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From Anti-Subordination to Anti-Classification: The Doctrinal Transformation of Equal Protection In *Students for Fair Admissions v. Harvard*

Alyssa Totoro

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Abstract

The Supreme Court's decision in *Students for Fair Admissions v. Harvard* marks the culmination of a broader doctrinal shift in Equal Protection jurisprudence from an anti-subordination framework to an anti-classification framework, a move that negates the intentions and remedial purposes intended by the Clause's framers. While the Equal Protection Clause was originally understood during Reconstruction as permitting race-conscious remedies aimed at dismantling racial hierarchy, the Court now interprets it as requiring formal colorblindness for neutral application across all jurisdictions. Drawing on the historical foundation of the Fourteenth Amendment, this Article traces how the Court's reasoning departs from the remedial logic embedded in Civil Rights Era jurisprudence and reframes structural inequality as individual disadvantage. Using the theoretical frameworks of Derrick Bell and Robert Cover, I argue the decision reflects a jurispathic act—one that suppresses competing interpretations of equality while preserving existing power structures. The elimination of affirmative action demonstrates how formally neutral legal frameworks can reproduce inequality while appearing to promote fairness, ultimately redefining constitutional equality in a manner detached from historical context and lived experience. Absent careful scrutiny, this doctrinal shift risks entrenching a regressive understanding of equality, placing the law at the center of the very inequalities it purports to resolve.

Table of Contents

I. Introduction

II. The Remedial Roots of the Equal Protection Clause

III. History of Affirmative Action

IV. The Building of The *Students for Fair Admission v. Harvard* Decision

V. Direct Implications

VI. Rippling Forward

VII. Jurispathic and Jurisgenic Uses of the Equal Protection Clause

VIII. Conclusion

I. Introduction

American law operates on the premise that legislation is binding and applied evenly across the population. Chief Justice Roberts famously stated in *Parents Involved in Community Schools v. Seattle School District No. 1* that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[1] This statement reflects a commitment to formal neutrality, treating equal application as synonymous with equality itself. However, this raises a critical question: what happens when laws are drafted without considering the perspectives of the minorities historically excluded from shaping them?

Affirmative action is at the heart of this debate. Originating in the Civil Rights Era with President John F. Kennedy's Executive Order 10925, it required government contractors to "take affirmative action" to dismantle discrimination.[2] Today, it is utilized in college admissions to mitigate lived inequality. Yet, recent rulings frame formally neutral eligibility requirements as fairness-enhancing rather than exclusionary, often by invoking the Equal Protection Clause. In practice, these regulations often function as mechanisms that preserve existing hierarchies rather than producing a neutralizing effect. Such results stem from the interpretation of the Equal Protection Clause through two competing frameworks: anti-classification, in which all classifications based on race are unconstitutional, and anti-subordination, in which the Constitution prohibits laws that create or reinforce racial hierarchy.[3]

This analysis examines the Supreme Court's decision in *Students for Fair Admissions v. Harvard* through established jurisprudential frameworks. I argue that the Court's analysis reflects

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[1] *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).
[2] *Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961)*, https://www.presidency.ucsb.edu/documents/executive-order-10925-establishing-the-presidents-committee-equal-employment-opportunity (last visited Feb. 27, 2026).
[3] Abigail Nurse, Anti-Subordination in the Equal Protection Clause: A Case Study, 89 N.Y.U. L. Rev. 293 (2014).

a retreat from the historically grounded, inclusive interpretations of constitutional equality rooted in the Civil Rights Era. By refusing to account for disparate starting positions, formally neutral systems recast structural inequality as individual failure.

To understand this shift, this Review first traces the original purpose of the Equal Protection Clause during Reconstruction. It then follows the development of affirmative action through the Johnson administration, analyzes the doctrinal evolution leading to *Students for Fair Admissions v. Harvard* (SFFA), and situates the decisions as a jurispathic act. Finally, it argues that the Court's reasoning has created an avalanche of precedents that systematically perpetuate injustice under the language of formal neutrality across recent judicial decisions.

This analysis ultimately asks how legal neutrality reshapes constitutional purpose: whether the enforcement of laws should be applied horizontally in a culturally sensitive manner, or vertically and uniformly to all citizens stripped of historical context. This article argues that *Students for Fair Admissions v. Harvard* represents the culmination of a doctrinal transformation in Equal Protection jurisprudence that facilitates the dismantling of an anti-subordination approach to law. Where the Equal Protection Clause was originally understood as permitting race-conscious remedies to dismantle racial hierarchy, the Court now treats all racial classifications as constitutionally suspect, regardless of purpose. In doing so, *SFFA* completes the Court's shift from race-conscious and remedial to anti-classification, redefining equality as formal colorblindness rather than structural redress, which is now reflected throughout legislation today.

II. The Remedial Roots of the Equal Protection Clause

To understand the erosion of the Equal Protection Clause's original purpose, this section traces its origins in the 1860s. During the Reconstruction Era, after the Civil War, Southern states enacted Black Codes to restrict property ownership, contract rights, movement, and access to courts.[4] In response, Congress passed the Civil Rights Act of 1866, which was explicitly race-conscious and remedial, guaranteeing that formerly enslaved persons were afforded the same rights as white citizens.[5] Congress subsequently constitutionalized this commitment to remedial equality through the Fourteenth Amendment and the establishment of the Equal Protection Clause.

At the time, however, the scope of equality remained contested. Lawmakers often distinguished between civil, political, and social rights, with the strongest consensus surrounding the protection of civil rights—such as the right to contract, hold property, and access courts—rather than full social integration. Even within this limited framework, Reconstruction-era measures were explicitly race-conscious and remedial.[6] Although the framers may not have envisioned complete social equality, they nonetheless recognized that formally neutral laws would be insufficient to dismantle the entrenched racial hierarchy.

The Equal Protection Clause provides: "No state shall… deny to any person within its jurisdiction the equal protection of the laws."[7] Rather than embodying abstract colorblindness, the Clause emerged in response to the explicit racial hierarchy following the Civil War. This intent is reflected in Senator Jacob M. Howard's speech introducing the Fourteenth Amendment, where he stated that "whatever law protects the white man shall afford 'equal' protection to the

[4] William J. F. Meredith, *The Black Codes*, 3 Negro Hist. Bull. 76 (1940).
[5] Civil Rights Act of 1866, Ch. 31, 14 Stat. 27.
[6] Ilan Wurman, *Reconstructing Reconstruction-Era Rights*, 109 Va. L. Rev. 885 (2023).
[7] *14th Amendment to the U.S. Constitution: Civil Rights (1868)*, National Archives (Sept. 7, 2021), https://www.archives.gov/milestone-documents/14th-amendment.

black man."[8] While the Civil Rights Act of 1866 spoke explicitly in racial terms, guaranteeing formerly enslaved persons the same rights "as enjoyed by white citizens," the Equal Protection Clause adopted universal language, protecting "any person" within a state's jurisdiction. This linguistic shift marks a move from explicit racial reference to abstraction. While the Clause was enacted to protect formerly enslaved persons, its neutral phrasing later allowed courts to detach the provision from its remedial origins.

The Equal Protection Clause did not evolve in a vacuum; around the same time, the Freedmen's Bureau was established to provide food, education, housing, and legal assistance specifically for formerly enslaved persons.[9] This race-conscious legislation demonstrates that the same Congress responsible for drafting the Fourteenth Amendment did not understand equal protection to prohibit targeted remedial measures. Rather, race-conscious intervention was viewed as necessary to dismantle the racial hierarchy that the Amendment sought to abolish in post-Civil War American society.

One of the first times the Equal Protection Clause was narrowly interpreted was in the *Slaughter-House Cases* (1873). When deciding whether a state-granted monopoly violated the Privileges or Immunities Clause, the Court upheld the monopoly, effectively stating that primary authority over civil rights resides within the states unless discrimination fits a narrow description.[10] These decisions narrowed not only the Equal Protection Clause but also the Privileges or Immunities Clause, creating a distinction between national and state remedial potential. Rather than functioning as a robust safeguard against state-imposed racial hierarchy, the Fourteenth Amendment was redefined as offering only minimal protection against a narrow

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[8] Sen. Jacob M. Howard, Speech Introducing the Fourteenth Amendment, Congressional Globe, 39th Cong., 1st Sess. 2764-66 (May 23, 1866).
[9] *The Freedmen's Bureau*, National Archives (Aug. 15, 2016), https://www.archives.gov/research/african-americans/freedmens-bureau.
[10] *Slaughterhouse Cases, 83 U.S. 36 (1872)*, Justia Law, https://supreme.justia.com/cases/federal/us/83/36/ (last visited Feb. 27, 2026).

set of abuses. By stripping the Privileges or Immunities Clause of much of its intended force, the Court rendered the Fourteenth Amendment far less effective in protecting civil rights against state interference. Essentially, the Court's decision redirected power away from federal protection of rights, weakening Reconstruction-era protections and forcing subsequent decisions to rely on a more abstract interpretation of the Equal Protection Clause.

This narrowing opened the door to subsequent rulings such as *United States v. Cruikshank* (1876). Following the Colfax Massacre, the Court determined that the Fourteenth Amendment only restricts state action and not the actions of private individuals. The Court dismissed the federal government's efforts to prosecute white supremacists who had killed Black citizens.[11] By defining its power as limited to stopping discrimination by states, not private citizens, the Court effectively permitted private racial violence from organizations like the Ku Klux Klan to persist with minimal federal intervention.

Furthermore, in *Plessy v. Ferguson* (1896)*,* the majority articulated the doctrine of '"separate but equal," writing that separation does not necessarily imply the inferiority of either race.[12] Writing for the majority, Justice Brown rejected the criticism that segregation imposed a "badge of inferiority," claiming that if any such perception arose, it stemmed not from the law but from the personal interpretation of those affected.[13] In doing so, the Court reframed racial inequity as a subjective experience rather than a structural condition.

Taken together, these decisions reflect a judicial retreat from the Reconstruction-era vision of equality through a progressive narrowing of the Fourteenth Amendment's scope: first by limiting the Privileges or Immunities Clause, and later by redefining racial inequality as a

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[11] United States v. Cruikshank, 92 U.S. 542 (1876).
[12] Plessy v. Ferguson, 163 US 537 (Supreme Court 210 AD).
[13] *Id.*

matter of subjective perception rather than structural harm. The Court departed from the Amendment's original remedial purpose and instead embraced an anti-classification framework that diverged sharply from anti-subordination principles.

The foundation for applying heightened scrutiny in racial discrimination cases was later suggested in *United States v. Carolene Products Co.* (1938), which noted that laws directed at "discrete and insular minorities" might necessitate more rigorous judicial review.[14] *Brown v. Board of Education* (1954) illuminated this principle force when it rejected formal symmetry in favor of focusing on structural harm.[15] Thereby rejecting formal symmetry in favor of examining structural harm.[16] In *Loving v. Virginia* (1967), the Court declared that racial classifications are "odious to free people" and must withstand the "most rigid scrutiny."[17] Triggering strict scrutiny forces defendants to bear the burden of demonstrating that their policies serve a compelling governmental interest and are narrowly tailored to achieve that interest.[18]

In practice, however, the Court's use of strict scrutiny reflects two competing and often incompatible understandings of equality. The fundamental constitutional debate is not between equality and discrimination, but between whether the Constitution requires the remediation of racial hierarchy or simply enforces a formal prohibition on racial classification. One vision, defined as anti-subordination, is structural, remedial, and historically conscious, seeking to vertically integrate all individuals by dismantling racial hierarchy. The opposing view, anti-classification, is formalist, colorblind, and abstract, emphasizing a legally neutral approach. The Court frequently oscillates between these two distinct interpretations of the Equal Protection

[14] United States v. Carolene Products Co., 304 US 144 (Supreme Court 640).
[15] Brown v. Bd. of Educ., 347 U.S. 483 (1954).
[16] *Id.*
[17] Loving v. Virginia, 388 US 1 (Supreme Court 395 AD).
[18] Robin L. West, *Communities, Texts, and Law: Reflections on the Law and Literature Movement*, 1 YALE J.L. & HUMAN. 129 (1988).

Clause. This doctrinal inconsistency reflects not only competing definitions of equality but also competing theories about who has the authority to define constitutional meaning.

Scholar Robin West reveals how allegiance is maintained through those whose voices are allowed to shape legal meaning.[19] She distinguishes between textual communities and interactive communities. In textual communities, legal interpretation is closed off to those outside traditional power structures, causing the law to become static and detached from evolving moral understandings. Interactive communities, by contrast, imply that real justice requires the inclusion of all voices, especially those historically excluded. West warns that marginalized individuals risk becoming "nonspeakers"—those subject to the law but never its authors—thereby stripping them of agency in shaping the legal reforms that govern their lives.[20] Such a framework reveals how legal texts can become morally hollow when they exclude the very communities they are meant to protect.

Anti-subordination requires attention to lived experience, which necessarily demands the inclusion of the voices of those who have borne the weight of racial hierarchy. When the Court embraces anti-classification under the Equal Protection Clause, it distances constitutional meaning from social context and returns to abstraction, treating equality as a matter of symmetrical language rather than structural reality. Although the Fourteenth Amendment's universal phrasing was originally enacted to secure remedial protections for formerly enslaved persons, its analytic reduction has enabled later courts to detach the Clause from its race-conscious origins. This shift privileges West's textual community over the interactive community the Clause was intended to protect.

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[19] *Id.*
[20] *Id.*

III. History of Affirmative Action

The Reconstruction history of the Equal Protection Clause reveals that its framers did not equate equality with colorblindness; rather, anti-classification emerged as a later doctrinal development. The Clause was adopted alongside explicitly race-conscious legislation, as evidenced by the Civil Rights Act of 1866.[21] In a similar vein, a century later, during the Civil Rights Movement, the federal government again employed race-conscious measures through executive action to remedy structural inequality, reflecting a continuation of the remedial logic embedded in the Fourteenth Amendment's historical purpose. Modern doctrine thus reflects not a rejection of equality, but a conflict over what equality requires.

The phrase "affirmative action" was first introduced in Executive Order 10925, in which President John F. Kennedy required federal contractors to "take affirmative action" to ensure nondiscrimination in employment. The order applied only to federal contractors, grounded in the federal government's authority over contracting and the expenditure of federal funds. This early framework did not require numerical quotas or mandate race-based hiring, but rather emphasized good-faith compliance and oversight.[22]

Although initially limited in public visibility and scope, the concept of affirmative action evolved from a vague executive directive into an enforceable standard within the Civil Rights Act of 1964.[23] Under the Act, Title VI prohibited discrimination in federally funded programs, reinforcing the nondiscrimination principle that had previously applied to federal contractors under Executive Order 10925.[24] Furthermore, Title VII of the Civil Rights Act of 1964

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[21]Civil Rights Act of 1866, ch. 31, 14 Stat. 27.
[22] Exec. Order No. 10925, 26 Fed. Reg. 1977 (Mar. 8, 1961).
[23] National Academies of Sciences, Engineering, and Medicine, *America Becoming: Racial Trends and Their Consequences*, vol. 1 2001, https://www.nationalacademies.org/read/9599/chapter/12.
[24] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

prohibited employment discrimination and created the Equal Employment Opportunity Commission (EEOC), a federal agency tasked with enforcing anti-discrimination laws and issuing regulatory guidance.[25] Both Title VI and Title VII of the Civil Rights Act of 1964 initially relied on "soft" enforcement, including complaint-based and prohibitory enforcement mechanisms, rather than explicit diversity mandates.[26]

Under Presidents Lyndon B. Johnson and Richard Nixon, policies shifted. Executive Order 11246 expanded Kennedy's original order by requiring proactive measures.[27] Enforcement was placed under the Department of Labor, giving the order more regulatory teeth.[28] Johnson's 1965 commencement address at Howard University framed affirmative action as a necessary response to structural inequity. In that speech, he famously invoked the image of a runner who has been shackled for years, explaining that it is not enough to simply declare "you are free to compete with all the others" if that individual has been held back for most of their life.[29]

From this point, modern affirmative action policy began to take shape. This development did not represent a break from congressional action but reflected an evolution in how statutory commitments were enforced. The Civil Rights Act of 1964 established a legal framework grounded in nondiscrimination, but reliance on prohibitions and complaint-based enforcement did not, on its own, require the affirmative steps needed to dismantle entrenched patterns of exclusion. Nixon's approval of the Philadelphia Plan marked the turning point where affirmative action shifted from mere nondiscrimination to results-oriented enforcement. The plan required construction trades to establish specific hiring "goals and timetables" for minority workers.

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[25] *Id.*
[26] *Id.*
[27] Exec. Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).
[28] *Id.*
[29] Lyndon B. Johnson, *Commencement Address at Howard University: To Fulfill These Rights* (June 4, 1965), THE AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/commencement-address-howard-university-fulfill-these-rights.

Supporters believed that merely prohibiting discrimination was insufficient because entrenched exclusion in industries would persist without active intervention.[30] Nixon extended Johnson's Executive Order 11246 to include goal-oriented requirements for federally funded contractors.[31] Accordingly, while the legal foundation for nondiscrimination originated in Congress, the shift toward outcome-conscious affirmative action emerged through executive enforcement. This evolution lies at the center of contemporary constitutional debate: whether race-conscious policies constitute permissible remedial measures or impermissible discrimination.

IV. THE BUILDING OF *STUDENTS FOR FAIR ADMISSIONS V. HARVARD* DECISION

Few recent cases test the meaning of constitutional equality more directly than *Students for Fair Admissions v. Harvard* (2023).[32] In this case, the Court examined the race-conscious admissions practices of Harvard and the University of North Carolina at Chapel Hill (UNC). Harvard used an "overall" admissions category that considered race and geography as heavily weighted factors to prevent significant drop-offs in minority representation. In the final "lop list" stage, race, legacy status, and athletic recruitment were key determinants. Similarly, UNC made race a "plus" factor that significantly increased the chance of admission during the group review.

The lawsuit, initiated by Edward Blum on behalf of rejected applicants, challenged the universities' practices as being discriminatory against Asian American applicants, arguing that they decreased the chances of admission and raised the bar higher for Asian American applicants than for other races. Ultimately, the Court ruled that the use of race in these admissions processes violated constitutional limits on race-based decision-making.[33]

[30] Paul Marcus, *The Philadelphia Plan and Strict Racial Quotas in Federal Contracts,* 17 UCLA L. REV. 817, 817-836 (1970) (the Philadelphia Plan and construction trades).
[31] Exec. Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 24, 1965); see also Exec. Order No. 11478, 34 Fed. Reg. 12985 (Aug. 8, 1969).
[32] *Students for Fair Admissions, Inc v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).
[33] *Id.*

The Supreme Court held that race-conscious admissions practices violated the Equal Protection Clause and Title VI of the Civil Rights Act. Drawing on a doctrinal framework developed from *Regents of the University of California v. Bakke* (1978) to *Fisher v. University of Texas*, which has increasingly privileged anti-classification principles, the Court determined that federally funded universities could not sustain race-conscious admissions as compatible with the Constitution's prohibition on racial discrimination. Such policies, the Court held, failed to satisfy strict scrutiny.[34]

The decision in *SFFA* is markedly different from other historical cases in the same vein. In *Bakke*, the Court permitted race to be used as a "plus" factor in admissions while holding racial quotas unconstitutional.[35] UC Davis Medical School had been reserving 16 of the 100 available seats in its classes for minority applicants. The central tension in *Bakke* was not the legitimacy of diversity as a goal, but about rejecting the use of fixed quotas. Several Justices, including Brennan, Marshall, and White, defended quotas as being constitutionally permissible, believing that it is "not a quota to keep someone out – it's a quota to get someone in."[36] Epstein and Knight argue that *Bakke* helped create the "diversity rationale," where race may be considered in admissions provided that individualized review replaces rigid numerical quotas.[37] *Bakke* also marked an early articulation of the Equal Protection Clause's application to admissions, with Justice Stewart arguing that any discrimination based on race violated the Clause.[38] Most importantly, Justice Powell's opinion marked a shift from an anti-subordination rationale grounded in remedying past harms to a broader emphasis on diversity.[39]

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[34] *Id.*
[35] Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
[36]Lee Epstein & Jack Knight, *Piercing the Veil: William J. Brennan's Account of Regents of the University of California v. Bakke*, 19 YALE L. & POL'Y REV. 341, 341-379 (2001) (defense of quotes by Supreme Court Justices).
[37] *Id.*
[38] *Id.*
[39] *Id.*

Next came *City of Richmond v. J.A. Croson Co.* (1989), where a business set-aside program required 30% of public construction contract dollars to be awarded to minority business enterprises.[40] A contractor challenged the program after failing to meet the participation requirement. The Supreme Court ruled that the race classifications Richmond employed in its program failed to show sufficient evidence of past or present discrimination to meet the criteria for strict scrutiny and subsequently struck down the program. This was a sharp contrast to *Wygant v. Jackson Board of Education* (1986),[41] which suggested that affirmative action must be tied to prior discrimination by the specific governmental unit.[42] That principle was later formalized in *Adarand Constructors, Inc v. Peña* (1995), where the Court held that all racial classification—whether federal, state, or local—should be analyzed under strict scrutiny.[43] In these cases, the Court made clear that even if programs are remedial, they are still racial classifications that trigger strict scrutiny. A local government may only act if it has been a "passive participant" in a system of private discrimination, publicly funded operations that reinforce exclusion, or if there is a significant statistical disparity.[44]

A formalized goal regarding racial classifications was presented in *Grutter v. Bollinger* (2003), where it was decided that diversity is a compelling enough interest for schools to allow affirmative action. The court found that the University of Michigan Law School used a holistic review process that was intended to produce a "critical mass" of diverse perspectives through individualized review rather than fixed quotas.[45] The Court found Michigan's framework to be within constitutional bounds but shifted affirmative action from a remedial purpose to one of educational diversity and institutional benefit more formally than *Bakke* did. Since *Grutter*, many

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[40] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).
[41] Brown v. Board of Education, 347 U.S. 483 (1954).
[42] Derek M. Alphran, *Proving Discrimination after Croson and Adarand: "If It Walks Like a Duck,"* 37 U.S.F. L. Rev. 887, 887-970 (2003).
[43] Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).
[44] Derek, *supra* note 42.
[45] Grutter v. Bollinger, 539 U.S. 306 (2003).

colleges have adopted this diversity rationale, framing affirmative action as enhancing the learning mission rather than correcting past injustice.[46] The Court specifically flagged that affirmative action as a temporary measure, expected to fulfill its goal of achieving meaningful academic diversity within twenty-five years.[47] Scholar Wendy Parker argues that the Court initially applied a deferential version of strict scrutiny that relied heavily on the law school's judgment.[48]

That softening changed with *Fisher v. University of Texas* (2013, 2016)[49] coupled with *Parents Involved in Community Schools v. Seattle School District No. 1* (2007).[50] *Parents Involved* resolved the tensions where parents challenged school districts' student assignment plans that used racial classifications to prevent resegregation and promote diversity.[51] The Court ruled that the school districts failed strict scrutiny and therefore violated the Equal Protection Clause, siding with an anti-classification framework.[52] *Parents Involved* explicitly stated the case failed because it was "outside of higher education," a distinction later reflected in *Fisher*.[53] However, *Fisher* concluded by placing the burden on universities to demonstrate that race-based admissions policies are both necessary and tailored. In 2013, the Court acknowledged the decision in *Grutter* was too deferential, and by 2016, it emphasized that universities must continually reassess whether race is still necessary.[54] Scholar Norma Riccucci argues that the Court's focus on "critical mass" was a "red herring" allowing conservative justices to express deep skepticism toward race-conscious admissions without immediately overturning *Grutter*.

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[46] Wendy Parker, *The Story of Grutter v. Bollinger: Affirmative Action Wins*, SSRN Electronic Journal 1, 1-24 (2006).
[47] Grutter v. Bollinger, 539 U.S. 306 (2003).
[48] *Id.*
[49] Fisher v. University of Texas, 570 U.S. 297 (2013, 2016).
[50] *Parents Involved in Cmty. Sch. v. Seattle Sch.* Dist. No. 1, 551 U.S. 701 (2007).
[51] *Id.*
[52] *Id.*
[53] Andrew Sterritt, New Originalist Interpretation of *Parents Involved*, 15 Geo. J.L. & Pub. Pol'y 433 (2017).
[54] Fisher v. University of Texas, 570 U.S. 297 (2013, 2016).

Justice Kennedy stated that deference is “antithetical to strict scrutiny,” highlighting a marked doctrinal tightening.[55]

Students for Fair Admissions v. Harvard marks the latest tension within the Court's' affirmative action jurisprudence. In contrast to the decision in *Bakke* regarding the constitutionality of a “plus” factor, the court in *SFFA* reframed this framework, concluding that race functioned as a “negative” factor for some applicants, particularly Asian Americans.[56] The majority reasoned that because college admissions operate as a zero-sum process, granting a benefit to one group necessarily imposes a burden on others.

In *SFFA*, the Court found that Harvard and UNC failed to articulate a defined endpoint for their use of race undermining claims of narrow tailoring. The Court concluded that the universities failed to meet their burden of justification under the structure outlined in *Fisher*.[57] The Court further rejected the assumption that race could serve as a proxy for shared viewpoints, reasoning that such generalizations collapse applicants' individuality into racial classifications.[58] The Court also found that universities' asserted goals, including training leaders in diverse education environments, were too vague and immeasurable to justify a race-based decision-making. Harvard's “lop list” and UNC's “plus factor” were deemed too broad and inconsistently applied, specifically in their treatment of Asian applicants as a monolithic group. As a result, UNC was found to have violated the Equal Protection Clause, and Harvard was found to have violated Title VI.[59]

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[55]Norma M. Riccucci, *Fisher v. University of Texas and the Status of Affirmative Action: Implications for Social Equity,* 37 Rev. Pub. Pers. Admin. 23 (2017).
[56] Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
[57] Fisher v. University of Texas, 570 U.S. 297 (2013, 2016).
[58] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023).
[59] *Id.*

V. Direct Implications

The Supreme Court's decision in *Students for Fair Admissions v. Harvard* held, by a 6–3 majority, that the race-conscious admissions programs at Harvard and UNC were unconstitutional and violated the Equal Protection Clause and Title VI of the Civil Rights Act.[60]Although the ruling significantly limits the use of race in admissions, it leaves open the possibility for universities to consider an applicant's experiences with race, provided they relate directly to individual character or achievement.

The dissenting opinions, delivered by Justices Sonia Sotomayor and Ketanji Brown Jackson, forcefully challenged the majority's reasoning. Justice Sotomayor, joined by Justice Elena Kagan, argued that the Equal Protection Clause does not mandate colorblindness but rather permits race-conscious policies to address systemic inequality.[61] Justice Jackson reinforced this concern, emphasizing that a colorblind approach ignores the real-world consequences of race and the enduring legacy of discrimination.[62] Both justices highlighted how the *Students for Fair Admissions* ruling adopts a formal equality framework that ignores lived inequality. In stark contrast to Chief Justice Roberts' statement in *Parents Involved*, Sotomayor warned that "ignoring race will not equalize a society that is racially unequal," while Jackson asserted that "deeming race irrelevant in law does not make it so in life."[63] By adopting a framework of legal neutrality on issues of race and equality, the Court becomes an active participant in maintaining structural inequality, undermining the "passive participant" principle articulated in *Adarand*

[60] *Id.*
[61]Olivia B. Waxman, Read Justice Sotomayor and Jackson's Dissents in the Affirmative Action Case, TIME (Jun. 29, 2023), https://time.com/6291230/affirmative-action-dissent-jackson-sotomayor/.
[62] *Id.*
[63] *Id.*

Constructors, Inc. v. Peña, which presumes that the government must avoid even inadvertent participation in racial harm.[64]

Notably, the dissenting opinions were authored by justices whose perspectives may reflect lived experience with racial inequality, underscoring how such experience can shape constitutional interpretation.[65] These rulings carry significant implications for a broad range of stakeholders. Black and Latinx students, who are historically most likely to benefit from affirmative action, stand to progressively lose access to elite educational spaces that have historically excluded them. Asian American applicants, whose stereotype-based disadvantages were central to the case, may gain some procedural relief; however, without broader reform, the ruling risks reinforcing racial divisions. White applicants may experience shifts in competitive dynamics, though their existing structural advantages remain largely intact. Finally, elite universities face the loss of legal flexibility to cultivate diverse educational environments, raising questions about how inclusion can be meaningfully pursued going forward.

This uncertainty is already evident in current admissions practices. One scholar points to a pattern of "secret admissions" in which several lived experience factors are considered without being clearly defined in terms of their weight or classification. These universities are now in limbo, trying to balance the negative consequences of secrecy while retaining the strengths of individualized review to achieve their diversity missions.[66] While such approaches may be procedurally defensible, they are often difficult to administer consistently and require admissions officers to make subjective determinations that lack transparency. This ambiguity raises concerns that implicit bias may affect admissions outcomes, particularly for Asian American applicants.[67]

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[64] Derek, *supra* note 42.
[65] Olivia, *supra* note 61.
[66] Vinay Harpalani, *Secret Admissions,* 48 J.C. & U.L. 325 (2023).
[67] Patrick Hornbeck, *Implicit Bias against Asian Americans: A Blind Spot in the Harvard Admissions Case*, 52 J.L. & Educ. 123 (2023).

Furthermore, post-*SFFA,* high-achieving underrepresented minority (URM) students (including Native Americans, Black, Hispanic, and Pacific Islanders) were up to 10% less likely to enroll in highly selective colleges in fall 2024 compared to fall 2023.[68] In response, many of these students cascaded into less selective colleges with lower graduation rates, while non-URM students experienced little change in their enrollment probabilities across segments.[69]

VI. Rippling Forward

If *Students for Fair Admissions v. Harvard* represents the Court's full embrace of the anti-classification principle, then the constitutional significance of racial inequality shifts: disparate outcomes become legally irrelevant so long as government action remains facially neutral. This narrowing of legal meaning has already begun to ripple outward. Lower federal courts have been left to determine the outer limits of this reasoning as litigants attempt to apply the decision to other race-conscious policies.

Post–*SFFA*, courts have begun to apply similar reasoning in *Jeffery Nuziard et al. v. Minority Business Development Agency* (2024). The United States District Court for the Northern District of Texas applied the *SFFA* reasoning to a federal race-based business program, holding that the agency's statutory racial classification violates the Equal Protection Clause by defining "disadvantaged individuals" in racial terms.[70] Scholars fear that federal race-conscious economic programs long justified as remedial are now set to endure heightened scrutiny.[71]

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[68] *Id.*

[69] Michael D. Bloem et al., *College Enrollment Patterns After SFFA v. Harvard*, EdWorkingPaper No. 26-1392 Annenberg Inst. at Brown Univ 1 (2026), https://doi.org/10.26300/6a7w-bq06.

[70] Nuziard v. Minority Bus. Dev. Agency, No. 4:23-cv-00278-P N.D. Tex. (2024).

[71] Ralph Capio & Erin M. Carr, *Assessing the Potential Consequences of Students for Fair Admissions, Inc. (SFFA) on the Small Business Development Program*, 60 Cal. W. L. Rev. 525 (2024).

During President Donald Trump's first term, he issued Executive Order 13950, which restricted certain Diversity, Equity, and Inclusion (DEI) initiatives within federal agencies by targeting what it described as "anti-American race and sex stereotyping."[72] This order was quickly reversed by President Joe Biden, signaling that systematic barriers still needed to be addressed from an anti-subordination lens.[73] However, attacks on affirmative action have ramped up aggressively within the past year. Executive Order 14151 ordered the termination of DEI programs, offices, and training across federal agencies once again, with implications for grants and programs that promote DEI concepts.[74] Furthermore, Executive Order 14173 eliminated requirements that federal contractors take affirmative actions, revoking Executive Order 11246 during Nixon's presidency.[75] The goal was to ensure merit-based hiring, requiring submissions of compliance before receiving federal funding.[76] Such orders now trickle down to K-12 schools, where public institutions are being told federal funding will be withheld if DEI programming persists.[77]

Finally, President Trump has mandated DOJ compliance reviews of schools like Stanford University and several University of California campuses to ensure they are following protocol post–*SFFA*.[78] As institutions retreat from race-conscious review, many have returned to ostensibly "objective" criteria such as standardized testing and other quantifiable admissions metrics. Although SAT and ACT scores are race-neutral at face-value, decades of empirical

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[72] Exec. Order No. 13,950, 85 Fed. Reg. 60,683 (Sept. 22, 2020).
[73] Dawn Siler-Nixon, Nancy Van der Veer Holt & Cymoril M. White, *A Systematic Approach: Biden Revokes Trump's EO 13950 and Calls for a "Whole-of-Government" Racial Equity Agenda*, FordHarrison (Jan. 22, 2021), https://www.fordharrison.com/a-systematic-approach-biden-revokes-trumps-eo-13950.
[74] Exec. Order No. 14,151, 90 Fed. (January 20, 2025).
[75] Exec. Order No. 14,173, 90 Fed. (January 21, 2025); Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965).
[76] Luc Cohen, *Judge Blocks Trump's Labor Department from Requiring Grant Recipients to Abandon DEI*, Reuters (Mar. 27, 2025), https://www.reuters.com/world/us/judge-blocks-trumps-labor-department-requiring-grant-recipients-abandon-dei-2025-03-27/.
[77] Collin Binkley, *K-12 Schools Must Sign Certification Against DEI to Receive Federal Money, Administration Says*, Associated Press (Apr. 3, 2025), https://apnews.com/article/dei-trump-school-discrimination-federal-funding-7d1025753b9bd924711ace4069fca399.
[78] U.S. Department of Justice, *Attorney General Pamela Bondi launches compliance review investigation into admissions policies at Stanford University and several University of California schools, advancing President Trump's mandate to end illegal DEI policies* (Mar. 27, 2025) https://www.justice.gov/opa/pr/attorney-general-pamela-bondi-launches-compliance-review-investigation-admissions-policies.

research demonstrate their strong correlation with household income, parental education, and access to preparatory resources.[79] Yet, because they do not classify by race, they may not trigger Equal Protection scrutiny, even as they reproduce existing hierarchies.

A similar form of formal neutrality is exhibited in H.R. 1, *An Act to Provide for Reconciliation Pursuant to Title II of H. Con. Res. 14*, more casually known as the One Big Beautiful Bill Act (OBBBA), signed into law on July 4, 2025. Under this law, graduate and professional students are capped at a lifetime borrowing limit of $100,000 and $200,000, respectively.[80] The bill also begins the phase-out of the Graduate PLUS loan program.[81] The stated purpose was fiscal restraint to reduce federal student lending risk.[82] Although formally neutral, the OBBBA obscures the unequal access to intergenerational financial capital that made public financing necessary.[83] By capping financing, OBBBA disproportionately burdens students without access to intergenerational wealth. Although the OBBBA does not evoke the Equal Protection Clause, it operationalizes the same neutrality logic endorsed in *SFFA*. In both contexts, formally equal rules treat unequal conditions as irrelevant, converting structural disadvantage into individual failure while insulating the government from responsibility.

Taken together, these developments illustrate how the Court's reasoning in *Students for Fair Admissions* extends well beyond the admissions office. Whether through judicial decisions striking down remedial economic programs, executive orders dismantling diversity initiatives, or legislation framed in formally neutral fiscal terms, the same logic reappears: inequality is treated

[79] Audrey Amrein-Beardsley et al., *A Validation Review of the SAT and ACT for College and University Admissions Decisions*, 33 EDUCATION POLICY ANALYSIS ARCHIVES 1 (2025).
[80] H.R. 1, *One Big Beautiful Bill Act*, 119th Cong. (2025–2026), https://www.congress.gov/bill/119th-congress/house-bill/1.
[81] S. 308, 119th Cong. (2025).
[82] *Id.*
[83] Madeline Brighouse Glueck, *Beyond a bachelor's: Stratification in graduate school enrollment*, 96 RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY 1 (2025).

as legally irrelevant so long as the rule itself does not explicitly classify by race. What emerges is not merely a shift in admissions policy, but a broader constitutional reorientation in which structural disadvantage disappears from legal analysis. In this framework, laws that reproduce racial hierarchy remain constitutionally permissible so long as they operate through ostensibly neutral mechanisms. The ripple effects of *SFFA* therefore illuminate the deeper transformation this Article identifies: a move away from the Equal Protection Clause's anti-subordination foundations toward a rigid anti-classification doctrine that prioritizes formal neutrality over the dismantling of entrenched inequality. In doing so, the Court reshapes constitutional equality itself, redefining it not as a tool to remedy historical injustice, but as a principle that treats unequal conditions as irrelevant to the law.

VII. Jurispathic and Jurisgenic Uses of the Equal Protection Clause

At the core of *Students for Fair Admissions v. Harvard* lies a harsh irony: the Equal Protection Clause, once a safeguard for racial justice, is now being used to abolish policies designed to dismantle systemic inequality. Robert Cover describes two ends of a spectrum: jurispathic (law-killing) and jurisgenic (law-creating).[84] A jurispathic act extinguishes competing legal interpretations by declaring a single authoritative meaning, whereas a jurisgenic act sustains evolving interpretations.[85] Cover argues that when law loses its connection to the communities and moral visions that give it life, it creates a destruction of the moral universe and argues for a society that fights for jurisgenic justice.

The Justices' dissent in *SFFA* contrasts starkly with landmark rulings like *Brown v. Board of Education* and *Loving v. Virginia*, signaling a jurisgenic ideology. *Brown* explicitly rejected the

[84] Robert M. Cover, *Foreword: Nomos and Narrative*, 97 Harv L. Rev 4.
[85] *Id.*

"separate but equal" doctrine of *Plessy.*[86] [87] *Loving* struck down anti-miscegenation laws, with the Court arguing that although races were punished the same, the statute was designed to maintain White Supremacy.[88] These decisions acknowledged that segregation was a system of racial hierarchy, interpreted in light of contemporary conditions.

In contrast, certain cases use the Equal Protection Clause not to expand constitutional meaning, but to foreclose it. These moves reflect the broader dismantling of race-conscious policies across education, employment, and government, threatening to roll back decades of civil rights gains. What distinguishes *Brown* and *Loving* is their framing within the current interests of those in power. Scholar Derrick Bell's theory of interest convergence and racial sacrifice covenants suggests racial progress is tolerated only when it aligns with dominant institutional interests.[89] In *SFFA*, the Court framed affirmative action as a zero-sum game that harmed white and Asian American applicants.[90] This framing depends on treating whiteness as the baseline for fairness. Bell argues that racial hierarchy is often maintained through the perseverance of neutrality in the name of procedural law. This case shows how formal equality can be used as a cover to uphold existing power structures.

Significantly, Asian American applicants have been positioned as victims of race-conscious admissions, primarily through claims that such practices limited the number of highly qualified Asian American candidates—a narrative that brought *Students for Fair Admissions v. Harvard* before the Court. However, the logical structure of this argument relies upon comparing Asian American outcomes to those of white applicants, effectively treating

[86] Brown v. Board of Education, 347 U.S. 483 (1954).
[87] Plessy v. Ferguson, 163 U.S. 537 (1896).
[88] Loving v. Virginia, 388 U.S. 1 (1967).
[89] Derrick Bell, *The Racial-Sacrifice Covenants*, in Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform 27–48 (2004).
[90] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023).

whiteness as the normative baseline for fairness. The underlying claim posited that Asian American applicants would experience higher admission rates if they were treated identically to white applicants, with some estimates suggesting an increase in admission probability of up to 19% under such a framework.[91] This framing of whiteness as the standard for fairness obscures the fact that Asian American applicants are neither treated as fully advantaged nor as historically subordinated; instead, they occupy an unstable position that allows their experiences to be selectively mobilized. Even when Asian American applicants are compared to white applicants as a benchmark, they do not receive the same structural advantages associated with whiteness, meaning that formal inclusion within a "majority" category fails to produce equivalent outcomes.

In light of Derrick Bell's theory of interest convergence, this positioning appears deliberate; it suggests that the recognition of Asian American disadvantage becomes legally salient only to the extent that it supports dismantling affirmative action, rather than ensuring a meaningful increase in Asian American admission rates. Although Asian American enrollment increased modestly following *Students for Fair Admissions*, these gains were neither uniform nor substantial, and they did not correspond with any meaningful decline in white enrollment.[92][93]

Thus, a case ostensibly brought to produce justice for one minority group, Asian Americans, ultimately proved harmful to other minority groups—particularly Black and Latinx applicants—while offering limited benefit to the plaintiffs themselves. This outcome reveals a broader pattern consistent with the preservation of white structural advantage at the expense of collective minority progress.

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[91] Peter Arcidiacono, Josh Kinsler & Tyler Ransom, *Asian American Discrimination in Harvard Admissions*, 144 EUR. ECON. REV. 104079 (2022).
[92] James S. Murphy, *The Future of Fair Admissions: A First Look at College Enrollment Outcomes After the End of Affirmative Action* (Class Action, Feb. 2026), https://www.joinclassaction.us/post/a-first-look-at-college-enrollment-outcomes-after-the-end-of-affirmative-action.
[93] Michael T. Nietzel, *Five Things the New Data About Race-Conscious College Admissions Tell Us*, Forbes (Feb. 4, 2026), https://www.forbes.com/sites/michaeltnietzel/2026/02/04/five-things-the-new-data-about-race-conscious-college-admissions-tell-us/.

From Derrick Bell's perspective, *Students for Fair Admissions* does not stand alone as a jurispathic act; instead, it reframes affirmative action as racial discrimination, elevates colorblindness as a constitutionally defensible claim, and narrows the consideration of race to individual narrative within admissions. What began as a judicial retreat from inclusion now threatens to reshape national policy by reframing efforts to address inequality as forms of unfairness or illegality. The crucial realization is that the text of the Equal Protection Clause itself has not changed from *Brown* to *Loving* and now *SFFA*; rather, the Court's authoritative narrative about equality has shifted. Instead of confronting enduring disparities, these legal and political shifts redefine the language of fairness in a way that excludes the very communities that affirmative action was originally meant to uplift.

VIII. Conclusion

While the majority opinion in *Students for Fair Admissions v. Harvard* may appear doctrinally grounded, it raises serious concerns about the Court's capacity to account for structural inequality. The decision marks a turning point in constitutional interpretation and reflects a broader retreat from racial justice within Equal Protection jurisprudence. Although the ruling was framed as a commitment to equal treatment, it betrays the original intent of the Equal Protection Clause by foreclosing the very forms of race-conscious legal interpretation that the Clause was designed to support. The central argument of this review is not merely about the place of affirmative action in admissions, but rather how the Court chose to review its legality and why that methodology is harmful to a remedial system of justice.

The Court's interpretation of the Equal Protection Clause in *SFFA v. Harvard* reflects a narrow, text-bound approach to justice that upholds formal equality while disregarding the

historical purpose and lived realities the Clause was meant to address. The Court's decision invalidated affirmative action by aligning itself with the textual community—applying the Equal Protection Clause through a colorblind lens to uphold a constitutional standard of equal treatment for all citizens.[94] However, this formal approach ignored the fundamental purpose of the Equal Protection Clause: to secure genuine equality, particularly for those who have historically faced systemic discrimination.

Ratified during the Reconstruction Era following the Civil War, the Equal Protection Clause was explicitly designed to protect the rights of formerly enslaved Black Americans and to prevent states from enacting discriminatory laws, such as the Black Codes, that restricted their newly gained freedoms.[95] It was written in the direct context of remediating racial injustice, yet the Court has now used the literal text—which mandates equal protection of the laws for all persons—to justify an abstracted application of the amendment. In doing so, the Court failed to account for the lived experiences and ongoing struggles of Black Americans who still face systemic discrimination. The decision in *SFFA* is reflective of a misunderstanding of equality similar to that seen in *Plessy*, only occurring at a current stage with far less temporal distance from the historical conditions it purports to address. This ongoing inequality is vividly reflected in disparities such as disproportionately lower high school graduation rates, significantly reduced median household incomes, and higher poverty rates among Black Americans.

By dismissing these lived experiences of American citizens, the Court systematically places Black communities in the role of Robin West's so-called "nonspeakers," denying them not only recognition of their distinct struggles but also the ability to influence how legal principles

[94] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023).
[95] Supreme Court Historical Society, Supreme Court Decisions and Women's Rights: Interpreting the Equal Protection Clause (last visited March 27, 2026), https://supremecourthistory.org/classroom-resources-teachers-students/decisions-womens-rights-equal-protection-clause/.

like equality are defined and applied.[96] The fact that the majority of justices striking down affirmative action were white, while the dissenting justices included only people of color, underscores the deep racial divide in how the stakes and meaning of race-conscious policies are understood within the judicial process itself.[97] This exclusion removes Black Americans from shaping the law's meaning, thereby reinforcing a system where those in power control legal interpretation while the lived experiences of marginalized communities are systematically ignored.

The Court failed to take an interactive approach—one that moves beyond the explicit language of the Equal Protection Clause to acknowledge the historically silenced voices of Black Americans. An interactive reading would have recognized Black students as moral participants in the legal community: individuals whose experiences should inform what equality means in practice through an anti-subordination reading of the Equal Protection Clause. Such an approach would have honored the original intent behind the Clause and affirmed its continuing relevance in addressing systemic inequality today.

Without such an approach, and given the ripple effect this decision has caused in minority communities' access to education, the Court has effectively adopted a jurispathic lens. In practical terms, *SFFA* establishes that race-conscious policies are presumptively unconstitutional unless they can be justified without reference to race as a category. Under this framework, courts are less concerned with whether a policy mitigates structural inequality and more concerned with whether it employs explicit racial classifications, regardless of remedial intent. As a result, the

[96] Robin L. West, *Communities, Texts, and Law: Reflections on the Law and Literature Movement*, 1 YALE J.L. & HUMAN.129 (1988).
[97] Olivia B. Waxman, Read Justice Sotomayor and Jackson's Dissents in the Affirmative Action Case, TIME (Jun. 29, 2023), https://time.com/6291230/affirmative-action-dissent-jackson-sotomayor/.

Equal Protection Clause now operates primarily as a constraint on classification rather than as a tool for addressing entrenched inequality. If law is to serve as a bridge between justice and injustice, it must remain responsive to history and the voices of those who have long been excluded from shaping its meaning. Without such responsiveness, formal equality risks becoming a mechanism of exclusion cloaked in the language of neutrality.[98]

[98] Disclaimer: The author, in support of academic transparency, discloses that artificial intelligence (primarily ChatGPT & Claude.ai) was used to review and expand initial outlines, to locate additional references supporting the author's researched sources, to format footnotes, and to provide draft section language. Just as authors would carefully review any work by a human research assistant, all generative AI content was reviewed, edited, and verified by the author to ensure accuracy and integrity.