NOTE

TREATING EACH APPLICANT AS AN INDIVIDUAL IN *STUDENTS FOR FAIR ADMISSIONS V. HARVARD* AND ITS KEY PRECEDENTS

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INTRODUCTION

In 2023, the Supreme Court decided *Students for Fair Admissions v. Harvard* (*SFFA*), a landmark case holding that the race-conscious admissions policies of Harvard College and the University of North Carolina (UNC) violated the Equal Protection Clause of the Fourteenth Amendment.[1] This decision is widely regarded as the elimination of the use of affirmative action in college admissions.[2] The Supreme Court's decision in *SFFA* was immensely controversial among the Justices. Chief Justice Roberts delivered the opinion of the Supreme Court and was joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett.[3] Justices Sotomayor, Kagan, and Jackson dissented.[4]

To some extent, *SFFA* was a well-anticipated case. In *Grutter v. Bollinger*, a touchstone precedent that the *SFFA* Court discussed in detail, Justice Scalia, dissenting, stated that "[the *Grutter* decision] seems perversely designed to prolong the controversy and the litigation," though he did not "look forward to any of these cases."[5] In fact, race-conscious school admissions had long been a battleground between the conservative and liberal Justices. For example, in another landmark precedent that the *SFFA* Court discussed in detail, *University of California v. Bakke*, three of the four Justices who were against the use of affirmative action in school admissions, Chief Justice Burger,

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1 Students for Fair Admissions, Inc. v. Pres. & Fellows Harvard Coll. (*SFFA*), 600 U.S. 181, 230 (2023).

2 Amy Howe, *Supreme Court Strikes Down Affirmative Action Programs in College Admissions*, SCOTUSBLOG (June 29, 2023), https://www.scotusblog.com/2023/06/supreme-court-strikes-down-affirmative-action-programs-in-college-admissions/ [https://perma.cc/753G-G3Z9].

3 *SFFA*, 600 U.S. at 189.

4 *Id.*

5 Grutter v. Bollinger, 539 U.S. 306, 348–49 (2003) (Scalia, J., concurring in part and dissenting in part).

and Justices Stewart and Rehnquist, were typically conservative.[6] We see the same pattern in *Grutter*, where the four Justices against affirmative action—Justices Scalia, Thomas, Rehnquist, and Kennedy—were also typically conservative.[7]

Such observations might lead many readers to believe that the judicial battle over race-conscious school admissions was nothing beyond an ideological fight between the conservatives and the liberals, or one between the originalists and the pragmatists. This Note finds the dichotomous interpretation to be a coarse-grained understanding of the Supreme Court's decisions in landmark affirmative action cases, because it completely ignores an important philosophical idea that underpinned the Court's discussion of race-conscious school admissions since *Bakke*—individuality. This Note argues that the Supreme Court's shifting attitude towards race-conscious school admissions can be best understood by making sense of the Court's gradually elevated requirements of individuality in school admissions. Specifically, this note argues that (1) treating each applicant as an individual has been a constitutionally necessary, but not constitutionally sufficient, requirement since *Bakke*; (2) the individuality requirement is intricately intertwined with the compelling-interest and narrow-tailoring requirements of strict scrutiny; and (3) race-conscious school admissions survived *Bakke* and *Grutter*, but were overruled in *SFFA* because the *SFFA* Court had such an elevated requirement of individuality that it rendered it impossible for the race-conscious admissions policies of Harvard and UNC to pass strict scrutiny.

This Note will first introduce the Supreme Court's reasoning in deciding *SFFA* as well as *Bakke* and *Grutter*, the two landmark precedents that led to *SFFA*. Then, I will survey the relevant philosophical texts on individuality and its relationship to stereotype and discrimination. Following that, I will analyze the Supreme Court's decisions in *Bakke*, *Grutter*, and *SFFA* through the lens of individuality, and explain why the Court's transformed conceptualization of individuality is the real reason behind the *SFFA* decision to overrule affirmative action.

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[6] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 408 (1978); William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study*, 1 J. LEGAL ANALYSIS 775, 782 (2009) (using empirical methods to show the role that ideology plays in voting behavior among Supreme Court Justices).

[7] *Grutter*, 539 U.S. at 310; Landes, *supra* note 6, at 782.

I
BACKGROUND

A. *Bakke*: The First Supreme Court Decision on Race-Conscious School Admissions[8]

1. *The* Bakke *Facts*

Bakke had a fact pattern that future followers of affirmative-action cases would find partly familiar and partly strange. First, the familiar part. Allan Bakke was a white male who applied to the University of California at Davis (Davis) Medical School in 1973 and 1974.[9] In both years, he was rejected despite strong benchmark scores, calculated by an aggregation of the interviewers' summaries, his overall grade point average (GPA), his science courses GPA, his Medical College Admissions Test (MCAT) scores, letters of recommendation, extracurricular activities, and other biographical data.[10]

The strange part about *Bakke* was that the Davis Medical School had two separate admissions programs for the entering class of one hundred students—the regular admissions program and the special admissions program.[11] Under the regular program, which was the procedure Allan Bakke went through, candidates were required to maintain an overall undergraduate GPA of 2.5 or above on a scale of 4.0, and were ranked against each other within the regular program by benchmark scores.[12] At the same time, a separate committee operated the special program, candidates who were considered under it were not subject to the GPA cut-off, and candidates would be ranked against each other within the special program by benchmark scores.[13] In 1973, candidates would be eligible for consideration under the special program if they were "economically

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8 Technically, *Bakke* was not the first Supreme Court case that challenged the constitutionality of race-conscious school admissions. In 1974, the Supreme Court heard *DeFunis v. Odegaard*, where DeFunis, after being denied admission by the University of Washington Law School, sued the President of the University of Washington, contending that the Law School Admissions Committee discriminated against him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment. DeFunis v. Odegaard, 416 U.S. 312, 314 (1974). However, the Supreme Court held that the case had become moot and did not render a decision on the merits. *Id.* at 319–20.

9 *Bakke*, 438 U.S. at 276 (plurality opinion).

10 *Id.* at 265, 276–77.

11 *Id.* at 265.

12 *Id.*

13 *Id.* at 265, 275.

and/or educationally disadvantaged."[14] In 1974, candidates would be eligible for consideration under the special program if they were members of a "minority group."[15] The Davis Medical School viewed "Blacks," "Chicanos," "Asians," and "American Indians" as minority groups for the purpose of the special program.[16] Additionally, sixteen out of the one hundred spots at Davis Medical School were reserved for applicants who came through the special program.[17]

In both 1973 and 1974, applicants admitted under the special program had GPAs, MCAT scores, and benchmark scores significantly lower than Allan Bakke's.[18] Allan Bakke sued the University of California, alleging that the Davis Medical School's special admissions program operated to exclude him from the school on the basis of his race, therefore violating his rights under the Equal Protection Clause of the Fourteenth Amendment.[19]

2. *The Foundation of Affirmative Action Analysis: Strict Scrutiny*

Justice Powell, in filing a plurality opinion that would later be adopted by the *Grutter* Court, stated that the Supreme Court must apply strict scrutiny, because the special admissions program involved a racial classification.[20] After *Bakke*, strict scrutiny became the most daunting hurdle that race-conscious admissions policies would face at the Supreme Court.[21] In other words, as the Supreme Court's first decision on race-conscious admissions policies, *Bakke* established the level of scrutiny applicable to future cases.

Under strict scrutiny, the individual rights guaranteed by the Fourteenth Amendment are not absolute; only if the school meets the burden of proving that the admissions policies are

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14 *Id.* at 274 (quoting Transcript of Record at 65–66, 146, 197, 203–05, 216–18, *id.* (No. 76-811)).

15 *Id.* (quoting Transcript of Record, *supra* note 14, at 65–66, 146, 197, 203–05, 216–18).

16 *Id.* (quoting Transcript of Record, *supra* note 14, at 65–66, 146, 197, 203–05, 216–18).

17 *Id.* at 289 (opinion of Powell, J.).

18 *Id.* at 277 (plurality opinion).

19 *Id.* at 277–78.

20 *Id.* at 279.

21 *See Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

precisely tailored to serve a compelling government interest can its policy stand.[22]

3. Bakke *Court Decided on the Unconstitutionality of Racial Quotas*

The *Bakke* Court did not file a majority opinion because the Justices vehemently disagreed with each other.[23] In the plurality opinion that would later be adopted by the *Grutter* Court, Justice Powell subjected Davis Medical School's special admissions program to strict scrutiny, and found it unlawful.[24] First, Justice Powell pointed out that the attainment of a diverse student body "clearly is a constitutionally permissible goal for an institution of higher education."[25] This was because "[t]he atmosphere of 'speculation, experiment and creation' . . . [was] essential to the quality of higher education" and this atmosphere was "widely believed to be promoted by a diverse student body."[26] Specifically, physicians served a heterogeneous population, so it would benefit the medical profession by putting together a medical student body from diverse ethnic, geographic, and cultural backgrounds.[27] Justice Powell never explicitly explained what he meant by "diversity" or "heterogeneity."[28] But we can at least infer that what Justice Powell had in mind was broader than mere ethnic diversity, because he stated that ethnic diversity "is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."[29]

The next issue was whether the special admissions program was narrowly tailored to the compelling interest of attaining a diverse student body.[30] Justice Powell stated that the program was not narrowly tailored to the compelling interest, because Davis Medical School misconstrued the nature of the compelling interest by focusing solely on ethnic diversity rather than a diversity that "encompasses a far broader array

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22 *See Bakke*, 438 U.S. at 299 (opinion of Powell, J.), *id.* at 320 (plurality opinion).

23 *Id.* at 267.

24 *Id.* at 315, 320.

25 *Id.* at 311–12 (opinion of Powell, J.).

26 *Id.* at 312 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)).

27 *Id.* at 314.

28 *See id.* at 310–15.

29 *Id.* at 314.

30 *Id.* at 315 (plurality opinion).

of qualifications and characteristics of which racial or ethnic origin is but a single though important element," therefore its program "would hinder rather than further [the] attainment of genuine diversity."[31] Thus, Justice Powell held the special admissions program at Davis Medical School, which essentially constituted a racial quota, invalid under the Fourteenth Amendment, because it failed the narrow tailoring requirement under strict scrutiny.[32]

4. *The* Bakke *Approach: Race-Conscious but Individualized Consideration*

While striking down the racial quota in Davis Medical School's admissions, Justice Powell also considered the admissions program at Harvard College, which he found to be "[a]n illuminating example."[33] Harvard did "not set target-quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year."[34] Instead, race or ethnic background was deemed a "plus" in a particular applicant's file, because the Admissions Committee would compare each applicant with all of the others while bearing the distribution of many types and categories of students in mind.[35] In this way, the file of an ethnic minority student would be examined for his potential contribution to diversity without the factor of race being decisive.[36]

Justice Powell praised the Harvard admissions program for "treat[ing] each applicant as an individual in the admissions process."[37] Later, the Harvard program became the gold standard for a constitutionally acceptable, race-conscious admissions program under the *Grutter* Court.[38] Ironically, the same Harvard College ended up having its admissions program held unconstitutional by the *SFFA* Court.[39]

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31 *Id.*

32 *Id.* at 288–89 (opinion of Powell, J.); *id.* at 320 (plurality opinion).

33 *Id.* at 316 (quoting Appendix to Brief for Columbia University et al. as Amici Curiae Supporting Petitioner at 2–3, *id.* (No. 76-811) [hereinafter Appendix to Brief for Columbia]).

34 *Id.* (quoting Appendix to Brief for Columbia, *supra* note 33, at 2–3).

35 *Id.* at 316–17.

36 *Id.* at 317.

37 *Id.* at 318.

38 Grutter v. Bollinger, 539 U.S. 306, 309 (2003).

39 Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023).

B. Grutter: When Justice Powell's *Bakke* Opinion Became a Binding Precedent

1. *The* Grutter *Facts*

Barbara Grutter, a white resident of Michigan, applied to the University of Michigan Law School with a 3.8 GPA and 161 LSAT score in 1996.[40] After being denied admission, she filed a lawsuit against the University of Michigan, alleging that the University discriminated against her on the basis of race in violation of the Fourteenth Amendment.[41] Barbara Grutter alleged that she was rejected because the Law School used race as a "'predominant' factor," and applicants from certain ethnic minority groups had a significantly greater chance of admission than applicants with similar credentials from disfavored racial groups.[42]

As part of its official admissions policy, the Law School sought to admit "a mix of students with varying backgrounds and experiences who will respect and learn from each other."[43] The Law School did not provide an explicit definition of diversity, but recognized "many possible bases for diversity admissions."[44] Specifically, the Law School sought to enroll a "'critical mass' of [underrepresented] minority students," because it was committed to promoting "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers."[45] The Director of Admissions of the Law School understood "critical mass" to mean a number that would allow underrepresented minority students to participate in the classroom and not feel isolated.[46]

The policy required admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, a diversity statement, undergraduate GPA, LSAT score, and soft

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40 *Grutter*, 539 U.S. at 316.

41 *Id.* at 316–17.

42 *Id.* at 317 (quoting Appendix at 33–34, *id.* (No. 02-241)).

43 *Id.* at 314 (quoting Appendix, *supra* note 42, at 110).

44 *Id.* at 316 (quoting Appendix, *supra* note 42, at 118, 120).

45 *Id.* (quoting Appendix, *supra* note 42, at 120–21 (alteration in original)).

46 *Id.* at 318 (quoting Appendix to Petition for Certiorari, at 208a–209a, *id.* (No. 02-241)).

variables.[47] The Law School did not seek to admit any particular number or percentage of underrepresented minority students, but at the height of the admissions season, the Law School would keep daily track of the racial and ethnic composition of the class to ensure that "a critical mass of underrepresented minority students would be reached so as to realize the educational benefits of a diverse student body."[48]

2. *Race-Conscious but Individualized Consideration Survived Strict Scrutiny*

Justice O'Connor, delivering the majority opinion, approved of the Law School's asserted compelling interest in securing the educational benefits of "a diverse student body" on the basis that the Law School did not "premise its need for critical mass on 'any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.'"[49]

The next issue was whether the admissions program was narrowly tailored to the compelling interest. Here, the *Grutter* majority adopted Justice Powell's plurality opinion in *Bakke* in two important aspects. First, the *Grutter* Court found that a race-conscious admissions program would be unconstitutional if it used a quota system.[50] Second, the *Grutter* Court found that a race-conscious admissions program would satisfy the narrow tailoring requirement if the University considered race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each applicant.[51]

The *Grutter* Court compared the Law School's practice to that of Harvard College in *Bakke* and decided that the Law School's admissions program was narrowly tailored to the compelling interest.[52] Justice O'Connor contrasted a quota,[53] which

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47 *Id.* at 315.

48 *Id.* at 318 (citing Appendix to Petition for Certiorari, *supra* note 46, at 207a).

49 *Id.* at 333 (quoting Brief for Respondent Bollinger et al. at 30, *id.* (No. 02-241)).

50 *Id.* at 334.

51 *Id.*

52 *Id.* at 335, 343.

53 A "quota" is a program in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups. Quotas impose a fixed number or percentage that must be attained or that cannot be exceeded and "insulate the individual from comparison with all other candidates for the available seats. *Id.* at 335 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265,

she reaffirmed as unconstitutional, with a permissible goal which would satisfy the narrowly tailored requirement. Furthermore, Justice O'Connor clarified that having some "plus" for race or giving greater weight to race than to some other factors would not constitute the functional equivalent of quota.[54] The Law School's admissions program was a permissible goal, because it was a "flexible admissions system" in which race was a "plus," rather than a decisive factor.[55]

After excluding the possibility that the Law School's admissions program would constitute a racial quota, Justice O'Connor moved on to navigate other necessary conditions for satisfying the narrowly tailored requirement, and found that the Law School's admissions program satisfied all of them.[56] First, the Law School's admissions program ensured that each applicant would be holistically evaluated "as an individual" and would not be defined by their race.[57] The admissions program also took a broad range of qualities and experiences that might contribute to student-body diversity into consideration, such as unusual intellectual achievement, employment experience, nonacademic performance, or personal background.[58] Second, Justice O'Connor held that the Law School's admissions program did not unduly harm nonminority students, because the Law School considered all pertinent elements of diversity and could select nonminority applicants who had greater potential to enhance student body diversity over underrepresented

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317 (1978) (opinion of Powell, J.)). A "'permissible goal . . . require[s] only a good-faith effort . . . to come within a range demarcated by the goal itself,' and permits consideration of race as a 'plus' factor in any given case while still ensuring that each candidate 'compete[s] with all other qualified applicants.'" *Id.* (alterations in original) (citation omitted) (first quoting Sheet Metal Workers v. EEOC, 478 U.S. 421, 495 (2003); and then quoting Johnson v. Transp. Agency, Santa Clara Cnty., 480 U.S. 616, 638 (1987)).

54 In rejecting the argument that using race as a "plus" factor would constitute the functional equivalent of quota, Justice O'Connor, citing Justice Powell's plurality opinion in *Bakke*, provided an example to illustrate a race-conscious admissions program that would not transform a *goal* into a *quota*. Harvard College had minimum goals for minority enrollment ("10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States"). *Id.* (quoting *Bakke*, 438 U.S. at 323 (opinion of Powell, J.)). However, it did not have a specific number or percentage of students firmly in mind. Justice O'Connor thus concluded that some attention to numbers, without more, such as Harvard's practice, would not transform the admissions program into a quota. *Id.* at 335–36.

55 *Id.* at 335–36 (citing *Bakke*, 438 U.S. at 323).

56 *Id.* at 336–38, 341–42.

57 *Id.* at 337.

58 *Id.* at 338.

minority applicants.[59] Finally, Justice O'Connor pointed out that race-conscious admissions policies must be limited in time, and the Law School promised that it would find a race-neutral admissions program and terminate the race-conscious admissions policy as soon as practicable.[60]

C. SFFA: Old Test, New Application

In many aspects, the *SFFA* case had nothing new. The facts in *SFFA* were similar to those of *Bakke* and *Grutter*. Students for Fair Admissions, a nonprofit organization, was founded in 2014 to litigate against affirmative action admissions policies at schools.[61] In 2014, SFFA filed separate lawsuits against Harvard College and UNC, alleging that their race-conscious admissions programs violated the Equal Protection Clause of the Fourteenth Amendment.[62] Like the admissions program of Harvard in *Bakke* and that of Michigan Law School in *Grutter*, the admissions programs at issue in *SFFA* were race-conscious but individualized evaluations of each applicant.[63] Specifically, in the Harvard College admissions program, every successful application would go through four stages: initial reading, regional subcommittee recommendation, full committee vote, and the "lop."[64] Race was a "plus" but never the only factor in each one of the stages.[65] Under the UNC admissions program, each successful application would go through two stages: the

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59 *Id.* at 341.

60 *Id.* at 342–43.

61 Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard Coll., 600 U.S. 181, 197 (2023).

62 *Id.* at 197–98.

63 *See id.* at 194–96.

64 The four-step admissions process worked as follows. First, a "first reader" would read every application and "assign[] scores in six categories: academic, extracurricular, athletic, school support, personal, and overall." *Id.* at 2154 (citing Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard Coll., 980 F.3d 157, 166–169 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023)). Then, regional subcommittees would meet and evaluate all applicants from a particular geographical area and would make recommendations to the full committee based on the scores assigned by the initial reader. *Id.* After that, the 40-member full committee would vote on the applicants recommended by the regional subcommittees. *Id.* at 2155. "Only when an applicant secures a majority of the full committee's votes is he or she tentatively accepted for admission." *Id.* (citing *SFFA*, 980 F.3d at 170). During the final "lop" stage, Harvard would further winnow the tentatively accepted applicants. *Id.* Once the "lop" process was over, Harvard's admitted class would be set. *Id.*

65 *See id.*

initial reading and the school-group review.[66] Like Harvard, race was a "plus" rather than a decisive factor in both the initial reading and the school-group review.[67]

The *SFFA* Court subjected the admissions programs at Harvard and UNC to strict scrutiny, and found that they failed.[68] Chief Justice Roberts, delivering the opinion of the Court, stated that neither did the two schools have a compelling interest nor were the admissions programs meaningfully connected to the goals they pursued.[69] Notably, some of the interests that the *SFFA* Court struck down as uncompelling included "preparing graduates to 'adapt to an increasingly pluralistic society,'" "better educating its students through diversity," and "producing new knowledge stemming from diverse outlooks," as stated by Harvard; and "promoting the robust exchange of ideas," "broadening and refining understanding," and "enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes," as stated by UNC.[70] At first glance, those were exactly the kinds of interests that Justice Powell in *Bakke* and the *Grutter* Court would have viewed as compelling.[71] The *SFFA* Court, however, reached a different conclusion, because "it is unclear how courts are supposed to measure any of these goals."[72] Specifically, the *SFFA* Court compared those goals to interests that the Court had recognized as compelling, such as preventing racial violence in prison, and stated that while the latter were measurable, the former were elusive in the sense that the Court would never be able to tell what counted as "better educati[on] . . . through

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66 The two-step admissions process looks like a simplified version of Harvard's admissions process. First, a first reader would read every application and formulate an opinion about whether the applicant should be offered admission. *Id.* at 196. In most cases, the admissions decisions made by the first readers were tentatively final. *Id.* Then, a review committee composed of experienced staff members would review every initial decision and collectively decide whether to accept or reject the initial decision. *Id.* at 196–97.

67 *See id.*

68 *Id.* at 213.

69 *Id.* at 214–16.

70 *Id.* at 214.

71 Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (opinion of Powell, J.); Grutter v. Bollinger, 539 U.S. 306, 333 (2003).

72 *SFFA*, 600 U.S. at 214.

diversity" or "enhance[ed] . . . cross-racial understanding."[73] In other words, such goals were standardless.[74]

The admissions programs would fail strict scrutiny immediately after failing the compelling interest requirement, but the *SFFA* Court went on to hold that the admissions programs also failed the narrowly tailored requirement, because they used imprecise racial categories to measure the racial composition of their classes, which would be unlikely to lead to a broadly diverse class.[75] Done with the strict scrutiny analysis, the *SFFA* Court further held that Harvard College and UNC used race as a "negative" factor against disfavored races.[76] The Court also found that the Harvard and UNC programs constituted stereotyping and engaged in the "offensive and demeaning assumption that [students] of a particular race, because of their race, think alike."[77] Finally, the *SFFA* Court held that Harvard and UNC admissions programs did not have a "logical end point," therefore violating the time limit in *Grutter*.[78]

D. Conceptualizing Treating Someone as an Individual in Philosophy Texts

1. *Introduction*

The last three sections survey the three landmark affirmative-action cases at the Supreme Court. There were two common threads in the Court's approach to them. First, in each case, the Court would only permit a race-conscious admissions program if it fell within the narrowly carved exception to the Fourteenth Amendment under strict scrutiny.[79] Second, in each case, the Court would only permit a race-conscious admissions program if it treated each applicant "as an individual."[80]

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73 *Id.* (first quoting Students for Fair Admissions, Inc. v. Pres. and Fellows of Harvard Coll., 980 F.3d 157, 166–169 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023); and then quoting Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp.3d 580, 656 (M.D.N.C. 2021), *rev'd*, *sub nom.* 143 S. Ct. 2141 (2023)).

74 *Id.*

75 *Id.* at 215–17.

76 *Id.* at 218.

77 *Id.* at 220–21 (alteration in original) (quoting Miler v. Johnson, 515 U.S. 900, 911–12 (1995)).

78 *Id.* at 221 (quoting Grutter v. Bollinger, 539 U.S. 306, 342 (2003)).

79 *See* Univ. of Cal. v. Bakke, 438 U.S. 265, 299, 320 (1978) (opinion of Powell, J.); *Grutter*, 539 U.S. at 333 (2003); *SFFA*, 600 U.S. at 213.

80 *Bakke*, 438 U.S. at 318; *Grutter*, 539 U.S. at 337; *SFFA*, 600 U.S. at 231.

Unlike strict scrutiny, treating each applicant as an individual was not a standalone test; it was an element impliedly incorporated in strict scrutiny. Each Court conceptualized "individual" in a nuanced way. In *Bakke*, Justice Powell contrasted "treat[ing] each applicant as an individual" with the racial quotas imposed by Davis Medical School, stating that, under an individualized process, a student would be rejected not simply because he was the wrong color, but because his combined qualifications did not outweigh those of the other applicants who might have a "plus" due to the color of their skin.[81]

In *Grutter*, the Court approved of Justice Powell's approach to individualized consideration in *Bakke*, stating that making an "applicant's race or ethnicity the defining feature" of their application would be contradictory to the idea of evaluating each applicant as an individual.[82] In addition, the *Grutter* Court also viewed awarding "mechanical, predetermined" bonus points based on race or ethnicity as failing to treat each applicant as an individual.[83] Using race as a "plus" factor, however, would be compatible with the requirement to treat each applicant as an individual.[84]

The *SFFA* Court's understanding of treating each applicant as an individual differed drastically from that of the *Bakke* and the *Grutter* Courts. Chief Justice Roberts, in delivering the Court's opinion, explicitly stated that "the student must be treated based on his or her experiences as an individual—not on the basis of race."[85] To illustrate this point, Chief Justice Roberts pointed out that a "plus" to a student who overcame racial discrimination must be tied to "*that student's* courage and determination."[86] In other words, the *SFFA* Court decided that using race *per se* as a "plus" factor to individualized, holistic consideration would be contradictory to treating each applicant as an individual.

The examples above demonstrate that *Bakke*, *Grutter*, and *SFFA* Courts approached the individuality requirement differently, which clearly arose out of their different understanding of the word "individual." In the next section, I will explore the

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81 *Bakke*, 438 U.S. at 318.

82 *Grutter*, 539 U.S. at 337.

83 *Id.* (quoting Gratz v. Bollinger, 539 U.S 220, 271–72 (2003)).

84 *See id.* at 336–37.

85 *SFFA*, 600 U.S. at 231.

86 *Id.*

concepts of "individual" and "treating someone as an individual" in philosophical texts, to have a theoretical background against which to subject the Justices' conceptualizations.

2. *What Counts as Treating People as Individuals?*

Philosophers disagree with each other as to what counts as treating someone as an individual. Nor do they have consensus as to the relationship between treating a person as an individual and stereotype or discrimination. In this section, I will first introduce some influential views on these two issues. Then, I will argue that treating people as individuals is better understood as a continuous spectrum rather than an on-and-off switch. In other words, whether X treats Y as an individual is a linear rather than binary question.

Before discussion, I need to provide definitions for "stereotype" and "discrimination," because they are key concepts for my discussion of individuality. For the purpose of this article, I use Lawrence Blum's definition of stereotype. He defines stereotypes as "false or misleading generalizations about groups held in a manner that renders them largely, though not entirely, immune to counterevidence."[87] Stereotypers would perceive the stereotyped groups through stereotypes, seeing nonexistent stereotypic characteristics, failing to see actual characteristics that are not compatible with the stereotype, and "generally homogenizing the group."[88] A stereotype in this sense does not necessarily connote treating the stereotyped groups worse than other groups that the stereotyper does not perceive through a stereotype. For example, if an admissions officer assumes that all applicants from Oregon are ambitious and hardworking, therefore giving them bonus points when making admissions decisions, this admissions officer stereotypes students from Oregon but does not treat them worse than applicants from other states. In fact, this admissions officer gives favorable treatment to students from Oregon because of the stereotype she has of them.

In defining discrimination, Deborah Hellman points out that the word can be used in a descriptive way.[89] Descriptively, to discriminate means to "draw distinctions among

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87 Lawrence Blum, *Stereotypes and Stereotyping: A Moral Analysis*, 33 PHIL. PAPERS 251, 251 (2004).

88 *Id.*

89 DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 13 (2008).

people on the basis of the presence or absence of some trait."[90] Kasper Lippert-Rasmussen also states that discrimination is "an essentially comparative notion: it requires that I treat different groups of people differently," which can be interpreted as an argument that discrimination necessitates drawing distinctions among people and treating them differently.[91]

Hellman then coins the phrase "wrongful and discrimination," which is defined as drawing distinctions among people on the basis of the presence or absence of some trait that the stereotyper should not have considered in that context.[92] Though this concept is only peripheral to Hellman's main argument, for the purpose of this paper, I will use it to define discrimination, because it captures a broad range of cases that people would feel are somehow wrongful but do not fall within Hellman's narrow definition of "wrongful discrimination."[93]

Now, I will introduce some influential views on what counts as treating someone as an individual, and the relationship between treating someone as an individual and a stereotype or discrimination.

According to Blum, treating someone as an individual means being alive to the range of characteristics constituting each person as an individual.[94] In other words, treating someone as an individual is contradictory to stereotyping.[95] For example, if I have a stereotype of Black people "as personally spontaneous and warm," this stereotype will prevent a recognition of individual Black people "in their individuality."[96] Blum also points out that sometimes the stereotyper recognizes the individuality of some members of the group she

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90 *Id.*

91 Kasper Lippert-Rasmussen, *"We are all Different": Statistical Discrimination and the Right to be Treated as an Individual*, 15 J. ETHICS 47, 56 (2011).

92 *See* HELLMAN, *supra* note 89, at 15–17.

93 Wrongful discrimination, as defined by Hellman, means drawing distinctions on the basis of attributes that define a group that has been mistreated in the past or is currently of lower status, therefore demeaning them. I choose not to use this definition for my Note, because it fails to capture many circumstances that we would generally describe as discrimination. For example, if a college counselor who happens to be very athletic counsels student athletes without reservation, but only provides suboptimal service to unathletic but otherwise similarly situated students, people would generally describe this college counselor's conduct as discriminating against unathletic students, even though unathletic students were not historically mistreated and are not currently of lower status. *See id.* at 21–22, 29.

94 *See* Blum, *supra* note 87, at 271.

95 *See id.*

96 *Id.* at 272.

stereotypes.[97] Then, those members will be seen as individuals without shedding the general stereotype of the group.[98] As to the moral significance of treating someone as an individual, Blum argues that treating or seeing others as individuals is not always required or appropriate, but failing to treat someone as an individual "is a moral fault and constitutes a bad of all stereotyping."[99]

Blum's account does not capture one important nuance, namely, what if I stereotype a person in some aspects but see her individuality in other aspects? In that case, overall, do I stereotype this person, or do I treat her as an individual? For example, if I have a Black, female professor, and I assume she is personally spontaneous and warm simply because she is Black, but I also appreciate her assertiveness and ambition, which are not qualities generally associated with a stereotypical woman, what would Blum say about my overall appraisal of this professor?

Lippert-Rasmussen has a drastically different point of view on the relationship between stereotyping and treating someone as an individual. According to Lippert-Rasmussen, treating someone as an individual is compatible with stereotyping or even statistical discrimination.[100] He defines treating someone as an individual to mean taking into account all relevant information when treating people.[101] He argues that even equipped with all relevant information about an individual, I might still use and assess the information in a biased manner.[102] For example, a police officer could consider all the evidence in a case where the suspect is white, and then let the suspect off the hook simply because (1) he is white; and (2) the officer has statistical evidence that whites have a lower crime rate than all other races. In this example, the police officer engages in what Lippert-Rasmussen coins as "statistical discrimination," meaning treating members of one group more favorably than members of another group when and only when I have statistical evidence suggesting that one group is different from the other group; but the police officer still treats the suspect as an

97 *Id.*

98 *See id.*

99 *Id.* at 273.

100 *See* Lippert-Rasmussen, *supra* note 91, at 49.

101 *See id.* at 55.

102 *Id.*

individual, because he has examined all relevant information available to him.[103]

Lippert-Rasmussen also argues that failing to treat someone as an individual comes in degrees.[104] He states that ignoring only one relevant piece of information is hugely different from only considering the individual's race.[105] In other words, Lippert-Rasmussen seems to believe that my respect for your individuality decreases as I take less relevant information about you into consideration, or that I am more accomplished at not failing to treat you as an individual as I take more relevant information about you into consideration.[106]

However, Lippert-Rasmussen's definition of treating someone as an individual is misaligned with our understanding of the concept in reality. While Lippert-Rasmussen requires perfect information ("all relevant information") for treating someone as an individual, it is plausible to not take all relevant information into account but still appreciate a person's individuality. Suppose an overworked, sleep-deprived attorney interviews a job candidate for her law firm. The attorney tries her best to engage in meaningful conversation with the job candidate, accurately grasps most of the information provided by the job candidate, and submits an objective evaluation to the partners. Nevertheless, she fails to grasp one case this job candidate worked on in his last summer internship. No one would claim the attorney fails to treat the job candidate as an individual despite that she does not take all the relevant information about the job candidate into account.

Benjamin Eidelson's account of treating someone as an individual is different from both Lippert-Rasmussen's and Blum's. Eidelson's standard is not only about the range of information one should take into consideration, but also about the way one should organize and evaluate such information; or, in his own words, treating someone as an individual is a "norm that directs us to structure our judgments and actions in ways that appropriately recognize a morally salient fact about the people involved."[107] At the core of Eidelson's definition of treating someone as an individual are the character and agency

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103 *See id.* at 54–55.

104 *Id.* at 50.

105 *Id.*

106 *See id.*

107 Benjamin Eidelson, *Treating People as Individuals*, *in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 203, 204 (Deborah Hellman & Sophia Moreau eds., 2013).

conditions.[108] He believes that X treats Y as an individual if and only if X's judgment of Y satisfies both the character condition and the agency condition:

> (*Character Condition*) X gives reasonable weight to evidence of the ways Y has exercised her autonomy in giving shape to her life, where this evidence is reasonably available and relevant to the determination at hand; and
>
> (*Agency Condition*) if X's judgments concern Y's choices, these judgments are not made in a way that disparages Y's capacity to make those choices as an autonomous agent.[109]

I would like to borrow an example from Eidelson to illustrate the two conditions required for treating people as individuals:

> Sally, who is of East Asian descent, auditions for her school orchestra. Sally plays the violin, but not seriously, and she is not particularly talented. Kevin, the orchestra director, thinks Sally performed poorly at her audition. But Kevin figures that Sally is probably a dedicated musician who just had a bad day, and selects her for the orchestra anyway. Kevin would not have made this assumption or selected Sally if not for her ethnicity and her sex.[110]

In this example, Kevin does not treat Sally as an individual because he fails both the character condition and the agency condition. Kevin fails the character condition because after listening to Sally's performance, Kevin should have plenty of evidence that Sally chose to become the suboptimal violinist that she is today. In other words, in the context of this audition, Sally has the particular character of being neither serious about nor talented at violin. Kevin, by refusing to consider the particular character Sally has demonstrated through the performance, and by resorting to the stereotypic character of East Asians as outstanding violinists, fails to appreciate how Sally has self-authored her own life. Kevin also fails the agency condition, because, by assuming that Sally "just had a bad day" and that she will be a dedicated musician once she joins the orchestra, Kevin disparages Sally's capacity as an autonomous agent to choose not to be a dedicated musician in the future. In other words, Kevin makes a prediction about Sally's future choices on the basis of her race ("though she did poorly today,

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108 *See id.* at 216.

109 *Id.*

110 *Id.* at 205.

she will do well in the future because she is East Asian") rather than her capacity as an autonomous agent.

Eidelson's account of treating people as individuals is not simply an "injunction against the use of group generalizations," but a certain way of viewing information and forming judgments.[111] Like Blum but unlike Lippert-Rasmussen, Eidelson believes treating people as individuals is contradictory to stereotyping.[112] However, like Blum, Eidelson does not fully explain whether treating people as individuals completely excludes group generalizations or stereotypes.[113]

3. *Degrees of Treating People as Individuals*

I argue that, as a philosophical question, treating people as individuals should not be approached as if a test that could lead to a yes or no answer exists, but should be approached in the sense of a spectrum, where we have "absolutely failing to treat someone as an individual" and "absolutely treating someone as an individual" at the two poles but also a variety of options in the middle.

I propose this solution mainly to resolve the philosophers' disagreements on two issues: the definition of treating people as individuals and the relationship between treating people as individuals and treating them as stereotypes or with discrimination. Readers of this Note might disagree vehemently as to the cut-off point where one's action no longer constitutes treating people as individuals, but they are much more likely to agree with each other if the issue is presented in degrees, where actions are ranked in terms of the extent to which they treat people as individuals.

Here, I will propose a "treating people as individuals" scale, where actions will be ranked from "absolutely failing to treat someone as an individual" to "absolutely treating someone as an individual." In the next section, I will use this scale to

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111 *Id.* at 204.

112 *See id.*

113 Eidelson never says we cannot smuggle any group generalizations or stereotypes into our consciousness when we form judgments about others based on the character and agency conditions. However, nor does he explicitly allow group generalizations or stereotypes to play a role when we form judgments about others. It is clear that group generalizations or stereotypes absolutely cannot be decisive when we form judgments about others, but it is not clear what is Eidelson's stance as to whether group generalizations or stereotypes can be considered along with a million other pieces of reasonably available information. *See id.*

analyze the Supreme Court's decisions in *Bakke*, *Grutter*, and *SFFA*.

(Scenario 1) At the bottom of the scale is absolute failure to treat someone as an individual, which I define as resorting to nothing but group generalization or stereotypes when X forms judgments about Y on a certain issue. I would like to borrow Sally's story from Eidelson to illustrate the point.[114] Suppose Kevin does not know Sally before this audition, but the moment Sally walks into the room, Keven immediately decides to take Sally as an orchestra member without even asking her to play anything. He makes this decision solely on the basis of Sally's skin color—she is of East Asian descent. In this case, Kevin resorts to nothing more than Sally's skin color and the group-image of East Asians being outstanding violinists. Therefore, Kevin sees nothing about Sally's individuality; all he sees is an East Asian who belongs to a racial group that Kevin believes to be good at violin.

(Scenario 2) Moving up the scale, X uses individualized consideration and stereotypes when X forms judgments about Y on a certain issue, where stereotyping decisively leads to discrimination. Suppose the moment Sally walks into the room, Kevin immediately notices that Sally is East Asian and recalls the stereotype that East Asians are outstanding violinists. He asks Sally to play a piece, and Sally gives a mediocre performance. Kevin listens closely and genuinely thinks Sally's performance is mediocre. Nevertheless, he decides to take Sally as an orchestra member because he believes Sally is just having a bad day. In this case, Kevin sees Sally through a stereotype, but he also pays attention to the individuality of Sally's performance by listening closely and judging the particular quality of her performance. However, the stereotype is still decisive when Kevin makes the decision to take Sally on the basis of her skin color. Readers will generally agree, however, that in this scenario, Kevin does a better job treating Sally as an individual, because at least he manages to see Sally as Sally, rather than a random East Asian.

(Scenario 3) Moving up the scale by another degree, X uses individualized consideration and stereotypes when X forms judgments about Y on a certain issue, but the stereotyping is not decisive. In fact, the weight of stereotypes in X's judgments of Y is not clear. Suppose the moment Sally walks into the room, Kevin immediately notices that Sally is East Asian and

114 *See id.* at 205.

recalls the stereotype that East Asians are outstanding violinists. He asks Sally to play a piece, and Sally gives a mediocre performance. Kevin listens closely and notes down every mistake Sally makes. Kevin does not rid himself of the stereotype that East Asians are outstanding violinists when he starts finalizing the orchestra recruits, but he thinks that Sally's performance is so mediocre compared to other candidates that it would be irresponsible to take her. In the end, Kevin does not pick Sally to play in the orchestra.

Though in both Scenario 3 and Scenario 2, Kevin resorts to both individualized consideration and stereotype, the two scenarios are different, because stereotype is a decisive factor in Scenario 2, but it is no longer a decisive factor in Scenario 3. In fact, the decisive factor in Scenario 3 is the individualized consideration. Therefore, Kevin clearly does a better job treating Sally as an individual in Scenario 3 than in Scenario 2. In Scenario 3, stereotypes might to some extent affect Kevin's judgment of Sally, but it is not clear what exactly is the weight of stereotype in Kevin's decision.

(Scenario 4) At the top of the scale is absolutely treating someone as an individual, defined as resorting only to individualized consideration when X forms judgments about Y on a certain issue. In other words, this requires X to completely exclude the use of stereotypes in forming their judgment about Y. Suppose Kevin is visually impaired and has no idea of Sally's skin color when she walks into the room. He asks Sally to play a piece, and Sally gives a mediocre performance. Kevin listens closely and notes down every mistake Sally makes. After the performance, Kevin asks Sally about her learning experience. Sally tells Kevin that she was raised by immigrant parents from East Asia, who have a strict parenting style and demand her to practice violin every day, although she has zero passion for violin. Kevin does not have any stereotypes about East Asians. He concludes that Sally has zero passion for violin, and that she is not a particularly good violinist anyway and chooses not to pick her.

Scenario 4 is an almost impeccable example of treating people as individuals. In this scenario, Kevin takes all relevant information into consideration, never uses group generalization or stereotypes in the judgment, and forms a clear idea as to the particular character and agency of Sally. This is a scenario that Blum, Lippert-Rasmussen, Eidelson, and readers would agree to be the gold standard of absolutely treating people as individuals.

One important note is that, on this scale, only Scenario 1 constitutes an absolute failure to treat people as individuals.

Scenarios 2 and 3 treat people as individuals at least to some extent. However, "treating people as individuals to some extent" is not the same as "treating people as individuals." If a reader has a specific cut-off as to what constitutes treating people as individuals, she might designate Scenario 2 or even Scenario 3 as failures to treat people as individuals. This is exactly what happened in the *SFFA* case.[115]

II
ANALYSIS

In this Section, I will apply the "treating people as individuals" scale to the Supreme Court decisions in *Bakke*, *Grutter*, and *SFFA*, and argue that race-conscious admissions programs survived *Bakke* and *Grutter* but were killed in *SFFA* because the *SFFA* Court had an elevated standard for "treating applicants as individuals." Therefore, the same programs that were held to satisfy the "treating applicants as individuals" requirement in *Bakke* and *Grutter* would no longer meet the standard in *SFFA*.

A. The Treating Each Applicant as an Individual Requirement in Strict Scrutiny

As I briefly discussed in Section I.D.1, unlike strict scrutiny, treating each applicant as an individual was not a standalone requirement in *Bakke*, *Grutter*, or *SFFA*. Instead, this requirement was impliedly incorporated into strict scrutiny.[116] However, I have not touched upon how this requirement exactly figures in strict scrutiny. In this section, I argue that "treating each applicant as an individual" is a necessary condition for satisfying the compelling interest requirement and the narrow tailoring requirement under strict scrutiny. In other words, a race-conscious admissions program cannot pass strict scrutiny unless it treats each applicant as an individual.

Treating each applicant as an individual is a necessary condition for the compelling interest requirement under strict scrutiny. The only compelling interest the Court ever accepted or seriously considered in *Bakke*, *Grutter*, and *SFFA* was the interest in a diverse student body.[117] In each case, the Court

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115 Students for Fair Admissions, Inc. v. Pres. & Fellows of Harvard Coll., 600 U.S. 181, 231 (2023).

116 *See generally supra* notes 79–86.

117 Univ. of Cal. v. Bakke, 438 U.S. 265, 311-12 (1978) (opinion of Powell, J.); Grutter v. Bollinger, 539 U.S. 306, 333 (2003); *SFFA*, 600 U.S. at 214–15.

held that the interest in diversity would be compelling only if the school treated each applicant as an individual.[118] In *Bakke*, Justice Powell held that "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[119] This indicates that, under *Bakke*, schools were required to consider each applicant's qualifications and characteristics. The *Grutter* Court cited Justice Powell's plurality opinion in *Bakke*, holding that an admissions program must "consider all pertinent elements of diversity in light of the particular qualifications of each applicant."[120] Though the *SFFA* Court held that diversity was not a compelling interest, it was still the only asserted compelling interest that the Court seriously considered.[121] By citing Justice Powell's requirement to "consider all pertinent elements of diversity in light of the particular qualifications of each applicant," the *SFFA* Court agreed with the *Bakke* and *Grutter* Courts that diversity relied on individualized consideration of each applicant's particular qualifications.[122]

Treating each applicant as an individual is also a necessary condition for the narrowly tailored requirement under strict scrutiny. In *Bakke*, Justice Powell held that Davis Medical School's special program was not narrowly tailored to, but would actually hinder the attainment of genuine diversity, because the special program focused solely on ethnic diversity while ignoring other important elements.[123] Here, Justice Powell was essentially saying that Davis Medical School failed to consider important elements particular to each applicant. In *Grutter*, the Court also held the Law School's admissions program to be a narrowly tailored plan, because it paid "truly individualized consideration" to each applicant.[124] In *SFFA*, the Court decided that the admissions programs did not have a meaningful connection with the asserted goal, because assigning students to imprecise and opaque racial categories would not help achieve broadly diverse enrollment.[125] The *SFFA* Court

118 *Bakke*, 438 U.S. at 318; *Grutter*, 539 U.S. at 334; *SFFA*, 600 U.S. at 231.

119 *Bakke*, 438 U.S. at 315.

120 *Grutter*, 539 U.S. at 334 (quoting *id.* at 317*)*

121 *See SFFA*, 600 U.S. at 214–15.

122 *See id.* at 210 (quoting *Bakke*, 438 U.S. at 317).

123 *Bakke*, 438 U.S. at 315.

124 *Grutter*, 539 U.S. at 334.

125 *SFFA*, 600 U.S. at 215–16.

was essentially criticizing the Harvard and UNC admissions programs for failing to give individualized consideration to each applicant when the Court wrote that the schools were "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."[126]

I thus argue that treating each applicant as an individual was a necessary condition for passing strict scrutiny in *Bakke*, *Grutter*, and *SFFA*. As passing strict scrutiny is itself a necessary condition for meeting the narrow exception carved out of the Fourteenth Amendment, treating each applicant as an individual would therefore become a necessary condition for proving the admissions program's constitutionality.

B. The *SFFA* Court Overruled Race-Conscious Admissions Because the Court Had an Elevated Standard for Treating Each Applicant as An Individual

Because it is a necessary condition for proving admissions programs' constitutionality, failure to meet the "treating each applicant as an individual" requirement would kill an admissions program. In this section, I argue that what distinguished *SFFA* from *Bakke* and *Grutter* was the *SFFA* Court's elevated requirement for treating each applicant as an individual. In other words, admissions programs that could have survived *Bakke* and *Grutter* would not be able to pass the hurdles in *SFFA*.

In Section I.D.3, I proposed a "treating people as individuals" scale, in which I ranked four scenarios from low to high in terms of the extent to which X treats Y as an individual.[127]

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126 *Id.* (emphasis omitted).

127 The four scenarios are (from low to high):
(Scenario 1) At the bottom of the scale is absolute failure to treat someone as an individual, which I define as resorting to nothing but group generalization or stereotypes when X forms judgments about Y on a certain issue.
(Scenario 2) Moving up the scale, X uses individualized consideration and stereotypes when X forms judgments about Y on a certain issue, where stereotype decisively leads to discrimination (favorable or unfavorable treatment based on the stereotype).
(Scenario 3) Moving up the scale by another degree, X uses individualized consideration and stereotypes when X forms judgments about Y on a certain issue, but the stereotypes are not decisive. Rather, the weight of stereotypes in X's judgments of Y is not clear.
(Scenario 4) At the top of the scale is absolutely treating someone as an individual, defined as resorting only to individualized consideration when X forms judgments about Y on a certain issue.

Subjecting the *Bakke*, *Grutter*, and *SFFA* decisions to the scale, I argue that the *SFFA* Court had the highest requirement for "treating each applicant as an individual." The Court believed only Scenario 4 would count as treating each applicant as an individual, and they held that race-conscious admissions programs were at best Scenario 2.[128] On the contrary, the *Bakke* and *Grutter* Courts believed that Scenario 3 would be good enough for "treating each applicant as an individual," and the race-conscious admissions programs should be classified as Scenario 3. In other words, the *SFFA* Court disagreed with the *Bakke* and *Grutter* Courts in two aspects: one was the standard that the Supreme Court should use to examine the race-conscious admissions programs, and the other was the nature of the race-conscious admissions programs themselves.

The *SFFA* Court treated using race *per se* as "plus" as a racial stereotype, and the Court clearly thought a racial stereotype was not compatible with treating each applicant as an individual. In other words, only individualized consideration should be permissible.[129] The *SFFA* Court's standard for treating each applicant as an individual was closely aligned with Scenario 4 ("resorting only to individualized consideration when X forms judgments about Y on a certain issue").[130]

Chief Justice Roberts, in delivering the opinion on the *SFFA* case, explicitly stated that the Harvard and UNC admissions programs "tolerate . . . stereotyping."[131] The Court held that the admissions programs tolerated stereotyping because Harvard and UNC believed there was a benefit "in race for race's

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128 It is very important to note that, for the purpose of this Section, I would only discuss racial stereotypes rather than any other stereotypes in school admissions decisions. It is true that schools currently resort to many stereotypes in the admissions process. For example, "legacy students will be more eager in building our school's tradition" and "athletes can contribute to the school spirit in a way that non-athletes will never be able to do" are clearly stereotypes. Even the preference for students who scored high on standardized tests could be interpreted as entrenched in the stereotype that students who do well in standardized tests are smarter and better learners. However, this Note will not be able to deal with every stereotype in the school admissions process. As the *Bakke*, *Grutter*, and *SFFA* Courts only discussed racial stereotypes in contrast to "individualized consideration," this Note will only focus on racial stereotypes. That said, this Note's argument is definitely not that only racial stereotypes must be eliminated while the many other stereotypes in higher education admissions programs could be kept intact.

129 *See SFFA*, 600 U.S. at 219–20, 230–31.

130 *See supra* note 127.

131 *SFFA*, 600 U.S. at 220.

sake."[132] For example, Harvard claimed that "a black student can usually bring something that a white person cannot offer." UNC also claimed that race in itself "says [something] about who you are."[133]

Chief Justice Roberts' was correct when he interpreted Harvard and UNC's claims as stereotyping underrepresented minority students.[134] It is true that Harvard and UNC's claims sounded like positive, rather than negative stereotypes because they assumed that underrepresented minority students could bring something different to the table, which was supposed to be a compliment. However, the two claims still stereotyped underrepresented minority students, because they were misleading generalizations about members of a whole group, assuming that the underrepresented minority students would be more likely to have certain views that other students would not have. In fact, the Court held that it would be offensive and demeaning to assume that students of a particular race, "because of their race, think alike."[135]

Some might argue that Harvard and UNC's claims should not be interpreted to mean applicants of the same race think alike; it should be construed to mean that underrepresented minority students would *tend to have* views different from that of students of other racial groups. However, this interpretation still constitutes a stereotype, because it would assume that members of group A would have different opinions from group B simply because they were members of group A—that would be no different than saying Sally would like violin simply because she is East Asian.

Some might also argue that underrepresented minority students have a more marginalized life experience, which is a resource that only they could tap into; therefore, the generalization would not be false or misleading but would be factual. This point, however, still constitutes a stereotype, because it first assumes that underrepresented minority students are more likely to have a certain life experience, while this assumption will mask their actual, individual life experiences. The point also assumes that underrepresented minority students

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132 *See id.*

133 *See id.*

134 Blum, *supra* note 87, at 251 ("Stereotypes are false or misleading generalizations about groups held in a manner that renders them largely, though not entirely, immune to counterevidence").

135 *SFFA*, 600 U.S. at 220–21 (quoting Miller v. Johnson, 515 U.S. 900, 911–12 (1995)).

are willing to narrate their marginalized life, if they actually have one, in a college seminar. Furthermore, Justice Thomas pointed out in his concurrences that marginalization could have many faces: an underrepresented minority student might come from a rich family, which gave him privileges that other students did not have.[136]

Towards the end of the opinion, Chief Justice Roberts explicitly stated 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."[137] He further provided two examples to illustrate how universities might consider an applicant's race under the *SFFA* standard.[138] An applicant might receive a benefit for overcoming racial discrimination, but such benefit must be tied to *that applicant's* courage and determination. An applicant might also receive a benefit for assuming a leadership role or attaining a particular goal under the motivation of her heritage or culture, but such benefits must be tied to *that applicant's* unique ability.[139] Chief Justice Roberts concluded this paragraph by reaffirming the majority's stance: students must be treated based on his or her experiences as an individual—not on the basis of race.[140]

Chief Justice Roberts made two points here. First, universities should give individualized consideration to each applicant; racial stereotypes were strictly prohibited. Second, universities were still allowed to consider race after *SFFA*, but only in an individualized manner, such as how an underrepresented minority student navigated his racial background in a particular way. Therefore, the *SFFA* Court clearly required the universities to give Scenario 4 treatment to applicants. If the universities failed to do so, the *SFFA* Court would hold the admissions program to be unconstitutional.

There was one final piece of evidence that the *SFFA* Court excluded racial stereotypes and demanded Scenario 4 action from universities. When rejecting student body diversity as a compelling interest, the *SFFA* Court gave only one justification—that this goal was not measurable.[141] The Court explicitly

136 *See id.* at 282 (Thomas, J. concurring).

137 *Id.* at 230 (majority opinion).

138 *See id.* at 231.

139 *See id.*

140 *See id.*

141 *See id.* at 214–15.

stated that the question whether a particular mix of minority students would produce engaged and productive citizens, sufficiently enhance appreciation, respect, and empathy, or effectively train future leaders was "standardless."[142] This shows that the *SFFA* Court believed that diverse racial composition could in no way measure student body diversity. Had the Court believed that race *per se* were somehow indicative of an applicant's contribution to student body diversity, the Court would have been able to use racial composition to measure Harvard and UNC's goals.

The *Bakke* and *Grutter* Courts, on the other hand, would let the admissions programs pass strict scrutiny as long as they satisfied Scenario 3 requirements.[143] Under Scenario 3, universities would be allowed to use individualized consideration and stereotypes, but the stereotype could not be decisive, and the weight of the stereotype is not clear.[144] In *Bakke*, Justice Powell used the Harvard admissions process as a model policy.[145] He stated that the Harvard admissions process treated each applicant as an individual when the school compared the combined qualifications of one applicant to another and race was a "plus" factor in some applicants' combined qualifications.[146] In *Grutter*, the Court was satisfied with the Law School's admissions program, because the program engaged in highly individualized, holistic review of each applicant's file.[147] Race was a "plus" factor, and the Law School also considered all pertinent elements of diversity in light of the particular qualifications of each applicant.[148]

It must be clarified why the *Bakke* and *Grutter* Courts' approval of using race *per se* as a plus factor should be classified as a stereotype. After all, both Courts were explicitly against racial stereotypes.[149] The answer is, the Courts used the word stereotype in a different way from stereotype in the "treating people as individuals" scale. Stereotype, as used by the *Bakke* and *Grutter* Courts, referred to negative images of certain racial groups. For example: "certain groups are unable to achieve

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142 *Id.* at 215.

143 *See* Univ. of Cal. v. Bakke, 438 U.S. 265, 318 (1978) (opinion of Powell, J.); *see* Grutter v. Bollinger, 539 U.S. 306, 336–37 (2003).

144 *See supra* note 127.

145 *Bakke*, 438 U.S. at 316.

146 *Id.* at 318.

147 *See Grutter*, 539 U.S. at 337.

148 *Id.*

149 *See id.* at 333; *Bakke*, 438 U.S. at 298.

success without special protection based on a factor having no relationship to individual worth."[150] In the "treating people as individuals" scale, however, stereotype simply means false or misleading group generalizations, and the group generalization itself can be negative, positive, or neutral.[151] Therefore, by arguing that the *Bakke* and *Grutter* Courts demanded scenario 3 action from universities, I only mean that the Supreme Court allowed the use of group generalizations rather than resorting to negative group images.

Using race *per se* as a "plus" factor constitutes racial stereotyping because such a "plus" is not given to all races. For example, in *Grutter*, only students from groups which have been historically discriminated against would receive a "plus" on the basis of their race.[152] That essentially means that the Court believed that giving a "plus" to racial groups that had been historically discriminated against without giving the same "plus" to racial groups that had not been historically discriminated against would somehow promote student body diversity, which was the compelling interest recognized by the Court.[153] The Court would not have reached this conclusion unless it believed that some racial groups were more likely than others to contribute to student body diversity.

This would constitute a false or misleading group generalization, because the Court claimed that student body diversity was much broader than diversity in racial composition.[154] In other words, the Law School assigned a plus to certain applicants on only one trait (race) so that a goal (student body diversity) that encompassed many, many traits, including race, could be achieved. It would be impossible to make sense of this logic unless one conceded that, here, the Law School was making a baseless assumption that racial groups that received the plus would be better able to contribute to the student body diversity in traits other than race. Additionally, had the schools in *Bakke* and *Grutter* relied entirely on individualized consideration like Kevin does in Scenario 4, they would not have given a "plus" to certain racial groups; they would have assigned specific applicants a "plus" for race when such applicants dealt with their racial identity in a unique way that

150 *Bakke*, 438 U.S. at 298.

151 *See* Blum, *supra* note 87, at 251.

152 *Grutter*, 539 U.S. at 316.

153 *See id.*

154 *Id.* at 325.

befitted the educational goals of the institution. Therefore, the *Bakke* and *Grutter* Courts clearly used the Scenario 3 standard for treating each applicant as an individual.

Not only did the *SFFA* Court disagree with the *Bakke* and *Grutter* Courts as to the standard for treating each applicant as an individual, it also disagreed with the *Bakke* and *Grutter* Courts as to the nature of the race-conscious admissions process. In *Bakke* and *Grutter*, the analyses of the admissions policies were entangled with the creation of the standard.[155] Therefore, the race-conscious admissions program at Harvard in *Bakke* was viewed by the Court as a Scenario 3 policy, as was the Law School's program in *Grutter*.[156]

The *SFFA* Court did not believe that the Harvard and UNC programs at issue were Scenario 3 policies.[157] The *SFFA* Court believed the Harvard and UNC programs at issue were Scenario 2 policies in which universities used individualized consideration and stereotype, and stereotype decisively lead to discrimination.[158] For example, the *SFFA* Court, citing the district court's findings, stated that the race-conscious admissions program at Harvard led to fewer Asian Americans and white students being admitted.[159] The *SFFA* Court also stated that Harvard and UNC engaged in outright racial balancing, providing a table which showed that the percentage of African-American, Hispanic, or Asian-American students admitted to each class from 2009 to 2018 was uniform.[160] It is clear that the *SFFA* Court believed the admissions programs at Harvard and UNC decisively led to more admissions of applicants from some racial groups while decisively resulted in less admissions of applicants from other racial groups.

Conclusion

Treating each applicant as an individual has been a recurring theme in affirmative action cases since *Bakke*. As an

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155 *Bakke*, 438 U.S. at 316; *Grutter*, 539 U.S. at 337–38.

156 In *Bakke*, what was at issue was not Harvard's program, but the racial quotas used by Davis Medical School. However, the Harvard program was what Justice Powell relied on as an "illuminating example" and from where he derived the standard for a constitutionally valid race-conscious admissions program. *Bakke*, 438 U.S. at 316.

157 *See* Students for Fair Admissions v. Harvard Coll., 600 U.S. 181, 221-23 (2023).

158 *See id.* at 218, 223.

159 *Id.* at 218.

160 *Id.* at 222–23.

impliedly incorporated test in strict scrutiny, it is a necessary condition for the constitutionality of race-conscious admissions programs. The *Bakke* and *Grutter* Courts had a lower standard for treating each applicant as an individual and held race-conscious admissions programs composed of individualized consideration and racial stereotyping to meet this standard as long as the racial stereotyping was not a decisive factor in admission. The *SFFA* Court had an elevated standard for treating each applicant as an individual and decided that only admissions policies that used individualized consideration free from racial stereotyping could meet the standard. Due to the elevated standard of treating each applicant as an individual, race-conscious admissions programs that survived *Bakke* and *Grutter* would not be able to survive *SFFA*. Such race-conscious admissions program necessarily engaged in racial stereotyping when they, by selectively giving a "plus" to some racial groups but not others, assumed some racial groups would be better able to contribute to student body diversity, which was defined as something much broader than mixed racial composition, than other racial groups.

The *SFFA* opinion did not prohibit universities from considering an applicant's discussion of race in their application. However, such consideration should be highly individualized and should be tied to the particular way an applicant navigates their racial identity. In other words, the *SFFA* opinion should not be construed as a complete ban on the use of race in college admissions, because it only banned using race *per se* as a "plus" for selected racial groups, but still permitted individualized evaluation of the way race affected an applicant's unique life journey.