THE ELISION OF CAUSATION IN THE 2023 AFFIRMATIVE ACTION CASES

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Abstract

In the affirmative action cases decided in 2023, the conservative supermajority on the Supreme Court found unconstitutional the consideration of race in admissions at Harvard College and the University of North Carolina. In reaching this outcome, the Court did not grapple with a critical aspect of standing doctrine: whether the practice complained of was the cause of the harm alleged. This article explores the omission by the justices in the majority, situates it in a pattern of decisions favoring plaintiffs challenging affirmative action efforts, explains why the failure to establish causation is problematic, and identifies undesirable implications of the Court's reasoning and analysis.

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INTRODUCTION

In the 237 pages of the opinion that justices of the Supreme Court produced in the early summer of 2023 to resolve challenges to the consideration of race in the admissions processes at Harvard College ("Harvard") and the University of North Carolina ("UNC"), the issue of causation received scant attention.[1] The justices laid out dueling visions of history,[2] of the relevance of statutory rather than constitutional law,[3] of the effects of the majority decision on the admissions prospects of students of color,[4] but they did not address the question of whether the practice challenged by the Plaintiffs—consideration of race as a factor in making admissions decisions—caused the injury of which the Plaintiffs had complained. In their complaint, which laid out a theory of harm that was assessed by two trial courts and one federal appellate panel, the plaintiffs asserted that because the two institutions considered the race of applicants who were members of some racial groups favorably in deciding whom to admit, they intentionally discriminated against applicants who belonged to other racial groups.[5] In demanding the abolition of this practice known as "affirmative action,"[6] the Plaintiffs contended that their chances of admission suffered *because* race was a factor in admissions decisions.[7]

The consideration of causation is supposed to be critical to the determination of standing, which is necessary for a claim to be justiciable.[8] Justiciability, the determination

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1 *See generally* Students for Fair Admissions v. President and Fellows of Harvard College, 600 U.S. 181 (2023) (finding consideration of race as an explicit factor in admissions decisions to violate the Equal Protection Clause of the Fourteenth Amendment) [hereinafter, *SFFA*].

2 For example, Justice Thomas and Justice Brown Jackson offer different views of history in their respective concurrence and dissent. *Compare* SFFA, 600 U.S. at 232 (Thomas, J., concurring) and SFFA, 600 U.S. at 385 (Jackson, J., dissenting). *See also* Stacy Hawkins, *JCUL Special Issue: What's Next? Diversity in Education After SFFA v. Harvard/UNC: An Introduction to the Special Issue*, 48 J. Col. & Univ. L. 231, 232 (2023).

3 For example, Chief Justice Roberts and Justice Gorsuch differed in their view of the relevance of the statutory or constitutional basis of the plaintiffs' claim in the case against Harvard. *SFFA*, 600 U.S. 181, 308 (Gorsuch, J., concurring). (lamenting the reliance on the Equal Protection Clause of the Fourteenth Amendment instead of Title VI of the Civil Rights Act).

4 For example, Justice Brown Jackson emphasizes the real and symbolic effect of prohibiting consideration of race for students who are people of color and for whom that identity matters. *Id.* at 403 (Jackson, J., dissenting).

5 *See* Complaint, Students for Fair Admissions v. University of North Carolina, 2014 WL 6386755 (D. Mass. 2014), at ¶¶ 198–99 (2014) (alleging "intentional" discrimination); *see also* Students for Fair Admissions v. President and Fellows of Harvard College, 2014 WL 6241935 (D. Mass. Nov. 17, 2014), 2, 4, 43 (repeatedly alleging "intentional" discrimination by the defendant).

6 Consideration of race as a means of ensuring opportunity for members of groups historically excluded from educational and other opportunities in the United States took this moniker from an order signed by President John F. Kennedy in 1961. Executive Order 10925, 26 FR 1977 (1961).

7 Complaint, Students for Fair Admissions v. President and Fellows of Harvard College, 2014 WL 6241935at ¶ 7 (D.N.C. 2014) (alleging that "Harvard's racial preference for each student… equates to a penalty imposed on Asian-American applicants").

8 *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

that a "case or controversy" exists that the Constitution authorizes a federal court to hear, in turn matters because the threshold determination of whether a federal court has jurisdiction to hear a claim implicates fundamental concerns over the separation of powers: if a court can exercise authority at the whim of members of the judiciary, then the judicial branch can effectively veto actions taken by the legislature or the executive anytime that anyone files a lawsuit over a policy disagreement.[9] To flout this constitutional constraint on the Court's jurisdiction is to enable the justices in the majority to serve as a supreme legislature, blocking the will of the democratically elected branches of the government. On the particular facts of these affirmative action cases, the Court's ruling also may ultimately undermine equity in access to the higher education that the Plaintiffs seek.

If the action that a plaintiff complains of is not the cause of injury, then neither should the defendant be liable for any resulting harm, nor would a remedy that enjoined the defendant's action make the plaintiff whole. So critical is this intuitively straightforward principle that consideration of causation is proper at the outset of litigation, when determining whether a plaintiff has standing to sue at all. To ascertain whether a plaintiff has standing, courts ask three straightforward and typically noncontroversial questions. First, the plaintiff must allege an "injury in fact" that is "'distinct and palpable'… as opposed to merely '[a]bstract,'… and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'"[10] Second, there must be causation, which the Supreme Court has described as a "fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant."[11] Finally, the court must find that the remedy sought by a plaintiff would "redress the alleged injury."[12] The Court has written that this "triad … constitutes the core of Article III's case-or-controversy requirement."[13]

The requirement is not easily enforced, and inconsistent definitions of standing make it vulnerable to manipulation in service of finding a dispute justiciable or not, as scholars have long warned[14]: judges may use standing to avoid reaching the merits of a claim, for example.[15] This article builds on the insights of scholars, including Elise Boddie, Michelle Adams, and Girardeau Spann, who have identified courts' use of standing doctrine to undermine efforts to promote equality of opportunity for people who are members of historically subordinated and excluded groups. An important, additional contribution of this article is the recognition of the doctrinal implications for Asian American plaintiffs who may challenge underrepresentation in selective colleges and universities in the future.

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9 Warth v. Seldin, 422 U.S. 490, 500 (1974) (in the absence of standing requirements, "courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions").

10 Whitmore v. Arkansas, 459 U.S. 149, 155 (1990) (internal citations omitted).

11 Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103 (1998) (internal citations omitted).

12 *Id.*

13 *Id.*

14 *See infra* Part I.

15 Mark V. Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 Cornell L. Rev. 663 (1977) (observing that "[d]ecisions on questions of standing are concealed decisions on the merits").

It is difficult to analyze causation within standing in isolation, without also considering the merits of the claim. Causation is also critical in discussion of remedies because the judicial intervention on behalf of a successful plaintiff should properly target the conduct that causes the harm. At the outset, though, it is not obvious how precisely or correctly the plaintiff must identify the connection between the defendant's actions and the injury. The causal connection may be difficult to ascertain, especially at the time of filing a complaint, which occurs necessarily in advance of discovery. While standing as an element of justiciability has received considerable scholarly attention, the specific subelement of causation has garnered less, perhaps for this reason. Perhaps, too, it takes a particular and unusual set of facts—naming the right defendant but blaming the wrong conduct—to make the causation question relevant. In that scenario, if the plaintiff fails to establish a link between an act of the defendant and the harm suffered, it may be that a reviewing court should investigate causation. The task is tricky *ex ante*, when the causal link matters for assessing justiciability.[16]

In prior cases involving White applicants' challenges to consideration of race in admissions to selective institutions of higher education, the question of causation received some attention.[17] The question that has arisen is, but for the consideration of race in admissions, would a White plaintiff have been admitted to a particular, selective university? And the answer has mattered in determining whether the remedy of admission by court order, sought by a plaintiff, was appropriate. If the defendant could show that the White applicant would not have been admitted even in the absence of an affirmative action regime, then the lack of a causal link between the targeted admissions practice and the denial of admission would mean that ordering admission was not a proper remedy.[18] But the consideration of causation did not occur in the course of assessment of justiciability: the issue was not addressed in order to decide whether a plaintiff could proceed with a claim at all.

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16 For this reason, the Supreme Court has suggested that allegations purporting to establish standing must meet different standards at different stages of the proceeding, clearing a lower bar at the pleading stage and confronting a motion to dismiss but facing a higher bar at the stage of summary judgment, and a higher bar still at the "final" stage. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). However, the unsual facts of the cases challenging use of race in admissions decisions make for a difficult causation analysis at the time of filing; the case also went to trial, meaning that the final resolution of the question of standing based on that analysis could conceivably have come after all evidence was produced.

17 *See infra* note 18 and accompanying text (describing discussion of causation in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)). The question of causation in standing analysis is analytically distinct from analysis of the role of wrongful intent to discriminate. That is, in determining whether a policy that has a disparate and adverse effect on members of a particular group violates the law, the Supreme Court has looked at the intention of the policy maker, asking whether the policy was adopted "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group," in order to determine whether the policy was the product of unlawful animus. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979). This relates to causation, asking whether the objective of the defendant was to cause the harm complained of, but again, presents a question distinct from that concerning whether the policy, whatever its motives, has a harmful effect.

18 Ordering admission was the outcome in *Regents of the University of California v. Bakke*, in which the Court determined that because the defendant medical school "could not carry its burden of proving that, but for the existence of its unlawful special admissions program, [the plaintiff] would not have been admitted … [the plaintiff] is entitled to the injunction" mandating his admission. *Bakke*, 438 U.S. at 320.

And because an individual claimant's fate was at issue, causation mattered only in assessing an individual applicant, rather than members of a racial or ethnic group. In the 2023 affirmative action cases, the Defendants' attack on standing was broader, meaning that causation analysis entailed not addressing a specific counterfactual, exploring what would have happened to an individual applicant in the absence of an affirmative action policy, but a general one, attempting to determine what would have happened to Asian American applicants in the absence of such a policy.

In concrete terms, as analyses of the Supreme Court majority's decision in the affirmative action cases have observed, the failure to explore the relationship between consideration of race and the alleged disparate exclusion of Asian and Asian American applicants for admission means that barring the consideration of race may not produce the desired greater representation via a fairer admissions regime.[19] More precisely, if the Defendant colleges discriminated against applicants of Asian descent in some other way, they can continue to engage in whatever practices have that adverse effect in the wake of the Supreme Court's decision. This possibility should be frustrating and disturbing on its own, but is more so given the majority's extended attack on the harm that race discrimination causes: were discrimination the evil the Justices wished to fight, perhaps they would at least take pains to ensure that their aim was true.

Of course, the attacks on admissions at Harvard and UNC did not seek only to vindicate the interests of Asian American applicants and were always intended to end affirmative action benefiting members of historically excluded racial and ethnic groups: Blacks and Latinos.[20] From a cynical perspective, the majority's decision to elide causation is an unsurprising result of the Justices' determination to get to a particular outcome in the case, regardless of the missing elements of justiciability on behalf of the Plaintiffs.[21] Some scholars have already argued that the Court has for decades applied standing doctrine differently depending on the racial identity of the plaintiff[22]; these critiques are described in more detail

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19 *See, e.g.*, Jerry Kang, *Ending Affirmative Action Does Nothing to End Discrimination Against Asian Americans*, The Conversation (Aug. 3, 2023), https://theconversation.com/ending-affirmative-action-does-nothing-to-end-discrimination-against-asian-americans-209647 (arguing that "it's simply erroneous to think that the Supreme Court struck down discrimination against Asian Americans since none was ever found"); Jeannie Suk Gersen, *The Secret Joke at the Heart of the Harvard Affirmative Action Case*, New Yorker (Mar. 23, 2023), https://www.newyorker.com/news/our-columnists/the-secret-joke-at-the-heart-of-the-harvard-affirmative-action-case (identifying "complicated questions about how we define racial discrimination—if white applicants are implicitly favored over Asian American ones, is it right to place the blame for that on race-conscious affirmative action?"); Jonathan P. Feingold, *How Affirmative Action Myths Mask White Bonus*, 107 Cal. L. Rev. 707 (2019) (disaggregating two often-conflated "dimensions of SFFA's suit: (1) a rather generic attack on Harvard's affirmative action policy, and (2) the more specific claim that Harvard intentionally discriminates against Asian Americans").

20 *See* Kang, *supra* note 19 (describing the effort to identify Asian American plaintiffs for strategic reasons in the litigation).

21 It is well established that the plaintiff bears the burden of establishing all three elements of standing. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 103–04 (1998) .

22 *See, e.g.*, Elise Boddie, *The Sins of Innocence in Standing Doctrine*, 68 Vand. L. Rev. 297 (2015) (arguing that courts "presume" harm to White plaintiffs in so-called reverse discrimination cases and thereby effectively presume, rather than question, standing); Girardeau A. Spann, *Color-Coded Standing*, 80 Cornell L. Rev. 1422 (1995) (arguing that the Supreme Court's finding of standing for White

below.[23] Perhaps the elision of causation in these cases simultaneously delineates the weakness of the analysis of the majority and offers a cautionary tale of the risk of deviating from methods of analysis enshrined in well-established doctrine, or should provide such a tale if remedying the harm alleged were the goal of the proceeding. But the consequences are different in this context.

In the challenge to admissions practices at Harvard and UNC, the Asian American applicants on whose behalf suits were filed were in the same position as White applicants. Like White applicants, Asian American applicants could argue that their chances of admission were harmed by the consideration of race favorably in considering Black and Latinx applicants. If Asian American applicants wish to challenge disparate results of admissions procedures in the future, after the Court's resolution of the two affirmative action cases, they will need to present evidence of intentional discrimination that they did not need when challenging the explicit use of race. There is a certain irony to this, because the outcome of the lawsuit in which lawyers representing Asian American applicants argued that their clients were disadvantaged relative to Black and Latinx applicants is that Asian American applicants alleging race discrimination in the future will find themselves doctrinally in the same disadvantated position as those Black and Latinx applicants.[24] Put slightly differently, underrepresentation of Asian Americans in a postaffirmative action admissions environment may be accepted by a reviewing court as the constitutionally permitted product of a race-neutral process. To counter that narrative, lawyers for those future, Asian American plaintiffs likely will argue that selective colleges and universities continued to do what the Court forbade – considering race – without explicitly acknowledging the practice. Indeed, if in the immediate future the numbers of admitted Black and Latinx students do not fall, or the numbers of Asian American and/or White students do not rise, lawsuits making that claim are all but certain.

The willingness of the majority to overlook causation offers hints of the devastating reasoning the conservative Justices will deploy when considering challenges to other race-conscious policies in the near future. When consideration of race *at all* is constitutionally prohibited,[25] then it does not matter whether the challenged practice *actually* operates to exclude or whether elimination of that practice will afford any benefit to the challengers; rather, consideration of race violates the Fourteenth Amendment regardless of whether anyone is harmed by

plaintiffs who challenge affirmative action is at a minimum inconsistent with standing doctrine and that the Court's racially disparate treatment itself would not survive judicial scrutiny, were such scrutiny available).

23 *See infra* Part I.

24 Mario Barnes and Erwin Chemerinsky have detailed the doctrinal challenge confronting minority plaintiffs challenging facially neutral practices that result in their disproportionate exclusion. Mario Barnes & Erwin Chemerinsky, *The Once and Future Equal Protection Doctrine*, 43 CONN. L. REV. 1059, 1080–83 (2011).

25 As Jonathan Feingold points out in his contribution to this volume, this is the consequence of equating Jim Crow segregation and race-conscious admissions countering the lasting effects of that segregation. Jonathan Feingold, *Affirmative Action After* SFFA, 48 J. COL. & UNIV. L. 239, 245 (2023).

it. Such a rule obviates the need for finding standing entirely.[26] The implications go further: in the wake of the decisions in these two cases, if the numbers of Black and Latinx students do not decline, a reviewing court may well presume that the universities have persisted in taking race into account in an effort to maintain Black and Latinx enrollments. Even if the criteria for admissions are race-neutral, if pursuit of a diverse class is a conscious objective, that motivation may doom whatever policy or practice is used. And while the underrepresentation of members of historically excluded groups—again, Black people and Latinx people—may not in itself raise constitutional red flags for the Court, inclusion of members of those same groups will.

This article explores the significance and consequences of the elision of causation in the two opinions striking down consideration of race in admissions decisions at Harvard and UNC. The article identifies the doctrinal step the courts have taken—or, more precisely, failed to take—in these cases, incompletely applying standing doctrine in order both to adjudicate the claims and to ignore the possibility that a defendant might simultaneously engage in constitutionally protected affirmative action *and* illegal race discrimination.[27] This argument does not accept that the Plaintiffs' statistical evidence established unlawful discrimination, to be clear; the point of the argument is that *even if* that statistical evidence conclusively established discrimination against Asian American applicants, in the absence of a causal connection, such discrimination would not impugn the Defendants' affirmative action admissions policies.[28]

Part I briefly explores scholarly work on standing in the context of challenges to race-based affirmative action. Part II provides the background on the assessment of causation in prior cases challenging the consideration of race in admissions. Part III examines the theories of causation in the Harvard litigation in particular, which included some discussion of standing only in the trial court. The final, substantive part warns of the effects of the majority's decision for future cases involving allegations of discrimination on the basis of race, including claims by Asian American plaintiffs challenging continued discrimination even after their successful attack on policies and practices explicitly aimed at providing more opportunity to members of historically excluded groups. Part V provides a brief conclusion.

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26 Although some of the justices might well support a rule prohibiting consideration of race always and absolutely. Justice Thomas writes in the case against Harvard that "under our Constitution, race is irrelevant." *SFFA*, 600 U.S. at 276 (Thomas, J., concurring).

27 The elision of causation creates what Jonathan P. Feingold accurately describes as the "illusion that one must choose between defending affirmative action and holding Harvard accountable for its alleged anti-Asian bias." Feingold, *How Affirmative Action Myths Mask White Bonus*, *supra* note 19 at 710.

28 In addition to the findings made against Plaintiffs by the District Court and affirmed by the First Circuit, more than 1200 scholars argued convincingly in an *amicus* brief that the evidence presented by the plaintiffs did *not* establish discrimination against Asian American applicants to Harvard. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 203 (1st Cir. 2020), r*ev'd*, 600 U.S. 181 (2023); *see also* Brief of 1,241 Social Scientists and Scholars on College Access, Asian American Studies, and Race as *Amici Curiae* in Support of Respondent, Students for Fair Admissions v. President and Fellows of Harvard College, No. 20-1199. *See generally* Mike Hoa Nguyen et al., *Racial Stereotypes About Asian Americans and the Challenge to Race-Conscious Admissions in* SFFA v. Harvard, 48 J. Col. & Univ. L. 369 (2023).

I. THE MALLEABILITY OF STANDING

The vulnerability of standing doctrine to manipulation has been recognized and criticized for decades. Scholars have noted the appeal of a neutral-sounding tool, resting on easily articulated principles, to avoid either resolving difficult or controversial disputes or taking on cases in which prior decisions might mandate a result that an arbiter disfavors. Judges may also find standing where prior doctrine would not have allowed it, in order to reach the merits in cases brought by plaintiffs ideologically aligned with their views.[29] Gene R. Nichol Jr., put it succinctly in a 1985 article: "As the doctrine presently exists, standing can apparently be either rolled out or ignored in order to serve unstated and unexamined values."[30] Critics at various points have decried standing decisions deemed too permissive, which raise concerns that the judicial branch is empowering itself to undermine the coequal branches of government,[31] or too restrictive, which raise concerns that the doctrine has closed the courts to certain classes of plaintiffs.[32]

The underlying concern of critics of the "incoheren[ce]" of standing doctrine[33] is the result of the difficulty of disentangling standing from the core, or merits, of the case. For example, in deciding that Black parents lacked standing to challenge the failure of the Internal Revenue Service to deny tax-favored status to private schools that discriminated on the basis of race, the Supreme Court majority in *Allen v. Wright* focused on the absence of direct injury suffered by the plaintiffs whose children might not have been affected by the private schools' allegedly discriminatory conduct at all.[34] "The diminished ability of [plaintiffs'] children to receive a desegregated education would be fairly traceable to unlawful [Internal Reveue Service] grants of tax exemptions only if there were enough racially discriminatory private schools receiving tax exemptions in respondents' communities for withdrawal of those exemptions to make an appreciable difference in public school integration," Justice O'Connor wrote for the majority in 1984.[35] In other words, the futility of a remedy at the end of a case determined the jurisdication of the Court at the outset. The contrast to the standing analysis in the affirmative action cases decided in 2023, in which the majority *assumed* that ending an affirmative action policy would lead to admission of more members of

29 Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 Va. L. Rev. 633, 640–41 (2006).

30 Gene R. Nichol, *Abusing Standing: A Comment on* Allen v. Wright, 133 U. Pa. L. Rev. 635, 658 (1985).

31 *Id.* at 650.

32 Michelle Adams, *Causation, Constitutional Principles, and the Jurisprudential Legacy of the Warren Court*, 59 Wash. & Lee L. Rev. 1173, 1175–76 (2002) (arguing that "in the standing analysis, the Court [has] focuse[d] on the lack of a direct causal relationship between the injury and the conduct sufficient to create a judicially cognizable claim" in order to prevent the claim).

33 William A. Fletcher, *The Structure of Standing*, 98 Yale L.J. 221 (1988).

34 468 U.S. 737, 758 (1984).

35 *Id.*

the plaintiff class, is striking but consistent with the treatment of justiciability in several prior cases involving challenges to affirmative action.[36]

This was the argument by Girardeau Spann in a 1995 article that argued the Court's standing decisions were "racially suspicious,"[37] in that the justices were more likely to recognize the standing of a White plaintiff challenging a race-conscious policy than that of a non-White plaintiff challenging a facially neutral policy with disparate effects. Spann writes that the "Supreme Court's tendency has been to grant standing if the plaintiff was white or was challenging a practice alleged to have adversely affected the interests of the white majority… [while] [o]n the other hand, it has tended to deny standing if the plaintiff was a member of a racial minority group or was challenging a practice that was alleged to have adversely affected the interests of a racial minority group."[38] Elise Boddie has taken the critique further, identifying an "innocence paradigm" that "assumes that whites are necessarily harmed by considerations of race that benefit racial minorities."[39]

Boddie's analysis of the way in which doctrine favors claims of discrimination by White plaintiffs challenging affirmative action regardless of demonstrated injury, while burdening plaintiffs who are people of color challenging traditional discrimination with the obligation to establish hostile animus, illustrates the effect of the Supreme Court's malleable and inconsistent treatment of standing. The explicit use of race as a factor in admissions decisions relieves a plaintiff of the burden of showing that a defendant's consideration of an applicant's race actually caused harm, and a majority of the Court now appears to view consideration of race as sufficient in itself to prove harm.[40] The Court's—and the lower courts'—approach to the Plaintiffs' standing in the 2023 affirmative action cases are further examples of the phenomenon that Boddie has identified. But the more recent cases raise additional concerns, too, because of their adverse effect on the putative Plaintiffs this time around, who were not White. Having exploited the doctrinal favoritism bestowed on White plaintiffs in order to undo affirmative action, Asian American applicants to selective colleges and universities who may find they continue to be underrepresented will have to navigate the more difficult doctrinal terrain that has confronted Black and Latinx plaintiffs invoking the Equal Protection Clause; Asian American plaintiffs will now be worse off if they seek to challenge admissions practices in the future.

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36 In *Fisher v. University of Texas at Austin*, 579 U.S. 365 (2016), for example, the claim of the plaintiff, who challenged race-conscious admissions at the University of Texas at Austin, reached the Supreme Court twice even though she graduated from another institution in the meantime. Adam Liptak, *Justices Weigh Race as Factor at Universities*, N.Y. Times, Oct. 10, 2012, at A1.

37 Spann, *supra* note 22, at 1423.

38 *Id.* at 1461–62.

39 Boddie, *supra* note 22, at 301.

40 Justice Thomas voiced this view—to which he has adhered - in a terse dissent in the first of *Fisher*'s two trips to the Supreme Court. Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 315 (2013) (Thomas, J., dissenting) (asserting that a "State's use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause").

The current affirmative action cases, decided in the context of other cases in which the standing of the plaintiffs received widespread criticism, may illustrate that the standing doctrine is indeed neutral, in that an arbiter can use it to block disfavored claims or enable favored ones. The neutrality of the doctrinal tool does not, of course, mean that the application of the doctrine is neutral. The critical perspectives on standing voiced by Boddie and Spann, as well as other critiques of the Court's treatment of affirmative action generally,[41] suggest that the failure to analyze elements of the standing doctrine in the 2023 affirmative action cases is not anomalous and not limited to this historical moment, but is rather a consistent tactic to undermine policies and practices intended to benefit members of historically subordinated groups and maintain the privileged position of members of historically advantaged groups.

II. THE ROLE OF CAUSATION

In prior cases involving challenges to race-conscious admissions regimes, the Court has only glancingly attended to the question of causation. As California Supreme Court Justice Goodwin Liu pointed out in an article written more than twenty years prior to the Court's 2023 affirmative action decisions, this is an odd omission: while "minority applicants stand a much better chance of gaining admission to selective institutions with the existence of affirmative action…[,] that fact provides no logical basis to infer that white applicants would stand a much better chance of admission in the absence of affirmative action."[42] Liu dubbed this the "causation fallacy."[43] And the same logic applies to the plaintiffs who are of Asian descent, recruited as a tactic in an ongoing campaign[44] to obtain a ruling forbidding consideration of race in admissions. Admissions rates may differ for applicants who are members of different racial groups without much affecting

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41 *See, e.g.*, Barnes & Chemerinsky, *supra* note 24, at 1081 (observing that the "combination of the tiers of scrutiny and the requirement for a discriminatory purpose combine to immunize from judicial review countless government actions which create great social inequalities").

42 Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1046 (2002).

43 *Id.* Liu explains that this fallacy is the result of a simple error—or perhaps misunderstanding—of arithmetic: "At its core, the fallacy erroneously conflates the magnitude of affirmative action's instrumental benefit to minority applicants, which is large, with the magnitude of its instrumental cost to white applicants, which is small." *Id.* at 1048.

44 One activist, Edward Blum, orchestrated the challenges to affirmative action policies in 2023 and a decade earlier, in the *Fisher* litigation. Lulu Garcia-Navarro, *He Worked for Years to Overturn Affirmative Action and Finally Won. He's Not Done*, N.Y. TIMES (July 8, 2023), https://www.nytimes.com/2023/07/08/us/edward-blum-affirmative-action-race.html. Blum made clear his strategy in the 2023 cases rested on Asian American plaintiffs, in order to challenge affirmative action. Sandhya Dirks, *Affirmative Action Divided Asian Americans and Other People of Color. Here's How*, NAT'L PUB. RADIO (July 2, 2023), https://www.npr.org/2023/07/02/1183981097/affirmative-action-asian-americans-poc. And Blum shows no signs of slowing his assault on race-conscious policies intended to advance opportunity for those historically denied it: after the Supreme Court resolution of the cases against Harvard and UNC in 2023, Blum's nonprofit threatened or filed lawsuits against several law firms, targeting their efforts to promote diversity in their ranks. Julian Mark & Taylor Telford, *Conservatives Are Suing Law Firms over Diversity Efforts. It's Working*, WASH. POST (Dec. 9, 2023), https://www.washingtonpost.com/business/2023/12/09/conservatives-sue-law-firms-dei/.

overall representation of each group in the pool of admitted students, Kimberly West-Faulcon explained in a 2017 article looking at the state of the anti-affirmative action campaign at that moment.[45]

It is the first case to challenge consideration of race in higher education admissions, *Regents of the University of California v. Bakke*,[46] that includes a degree of analysis of the issue of causation—but not in the context of determining the plaintiff's standing to sue. In that case a majority of the Court agreed that the medical school at the University of California, Davis, improperly took race into account in deciding whom to admit, and the defendant sought an order compelling his admission. Consequently the Justices briefly addressed the question of whether the university had proven that the plaintiff would not have been admitted regardless of the consideration of race in admissions. Because the university "conceded that it could not carry its burden of proving that, but for the existence of its unlawful special admissions program, respondent still would not have been admitted[,] … respondent is entitled to the injunction" compelling his admission.[47] But no analysis of causation occurred as an element of standing at the outset. Critically, then, even in *Bakke* the Court did not have to examine the stages of the medical school's admissions process to confirm that the source of the plaintiff's injury was the consideration of race that he challenged. And the inattention to the causation element of standing here is consistent with the arguments by Spann and Boddie discussed above, contending that the Court presumes injury when a White plaintiff challenges a race-conscious measure intended to protect opportunity for beneficiaries who are not White.

In *Fisher*, a White plaintiff challenged consideration of race in a fraction of admissions decisions at the University of Texas at Austin that were not subject to the Top Ten Percent Plan.[48] The litigation dragged on for several years and the plaintiff attended and graduated from another institution before the case reached the Court for the second and final time.[49] When she was denied admission, the

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45 Kimberly West-Faulcon, *Obscuring Asian Penalty with Illusions of Black Bonus*, 64 UCLA L. Rev. Disc. 590, 639 (2017) (explaining that "even when a university's racial affirmative action policy is sufficiently robust to admit African Americans (or Latinos) at higher rates than whites and Asian Americans (such as the 58.5 percent African American rate for public universities and the 31.0 percent African American rate for private universities), the higher African American selection rate has little effect on the admission chances of white and Asian American applicants because of the comparatively small number of African American (or Latino) applicants and admits"). This mode of analysis presupposes that rates of admissions within groups are the proper indicator of equality, a supposition in need of a normative justification, Issa Kohler-Hausmann has noted. Issa Kohler-Hausmann, *What's the Point of Parity? Harvard, Groupness, and the Equal Protection Clause*, 115 Nw. U. L. Rev. Online 1, 20 (2020).

46 438 U.S. 265 (1978).

47 *Id.* In a footnote, Justice Powell elaborated, writing that "there is no question as to the sole reason for respondent's rejection—purposeful racial discrimination in the form of the special admissions program." *Id.* at n.54. Consequently there was no need to try construct a counterfactual to determine what might have happened in the absence of the race-conscious admissions regime. Powell concluded, "Having injured respondent solely on the basis of an unlawful classification, petitioner cannot now hypothesize that it might have employed lawful means of achieving the same result." *Id.* at 410.

48 Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 373-374 (2016).

49 *Id.* at 379.

admissions process had been in place for only three years,[50] providing relatively little data to assess the likelihood that the plaintiff would have been admitted but for the consideration of race. The plaintiff did not challenge the Top Ten Percent Plan,[51] the component of the university's admissions program that did not take race into account, and as a result, the majority observed, the "record … [was] almost devoid of information about the students who secured admission to the University through the Plan," making the determination of whether Abigail Fisher would have been admitted exceedingly difficult.[52] Even "[i]f the Court were to remand, … further factfinding would be limited to a narrow 3-year sample, review of which might yield little insight," the majority continued.[53] The Court ultimately upheld the consideration of race, hewing to the reasoning in a pair of opinions approving race conscious admissions in 2003.

In those two opinions, *Grutter v. Bollinger*[54] and *Gratz v. Bollinger*,[55] the Court did not deeply investigate causation, instead weighing the constitutional question of the ability to take race into account at all rather than the question of whether the practice harmed the plaintiffs. In *Grutter*, a majority upheld the consideration of race in the context of a law school's individualized review of each applicant for admission; in *Gratz*, a majority rejected the consideration of race in the context of an undergraduate program's more "mechanical" admissions program.[56] However, upon remand, the question of whether an injunction should issue requiring the admission of the plaintiffs who challenged the undergraduate admissions program did not come up; the issue was attorneys' fees.[57]

The prior affirmative action cases, then, did not prompt the Court to address the possibility that the explicit and formal consideration of race was not the reason that a plaintiff was denied admission. It is far from clear that a majority of the Court would even care to do so; the conservative justices have endorsed instead a "right to compete" theory of injury which posits the *consideration* of race as the harm in itself.[58] The Court has treated the explicit consideration of race alone as

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50 *Id.* The University of Texas operated a hybrid system, with most of the class admitted through the "Ten Percent Plan" that provided slots in entering classes to Texas high school graduates in the top tenth of their class, and a fraction admitted through the program that took into account race. *Id.*

51 The "Ten Percent Plan" guaranteed admission to Texas high school students who graduated in the top tenth of their class. *See* Fisher, 579 U.S. at 372 (describing the Top Ten Percent Plan). The state adopted the plan in the wake of a Fifth Circuit Court of Appeals ruling in 1996 that outlawed consideration of race in college admissions in that jurisdiction until the Supreme Court approved affirmative action in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

52 Fisher, 579 U.S. at 378.

53 *Id.*

54 539 U.S. 306 (2003).

55 539 U.S. 244 (2003).

56 *Id.* at 280.

57 Gratz v. Bollinger, 353 F.Supp.2d 929, 932 (E.D. Mich. 2005).

58 Jonathan Feingold has concisely explained the development of this understanding of the injury in affirmative action cases, which has "satisf[ied] standing and causation requirements even where a plaintiff fails to 'affirmatively establish that he would receive the benefit in question if race

the harm: this deprived the plaintiff of equal opportunity to compete.[59] This is the mechanism Boddie criticizes because it favors plaintiffs challenging affirmative action that considers race but does not aid victims of traditional and informal race discrimination. It is nevertheless not surprising that no court considered the question of causation: a defense strategy that contended that some other motive, potentially illicit in itself, led to discrimination, would be unlikely to result in a finding of no liability. The plaintiffs could have argued that regardless of consideration of race in pursuit of diversity, the university discriminated against applicants of Asian descent. That possibility raises others, all intriguing: the Court could have found, based on analysis of any potential injury to Asian and Asian American applicants, that the constitutionality of consideration of race was not at issue because some other policy or practice caused underrepresentation of Asian Americans in admitted classes. The trial court noted the role of special consideration for athletes and children of alumni in admissions, which could contribute to such underrepresentation, but concluded that Harvard's use of these "tips" to certain applicants was "to promote the institution and [was] unrelated to the racial composition of those applicant groups."[60] The conservative supermajority on the Court did not pull this thread.

III. THE PLAINTIFFS' THEORIES OF CAUSATION

The complaints against Harvard and UNC conclusively characterized the consideration of race in admissions at the two Defendant institutions as intentional discrimination against Asian American applicants. The plaintiffs repeatedly asserted that "Harvard intentionally discriminates against Asian Americans,"[61] that "statistical evidence establishes that Harvard is intentionally discriminating against Asian Americans,"[62] bringing to bear brute rhetorical force in the absence of compelling evidence of actual racial animus.[63] The complaint against UNC contained substantially similar, conclusory assertions.[64] But this was not a claim

were not considered.'" Jonathan P. Feingold, *Equal Protection Design Defects*, 91 Temple L. Rev. 513, 525 (2019) (quoting *Texas v. Lesage*, 528 U.S. 18, 20-21 (1999)).

59 Professor Boddie explains this reasoning, with roots in the facts of the affirmative action program targeted in *Bakke*; *see* Boddie, *supra* note 22, at 362–63 (noting that the claimed "*harm was the inability to compete on an equal footing*" (internal quotation omitted)).

60 Students for Fair Admissions v. President and Fellows of Harvard College, 397 F. Supp. 3d 126, 142 (D. Mass. 2019). Of course, given the demographic characteristics of children of alumni, for example, these "tips" could have disparate effects along the lines of race.

61 Complaint, Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, *supra* note 5, at ¶ 200.

62 *Id.* at ¶ 205.

63 There are similar assertions repeated in the Complaint. *See, e.g., id.* at ¶¶ 223, 238 and 427. Vinay Harpalani has observed that "[f]or the past four decades, conservative activists have sought to link affirmative action that benefits Black, Latina/o, and Native Americans with negative action that discriminates against Asian Americans," and that the 2023 cases represent the "culmination of that strategy: they represent a broad racial project that can pit different minority groups against each other." Vinay Harpalani, *Asian Americans, Racial Stereotypes, and University Admissions*, 102 B.U. L. Rev. 233, 323–24 (2022).

64 *See, e.g.*, Complaint, Students for Fair Admissions v. University of North Carolina, *supra*

that by itself necessarily established that the formal consideration of race in admissions caused exclusion of Asian American applicants.[65] The Court has not indulged in this distinction in its jurisprudence on affirmative action, instead finding that the use of the classification at all is sufficient to justify legal challenge.

At the outset, neither case alleged that the Defendants set out to depress the number of students of Asian descent admitted at each institution because they harbored racial animus against those students.[66] That is, the "intent" to discriminate asserted by the Plaintiffs was manifest in the consideration of race at all—in the desire to help members of some racial and ethnic groups, the Defendant necessarily disadvantaged members of other groups; this is the formulation the Chief Justice articulated in the majority opinion. Chief Justice Roberts wrote in his opinion for the majority that "[c]ollege admissions are zero-sum, and a benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter."[67] Such a theory of liability considerably eases, if it does not eliminate, the need to find an injury in fact, caused by the conduct complained of, in order to find federal jurisdiction—but only in favor of certain Plaintiffs.

The Plaintiffs cited statistical evidence in arguing that Harvard illegally and unconstitutionally discriminated against Asian American applicants.[68] The complaint summarizes research by various scholars and the Harvard *Crimson* finding, for example, that odds of admission at selective institutions were lower for Asian American applicants,[69] that Asian Americans disproportionately received higher standardized test scores than did members of other racial or ethnic groups,[70] and that the number of admitted Asian American students followed a pattern similar

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note 5, at ⁋⁋ 148, 154 and 198 (each alleging "intentional" discrimination by the defendant).

65 That is because really, the plaintiffs make two claims, as Jonathan Feingold has noted. *See* Feingold, *supra* note 19, at 709 (arguing that "by viewing this as a case that is all about affirmative action, common accounts tend to conflate two discrete dimensions of SFFA's suit: (1) a rather generic attack on Harvard's affirmative action policy, and (2) the more specific claim that Harvard intentionally discriminates against Asian Americans").

66 Although the plaintiffs alluded to Harvard's history of exclusion of Jewish applicants, which was driven by animus. *See, e.g.*, Complaint, Students for Fair Admissions, Inc., v. President and Fellows of Harvard College, *supra* note 5 at ⁋ 5 (arguing that "Harvard is using racial classifications to engage in the same brand of invidious discrimination against Asian Americans that it formerly used to limit the number of Jewish students in its student body"). On appeal, Students for Fair Admissions expressly argued that hostile animus was not necessary and consideration of race alone, in the interest of benefiting members of some racial and ethnic groups, constituted prohibited discrimination against members of other racial and ethnic groups. Reply Brief of Appellant, Students for Fair Admissions v. President and Fellows of Harvard College, 2020 WL 3047921, at *15-16 (1st Cir., June 5, 2020), (arguing that the category of prohibited, "intentional discrimination" includes "any racial classification that appears on the face of a policy, 'even if not based on any underlying malevolence'" (quoting AT&T Corp. v. Hulteen, 556 U.S. 701, 711 (2009)).

67 *SFFA*, 600 U.S. at 218.

68 Although the plaintiffs did argue that there was "no reason to doubt that Harvard is one" of the colleges included in a study that they cited showing disparities in rates of admissions. Complaint, Students for Fair Admissions v. President and Fellows of Harvard College, *supra* note 5 at ⁋ 221.

69 *Id.* at ⁋ 207.

70 *Id.* at ⁋ 216.

to that of Jewish students during years when Harvard sought to depress the number of Jewish students on campus.[71] Though the evidence relied upon was circumstantial, the claim of the plaintiffs was clearly stated: "No non-discriminatory factor justifies the gross disparity in Asian American admissions relative to their presence in Harvard's applicant pool."[72] In doctrinal terms, the Plaintiffs asserted that this evidence constituted proof of intentional discrimination—even if driven by the goal of promoting access for Black and Latinx applicants rather than invidious animus[73]—because that data supported no other explanation.

Evidence gathered over the course of trial contributed to a more specific theory of anti-Asian bias at Harvard—one unrelated to explicit consideration of race in the context of the college's affirmative action policy.[74] As the Plaintiff argued in its briefing to the First Circuit, "[t]here is significant record evidence that being Asian American has a negative effect on an applicant's personal rating," which is a significant factor in the determination of whether an applicant receives an offer of admission.[75] The admissions process relies on readers who review application materials and give each applicant an "overall rating; four profile ratings: (1) academic, (2) extracurricular, (3) athletic, and (4) personal."[76] The personal rating "reflects the admissions officer's assessment of what kind of contribution the applicant would make to the Harvard community based on their personal qualities," which include qualities like "integrity, helpfulness, courage, kindness, fortitude, empathy, self-confidence, leadership ability, maturity, or grit."[77] The trial court found that Harvard's admissions process involved monitoring of the demographics of the admitted class and attention to the representation of specific groups, but the court wrote that race had "no specified value in the admissions process and is never viewed as a negative attribute."[78] The Plaintiffs argued, in contrast, that Asian American applicants' identity consistently correlated with lower personal ratings.[79]

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71 *Id.* at ⁋ 226.

72 *Id.* at ⁋ 229.

73 The plaintiffs make this point most clearly in briefing to a panel of the the First Circuit Court of Appeals, arguing that it does not matter whether "discrimination" is the result of "conscious animus"; it can still be intentional for doctrinal purposes. Brief of Appellant, Students for Fair Admissions, Inc., v. President and Fellows of Harvard College, 2020 WL 882260, at 39 (1st Cir. Feb. 20, 2020).

74 This is not surprising: discovery produced data and made possible expert analyses of data that both sides to the dispute could use, but that was not available at the outset of litigation.

75 Brief of Appellant, Students for Fair Admissions v. President and Fellows of Harvard College, 2020 WL 882260, at *27 (1st Cir. Feb. 20, 2020).

76 Students for Fair Admissions, Inc., v. President and Fellows of Harvard College, 397 F. Supp. 3d 126, 140 (D. Mass. 2019).

77 *Id.* at 141. After the lawsuit was filed, Harvard overhauled its process to state explicitly that race should not be considered in assigning the personal rating. *Id.*

78 *Id.* at 147.

79 *Id.* at 169. However, the trial court concluded that "[a]ny causal relationship between Asian American identity and the personal rating must therefore have been sufficiently subtle to go unnoticed by numerous considerate, diligent, and intelligent admissions officers who were immersed in the admissions process." *Id.*

More specifically, SFFA argued that the data on admissions showed that "systematically… African Americans and Hispanics have better personal qualities than other racial groups"[80] and that White applicants received higher personal rating scores than Asian applicants. It made sense to focus on the difference between personal ratings given to White applicants and those given applicants of Asian descent, if the personal rating was the mechanism by which the formal consideration of race worked. But the formal consideration of race in the effort to help applicants who were Black and Latinx would not explain why White applicants would receive higher scores than applicants of Asian descent. This pattern, not described in these terms by the Plaintiffs, suggests that the formal consideration of race is *not* the cause of any possible disadvantage to Asian applicants relative to White applicants. It would only—and unconstitutionally, in the view of the Plaintiffs—disadvantage Asian applicants relative to Black and Latinx applicants. The clear implication is, any disparity suffered by Asian American applicants *relative to White applicants* was the result of something else, namely, implicit bias.[81]

The conservative majority on the Supreme Court did not pick up the implicit bias theory in finding that the formal consideration of race violated the equal protection clause of the Fourteenth Amendment. The Justices did not take on the potentially complex facts of the case—beyond the difficult parsing of causes of any alleged injury to Asian American applicants, there is the sophistication of the dueling statistical analyses of Harvard's admissions data, which this article will not grapple with. The majority did not develop the Plaintiffs' argument that implicit bias or explicit consideration of race in an affirmative action program could constitute racial animus. Nor did the lengthy dissents disaggregate in this way. Given the stakes, the choice to focus on the constitutional question of whether race can be considered in admissions at all makes obvious sense. But to ignore the slightly more subtle issue posed by the facts of the case against Harvard will have consequences, to which the next Part will turn.

None of the questions about the reasons why Harvard's admitted classes consisted of the students that they did played a role in the analysis by the trial court judge of whether the Plaintiffs had standing, which Harvard forced when asking the court to dismiss the complaint. Rather, the analysis by the judge, Allison D. Burroughs, focused on whether the association that had brought the suit, SFFA, could assert that it had suffered an injury that was sufficiently "concrete and particularized" to satisfy the first element of the three-part standing test described in prior Supreme Court cases. This is so, even though the judge notes[82] that standing

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80 Brief of Appellant, Students for Fair Admissions, Inc., v. President and Fellows of Harvard College, 2020 WL 882260 (1st Cir. Feb. 20, 2020) at 32.

81 The alternative theory that the plaintiffs advanced, and which both the trial court and a panel of the First Circuit Court of Appeals rejected, was "implicit bias," driven by stereotypes and cognitive reactions not the result of either intentional thought or conscious animus against people of Asian descent. *Id.* at 39.

82 *See* Memorandum and Order Denying Motion to Dismiss, Students for Fair Admissions v. President and Fellows of Harvard College, 14-cv-14176-ADB, 4 [hereinafter Order] (observing that "[a] Article III standing requires that three conditions be satisfied").

requires satisfaction of all three elements discussed above.[83] The judge's discussion then addressed whether the *association* had standing derivatively, if it alleged that any of its members "are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit."[84] Yet the court did not evaluate whether each or any member of SFFA could satisfy the three-part standing test, perhaps because the judge concluded that explicit consideration of race in itself conferred standing on any challenger. Having concluded that the association could have standing and that the individuals whom it represented did in fact wish the association to vindicate their interests, the court noted that "SFFA has submitted declarations of certain members whom it specifically identifies for standing purposes," and then concluded its analysis.[85]

To be fair, the trial court judge had a very good reason not to attempt a more nuanced analysis of the three elements of standing: no party to the litigation demanded it.[86] As Jonathan P. Feingold has argued, "[B]oth SFFA and Harvard benefit when the public conflates SFFA's discrimination claim with its broader assault on affirmative action."[87] For Harvard, to argue that the practice targeted by the plaintiffs was not the cause of the injury alleged would be to concede that there was an injury, and that would be inconsistent with an effort both to avoid liability and to preserve race-conscious admissions practices.[88] Indeed, Feingold points out, Harvard could burnish its image as a champion of social justice by losing in court with its defense of affirmative action, emerging from litigation without attaining a victory for the broad policy but also without suffering a

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83 *See supra* notes 10–13 and accompanying text.

84 Warth v. Seldin, 422 U.S. 490, 511 (1975). This is the language relied upon by the trial court. Order, *supra* note 82.

85 Order, *supra* note 82, at 17; see also *id.* at 14 ("SFFA has provided the affidavits of a subset of its members, referred to as Standing Members, which demonstrate that at least some of these individuals, the rejected applicants, would have standing to sue on their own.").

86 The parties did hold extensive sidebar discussions with the judge over admissions of evidence that could have indicated bias on the part of Harvard officials and the presiding judge. Jeannie Suk Gersen, *The Secret Joke at the Heart of the Harvard Affirmative-Action Case*, New Yorker (Mar. 23, 2023), https://www.newyorker.com/news/our-columnists/the-secret-joke-at-the-heart-of-the-harvard-affirmative-action-case. But as Jeannie Suk Gersen noted after the decision, "sealed sidebars and court hearings obscured private understandings between officials from Harvard and the federal government, who shared a joke about racial stereotyping, and between judge and litigants, who agreed to keep hidden a discussion of alleged judicial bias."

87 Feingold, *How Affirmative Action Myths Mask White Bonus*, *supra* note 19 at 711.

88 As Feingold puts it,

> By acquiescing to an affirmative action narrative, Harvard can present itself as the valiant defender of race-conscious admissions and, by extension, racial equality more broadly. This, in turn, blunts the force of SFFA's more potent charge that Harvard intentionally suppresses Asian admission to preserve White market share--a decidedly "bad look" for an institution committed to racial equality. It also deflects attention from other sites within Harvard's admissions regime that, although not challenged by SFFA, reproduce race and class privilege by conferring unearned benefits upon the wealthy and the connected.
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> *Id.*

finding of unlawful discrimination against Asian Americans.[89] For SFFA, even to recognize the possibility that race-conscious admissions practices might not be the cause of injury to the plaintiffs that it claimed to represent would be at odds with the organization's stated goal of abolishing consideration of race entirely. Yet it is troubling to contemplate that because of these clear and entirely explicable interests, any injury to Asian American applicants to Harvard might persist after the Supreme Court's decision, as a result of other, unchanged admissions practices. And should any of those applicants attempt to challenge the surviving practices that have a disparate and adverse impact, it will be more difficult to mount a successful challenge, as the next part illustrates.

IV. IMPLICATIONS OF THE ELISION OF CAUSATION

The elision of causation in the analysis by the courts hearing the affirmative action cases in 2023 matters for at least four different reasons. First and perhaps most immediately, there are implications for future plaintiffs alleging discrimination in the context of admissions at selective institutions of higher education and potentially in other contexts as well. Second, the incomplete application of long-standing principles of standing in these cases adds to instability of established doctrine in ways that give the Court more discretion to permit thin claims to proceed to adjudication. Third, the decisions here have substantive effects on applicants to selective colleges and universities. Fourth, the reasoning of the conservative supermajority undermines a possible national conversation about how higher education should be allocated by suggesting that admissions without affirmative action will produce fairer results. This part elaborates on each of these concerns, then sketches possibilities for efforts to promote equity in access to higher education notwithstanding the Supreme Court's recent decisions.

A. Shifting the Analysis of Discrimination

Consider the two different paths confronting differently situated, future plaintiffs who allege that a selective college has engaged in unlawful discrimination on the basis of race in its admissions practices. Those plaintiffs who are members of historically excluded groups—Black and Latinx applicants—must find evidence that a defendant's facially neutral conduct, which did not involve explicit consideration of race, was intentional.[90] This evidence will be difficult to come by, not least because of the even greater incentive to obscure admissions practices and rationales after the resolution of the affirmative action cases:[91] no admissions officer will want to create evidence of intentional consideration of race for fear of litigation. Vinay Harpalani describes the resulting "secret admissions" process in his contribution

89 Jonathan P. Feingold, *Ambivalent Advocates: Why Elite Universities Compromised the Case for Affirmative Action*, 58 Harv. Civ. Rts.-Civ. Liberties L. Rev. 143, 185 (2023).

90 Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979).

91 Peter Arcidiacono et al., *Affirmative Action, Transparency, and the SFFA v. Harvard Case*, 87 U. Chi. L. Rev. Online 119, 125–26 (2020) (describing how universities in the United States "have obfuscated their admissions criteria as they relate to race" in response to Supreme Court decisions addressing consideration of race in that setting).

to this volume, which argues for transparency in admissions decisions.[92] The critical observation is that plaintiffs challenging affirmative action face an easier doctrinal path because the challenged policy plainly and explicitly invokes race; the plaintiff challenging traditional race discrimination must present evidence that the intentional consideration of race led to injury.

On the other hand, White applicants, concerned that a selective college or university has discriminated against them, may enjoy a shortcut: they may be able to point to prior explicit consideration of race in admissions and argue that, perhaps for the most noble of reasons, the defendant institution continues to consider race in favor of members of historically underrepresented groups. That is, the fact that the college previously considered race in an affirmative action program could be used as evidence of intent, to assert that the college is engaged in the same, now definitively unconstitutional practice. It is not difficult to imagine a complaint charging that the defendant institution attempted to do covertly what the Supreme Court held unconstitutional when done overtly.[93] Indeed, if the numbers of Black and Latinx applicants admitted to selective institutions do not decline in the wake of the 2023 decisions, such litigation seems certain.[94] In this way, inequality consistent with the results of past, explicitly racist policies and practices persists, protected by the facially neutral principle of colorblindness endorsed by the Supreme Court. And after the 2023 decisions, potential Asian American plaintiffs seeking to redress the unresolved sources of their underrepresentation confront the same challenges that face Black and Latinx applicants, needing to find evidence of intentional discrimination in an opaque admissions regime. While the litigation against affirmative action made doctrinal allies of White and Asian American challengers hoping to achieve greater access to selective higher education, its end may put Asian Americans in the same position as Black and Latinx applicants.

B. Erosion of Standing Doctrine

The failure to confirm a causal connection between the race-conscious admissions practice targeted by the plaintiffs in the *SFFA* cases and the harm allegedly suffered by Asian American applicants will affect future plaintiffs. The resolution of these affirmative action cases demonstrates yet again that two of the three elements long accepted as components of standing analysis in other contexts do not matter here. This mechanism intended to ensure justiciability and thereby preserve the separation of powers—preventing courts from using ideologically

92 Vinay Harpalani, *Secret Admissions*, 48 J. Col. & Univ. L. 325, 365 (2023).

93 Indeed, Chief Justice Roberts may have previewed this argument in his opinion for the majority when he cited *Cummings v. Missouri*, writing that "'what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows,' and the prohibition against racial discrimination is 'levelled at the thing, not the name.'" Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181, 230 (2023) (quoting Cummings v. Missouri, 71 U.S. 277, 325 (1867)). *See also* Harpalani, *Secret Admissions*, *supra* note 92 at 352.

94 Indeed, within weeks of the Supreme Court's decision, SFFA sent a warning email to 150 colleges and universities, outlining a series of demands to eliminate consideration of race from every aspect of the admissions process. Scott Jaschik, *The Demands of Students for Fair Admissions*, Inside Higher Ed (July 13, 2023), https://www.insidehighered.com/news/admissions/2023/07/13/demands-students-fair-admissions.

motivated claims by preferred plaintiffs to undo the work of the legislature—will be that much weaker. The conservative supermajority on the Court may accept tenuous theories of standing, perhaps resting on highly contingent and uncertain assertions of harm, in order to assist plaintiffs pursuing objectives of a shared ideology or even a bare partisan, political advantage.[95]

A formalist might at least hope for consistency and that the conservative Justices would feel constrained to entertain claims regardless of ideology. But the Justices might not believe themselves so constrained by a "hobgoblin of little minds."[96] Given their willingness to depart from decades-old precedent that permitted consideration of race in college admissions in pursuit of a particular objective, it is not difficult to imagine that the majority on the Court could distinguish the standing argument of a plaintiff that the Justices considered an ideological ally from the same sort of argument by an ideological opponent.

C. Perpetuating Inequality in Selective Higher Education—and Beyond

The resolution of the 2023 affirmative action cases will have substantive effects on students in subsequent admissions cycles. The implication of Chief Justice Roberts's characterization of admissions as a zero-sum game is that the number of Black and Latinx students admitted should indeed fall; presumably, were there a causal connection between the explicit consideration of race in an affirmative action policy, the number of Asian American students admitted would go up. If that pattern does not manifest, litigation challenging admissions practices seems guaranteed, as noted above.[97] And whether it manifests or not, the shift away from promoting access to members of historically excluded groups in the admissions process is likely to contribute to racialized resentment of selective colleges and universities, if the number of students who are members of historically excluded groups declines.

If selective colleges and universities do allow the demographic characteristics of their classes to change in the ways that the conservative justices anticipate, there will be other consequences, too. Less diversity on elite campuses will mean less representation in classrooms of experiences beyond the most privileged slice of the population.[98] Less representation in turn means fewer opportunities for students of widely differing backgrounds to interact, empathize, learn, and grow from and with one another. Less representation, justified by the abandonment of

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95 In the student debt decision released shortly prior to the affirmative action decisions, the Court appears to have accepted just such a tenuous theory of standing, finding that a Republican state attorney general had standing to sue on behalf of a state-created corporation to block a signature policy initiative of a Democratic administration—even though the state would not necessarily suffer any injury as a result of the policy. Biden v. Nebraska, 600 U.S. __, 143 S.Ct. 2355, 2386 (2023) (Kagan, J., dissenting)..

96 Ralph Waldo Emerson, Self-Reliance (1841).

97 *See supra* Part IV.A (describing likelihood of this additional litigation).

98 Philip Lee, *Rejecting Honorary Whiteness Asian Americans and the Attack on Race-Conscious Admissions*, 70 Emory L.J. 1475, 1493 (2021) (describing the effects of adoption of a "colorblind" model of admissions to selective institutions).

consideration of race in admissions, also reinforces a particular racial hierarchy, with White and Asian American students at the top and Black and Latinx students at the bottom. The most selective institutions of higher education may admit classes that include fewer Black and Latinx students, a pattern that outsiders and even students on such elite campuses themselves may come to see as natural and inevitable rather than as a construct of law and social structures. Those Black and Latinx students may in turn attend less selective, less prestigious, and less well-endowed institutions that send fewer graduates into the ranks of the national elite. The seductive story will be that affirmative action constituted social engineering and its abolition marks a return to a pure merit system—never mind that there has never been such a pure meritocracy. Modifications to admissions standards may be more difficult to change if they are accepted as neutral and objective, despite their disparate effects: the process may be accepted as fair. And if elite institutions' graduates are less diverse, the leadership of business, cultural, and political institutions they disproportionately flock to will be less diverse, too.[99]

The distribution of students across institutions is also likely to shift, with Black and Latinx students overrepresented at colleges and universities (or other programs of higher education) that are less selective. These less elite institutions typically have lower completion rates and may have fewer financial resources to offer aid to students who need it, meaning that those disproportionately Black and Latinx students may have to borrow more.[100] Those worse outcomes, higher debt burdens, and racial disparities in postgraduate compensation in turn work together to undermine the promise of financial security and socioeconomic mobility that access to higher education is supposed to confer.[101] The lower benefit of the investment in higher education reinforces preexisting societal inequality, something policies promoting access to higher education have long aimed to counter.

D. Pursuit of Higher Education Opportunity

There are counternarratives and arguments in favor of promoting fairness in access to higher education opportunity, especially at the state level. In California, for example, concern over out-of-state residents taking spots in the state's prized three-tired higher education system can work to promote opportunities for in-state applicants, and the population of the state is increasingly diverse in all dimensions. In discussing caps on out-of-state enrollment, lawmakers have noted the importance of having an undergraduate population that resembles the population of the state as a whole. Of course, out-of-state students pay more for their education in the state, so efforts to shape who is enrolled should take into account the fiscal consequences. Another, concrete policy step is a shift away from so-called merit aid and toward need-based aid. Both of these steps are possible at the state level, perhaps relying

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99 Joni Hersch, *Affirmative Action and the Leadership Pipeline*, 96 Tul. L. Rev. 1, 6 (2021).

100 Dalié Jiménez and Jonathan D. Glater, *Student Debt is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*, 55 Harv. C.R.–C.L. L. Rev. 131, 136-137 (2020).

101 Rachel F. Moran, *Diversity's Distractions Revisited: The Case of Latinx in Higher Education*, 73 S.C. L. Rev. 579, 614 (2022).

on state constitutional provisions.[102]

However, there is no model of a fair admissions regime to be derived from past practices. Although the implication of the Plaintiffs' argument is that but for consideration of race, admissions regimes at selective colleges and universities are inoffensive, the status quo ante—prior to adoption of any form of race-based affirmative action—was race-based exclusion; we have no ideal to serve as a benchmark for assessing whether any particular admissions regime is more or less fair.[103] There is no ready allocation system to apply to the precious resource that is elite higher education. Conversations about whom to prioritize and how are inevitably fraught, and yet such a difficult political process might be the necessary step to move past a paradigm that perpetuates exclusion and inequality. Determining how to allocate the educational experience offered by selective institutions of higher education requires first some discussion of the purposes that these colleges and universities should serve; but that question is beyond the scope of this article.

V. CONCLUSION

This article has argued that the courts that heard the challenge to consideration of race in admissions at Harvard College and the University of North Carolina failed to consider a key aspect of the Plaintiffs' claim: that the practice complained of caused the injury they alleged. Such analysis is called for under established doctrine to verify standing or the right to proceed with a lawsuit. The omission, which may prove to have muddled that doctrine, enabled the Supreme Court to reach the merits of the cases against the two institutions of higher education and strike down their affirmative action policies as unconstitutional. This elision of causation means that the possibility persists of discrimination against Asian American applicants to Harvard, notwithstanding the termination of policies intended to promote access to the college for members of historically groups. The Court's opinion suggests continued hostility to efforts to promote racial equity and little concern for precedent. For advocates of racial equity in higher education, paths around the courts may hold the best opportunities, until the composition of the Court changes.

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102 Erwin Chemerinsky, *The Supreme Court and Racial Progress*, 100 N.C. L. Rev. 833, 854–55 (2022).

103 In other work, I have suggested that if we accept an equal distribution of ability and intellect across racial lines, then a fair selection regime should produce admitted classes that resemble the applicant pool. Jonathan D. Glater, *Pandemic Possibilities: Rethinking Measures of Merit*, 69 UCLA L. Rev. Disc. 48, 71 (2021).