Regarding Asian Americans, traditional antisubordination theorists could make substantial headway by contending that affirmative action in no way invariably requires subjugating Asian Americans as perpetual foreigners or one-dimensional brainiacs. Assuming *arguendo* that Harvard (and other elite universities) discriminated against Asian Americans by artificially driving down their acceptance rates, that fact would not mean that affirmative action for Black and brown students must cease. Professor Jeannie Suk Gersen has pressed exactly this point. “Continued use of affirmative action . . . is perfectly compatible with tackling the discrimination at issue,” Gersen argued. “The problem is not [affirmative action]; rather, it is the added, sub-rosa deployment of racial balancing in a manner that keeps the number of Asians so artificially low *relative to whites* who are less strong on academic measures [than Asian Americans].”<sup>365</sup> Traditional antisubordination scholars could thus maintain that universities should implement affirmative action in a manner that does not marginalize and subjugate other racial minorities. This account would emphasize that any good policy could be administered in bad ways, and that the correct solution in such instances is not to eliminate the program, but rather to cure the maladministration.

Although this method of defusing the charge that affirmative action subordinates Asian Americans may seem intuitive, some eminent constitutional theorists seem to have encountered severe difficulty connecting these particular dots. In April 2023, as *SFFA* was pending, Professors Lee Bollinger and Geoffrey Stone published a book length defense of affirmative action titled *A Legacy of Discrimination*.<sup>366</sup> The book was a major event, as both Bollinger and Stone began their careers as First Amendment scholars before becoming significant figures in higher education.

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taint of racial preference.”). Given that Justice Thomas concentrated his job search on leading law firms in Atlanta—none of whom had ever hired a Black associate—it seems certain that Justice Thomas’s job search difficulties stemmed primarily not from affirmative action, but instead good old-fashioned racism. If this inference is the upshot of Edwards’s analysis, I wholeheartedly concur.

<sup>365</sup> Jeannie Suk Gersen, *The Uncomfortable Truth About Affirmative Action and Asian-Americans*, NEW YORKER (Aug. 10, 2017), <https://www.newyorker.com/news/news-desk/the-uncomfortable-truth-about-affirmative-action-and-asian-americans> (emphasis in original).

<sup>366</sup> LEE C. BOLLINGER & GEOFFREY R. STONE, *A LEGACY OF DISCRIMINATION: THE ESSENTIAL CONSTITUTIONALITY OF AFFIRMATIVE ACTION* (2023).

Bollinger was, of course, the named defendant in *Grutter* when he was the University of Michigan's President, and eventually took the helm of Columbia University; Stone served the University of Chicago as its Law School Dean and rose to become Provost before he drafted its widely emulated Chicago Principles, which outlined universities' core commitments to academic freedom and free expression. Not surprisingly, then, the book quickly garnered considerable attention, and Justice Jackson's opinion in *SFFA* cited *A Legacy of Discrimination* approvingly ten separate times.<sup>367</sup>

Despite the book's acclaim, its conceptualization of the allegations laying at the heart of *SFFA* severely misses the mark. Here is how Bollinger and Stone encapsulated what was at stake:

In short, Asian applicants, once discriminated against on the basis of their race and eventually granted entry into highly selective colleges and universities as a result of diversity policies, appear to be discounting the contribution that other minority groups make to educational diversity and the value of selective universities in helping realize the promise of *Brown*.<sup>368</sup>

This characterization portrays Asian Americans as ungrateful turncoats who have placed their boots on the necks of Black and brown college applicants. Even setting aside the questions regarding whether *SFFA* accurately represented the views of many Asian Americans,<sup>369</sup> this framing wrongly pits various racial minorities against each other. Even if that is how *SFFA* pitched the case, other available conceptions provide illumination rather than recrimination.

Some traditional antisubordination theorists could conceivably argue that the admissions policies, even if they operate on stereotypes, do not actually subordinate Asian Americans at all. To the contrary, this claim would run, the social meaning that motivates caps on Asian American enrollment works by elevating

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<sup>367</sup> See, e.g., *SFFA*, 143 S. Ct. at 2269 n.50 (Jackson, J., dissenting).

<sup>368</sup> BOLLINGER & STONE, *supra* note 366, at 134–35.

<sup>369</sup> Compare Amici Curiae Brief of the Asian American Coalition for Education and the Asian American Legal Foundation in Support of Petitioner at 6, *SFFA v. Harvard & SFFA v. UNC*, 600 U.S. 181 (Nos. 20-1199 & 21-707) (opposing affirmative action) with Amici Curiae Brief of the Asian American Legal Defense and Education Fund et al. in Support of Respondents at 4, 15, *SFFA v. Harvard & SFFA v. UNC*, 600 U.S. 181 (Nos. 20-1199 & 21-707) (supporting affirmative action). See also Serena Puang, Opinion, *Affirmative Action Is in Peril and 'Model Minority' Stories Don't Help*, N.Y. TIMES (Mar. 30, 2023), <https://www.nytimes.com/2023/03/30/opinion/affirmative-action-model-minority-asian-americans.html> (encouraging Asian Americans to support affirmative action).

estimation of that group's mental acuity. This stereotype is almost the exact opposite of the stereotype that construes Black people as intellectually inferior, and therefore we should not construe it as subordination of any kind. As Professor Henry Louis Gates has written, "anti-Asian prejudice often more closely resembles anti-Semitic prejudice than it does anti-black prejudice."<sup>370</sup>

Conventional antisubordination theorists should, however, demonstrate great caution before venturing this particular counterargument. The notions deeming some groups superhuman and others subhuman are intricately interconnected because both are predicated on denying basic humanity. These super- and subhuman categories are far from stable, moreover, as an extensive body of research has linked antisemitism with its supposed polar opposite: philosemitism. A recent history of philosemitism remarked that the phenomenon is often viewed as "deeply suspicious, sharing with antisemitism a trafficking in distorted, exaggerated, and exceptionalist views of Jews and Judaism," and some view philosemites as "antisemites in sheep's clothing."<sup>371</sup> Just as "[p]raise for Jewish intelligence . . . frequently accompanies animosity or envy,"<sup>372</sup> that same phenomenon applies to the mythic Asian American brainiac. Professor Gates has captured this dynamic well: "Surely anti-Asian prejudice that depicts Asians as menacingly superior, and therefore as a threat to 'us,' is . . . likely to arouse . . . violence [against Asian Americans]."<sup>373</sup> Although Gates offered that assessment three decades ago, it retains all too much vitality today. It is a tiny leap from believing that Asian Americans are so supremely endowed with intellect that they should confront elevated academic standards to believing that they are not really Americans at all.

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<sup>370</sup> Henry Louis Gates, Jr., *Let Them Talk: Why Civil Liberties Pose No Threat to Civil Rights*, NEW REPUBLIC (Sept. 20, 1993), <https://perma.cc/994E-8CTZ>.

<sup>371</sup> Adam Sutcliffe & Jonathan Karp, *Introduction: A Brief History of Philosemitism*, in *PHILOSEMITISM IN HISTORY* 1, 1 (Adam Sutcliffe & Jonathan Karp eds., 2011).

<sup>372</sup> Maurice Samuels, *Philosemitism*, in *KEY CONCEPTS IN THE STUDY OF ANTISEMITISM* 201, 202 (Sol Goldberg, Scott Ury & Kalman Weiser, eds., 2021); see also SANDER L. GILMAN, *SMART JEWS: THE CONSTRUCTION OF THE IMAGE OF JEWISH SUPERIOR INTELLIGENCE* 29–30 (1996).

<sup>373</sup> Gates, *supra* note 370; see also Bennett Kravitz, *Philo-Semitism as Anti-Semitism in Mark Twain's "Concerning the Jews"*, 25 *STUDIES IN POPULAR CULTURE*, no. 2, 2002, at 1, 1 ("[A]ll philo-Semitic texts are anti-Semitic.").



I will leave it to others to evaluate whether these counterarguments—or others that may well be forthcoming—suffice to salvage the traditional antisubordination view. Legal theorists of varying commitments seem likely to arrive at different conclusions regarding whether the traditional antisubordination position can be maintained, or whether it should be jettisoned in favor of other theories that endeavor to explain why at least some instances of race-conscious decision-making comport with equal protection principles. I hope that virtually all constitutional theorists can agree, however, that the significant, longstanding, and—above all—competing invocations of antisubordination values ought to be acknowledged rather than submerged.

## V. IMPLICATIONS

This Part pursues various implications of taking antisubordination's complexity seriously. First, these insights recast a prevalent scholarly view of Justice Thomas, which views his jurisprudence through the prism of Black Nationalism. But, when it comes to affirmative action, the positions advanced by Justice Thomas overlap substantially with Justice Douglas and then-Professor Scalia, and exactly no one construes them as channeling Stokely Carmichael. Second, assuming *arguendo* antisubordination does not constitutionally justify affirmative action, that does not mean that affirmative action must fall. Rather, that would mean merely that another justification should emerge, and several opinions—along with a small group of scholars—identify integration as a potentially fruitful avenue.

### A. Justice Thomas Reconsidered

Appreciating the great multiplicity of antisubordination—how the concept has been invoked at many different times, by many different actors who advocate many conflicting legal positions—challenges dominant understandings of Justice Thomas's jurisprudence. In recent years, several distinguished scholars have attributed Justice Thomas's position on affirmative action to racial considerations, suggesting, in particular, that his judicial views on that question—and many others besides—are overwhelmingly outgrowths of a Black Nationalist ideology. Thus, for example, Professor Stephen Smith, one of Justice Thomas's former law clerks, has offered *Clarence X? The Black*

*Nationalist Behind Justice Thomas's Constitutionalism*,<sup>374</sup> and Professor Mark Tushnet has produced *Clarence Thomas's Black Nationalism*.<sup>375</sup> More recently, Professor Corey Robin published a book exploring Justice Thomas's supposed Black Nationalism that received extensive public and academic notice.<sup>376</sup> These works all lavish considerable attention on Justice Thomas's jurisprudence of affirmative action, contending that his alleged Black Nationalist ideology appears in his overarching concern for the harms admissions systems impose on Black students, rather than on the injuries sustained by white rejected applicants.<sup>377</sup> In this vein, Dean Angela Onwuachi-Willig has succinctly contended: “[U]nlike white conservative ideology, which posits that affirmative action is unfair because it results in ‘reverse’ discrimination against Whites, Justice Thomas’s philosophy and jurisprudence on affirmative action concentrates on what he views as its poisonous impact on the lives and psyche of black people.”<sup>378</sup>

Scholars should, however, exhibit far greater caution in attributing Justice Thomas's jurisprudential views to either Black Nationalism or even his lived experiences as a Black man. Yes, Justice Thomas has highlighted the subordinating aspects of affirmative action for Black students. But that does not distinguish him from Justice Douglas, Justice Powell, then-Professor Scalia, or then-Professor Wilkinson, among many, many other legal voices. Yet it seems improbable in the extreme that any scholar would attribute the affirmative action skepticism of those white legal figures to latent Black Nationalist ideologies. And for good reason, as such a view would be the purest of hokum.

The essentializing vision of Justice Thomas, which construes him as articulating racially identifiable positions, merits sustained interrogation. No compelling rationale holds that one must

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<sup>374</sup> See generally Stephen F. Smith, *Clarence X?: The Black Nationalist Behind Justice Thomas's Constitutionalism*, 4 N.Y.U. J. L. & LIBERTY 583 (2009).

<sup>375</sup> See generally Mark Tushnet, *Clarence Thomas's Black Nationalism*, 47 HOW. L.J. 323 (2004). Full disclosure requires acknowledging that I, too, have compared Thomas's writings to Black Nationalism. See DRIVER, *supra* note 87, at 289.

<sup>376</sup> See COREY ROBIN, *THE ENIGMA OF CLARENCE THOMAS 2* (2019) (“Thomas is also a Black Nationalist.”). For samples of the many reviews of Robin's book, see Randall Kennedy, *The Apparatchik*, NATION (Oct. 29, 2019), <https://www.thenation.com/article/culture/enigma-clarence-thomas-book-review/>; Shaun Ossei-Owusu, *Racial Revisionism*, 119 MICH. L. REV. 1165 (2021).

<sup>377</sup> See Smith, *supra* note 374, at 617–18; Tushnet, *supra* note 375, at 329–31; ROBIN, *supra* note 376, at 76–79.

<sup>378</sup> Angela Onwuachi-Willig, *Just Another Brother on the SCT?: What Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931, 988–89 (2005).

be steeped in Black Nationalist ideology or anything of that ilk to contend that affirmative action harms Black people. Yet by construing Justice Thomas's views regarding admissions policies as emanating from concerns about Black liberation, scholars come perilously close to suggesting that Justice Thomas's race endows him with innate insight into racial matters.<sup>379</sup>

Justice Thomas, for his own part, has explicitly disavowed the notion that he is in any sense a Black Nationalist.<sup>380</sup> Rather than projecting an ideology onto Justice Thomas that he has affirmatively rejected, it seems worth dedicating at least some attention to pondering his own avowed intellectual influences.

Too often lost among the roundabout inquiries into Justice Thomas's thought is the embarrassingly straightforward fact that Justice Thomas received training as a lawyer, and that this legal education may well have shaped his jurisprudential views. Justice Thomas graduated from Yale Law School in 1974. Is it at least possible that ideas in circulation at that time influenced Justice Thomas's suggestions that affirmative action subjugates Black students? Justice Douglas issued his dissenting opinion in *DeFunis*, which embraced antisubordination values, in April 1974<sup>381</sup>—not long before Justice Thomas obtained his law degree. As it turns out, Justice Thomas is the only Supreme Court Justice during the last three decades who has cited Justice Douglas's *DeFunis* dissent, and Justice Thomas has done so repeatedly.<sup>382</sup> Indeed, Justice Thomas was so enamored with Justice Douglas's *DeFunis* dissent that he cited it in one of his few scholarly writings that he published before joining the D.C. Circuit in 1990.<sup>383</sup>

Furthermore, Justice Thomas has underscored the great intellectual debt that he owed to economist Thomas Sowell for his scholarship on race.<sup>384</sup> Predictably, Justice Thomas's judicial opinions regarding affirmative action have often made an effort to pay down at least some of that debt, citing Sowell's work with great

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<sup>379</sup> See Kennedy, *Racial Critiques*, *supra* note 206, at 1786–87 (contesting the belief that scholars of color are innately endowed with special intellectual insights into racial equality).

<sup>380</sup> Kauffman, *supra* note 166 (quoting Justice Thomas as follows: “I’m not a nationalist”).

<sup>381</sup> See *supra* notes 114–17 and accompanying text.

<sup>382</sup> See, e.g., *Grutter*, 539 U.S. at 369, 374 (Thomas, J., dissenting); *Fisher I*, 570 U.S. at 325–26 (Thomas, J., dissenting).

<sup>383</sup> See Clarence Thomas, *Affirmative Action Goals and Timetables: Too Tough? Not Tough Enough!*, 5 YALE L. & POLY REV. 402, 411 n.23 (1987).

<sup>384</sup> See *supra* note 166.

frequency.<sup>385</sup> It would, of course, require herculean effort to depict Sowell as a Black Nationalist rather than the conservative that he actually is. That same statement applies with greater force to Sowell's most prominent disciple, Justice Thomas, than much recent scholarship examining his jurisprudence allows. In seeking to grasp Justice Thomas's intellectual influences, rather than attributing his views to Black Nationalist authors whom he does not cite, it makes far more sense to apply Occam's razor.

There is, of course, abundant irony in the fact that scholars have contended Justice Thomas's views *on affirmative action* stem from his race. Many supporters of affirmative action have long held that racial diversity yields a diversity of viewpoints.<sup>386</sup> But Justice Thomas's views complicate this analysis in at least two fashions. First, Justice Thomas's views on affirmative action clash with the views of most African Americans, who generally support such programs.<sup>387</sup> Does this gap somehow suggest that Justice Thomas's position is an inauthentically "Black" one, or, worse, that he is some sort of racial deviant? It is, in my view, not only intellectually stifling, but racially corrosive to suppose that Black people must espouse particular positions only because they are Black. Yet, as Professor Carter has suggested, such racially constrained thinking mandates that African Americans "who gain positions of authority" embrace "the presumed views of other people who are black—in effect, to think and act and speak in a particular way, the *black* way—and [it may suggest] that there is something peculiar about black people who insist on doing anything else."<sup>388</sup>

Second, and relatedly, Justice Thomas has often castigated this very idea that race invariably explains and informs one's beliefs. Most recently, in his *SFFA* concurrence, Justice Thomas

<sup>385</sup> See, e.g., *Grutter*, 539 U.S. at 372 (Thomas, J., dissenting) (citing Sowell's work); *SFFA*, 143 S. Ct. at 2197, 2198, 2203, 2205, 2207 n.12 (Thomas, J., concurring) (same).

<sup>386</sup> See, e.g., *Bakke*, 438 U.S. at 316 ("A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer.").

<sup>387</sup> Lydia Saad, *Americans' Confidence in Racial Fairness Waning*, GALLUP (July 30, 2021), <https://perma.cc/Y6FV-GDW8> (indicating that the vast majority of Black respondents support affirmative action).

<sup>388</sup> CARTER, *supra* note 198, at 31; cf. Kennedy, *Racial Critiques*, *supra* note 206, at 1802 (contending that "the term 'black perspective' would seem to [either] have only a circular, tautological character: a black perspective is a perspective articulated by a black," or "[i]f . . . the concept of a 'black perspective' is to have a substantive character apart from the racial identity of a given speaker or author, there must be some means of determining that character, some criterion for 'blackness'").

stated: “[R]acial categories are little more than stereotypes, suggesting that immutable characteristics somehow conclusively determine a person’s ideology, beliefs, and abilities.”<sup>389</sup> That belief “[o]f course, [ ] is false,” Thomas contended, as “[m]embers of the same race do not all share the exact same experiences and viewpoints; far from it.”<sup>390</sup> Thus, when scholars read Justice Thomas’s jurisprudential commitments as racially inflected—when many white legal theorists have advanced similar positions—it seems more than likely that Justice Thomas would construe those suggestions as not only reductive, but flat-out wrong. Just as all Black people need not think alike, Justice Thomas would reason, sometimes people of different races can locate common ground.

## B. Integration

Accepting that antisubordination contains far greater indeterminacy than its liberal supporters typically concede does not require believing that affirmative action programs are constitutionally indefensible. It does mean, however, that such programs would need to rest on an alternate normative foundation. One promising justification for affirmative action that finds support in both judicial opinions and scholarly writings is the widely reviled concept of racial integration.

Support for racial integration as an unalloyed good reached its rhetorical apex with Martin Luther King’s “I Have a Dream” speech at the March on Washington for Jobs and Freedom in 1963.<sup>391</sup> Since then, however, integration has experienced a steep reputational decline. As early as 1965, a leader in the Congress of Racial Equality (CORE) declared: “Integration is a dirty word.”<sup>392</sup> Two years later, CORE’s national director—Floyd McKissick—demoted integration from sullied to buried, calling it “as dead as a doornail.”<sup>393</sup> Doubts about the wisdom of pursuing integration eventually became pervasive among both intellectuals and policymakers. In 2001, as *Brown* creaked toward its fiftieth anniversary, Professor Derrick Bell spoke for many in lamenting that the “integration ethic centralizes whiteness,” where “[w]hite bodies

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<sup>389</sup> *SFFA*, 600 U.S. at 276–77 (Thomas, J., concurring).

<sup>390</sup> *Id.* at 277

<sup>391</sup> For a recent, magnificent rendering of this speech, see JONATHAN EIG, KING: A LIFE 328–39 (2023). Eig modeled his treatment of the speech on Don DeLillo’s *Pafko at the Wall* (2001), and his chapter forms a stirring homage. *Id.* at 638.

<sup>392</sup> WOODWARD, *supra* note 19, at 196.

<sup>393</sup> *Id.*

are represented as somehow exuding an intrinsic value that percolates into the ‘hearts and minds’ of black children.”<sup>394</sup> Economist Glenn Loury also expressed concerns that integration wrongly prized whiteness. “A compulsive focus on racial integration can involve condescension (no doubt unintended) toward nonwhite students and their families,” Loury stated. “To presume that blacks must have a sufficient quota of whites in the classroom to learn is to presume that something is inherently wrong with blacks.”<sup>395</sup> By the time that the Supreme Court curtailed voluntary integration plans in public schools in 2007, school districts had overwhelmingly abandoned the practice of their own volition.<sup>396</sup>

Yet reports of integration’s demise may turn out to be greatly exaggerated. Over the last two decades, a band of scholars has sought to revitalize integration as an ambition worth pursuing.<sup>397</sup> Professor Elizabeth Anderson, perhaps the foremost contemporary theorist of integration, has framed her work as “aim[ing] to resurrect the ideal of integration from the grave of the Civil Rights Movement.”<sup>398</sup> Anderson has conceptualized integration “as an imperative of justice and an ideal of intergroup relations in democratic society.”<sup>399</sup> For Anderson, affirmative action in higher education is valuable because it advances this integrationist vision. The United States is composed of many different racial groups, Anderson observes, but for too long the nation’s leading campuses failed to reflect that reality and were, more or less, monoracial. Race-conscious admissions policies are permissible, Anderson maintained, because they help universities to resemble

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<sup>394</sup> Derrick A. Bell, *Derrick A. Bell (dissenting)*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 185, 192 (Jack M. Balkin ed., 2002). For adumbrations of these views, see generally Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976); Alex M. Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 *CALIF. L. REV.* 1401 (1993).

<sup>395</sup> Glenn C. Loury, Opinion, *Integration Has Had Its Day*, *N.Y. TIMES*, (Apr. 23, 1997), <https://www.nytimes.com/1997/04/23/opinion/integration-has-had-its-day.html>.

<sup>396</sup> James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 *HARV. L. REV.* 131, 144–46 (2007) (noting that a miniscule number of school districts enacted voluntary integration plans even before the Court’s decision curtailing the practice in *Parents Involved*).

<sup>397</sup> See, e.g., ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 1 (2010); JAMES E. RYAN, *FIVE MILES AWAY, A WORLD APART: ONE CITY, TWO SCHOOLS, AND THE STORY OF EDUCATIONAL OPPORTUNITY IN MODERN AMERICA* 278–80 (2010); Michelle Adams, *Radical Integration*, 94 *CALIF. L. REV.* 261, 272–73 (2006).

<sup>398</sup> ANDERSON, *supra* note 397, at 1.

<sup>399</sup> *Id.* at 21.

the larger multiracial American democracy of which they are part. In that sense, Anderson posited, affirmative action aids the nation's democratic experiment because permitting marginalized racial groups to remain excluded from the elite corridors of higher education prevents America from fully utilizing its multihued talent.<sup>400</sup>

Supreme Court Justices have written several opinions espousing potent integrationist visions of the Constitution. In *Keyes v. Denver School District*<sup>401</sup>, Justice Powell wrote a remarkable concurring opinion in 1973, contending that the Equal Protection Clause—properly understood—required local school boards across the country to pursue racial integration, regardless of whether they had a history of de jure or de facto segregation. “This means that school authorities, consistent with the generally accepted educational goal of attaining quality education for all pupils, must make and implement their customary decisions with a view toward enhancing integrated school opportunities,” Justice Powell stated.<sup>402</sup> It bears repeating that Justice Powell contended the Constitution not simply *permitted* school districts to pursue integration, but affirmatively *mandated* them to do so.

Justice Stephen Breyer's dissenting opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*<sup>403</sup> embraced a similar integrationist understanding of the Reconstruction Amendments, even if he would have stopped short of requiring school districts to pursue integration. “[T]he basic objective of those who wrote the Equal Protection Clause,” Justice Breyer maintained, was “forbidding practices that lead to racial exclusion.”<sup>404</sup> The Reconstruction Amendments, he contended, were “designed to make citizens of slaves,” and cases like *Brown* “sought one law, one Nation, one people, not simply as a matter of legal principle but in terms of how we actually live.”<sup>405</sup>

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<sup>400</sup> See *id.* at 136–37, 148–54 (explaining how the integration rationale for affirmative action differs from the diversity rationale).

<sup>401</sup> 413 U.S. 189 (1973).

<sup>402</sup> *Keyes*, 413 U.S. at 224–26. (Powell, J., concurring). For background and analysis of Powell's opinion in *Keyes*, see DRIVER, *supra* note 87, at 274–84. For a thoughtful argument contending that the Equal Protection Clause might constitutionally require affirmative action, see David A. Strauss, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99, 127–28.

<sup>403</sup> 551 U.S. 70 (2007).

<sup>404</sup> *Id.* at 829 (Breyer, J., dissenting).

<sup>405</sup> *Id.* at 867–68; see *id.* at 868 (“Many parents, white and black alike, want their children to attend schools with children of different races. Indeed, the very school districts that once spurned integration now strive for it.”).

In the context of affirmative action, *Grutter* justified race-conscious admissions practices as promoting a racially integrated nation. “Access to legal education . . . must be inclusive of talented and qualified individuals of every race and ethnicity,” *Grutter* instructed, “so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.”<sup>406</sup> Failing to achieve racial integration in elite educational environments, *Grutter* further suggested, threatened the vitality of our multiracial democracy: “In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity.”<sup>407</sup> These opinions suggest that integration is not quite so foreign to mainstream constitutional interpretation as one might initially believe.

It is important to acknowledge, however, that significant implementation questions could trouble the integrationist justification for affirmative action. That is, even if a commitment to integration were somehow to gain adherents in theory, questions abound regarding how that commitment would apply in practice. What minimum percentages of various racial groups at universities would, for example, discharge a university’s obligation to achieve integration? Could some universities successfully opt out of the integrationist vision by demonstrating that achieving even a modicum of racial integration would be implausible due to a lack of interest from students of color? Can voluntary campus housing arrangements based upon racial identity be squared with an integrationist approach? How do historically Black colleges and universities (HBCUs), with their largely Black student bodies, comport with an integrationist vision of higher education?

These questions are formidable. Different integrationists will answer those questions in different ways. Some integrationists will, for example, indicate that race-themed housing and even HBCUs in their current form may well undermine integration. For these integrationists—particularly those who are attracted to those institutions—that position could demonstrate that integration is a shoe that sometimes pinches. Other integrationists

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<sup>406</sup> *Grutter*, 539 U.S. at 332–33.

<sup>407</sup> *Id.* at 332. While Professor Siegel has contended “*Grutter* embodies an antisubordination understanding” of the Fourteenth Amendment, Siegel, *supra* note 16, 1540, others have perceived it as embodying integrationist commitments. See KENNEDY, FOR DISCRIMINATION, *supra* note 207, at 107–08; Adams, *supra* note 397, at 286.



would surely beg to differ, emphasizing the importance of having physical spaces for students of color to experience being in the majority.<sup>408</sup> But this occasion is not the time to elaborate a grand, unified theory of racial integration.

It is to suggest, however, that such work should be pursued apace. While *SFFA* cabined race-conscious admissions policies for now, this moment will not extend forever. While liberals are in the constitutional wilderness, we should consider dedicating some time to developing and refining a constitutional approach that can justify race-conscious measures. Integration is surely not the only idea that merits further exploration, but it is also just as surely not the sole idea that merits dismissing out of hand.

### CONCLUSION

In 1991, more than three decades ago now, Professor Carter observed that “it is hard to hold an honest conversation about affirmative action,” and that “[i]t may be harder still to hold an honest conversation about the reasons why it is hard to hold an honest conversation” about the inflammatory subject.<sup>409</sup> The intervening thirty-three years have not rendered that conversation much easier. Within legal circles, a severely underappreciated reason for the difficulty of that conversation stems from the fact that liberal supporters of affirmative action believe that the programs alleviate racial subordination, and conservative critics believe that the programs perpetuate racial subordination. The two competing sides seem not even to appreciate that they are using the same concept to arrive at diametrically opposed conclusions. By identifying longstanding—though unacknowledged—commonality regarding the importance of antisubordination to affirmative action debates, this Article endeavors to make conversations about that heated issue, the Equal Protection Clause, and our larger constitutional order a little easier. I do not suffer from the delusion that conservatives and liberals will now magically agree on the constitutionality of race-conscious admissions policies, but I do hope that this Article will at long last equip willing participants to engage meaningfully on the pivotal constitutional concept of antisubordination.

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<sup>408</sup> Cf. Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1143 (2005).

<sup>409</sup> CARTER, *supra* note 198, at 2.