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ORIGINAL INTENT, RACIAL EQUALITY, AND THE CONUNDRUMS OF “COLORBLINDNESS”

JEFFREY D. HOAGLAND & VINAY HARPALANI*

With its consolidated opinion in *Students for Fair Admissions v. President & Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina*,¹ the U.S. Supreme Court effectively ended the use of race in university admissions. In these cases, one sees a recurring constitutional and political narrative. Both parties advanced originalist legal arguments and appealed to notions of racial equality to illuminate the meaning of the Fourteenth Amendment.² This interplay between originalism and equality is deeply rooted not only in American law, but also in politics. It played a prominent role at another polarized period in American history: 165 years ago, when Abraham Lincoln and Stephen Douglas held a series of debates in 1858, during the Illinois Senate race.³ Lincoln and Douglas appealed to the original intent of the Founders and made claims about the equality of Black Americans, defining their own visions of federalism in the process. The Supreme Court loomed over these debates, as the 1857 decision in *Dred Scott v. Sandford*,⁴ along with the specter of a future pro-slavery ruling,⁵ shaped the debate on racial equality. Across time and space,

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1. *Students for Fair Admissions, Inc. (“SFFA”) v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

2. See, e.g., Christopher Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203 (2008); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011); Sonja B. Starr, *The Magnet-School Wars and the Future of Colorblindness*, 76 STAN. L. REV. (forthcoming Jan. 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4354321; Memorandum of *Amici Curiae* in Support of Defendant’s Motion for Summary Judgement on Remaining Counts II, III, V, SFFA v. President & Fellows of Harvard Coll., 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176), https://lawyerscommittee.org/wp-content/uploads/2020/07/Docket-440_Students-Brief-in-Sppt-SJ.pdf.

3. See *infra* Part I.

4. 60 U.S. (19 How.) 393 (1857).

5. This was an open question after *Dred Scott*. Later, in *Lemmon v. People*, the New York Court of Appeals held that a group of enslaved persons had gained their freedom by entering the

American constitutional and political discourse on race has tied together originalism and equality, along with notions of federalism, to define debates over the legal boundaries of government racial classifications.

I. THE LINCOLN DOUGLAS DEBATES

The Lincoln Douglas Debates highlighted the interplay among these rhetorics. The debates focused on whether the Founders intended slavery to be eventually abolished, contained within particular states, or left to each individual state to decide.⁶ This raised broader questions of federalism: To what extent could the federal government intervene in the affairs of the states? Lincoln's and Douglas's positions on federalism were shaped by their views on the racial equality of Black Americans. Douglas's racist contempt for the very notion of equality was in slight tension to Lincoln's own views on minimal economic equality—that Black Americans ought to be able to eat the bread they toiled for.⁷ But Douglas did not hesitate to seize on this minimal commitment to paint Lincoln as a radical believer in the complete social equality of Black Americans.⁸ And regardless of their answers to the questions posed to them, both were aware that the Supreme Court would likely decide the issue of constitutional limits on slavery, rendering both their positions moot. Thus, the shadow of the *Dred Scott* decision made clear that a constitutional crisis required a constitutional solution.

This shadow hung over the debates. Both Lincoln and Douglas offered the public positions that sought pragmatic compromises on the contentious issues of the day. This pressure brought out different themes of their exchange: the original intent(s) of the Founders and social equality for Black Americans, all wrapped around issues of federalism. While he thought slavery was morally wrong, Lincoln was not an abolitionist. He sought to contain slavery to the states it had been adopted in—though he did hope that in the future it would cease to exist.⁹ He championed limiting the expansion of slavery to the territories.¹⁰ Douglas, on the other hand, championed

free state of New York. 20 N.Y. 562 (1860). Some scholars have argued that if this case had reached the U.S. Supreme Court, it could have extended *Dred Scott* from the territories to the states. See, e.g., William M. Wiecek, *Slavery and Abolition Before the United States Supreme Court, 1820-1860*, 65 J. AM. HIST. 34, 57 (1978). The Civil War aborted this controversy. *Id.*

6. E.g., Third Debate with Stephen A. Douglas at Jonesboro (Sept. 15, 1858) [hereinafter Third Debate], in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN 102, 117 (Roy P. Basler ed., 1953) (Mr. Lincoln's reply).

7. Seventh and Last Debate with Stephen A. Douglas at Alton (Oct. 15, 1858) [hereinafter Seventh Debate], in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 6, at 283, 315 (Mr. Lincoln's reply).

8. See Third Debate, *supra* note 6, at 112 (Mr. Douglas's speech).

9. *Id.* at 102, 117 (Mr. Lincoln's reply).

10. *Id.*

popular sovereignty, the idea that the states should choose for themselves whether to exclude or embrace slavery.¹¹

Both Lincoln and Douglas also appealed to the original intent of the Founders. Douglas sought to paint Lincoln as a radical, and thus argued that the Founders intended slavery to exist in America—wherever the States wanted it to.¹² In a twist that may surprise modern readers, Lincoln claimed his policy of containment and eventual abolition was in line with the intent of the Founders:

I say when this government was first established it was the policy of its founders to prohibit the spread of slavery into the new Territories of the United States, where it had not existed. But Judge Douglas and his friends have broke up that policy and placed it upon a new basis by which it is to become national and perpetual. All I have asked or desired anywhere is that it should be placed back again upon the basis that the fathers of our government originally placed it upon. I have no doubt that it *would* become extinct, for all time to come, if we but re-adopted the policy of the fathers by restricting it to the limits it has already covered—restricting it from the new Territories.¹³

Lincoln further argued that the Founders deliberately used “covert language” when referring to slavery.¹⁴ The Constitution did not make explicit reference to slavery so that once it was abolished, the Constitution would make sense to future generations.¹⁵

Both Lincoln and Douglas had to address the implications of their positions for federalism. In Jonesboro, Lincoln responded to Douglas’s claim that states could exclude slavery through legislation.¹⁶ He asked his audience to imagine that they were the legislators, sworn by oath to protect and uphold the constitution. “How could you, having sworn to support the Constitution, and believing it guaranteed the right to hold slaves in the Territories, assist in legislation *intended to defeat that right?*”¹⁷ He went on to explain, “[a] member of Congress swears to support the Constitution of the United States, and if he sees a right established by that Constitution which needs specific

11. First Debate with Stephen A. Douglas at Ottawa, Illinois (Aug. 21, 1853) [hereinafter First Debate], in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 6, at 1, 11 (Mr. Douglas’s speech).

12. Third Debate, *supra* note 6, at 110 (Mr. Douglas’s speech) (“[Lincoln] says that they must all become free or all become slave, that they must all be one thing or all be the other, or this government cannot last. Why can it not last if we will execute the government in the same spirit and upon the same principles upon which it is founded.”).

13. *Id.* at 117 (Mr. Lincoln’s reply).

14. Seventh Debate, *supra* note 7, at 307 (Mr. Lincoln’s reply).

15. *Id.*

16. Third Debate, *supra* note 6, at 131 (Mr. Lincoln’s reply).

17. *Id.*

legislative protection, can he clear his oath without giving that protection?"¹⁸ Thus, "on what ground would a member of Congress who is opposed to slavery in the abstract vote for a fugitive law, as I would deem it my duty to do? Because there is a Constitutional right which needs legislation to enforce it."¹⁹ Lincoln saw all constitutional rights as containing an implied mandate for Congress to enforce them. His near absolute allegiance to constitutional supremacy foreshadowed the Reconstruction Amendments, and their enforcement clauses. Unfortunately, in the face of a Supreme Court that appeared poised to render unconstitutional his own policy positions on slavery,²⁰ Lincoln had to concede that this would create a duty for legislators to enact laws against their own views.²¹

Douglas, on the other hand, thought the only duty owed to other states, and other citizens, was to allow them to make their own decisions:

We have settled the slavery question as far as we are concerned; we have prohibited it in Illinois forever, and in doing so, I think we have done wisely, and there is no man in the State who would be more strenuous in his opposition to the introduction of slavery than I would; (cheers) but when we settled it for ourselves, we exhausted all our power over that subject. We have done our whole duty, and can do no more. We must leave each and every other State to decide for itself the same question.²²

Douglas's position was a simple one: The federal government should not be involved at all. This appeared nearly untenable in light of the *Dred Scott* decision, and the constitutional provision that already existed, such as the Fugitive Slave Clause.²³ Nonetheless, he continued to advocate for popular sovereignty as a solution to national divisions.²⁴ Thus, both Lincoln and Douglas would allow slavery to continue or end, against their own personal views, based on which authority controlled. For Lincoln, the national Constitution was the touchstone, while Douglas emphasized the right of the states to decide.

Both Lincoln and Douglas invoked federal power as a scare tactic. Given the likelihood that the ruling from the *Dred Scott* case would be expanded, Lincoln argued that the ruling should be limited and that the role of the federal government was to contain slavery and hopefully bring about its eventual end.²⁵ Douglas was more afraid of the power of the federal

18. *Id.*

19. *Id.*

20. *See supra* note 5.

21. Third Debate, *supra* note 6, at 131 (Mr. Lincoln's reply).

22. First Debate, *supra* note 11, at 11 (Mr. Douglas's speech).

23. *See* U.S. CONST. art. IV, § 2, cl. 3.

24. First Debate, *supra* note 11, at 11 (Mr. Douglas's speech).

25. Seventh Debate, *supra* note 7, at 306 (Mr. Lincoln's reply).

Congress to legislate an end to slavery everywhere.²⁶ He argued that the *Dred Scott* decision would likely be limited to the territories, and that states could, and should, decide for themselves whether to abolish slavery.²⁷

Yet both views were imperiled. For in *Dred Scott*, the Supreme Court had ruled that slaves were not and could not be made citizens:

[T]hey are not included, and were not intended to be included, under the word “citizens” in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at [America’s founding] considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges²⁸

Here, the Supreme Court contravened Lincoln’s view. It appealed to the intentions of the Founders to justify the inferior status of Black Americans, which was fundamentally tied to slavery. This was also the basis for its holding that territories could not exclude slavery, which in turn contravened Douglas’s view.²⁹ It was unlikely that federalism concerns regarding differences between federal territories and sovereign states would mandate a difference in outcome.³⁰

Douglas attempted to paint Lincoln as an advocate of racial equality, claiming that Lincoln objected to the *Dred Scott* decision “first and mainly because it deprives the negro of the rights of citizenship.”³¹ He further attempted to link Lincoln with the radical abolitionist wing of the Republicans, specifically Fredrick Douglass: “Why, they brought Fred Douglass to Freeport when I was addressing a meeting there in a carriage driven by the white owner, the negro sitting inside with the white lady and her daughter.”³² Such rhetoric foreshadows the development of segregation as a means of racial subordination.³³

26. *Id.* at 287 (Mr. Douglas’s speech).

27. Fifth Debate with Stephen A. Douglas, at Galesburg, Illinois (Oct. 7, 1858), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 6, at 207, 242–43 (Mr. Douglas’s reply).

28. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 404–05 (1857).

29. *Id.*

30. See *supra* note 6. Lincoln himself made a similar argument in a previous case before the Illinois Supreme Court in *Matson v. Ashmore et al. for the use of Bryant*, where he defended a slaveowner who asserted that his slaves did not become free when he brought them from Kentucky to Illinois. For an overview of *Matson*, see Anton-Hermann Chroust, *Abraham Lincoln Argues a Pro-slavery Case*, 5 AM J. LEGAL HIST. 299 (1961).

31. Third Debate, *supra* note 6, at 112 (Mr. Douglas’s speech).

32. *Id.* at 105.

33. See generally STATES’ LAWS ON RACE AND COLOR AND APPENDICES (Pauli Murray ed., 1950).

Lincoln responded to Douglas's attacks by emphasizing his own view that:

I, as well as Judge Douglas, am in favor of the race to which I belong, having the superior position. I have never said anything to the contrary, but I hold that notwithstanding all this, there is no reason in the world why the negro is not entitled to all the natural rights enumerated in the Declaration of Independence, the right to life, liberty and the pursuit of happiness. . . . I hold that he is as much entitled to these as the white man. I agree with Judge Douglas he is not my equal in many respects—certainly not in color, perhaps not in moral or intellectual endowment. But in the right to eat the bread, without leave of anybody else, which his own hand earns, *he is my equal and the equal of Judge Douglas, and the equal of every living man.*³⁴

The “tyrannical principle” behind slavery was: “You work and toil and earn bread, and I’ll eat it.”³⁵ Yet this economic equality is minimal, the mere right to the fruit of one’s own labor. Lincoln was emphatic that, “I will say then that I am not, nor ever have been in favor of bringing about in any way the social and political equality of the white and black races.”³⁶

II. THE MEANING OF THE RECONSTRUCTION AMENDMENTS

After the Civil War, the Reconstruction Amendments aimed to address the controversies raised in the Lincoln-Douglas debates, moving even further with respect to racial equality. These Amendments created a new originalism around the legal rights of Black citizens: To ensure that nothing like the *Dred Scott* decision would ever arise again, lawmakers included the Thirteenth Amendment. Just as Lincoln saw it as the duty of legislators to vindicate the rights of their fellow citizens, the Reconstruction Congress included enforcement clauses in these new Amendments, to ensure that Congress could act. To ensure that newly freed Black Americans could eat the bread they had toiled for, the Freedman’s Bureau was created. In an answer to Douglas, the Fourteenth Amendment was drafted to ensure the equal protection of the laws throughout the country. And the Fifteenth Amendment was adopted to ensure that popular sovereignty would truly be the will of the people.

34. First Debate, *supra* note 11, at 16 (Mr. Lincoln’s reply).

35. Seventh Debate, *supra* note 7, at 315 (Mr. Lincoln’s reply).

36. Fourth Debate with Stephen A. Douglas at Charleston, Illinois (Sept. 18, 1853), in 3 THE COLLECTED WORKS OF ABRAHAM LINCOLN, *supra* note 6, at 145, 145 (Mr. Lincoln’s speech).

The Thirty-Ninth Congress also passed a number of federal laws designed to provide some economic uplift to the newly freed slaves.³⁷ The appeal from Lincoln that legislators protect the rights of their fellow citizens enshrined in the Constitution echoes through the efforts of the Congress to ensure economic opportunity. Once the Fourteenth Amendment was in place, with its Enforcement Clause, Congress acted swiftly. As Professor Mark Graber notes, Congress created the Freedmen’s Bureau to “provide[] former slaves and refugees with the goods and services they needed to make the transition from slavery to full American citizenship and to avoid falling into a permanent state of destitution inconsistent with the independence necessary for full citizenship in a democratic republic.”³⁸

But the expansion of federal power had other consequences. The Fourteenth Amendment set fundamental rights such as equal protection in the Constitution—higher than Congress could reach. Thus, the courts became the primary interpreters of the scope of those rights. Lincoln envisioned that Congress would enact legislation to enforce the rights of Black citizens. But while that has happened at times, it has often been the courts that lead the way on issues of racial equality. As a result, the legacy of the Reconstruction Amendments has been shaped by judicial decisions and interpretations. Today, debates over equal protection focus on conflicting interpretations of *Brown v. Board of Education*.³⁹

Contestation over *Brown*’s meaning is heated, in no small part, because of its implications for fundamental fairness and equality. Just as in the Lincoln-Douglas Debates, the process of selecting students at America’s elite institutions implicates ideals of equality.⁴⁰ Proponents of race-conscious policies argue that *Brown* embodies an anti-subordination view of equal protection and allows government racial classifications for particular

37. See, e.g., Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–82 (1987)); see also CONG. GLOBE, 39th Cong., 1st Sess. app. at 83 (1866).

38. Mark A. Graber, *The Second Freedmen’s Bureau Bill’s Constitution*, 94 TEX. L. REV. 1361, 1362 (2016); see Brief of Professors of History and Law as Amici Curiae Supporting Respondents at 15, *SFFA v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (Nos. 20-119, 21-707) (citing Prof. Graber’s article).

39. 347 U.S. 483 (1954). For an analysis of the conflicting interpretations of *Brown*, see Schmidt, *supra* note 2, at 203.

40. See *SFFA v. Harvard*, 143 S. Ct. at 2207 (Thomas, J., concurring) (“Those policies fly in the face of our colorblind Constitution and our Nation’s equality ideal.”); *id.* at 2226 (Sotomayor, J., dissenting) (“Equal educational opportunity is a prerequisite to achieving racial equality in our Nation.”); *id.* at 2263 (Jackson, J., dissenting) (“Gulf-sized race-based gaps exist with respect to the health, wealth, and well-being of American citizens. They were created in the distant past, but have indisputably been passed down to the present day through the generations. Every moment these gaps persist is a moment in which this great country falls short of actualizing one of its foundational principles—the ‘self-evident’ truth that all of us are created equal.”).

purposes.⁴¹ Conversely, opponents of these policies take an anti-classification view of *Brown*, arguing that it prohibits government racial classifications.⁴² In various ways, *Brown* itself has supplanted the history of the Fourteenth Amendment for determining the constitutionality of government racial classifications.⁴³ For conservatives, it has also been the cornerstone of the principle of colorblindness.⁴⁴

In peculiar fashion, this was apparent during *SFFA v. University of North Carolina* and *SFFA v. Harvard*. Several amici had submitted briefs on the original meaning of the Fourteenth Amendment, arguing that it was not originally intended to prevent the government from making racial classifications in all cases.⁴⁵ During oral arguments, the Justices asked SFFA counsel to respond to these amicus briefs.⁴⁶ They asked about the Freedman's Bureau and whether the laws passed by the Thirty-Ninth Congress show that the authors of the Fourteenth Amendment did not intend it to prohibit all racial classifications.⁴⁷ In response, SFFA pointed to the U.S. Government's brief in *Brown* to support their colorblind view of the Equal Protection Clause.⁴⁸ The *Brown* litigation at the Supreme Court, in opposition to racial segregation no less, was the "best source" to illuminate the originalist appeal to anti-classification, according to SFFA.⁴⁹

41. Schmidt, *supra* note 2, at 236.; *see also* Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976).

42. Schmidt, *supra* note 2, at 237.

43. *See, e.g.*, Schmidt, *supra* note 2; Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004).

44. *Id.* at 236.

45. Brief of Professors of History and Law as Amici Curiae for Respondents, *supra* note 38, at 15; Brief of Black Women Law Scholars as Amicus Curiae in Support of Respondents at 4, *SFFA v. Harvard*, 143 S. Ct. 2141 (Nos. 20-119, 21-707); Brief of Constitutional Accountability Center as Amicus Curiae in Support of Respondents at 2, *SFFA v. Harvard*, 143 S. Ct. 2141 (Nos. 20-119, 21-707); Brief of the Washington Bar Association and the Women's Bar Association of the District of Columbia as Amicus Curiae in Support of Respondents at 2-3, *SFFA v. Harvard*, 143 S. Ct. 2141 (Nos. 20-119, 21-707).

46. Transcript of Oral Argument at 9-10, *SFFA v. Univ. of N.C.*, 143 S. Ct. 2141 (2023) (No. 21-707) [hereinafter Transcript of Oral Argument, *SFFA v. Univ. of N.C.*]; Transcript of Oral Argument at 14, 16-17, *SFFA v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (No. 20-119) [hereinafter Transcript of Oral Argument, *SFFA v. Harvard*].

47. Transcript of Oral Argument, *SFFA v. Harvard*, *supra* note 46, at 14.

48. *Id.* at 5; *see also* Supplemental Brief for the United States on Reargument at 11, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (Nos. 1, 2, 4, 8, 10).

49. Transcript of Oral Argument, *SFFA v. Harvard*, *supra* note 46, at 5 ("[I]n terms of the original meaning of the Fourteenth Amendment, the best source on this [SFFA Counsel Cameron Norris] ever read is the United States' brief on reargument in *Brown*. It painstakingly details the legislative history and how the framers of the Fourteenth Amendment saw it as a ban on all racial classifications."); *see also* Supplemental Brief for the United States on Reargument, *supra* note 48, at 11.

This might appear an odd choice. But when Thurgood Marshall set out to bring down the system of Jim Crow, he adopted a legal strategy originally developed by Pauli Murray.⁵⁰ Limited by precedent, he had to draw on the existing rhetoric. One source of that was the purportedly originalist dissent of Justice John Marshall Harlan in *Plessy v. Ferguson*,⁵¹ which famously proclaimed that “[o]ur Constitution is color-blind.”⁵² Ironically, in the same paragraph, Harlan espoused White supremacy, stating that:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.⁵³

Nevertheless, following Harlan’s lead, the Solicitor General’s office submitted an amicus brief in *Brown* that heavily emphasized the theme of colorblindness, concluding that “there is ample evidence that [the Reconstruction Congress] did understand that the Amendment established the broad constitutional principle of full and complete equality of all persons under the law, and that it forbade all legal distinctions based on race or color.”⁵⁴

This theme has been picked up by conservatives on the Supreme Court and used to prevent any race conscious measures—even those designed to integrate K-12 schools. In *Parents Involved in Community Schools v. Seattle School District No. 1*,⁵⁵ Chief Justice John Roberts wrote the opinion for the Court striking down a school district’s plan to racially integrate their schools. Since this plan would require assigning individual students to certain schools based on their race, the Court ruled it violated the Constitution.⁵⁶ Chief Justice Roberts justified this ruling by stating, “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”⁵⁷

The originalist case for a colorblind Constitution has several weaknesses.⁵⁸ It is true that one of the original drafts of the Fourteenth Amendment contained language prohibiting discrimination against “persons

50. Kathryn Schulz, *The Many Lives of Pauli Murray*, NEW YORKER (April 10, 2017), <https://www.newyorker.com/magazine/2017/04/17/the-many-lives-of-pauli-murray>.

51. 163 U.S. 537 (1896).

52. *Id.* at 559 (Harlan, J., dissenting).

53. *Id.*

54. Supplemental Brief for the United States on Reargument, *supra* note 48, at 115.

55. 551 U.S. 701 (2007).

56. *Id.* at 708–11.

57. *Id.* at 748.

58. Stephen A. Siegel, *The Federal Government’s Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 NW. U. L. REV. 477 (1998).

because of race, color or previous condition of servitude,” but the final text is much broader, stating that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁵⁹ Colorblindness emerged out of struggles over interpreting *Brown*,⁶⁰ and rather than attempt to justify the colorblind Constitution on purely originalist grounds, the conservative block defends this principle as the best interpretation of *Brown*.⁶¹ Notably, in *SFFA v. Harvard*, only one amicus brief attempted to argue that a purely originalist interpretation of the Fourteenth Amendment supported SFFA.⁶²

Nevertheless, the rhetorical power of appealing to original meaning has not only proven incredibly persuasive through movements like originalism but has become unavoidable in debates over equal protection. The parties in *SFFA v. Harvard* and *SFFA v. University of North Carolina* both argued that the Thirty-Ninth Congress would have agreed with them, just as both Douglas and Lincoln argued that the Founders would agree with their views on the expansion of slavery.⁶³ As part of this appeal to *Brown*’s putatively original colorblind principle, SFFA ironically invoked federal power. It argued that the Fourteenth Amendment has removed from both states and the federal government the power to make policies that use explicit racial classifications.⁶⁴ Similarly, in *Parents Involved*, Justice Thomas quoted from a filing by plaintiffs in a companion case to *Brown* to make this point: “[W]e take the unqualified position that the Fourteenth Amendment has totally stripped the state of power to make race and color the basis for governmental action.”⁶⁵ Amici in support of Respondents also invoked federal power, but it argued that the Freedman’s Bureau and other race-conscious actions of the

59. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 151 (1994) (Kennedy, J., concurring). For a historical overview of the drafting of the Fourteenth Amendment, see WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

60. Siegel, *supra* note 58.

61. *Parents Involved*, 551 U.S. at 747 (“[T]he position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: ‘[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race.’” (alteration in original) (quoting Brief for Appellants in Nos. 1, 2 and 4 and for Respondents in No. 10 on Reargument, *Brown v. Bd. of Educ.*, 348 U.S. 886 (1954))); Brief for Petitioner at 51, *SFFA v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (Nos. 20-1199, 21-707) (“Because *Brown* is right, *Grutter* is wrong.”). See generally Schmidt, *supra* note 2.

62. Brief of Amicus Curiae Former Attorney General Edwin Meese III in Support of Petitioner, *SFFA v. Harvard*, 143 S. Ct. 2141 (Nos. 20-1199, 21-707).

63. See *supra* Part I.

64. Transcript of Oral Argument, *SFFA v. Harvard*, *supra* note 46, at 5 (“This Court should admit that it was wrong about Harvard, wrong about Grutter, and wrong about letting the poison of racial classifications seep back into education.”); see also Schmidt, *supra* note 2, at 211 (quoting same statement).

65. *Parents Involved*, 551 U.S. at 772 n.20 (Thomas, J., concurring) (quoting Statement as to Jurisdiction for Appellants, *Davis v. Cnty. Sch. Bd.*, 347 U.S. 483 1 (1954) (No. 3)).

Thirty-Ninth Congress indicated that the federal government had a role to play in remedying racial inequality.⁶⁶

With respect to race-conscious policies, the Court has previously addressed federalism. In *Schuette v. Coalition to Defend Affirmative Action*,⁶⁷ the Justices held that states can ban race-conscious policies through their own political processes.⁶⁸ The negotiation of what state actors and government funded institutions can and cannot do continues through heated debates with frequent and pointed appeals to history. At oral argument for *SFFA v. Harvard*, Chief Justice Roberts remarked, “We did not fight a Civil War about oboe players.”⁶⁹ By banning all government use of race, the SFFA cases threaten to remove the role of states altogether.⁷⁰ The present jurisprudence has a narrow view of federalism. And the Fourth Circuit recently decided the case of *Coalition for TJ v. Fairfax County School Board*,⁷¹ which implicates even race-neutral measures to increase racial diversity.⁷² This case and others like it involve elite magnet high schools which implemented new admissions policies that are facially neutral, but which were adopted specifically because of their demographic impact and potential to increase racial diversity.⁷³ The Fourth Circuit upheld the admissions policy, with one judge writing the main opinion, one concurring, and one dissenting. The concurrence highlighted that the Supreme Court has never viewed increasing diversity as a constitutionally suspect motive and, “[i]n fact, the Court and individual Justices have spent more than three decades encouraging—and sometimes insisting—government officials do precisely that before considering race-conscious ones.”⁷⁴ But the dissent asserted that the decrease in Asian American enrollment was the intent of the school board, and therefore the facially neutral policy failed under a disparate

66. See Brief of Professors of History and Law as Amici Curiae for Respondents, *supra* note 38.

67. 572 U.S. 291 (2014).

68. For a recent popular sovereignty approach which returns decision-making power to the states, see *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022) (overturning *Roe v. Wade*, 410 U.S. 113 (1973), and returning power to regulate abortion to states). The view of fundamental rights in these cases contravenes the notion of strict scrutiny articulated in Footnote 4 of *United States v. Carolene Products Co.*, which touted lack of access to the political process as the basis for heightened scrutiny of protected groups. 304 U.S. 144, 152 n.4 (1938).

69. Transcript of Oral Argument, *SFFA v. Harvard*, *supra* note 46, at 67.

70. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

71. 68 F.4th 864 (4th Cir. 2023).

72. See Vinay Harpalani, *Testing the Limits: Asian Americans and the Debate Over Standardized Entrance Exams*, 73 S.C. L. REV. 759, 786 (2022); Starr, *supra* note 2.

73. Starr, *supra* note 2, at 2.

74. *Coalition for TJ*, 68 F.4th at 891 (Heytens, J., concurring).

impact analysis.⁷⁵ Thus, colorblind ideals in equal protection jurisprudence may wind up preventing any policies—race-conscious or race-neutral—designed to address racial inequities or increase racial diversity.⁷⁶

Race-conscious admissions policies also implicate ideals of fairness implicated in democratic understandings of social and racial equality. The holistic admissions process upheld in *Grutter v. Bollinger*,⁷⁷ which required universities to weigh social experience and identity as a factor, necessarily implicates such ideals. These concerns are important for educational institutions in particular, given their role in shaping the citizenry.⁷⁸ As Justice O'Connor wrote in *Grutter*, because “universities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders . . . the path to leadership [must] be visibly open to talented and qualified individuals of every race and ethnicity.”⁷⁹

Conversely, SFFA appealed to a narrow understanding of racial equality: “In a zero sum game like college admissions, if race is going to be counted, that means some people are going to get in and some people are going to be excluded based on race.”⁸⁰ For SFFA, “[t]hat is one of the problems with *Grutter*, is that it suggested that the harm of racial classifications, which this Court have always recognized are inherent and invidious of themselves, can be . . . hidden or pushed down as long as race is just one of many factors.”⁸¹

At the *SFFA v. University of North Carolina* oral argument, Justice Ketanji Brown Jackson addressed SFFA’s counterpoint. Justice Jackson created a hypothetical scenario to emphasize the ways race is integral to someone’s family history, sense of self, and accomplishments as an individual:

The first applicant says: I’m from North Carolina. My family has been in this area for generations, since before the Civil War, and I would like you to know that I will be the fifth generation to graduate from the University of North Carolina. I now have that opportunity to do that, and given my family background, it’s important to me that I get to attend this university. I want to honor my family’s legacy by going to this school.

75. *Id.* at 892 (Rushing, J., dissenting).

76. *Id.*

77. 539 U.S. 306 (2003).

78. *See id.* at 308 (2003); *see also* Stacy Hawkins, *A Deliberative Defense of Diversity: Moving Beyond the Affirmative Action Debate to Embrace a 21st Century View of Equality*, 2 COLUM. J. RACE & L. 75 (2012).

79. *Grutter*, 539 U.S. at 332 (internal citations omitted).

80. Transcript of Oral Argument, *SFFA v. Univ. of N.C.*, *supra* note 46, at 11.

81. *Id.* at 40.

The second applicant says, I’m from North Carolina, my family has been in this area for generations, since before the Civil War, but they were slaves and never had a chance to attend this venerable institution. As an African American, I now have that opportunity, and given my family—family background, it’s important to me to attend this university. I want to honor my family legacy by going to this school.⁸²

Justice Jackson’s hypothetical illustrates how race, even with its invidious history, remains intertwined with social identity, and how eliminating its use would compromise the very goals of holistic admissions.⁸³ And despite their hostility to racial classifications, both SFFA and the Justices had to acknowledge that applicants should be able to write about their racial experiences in a personal essay.⁸⁴

These two applicants appeared again in Justice Jackson’s dissent.⁸⁵ She also highlighted how University of North Carolina “permits, but does not require” the applicants disclose their race and what it means for their lives and how the system “permits, but does not require” the admissions officers consider this information offered by students.⁸⁶ As she noted, “A reader of today’s majority opinion could be forgiven for misunderstanding how UNC’s program really works, or for missing that, under UNC’s holistic review process, a White student could receive a diversity plus while a Black student might not.”⁸⁷ The complexities of social and racial equality rung through her opinion.

82. *Id.* at 65.

83. See also Jeffrey D. Hoagland, *Holistic Admissions and the Intersectional Nature of Racial Identity*, UNIV. OF PITTSBURGH: CTR. FOR C.R. & RACIAL JUST. (Feb. 14, 2023), <https://www.civilrights.pitt.edu/holistic-admissions-and-intersectional-nature-racial-identity-jeffrey-d-hoagland-jd>.

84. *SFFA v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2176 (2023) (“At the same time, as all parties agree, 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.”). SFFA’s position was a change from its original Complaint against Harvard, where it argued that any information identifying an applicant’s race should be removed. See Complaint at 119, *SFFA v. President & Fellows of Harvard Coll.*, 397 F. Supp. 3d 126 (D. Mass. 2019) (No. 1:14-cv-14176) (requesting “permanent injunction requiring Harvard to conduct all admissions in a manner that does not permit those engaged in the decisional process to be aware of or learn the race or ethnicity of any applicant for admission”).

85. *SFFA v. Harvard*, 143 S. Ct. at 2270 (Jackson, J., dissenting). Justice Thomas responded to Justice Jackson in his concurrence, accusing her of “lumping people together and judging them based on assumed inherited or ancestral traits is nothing but stereotyping.” *Id.* at 2205 (Thomas, J., dissenting). Justice Jackson, however, acknowledged that “[t]hese stories are not every student’s story.” *Id.* at 2271 (Jackson, J., dissenting).

86. *Id.* at 2273 (Jackson, J., dissenting).

87. *Id.*

CONCLUSION

Certain constitutional and political narratives recur through charged debates in the public sphere. Although *SFFA v. Harvard* and the Lincoln-Douglas debates deal with very different issues, their rhetoric is uniquely American. Similar themes animate both: a concern for honoring original intent, the powers of the federal government and the states under various constitutional provisions, and the ideals of social and racial equality in our multicultural democracy. And both stand as pivotal moments in American history—flashpoints when Americans debated what it means to be a citizen of their constitutional democracy.