

## RACE CONSCIOUS PROGRAMS AFTER *STUDENTS FOR FAIR ADMISSIONS*

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## PART 1: INTRODUCTION

There exists a misconception within modern day political discourse wherein the courts have assumed that current inequalities caused by past “private discriminations” by non-state actors are not justification for remedial policies.<sup>1</sup> However, segregation and its enduring effect on the United States was caused by public policies of the state and federal governments and should be considered issues that can be addressed equally by federal policy. In the late 1940s through the 1950s, the Federal Housing Administration (“FHA”) and Veterans Affairs (“VA”) undertook massive projects to fund the development of entire residential subdivisions throughout the United States.<sup>2</sup> In Levittown, New York, mass-production builders constructed 17,500 two-bedroom homes of 750 square feet at \$8,000 each.<sup>3</sup> Private developers who agreed to build Levittown could never hope to amass the capital needed for such a massive project alone.<sup>4</sup> Such developments were only possible via congressional action authorizing the FHA and the VA to guarantee bank loans to the builders for almost the entire cost of construction.<sup>5</sup> By the end of the 1940s, nearly every home in the United States was being constructed with the aid of the FHA.<sup>6</sup>

In 1941, the Federal Housing Administration required a developer building a new white-only neighborhood in Detroit to build walls around the construction project to isolate future white residents from nearby Black American residences.<sup>7</sup> Detroit still remains one of the most segregated cities in the United States, and the wall still exists to this day.<sup>8</sup> In 1953, the Florida State Road Department routed the construction of I-95 directly through a

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<sup>1</sup> Richard Rothstein, *Misteaching History on Racial Segregation: Ignoring Purposeful Discriminatory Government Policies of the Past Contributes to the Ongoing Achievement Gap*, ECON. POL’Y INST. (Dec. 12, 2013), <https://www.epi.org/publication/misteaching-history-racial-segregation-ignoring/> [https://perma.cc/A7ET-SYKY].

<sup>2</sup> Chris Birk, *Seven Decades of Success: A Brief History of the VA Home Loan*, VETERANS UNITED (May 29, 2019), <https://www.veteransunited.com/valoans/seven-decades-success-history-va-home-loan/> [https://perma.cc/5WY9-8FXU]; Terry Gross, *A “Forgotten History” of How the U.S. Government Segregated America*, NPR (May 3, 2017, 12:47 PM), <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america> [https://perma.cc/RG2X-LXR5].

<sup>3</sup> RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* loc. 70 (2018) (ebook).

<sup>4</sup> *Id.* at 70.

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

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 58.

<sup>8</sup> Caroline Llanes, *Detroit Ranked as One of the Most Segregated Cities in the Country*, MICH PUB. (June 21, 2021, 10:35 PM), <https://www.michiganpublic.org/families-community/2021-06-21/detroit-ranked-as-one-of-the-most-segregated-cities-in-the-country> [https://perma.cc/2LR3-3XR4]; Erin Einhorn, Olivia Lewis, NBC News & Bridge Detroit, *Built to Keep Black from White*, BRIDGE DETROIT (July 19, 2021), <https://www.bridgedetroit.com/built-to-keep-black-from-white-the-story-behind-detroits-wailing-wall/> [https://perma.cc/7SK6-9QN7].

vibrant and culturally significant Black community of Overtown, bulldozing over eighty-seven acres of residential and commercial properties in the process.<sup>9</sup> The well-being of the community of almost 40,000 Black Americans declined immediately; the community lost more than 50% of its population as well as 33% of its business in the 1960s and continued to hemorrhage population well into the 1990s.<sup>10</sup> During the same decade, the federal government constructed a central post office and distribution center in Oakland, California, bulldozing over 20 acres of land and causing a net loss of between 5,100 to 9,700 housing units in a predominantly Black neighborhood in an effort to “renew” Oakland.<sup>11</sup> Despite an executive order encouraging affirmative action to hire Black Americans, the massive Bay Area Rapid Transit system failed to hire a single skilled Black worker when it was built in 1967 as National Labor Relations Board (“NLRB”)-certified unions refused to admit Black workers.<sup>12</sup>

For Levittown and other such developments across the country, the FHA imposed several requirements, including, most importantly, a commitment not to sell to any Black Americans.<sup>13</sup> The FHA also heavily favored loans to whites only subdivisions, particularly those insulated from neighboring Black communities, at times even requiring the construction of walls or buffer zones to prevent integration.<sup>14</sup> The FHA, in essence, required any developers seeking financial assistance to commit to keeping the

<sup>9</sup> Stephen Robb, *How Urban Renewal and Highways Destroyed Overtown, Miami's Historic Black Neighborhood*, THE MIAMI HERALD (Oct 1, 2024), [https://www.miamitimesonline.com/news/local/how-urban-renewal-and-highways-destroyed-overtown-miami-s-historic-black-neighborhood/article\\_7b87a634-8092-11ef-86f7-0b1f7ee90115.html](https://www.miamitimesonline.com/news/local/how-urban-renewal-and-highways-destroyed-overtown-miami-s-historic-black-neighborhood/article_7b87a634-8092-11ef-86f7-0b1f7ee90115.html) [https://perma.cc/VKK5-P9LF]; INST. OF GOV'T: FLA. INT'L UNIV., THE HIST. IMPACTS OF THE TRANSP. PROJECTS ON THE OVERTOWN COMMUNITY 1, 2 (1998), <https://dpanther.fiu.edu/record/62474?ln=es&p=%28+%28subject%3A%22Overtown+%28Miami%2C+Fla.%29%22%29%29&v=pdf> [https://perma.cc/Y4KV-8FF9] (Executive Summary and Major Recommendations); ROTHSTEIN, *supra* note 3, at 128-29; Farrell Evans, *How Interstate Highways Gutted Communities—and Reinforced Segregation*, HISTORY (May 27, 2025), <https://www.history.com/articles/interstate-highway-system-infrastructure-construction-segregation> [https://perma.cc/H62F-TYK8].

<sup>10</sup> *Id.*

<sup>11</sup> *West Oakland: Mapped by Destruction*, HABITAT FOR HUMAN. EAST BAY/SILICON VALLEY (May 23, 2023), <https://www.habitatcsv.org/blog/west-oakland-fair-housing-history> [https://perma.cc/V746-FWY7].

<sup>12</sup> *Chapter 10 - Stolen Labor and Hindered Opportunity*, in THE CAL. REPARATIONS REP. 352, 353 (June 29, 2023), <https://oag.ca.gov/system/files/media/ch10-ca-reparations.pdf> [https://perma.cc/L7R6-92GX].

<sup>13</sup> See La-Brina Almeida, *A History of Racist Federal Housing Policies*, MASS. BUDGET AND POL'Y CTR. (August 6, 2021), <https://massbudget.org/2021/08/06/a-history-of-racist-federal-housing-policies/> [https://perma.cc/E82E-U23F].

<sup>14</sup> *Id.*; Chat Travieso, *A Nation of Walls: The Overlooked History of Race Barriers in the United States*, PLACES J. (Sep. 2020), <https://placesjournal.org/article/a-nation-of-walls/> [https://perma.cc/NT48-2G96].

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composition of the neighborhood white for the foreseeable future. Furthermore, the federal government instituted a discriminatory policy of “redlining” neighborhoods to refuse loans and mortgages for specific geographic neighborhoods, labeling neighborhoods with communities of color “at-most risk” and describing the presence of minority individuals as “infiltrations.”<sup>15</sup> For example, in New York, a redlined neighborhood was described in the federal report in the following way: “[t]here is a steady infiltration of negro, Spanish and Puerto Rican into the area,” and “colored infiltration is a definitely adverse influence on neighborhood desirability.”<sup>16</sup>

These stories may seem like relics of the past, but the deprivation of property has had profound and lasting effects on racial wealth inequality.<sup>17</sup> Today, minority communities remain disproportionately concentrated in low-income neighborhoods, and the lack of inherited property among Black Americans and other marginalized groups has left these communities more vulnerable to environmental pollution and housing instability as a direct result of past government policies that denied them access to property ownership.<sup>18</sup> Undoing this purposeful geographical segregation would likely take significant investment and policy initiatives from the government.<sup>19</sup> In response to injustices created by past federal policies, this Note proposes that equality can be furthered and geographical segregation can be mitigated by unbundling infrastructure projects,<sup>20</sup> improving public transportation access

<sup>15</sup> Redlining was a practice under which Home Owners’ Loan Corporation, a federal agency, graded presence of African Americans and, to a lesser extent, other races and immigrants as a threat to future home values, thus justifying denial of access to mortgages. FACING SEGREGATION: HOUSING POLICY SOLUTIONS FOR A STRONGER SOCIETY (Molly W. Metzger & Henry S. Webber eds., 2018); *Mapping Inequality: Redlining in New Deal America*, DIGIT. SCHOLARSHIP LAB. <https://dsl.richmond.edu/panorama/redlining/> [https://perma.cc/Y2PK-VTWD].

<sup>16</sup> McKay Cunningham & Latonia Haney Keith, *Redlining and Intergenerational Wealth*, 64 ADVOC. 24, 25 (2021).

<sup>17</sup> Kevin E. Jason, *Dismantling the Pillars of White Supremacy: Obstacles in Eliminating Disparities and Achieving Racial Justice*, 23 CUNY L. REV. 139, 157 (2020) (“Overall, the study estimates that forty percent of the gap in home values between Blacks and whites are attributable to HOLC maps alone.”).

<sup>18</sup> Bongki Woo et al., *Residential Segregation and Racial/Ethnic Disparities in Ambient Air Pollution*, 11 RACE & SOC. PROBS. 60, 60-61 (2019); ALLISON SHERTZER, TATE TWINAM & RANDALL P. WALSH, NAT’L BUREAU OF ECON. RSCH., RACE, ETHNICITY, AND DISCRIMINATORY ZONING 20 (2014), [https://www.nber.org/system/files/working\\_papers/w20108/w20108.pdf](https://www.nber.org/system/files/working_papers/w20108/w20108.pdf) [https://perma.cc/6ZJW-MANG].

<sup>19</sup> Jessica Trounstone, *Land Use Regulation and Residential Segregation*, THE REGUL. REV. (Apr. 11, 2011), <https://www.theregreview.org/2022/04/11/trounstone-land-use-regulation/> [https://perma.cc/Y6WV-PARX].

<sup>20</sup> BRETT THEODOS, SOPHIE MCMANUS & TOMI RAJNINGER, URB. INST., REMOVING BARRIERS TO PARTICIPATION IN LOCAL AND STATE GOVERNMENT PROCUREMENT AND CONTRACTING FOR ENTREPRENEURS OF COLOR 11-12 (2014), <https://www.urban.org/sites/default/files/2024-04/Removing%20Barriers%20to%20Participation%20in%20Local%20and%20State%20Government%20Procurement%20and%20Contracting%20for%20Entrepreneurs%20of%20Color.pdf> [https://perma.cc/3JXM-TDLB].

to minority communities,<sup>21</sup> and creating a standard for racial impact studies prior to infrastructural construction in the United States.<sup>22</sup>

Part 2 of this Note will review the factual and legal background of the past and current state of geographical segregation in the United States.<sup>23</sup> It also discusses the difficulties in addressing and debating these issues.<sup>24</sup> Part 3 explores the current and past state of the law as it pertains to affirmative action and race-conscious policies in the United States, discussing the radical departure from past standards by the Supreme Court in the recent *Harvard v. Students for Fair Admissions* decision (hereinafter “*SFFA*”).<sup>25</sup> Part 3 will also analyze the *SFFA* standard and the holding imposed by the court in *SFFA* and argue that undoing the effects of geographical segregation or removing tools of economic oppression would still be considered compelling state interest under this standard.<sup>26</sup> Part 4 recommends specific policies such as unbundling infrastructural projects, requiring racial impact studies prior to construction of major infrastructure projects, and improving public transit infrastructure and access to low-income and minority neighborhoods.

This Note is written with the aim of seeking a path forward in compliance with the recent Supreme Court decision in *SFFA*, and takes issue with the assertion by the Court that “ameliorating societal discrimination” does not constitute a compelling interest of the state.<sup>27</sup> It also advances the argument that race-conscious efforts to combat physical segregation and repair damage caused by racist acts would remain an important state interest despite *SFFA*. While this decision will certainly hinder efforts to undo government-sponsored segregation in our education system and elsewhere, seeking a path forward to promote equality is nonetheless still possible.<sup>28</sup>

<sup>21</sup> Christof Spieler, *Racism Has Shaped Public Transit, and It’s Riddled with Inequities*, RICE UNIV. (Aug. 24, 2020), <https://kinder.rice.edu/urbanedge/racism-has-shaped-public-transit-and-its-riddled-inequities> [https://perma.cc/XD9X-D6ZG]; Prottoy Akbar, *Public Transit Access and Income Segregation*, CEPR (Apr. 26, 2025) <https://cepr.org/voxeu/columns/public-transit-access-and-income-segregation> [https://perma.cc/Y5ZN-3RCM].

<sup>22</sup> CASSANDRA CARUDO, RACIAL IMPACT ANALYSIS IN LOCAL LAND USE APPLICATIONS (Keith Hirokawa, Jocelyn Gibson, Victor Flatt, Bridget Nostro, Jonathan Rosenbloom, eds.) <https://sustainablecitycode.org/brief/racial-impact-analysis-in-local-land-use-applications-2/> [https://perma.cc/9CUR-9KT5].

<sup>23</sup> See *infra* Part 2.

<sup>24</sup> *Id.*

<sup>25</sup> See *infra* Part 3.

<sup>26</sup> *Id.*

<sup>27</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 226 (2023).

<sup>28</sup> Edward Lempinen, Jason Pohl, & Ivan Natividad, *Berkeley Leaders, Scholars React to Supreme Court’s Decision on Affirmative Action*, UC BERKLEY (June 29, 2023), <https://news.berkeley.edu/2023/06/29/berkeley-leaders-scholars-react-to-supreme-courts-decision-on-affirmative-action/> [https://perma.cc/Z95V-5FEF].

## PART 2: THE BACKGROUND OF SEGREGATION

## A. Government Policies That Contributed to Geographical Segregation

A fundamental barrier to remedying the effects of segregation is the public perception that segregation and discrimination are merely behavioral or policy issues that can be resolved with a few strokes of the pen. Segregation, however, is a phenomenon that often manifests itself physically, such as through the practice of redlining, a practice under which access to federal loans and mortgages were used to encourage ‘private segregation’ such as racially exclusive covenants.<sup>29</sup> Between the periods of 1930s through 1960s, the Federal Housing Administration (“FHA”) was tasked with repairing the damage done to mortgage finance by the Great Depression through insuring “economically sound” loans.<sup>30</sup> However, the Underwriting Manual of the FHA at the time claimed that no loans could be “economically sound” if granted to a neighborhood that had even the mere possibility of integration in the future, and recommended instituting restrictive covenants.<sup>31</sup> This practice, called redlining, wherein segregation of entire neighborhoods was encouraged by official public policy, affected long-term change upon the composition of society in the United States.<sup>32</sup> Prior to redlining, urban society was much more integrated.<sup>33</sup>

This radical change in the nation’s social landscape was further enabled by the advent of cars, which allowed public policy to entrench geographic segregation, by facilitating the movement of white Americans to the suburbs while largely denying Black Americans access to the same opportunities.<sup>34</sup> For instance, the Veterans Administration (now the Department of Veterans Affairs), created to support returning servicemen from World War II, frequently denied Black servicemen the mortgage assistance to which they were entitled under the G.I. Bill and steered their applications away from four-year colleges toward vocational schools.<sup>35</sup> While white servicemen

<sup>29</sup> FACING SEGREGATION: HOUSING POLICY SOLUTIONS FOR A STRONGER SOCIETY (Molly W. Metzger & Henry S. Webber eds., 2018); *Mapping Inequality: Redlining in New Deal America*, DIGIT. SCHOLARSHIP LAB. <https://dsl.richmond.edu/panorama/redlining> [https://perma.cc/Y2PK-VTWD].

<sup>30</sup> FEDERAL RESERVE HISTORY, *Redlining* (June 2, 2023), <https://www.federalreservehistory.org/essays/redlining> [https://perma.cc/GVJ9-LV4S].

<sup>31</sup> *Id.*

<sup>32</sup> RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* loc. 21 (2018) (ebook).

<sup>33</sup> *Id.*

<sup>34</sup> ROTHSTEIN, *supra* note 3, at 74-75.

<sup>35</sup> *Id.* at 167; *First-of-Its-Kind Challenge Tons Benefits Brought by Clinic Moves Forward*, YALE L. SCH. (Apr. 1, 2024), <https://law.yale.edu/yls-today/news/first-its-kind-challenge-racial-discrimination-veterans-benefits-brought-clinic> [https://perma.cc/83B3-DTRV].

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benefited greatly from this federal policy, with loan support encouraging white homeownership and education support allowing white servicemen to pursue higher paying jobs, black servicemen were denied much of the same opportunity.<sup>36</sup> Accordingly, the federal government not only unjustly denied many Black Americans their right to the dignity of equal treatment, but also likely caused them direct and measurable harm that had a lasting effect across generations.<sup>37</sup>

The discrepancy of property ownership between Black and white Americans is a clear example of this measurable harm. While the income of all racial groups of working-class families stagnated since the 1970s, prices of single-family homes have skyrocketed ever since.<sup>38</sup> When they were initially developed, properties in massive developments assisted by federal loans such as Levittown were sold to white working class veteran families for approximately \$8,000, which would be approximately \$100,000 in 2025.<sup>39</sup> Many Black Americans met the income-requirement for the purchase of properties in Levittown, yet they were prohibited from applying as Levittown was designated for white-use only.<sup>40</sup> The property value of Levittown has since ballooned to around \$700,000.<sup>41</sup> In other words, across three or so generations, white working-class families who bought property in Levittown or similar developments amassed more than \$500,000 in generational wealth.<sup>42</sup> The gap in property wealth is further consistent with statistics revealing that Black Americans are much less likely to inherit wealth or receive significant gifts from family members than white Americans.<sup>43</sup> In 2019, the median white household held about nine times as

<sup>36</sup> Rachel Horvath, *Not All WWII Veterans Benefited Equally from the GI Bill*, THE HELLER SCH. (Nov. 7, 2023), <https://heller.brandeis.edu/news/items/releases/2023/impact-report-gi-bill.html> [<https://perma.cc/73QE-NL34>].

<sup>37</sup> LaDavia S. Hatcher, *A Case for Reparations: The Plight of the African-American World War II Veteran Concerning Federal Discriminatory Housing Practices*, THE MODERN AM., Summer 2006, at 18, 20.

<sup>38</sup> John Pavlus, *What's Causing Wage Stagnation in America?*, KELLOGG INSIGHT (Dec. 2, 2019), <https://insight.kellogg.northwestern.edu/article/wage-stagnation-in-america> [<https://perma.cc/G9GJ-9JBS>]; U.S. Census Bureau and U.S. Dep't of Hous. and Urb. Devel., *Median Sales Price of Houses Sold for the United States [MSPUS]*, FED. RSRV. BANK OF ST. LOUIS, <https://fred.stlouisfed.org/series/MSPUS>, [<https://perma.cc/4YEM-B78R>].

<sup>39</sup> Values were shifted from the original source material using publicly available inflation calculator to meet 2025 standard. See ROTHSTEIN, *supra* note 3, at 181.

<sup>40</sup> *Id.* at 182.

<sup>41</sup> Levittown, *NY Housing Market*, ZILLOW, <https://www.zillow.com/home-values/25566/levittown-ny/> [<https://perma.cc/H4UW-X57S>].

<sup>42</sup> See ROTHSTEIN, *supra* note 3, at 181; Jason, *supra* note 17 at 181.

<sup>43</sup> John Bailey Jones & Urvi Neelakantan, *How Big Is the Inheritance Gap Between Black and White Families?*, FED. RSRV. BANK OF RICHMOND, [https://www.richmondfed.org/publications/research/economic\\_brief/2022/eb\\_22-49](https://www.richmondfed.org/publications/research/economic_brief/2022/eb_22-49) [<https://perma.cc/WR49-UG5Y>].

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much wealth as a median Black household. Moreover, a 2020 simulation analysis indicated that intergenerational wealth transfers and inheritance accounted for about 26% of the gap in racial wealth inequality.<sup>44</sup>

*B. How Geographical Segregation Furthers  
Racial Wealth Inequality*

The geographical segregation that arose from public policy has caused long lasting effects upon the United States.<sup>45</sup> For instance, while infrastructural developments often contain both negative and positive consequences for communities in which they are built, low-income and minority communities often suffer the brunt of the negative consequences.<sup>46</sup> Construction of hazardous waste disposal facilities also often target low-income and minority neighborhoods.<sup>47</sup> Over 79% of garbage incinerators in the United States are built around low-income and minority neighborhoods, leading to significant health problems for the denizens within.<sup>48</sup> Meanwhile, green spaces such as parks, playgrounds, and gardens that can improve health outcomes are a rarity in low-income and minority communities.<sup>49</sup>

Despite extensive studies detailing the health risks of such infrastructural developments to the locals, statistics do not indicate that people of color or low-income citizens of the United States receive more medical care than the average American.<sup>50</sup> In actuality these studies indicate that the opposite is true: that despite the fact that infrastructural development

<sup>44</sup> *Id.*

<sup>45</sup> Adewale A. Maye, *Chasing the Dream of Equity*, ECON POL'Y INST. (Aug. 1, 2023), <https://www.epi.org/publication/chasing-the-dream-of-equity/> [<https://perma.cc/KCA5-XK89>]; OFF. OF THE N.Y.C. COMPTROLLER, *THE RACIAL WEALTH GAP IN NEW YORK* (2023), <https://comptroller.nyc.gov/wp-content/uploads/documents/The-Racial-Wealth-Gap-in-New-York.pdf> [<https://perma.cc/BR48-HBPQ>].

<sup>46</sup> Tomi Rajninger, *Considering the Impacts of Federal Infrastructure Investments on Racial Equity*, Urb. Inst. (Dec. 7, 2023), <https://www.urban.org/urban-wire/considering-impacts-federal-infrastructure-investments-racial-equity> [<https://perma.cc/E8X8-2VHW>].

<sup>47</sup> Morgan Sherburne, *Targeting Minority, Low-Income Neighborhoods for Hazardous Waste Sites*, UNIV. OF MICH. (Jan. 19, 2016), <https://news.umich.edu/targeting-minority-low-income-neighborhoods-for-hazardous-waste-sites/> [<https://perma.cc/NQS3-7FWR>].

<sup>48</sup> Oliver Milman, *Revealed: 1.6m Americans Live Near the Most Polluting Incinerators in the US*, THE GUARDIAN (May 21, 2019), <https://www.theguardian.com/environment/2019/may/21/us-pollution-incinerators-waste-burning-plants-report> [<https://perma.cc/ED4Z-59UK>].

<sup>49</sup> Emily G. Bergeron, *A Right to Nature: Addressing Disparities in Green Space Access*, HUM. RTS. MAG. (Oct. 30, 2024), <https://www.americanbar.org/groups/crsj/resources/human-rights/2024-october/right-to-nature/> [<https://perma.cc/27CF-PYXX>].

<sup>50</sup> See NAT'L RSCH. COUNCIL (US) PANEL ON RACE, ETHNICITY, & HEALTH IN LATER LIFE, UNDERSTANDING RACIAL AND ETHNIC DIFFERENCES IN HEALTH IN LATE LIFE: A RESEARCH AGENDA (Rodolfo A. Bulatao & Norman B. Anderson eds., 2004); Martine Vrijheid, *Health Effects of Residence Near Hazardous Waste Landfill Sites: A Review of Epidemiologic Literature*, 108 ENV'L HEALTH PERSP. 101, 110 (2000); Tomi Rajninger, *supra* note 46; Morgan Sherburne, *supra* note 47; Oliver Milman, *supra* note 48.

policies place low-income and minority communities at an enhanced risk of air pollution and other health complications, the quality of care received by an average Black American tends to be less than his or her white counterparts, due to their historical underrepresentation compared to white Americans in better paying jobs.<sup>51</sup>

Health injustice has consequences other than quality of life issues and the well-being of the inhabitants of these low-income and minority communities.<sup>52</sup> Due to air pollution created by negative infrastructure, children in minority communities are significantly more likely to develop chronic conditions such as asthma.<sup>53</sup> Chronic health conditions often cause long term disadvantage to education attainment in children: asthma is one of the leading causes of school absenteeism, and students afflicted by it often experience more emergency room visits than the other children.<sup>54</sup> While schools may be able to effectively handle a small number of children with a chronic conditions through providing special support, it may be overwhelmed if a relatively large proportion of children develop chronic conditions due to environmental injustice.<sup>55</sup>

Low-income and minority neighborhoods also tend to suffer from poor access to employment opportunities or public transit that may enable them to travel to places with employment opportunities.<sup>56</sup> People in low-income and minority communities thus tend to absorb the worst outcomes of infrastructure developments while simultaneously receiving few of its benefits.<sup>57</sup>

<sup>51</sup> David R. Williams & Toni D. Rucker, *Understanding and Addressing Racial Disparities in Health Care*, 21 HEALTH CARE FIN. REV. 75 (2000).

<sup>52</sup> See generally, Lauren E. Wisk & Elissa R. Weitzman, *Expectancy and Achievement Gaps in Educational Attainment and Subsequent Adverse Health Effects Among Adolescents With and Without Chronic Medical Conditions*, 58 J. OF ADOLESC. HEALTH 461 (2017); United Way NCA, *Health Disparities: Creating Health Care Equity for Minorities* (Jan. 28, 2026), <https://unitedwaynca.org/blog/healthcare-disparities/> [https://perma.cc/GDJ2-SMAY].

<sup>53</sup> Katherine K Nishimura et al., *Early-life Air Pollution and Asthma Risk in Minority Children*, 188 AM. J. RESPIR. AND CRIT. CARE MED. 309, 311 (2013).

<sup>54</sup> *Managing Asthma in Schools*, CDC (Aug. 13, 2024), <https://www.cdc.gov/school-health-conditions/chronic/asthma.html> [https://perma.cc/HN6U-SLSV].

<sup>55</sup> See ROTHSTEIN, *supra* note 3, at 196.

<sup>56</sup> Christian E. Weller & Jaryn Fields, *The Black and White Labor Gap in America*, CTR. AM. POL'Y (July 25, 2011), <https://www.americanprogress.org/article/the-black-and-white-labor-gap-in-america/> [https://perma.cc/58D9-UAFV]; *How Unequal Transportation Access Limits Low-Income Households*, UNITED WAY, <https://www.unitedway-york.org/news/how-unequal-transportation-access-limits-low-income-households> [https://perma.cc/2LLB-E5WM].

<sup>57</sup> Candice Norwood, *How Infrastructure Has Historically Promoted Inequality*, PBS NEWS (Apr. 23, 2021), <https://www.pbs.org/newshour/politics/how-infrastructure-has-historically-promoted-inequality> [https://perma.cc/C6NY-5YU8]; Morgan Sherburne, *Targeting Minority, Low-Income Neighborhoods for Hazardous Waste Sites*, UNIV. OF MICH. (Jan. 19, 2016), <https://news.umich.edu/targeting-minority-low-income-neighborhoods-for-hazardous-waste-sites/> [https://perma.cc/NQS3-7FWR].

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Finally, minority communities tend to be more vulnerable to economic shock caused by downturns and shifts in the economy than white Americans due to relative lack of accumulated wealth and property in low-income and minority neighborhoods.<sup>58</sup> In addition, despite suffering from higher levels of unemployment compared to white Americans, minorities are often less able to claim unemployment benefits compared to their white counterparts.<sup>59</sup> Federal and state policies have shaped these economic disparities, and addressing these issues will likely require long term investments.<sup>60</sup>

### C. Geographical Segregation Furthers Racism and Lack of Diversity

Segregationist policies are likely responsible for modern Americans' unease with issues of diversity.<sup>61</sup> Historic and currently segregated neighborhoods have meant that many children in the United States grew up in largely homogenous upbringing and thus lack experience in interacting with a diverse environment, which they will almost certainly have to navigate as adults due to the increasing diversity of American society.<sup>62</sup> While the damage to Black Americans is obvious, lack of racial and cultural acceptance in the United States has made many of our national problems intractable.<sup>63</sup>

<sup>58</sup> Emily Moss, Kriston McIntosh, Wendy Edelberg & Kristen Broady, *The Black-White Wealth Gap Left Black Households More Vulnerable*, BROOKINGS (Dec. 8, 2020), <https://www.brookings.edu/articles/the-black-white-wealth-gap-left-black-households-more-vulnerable/> [<https://perma.cc/3U8W-9NK4>]; Michael Neal & Alanna McCargo, *How Economic Crises and Sudden Disasters Increase Racial Disparities in Homeownership*, URB. INST. (June 1, 2020), <https://www.urban.org/sites/default/files/publication/102320/how-economic-crises-and-sudden-disasters-increase-racial-disparities-in-homeownership.pdf> [<https://perma.cc/MSU5-5HVV>].

<sup>59</sup> Ava Kofman & Hannah Fresques, *Black Workers Are More Likely to Be Unemployed but Less Likely to Get Unemployment Benefits*, PROPUBLICA (Aug. 24, 2020), <https://www.propublica.org/article/black-workers-are-more-likely-to-be-unemployed-but-less-likely-to-get-unemployment-benefits> [<https://perma.cc/H7JR-AH3H>].

<sup>60</sup> Anaïs Goubert & Algernon Austin, *The Historic Opportunities for Racial Equity in the Infrastructure Investment and Jobs Act*, CTR. ECON. AND POL'Y RSCH. (Feb. 2, 2022), <https://cepr.net/publications/the-historic-opportunities-for-racial-equity-in-the-infrastructure-investment-and-jobs-act/> [<https://perma.cc/7UY2-2SMF>]; ROTHSTEIN, *supra* note 3, at 173.

<sup>61</sup> Grace Kao, Kara Joyner & Kelly Stamper Balistreri, *The Case for More Diversity in Schools*, MLK50 (Jan. 17, 2020), <https://mlk50.com/2020/01/17/the-case-for-more-diversity-in-schools> [<https://perma.cc/S4HE-2CJ3>]; ROTHSTEIN, *supra* note 3, at 195-96.

<sup>62</sup> *Id.* at 196; Kao et al., *supra* note 61.

<sup>63</sup> ROTHSTEIN, *supra* note 3, at 194; *see generally* Lauren E. Wisk & Elissa R. Weitzman, *Expectancy and Achievement Gaps in Educational Attainment and Subsequent Adverse Health Effects Among Adolescents with and Without Chronic Medical Conditions*, 58 J. OF ADOLESC. HEALTH 461 (2017); United Way NCA, *Health Disparities: Creating Health Care Equity for Minorities* (Jan. 28, 2026), <https://unitedwaynca.org/blog/healthcare-disparities> [<https://perma.cc/GDJ2-SMAY>]; LaDavia S. Hatcher, *A Case for Reparations: The Plight of the African-American World War II Veteran Concerning Federal Discriminatory Housing Practices*, THE MODERN AM., Summer 2006, at 18, 20; Richard Rothstein, *Misteaching History on Racial Segregation: Ignoring Purposeful Discriminatory Government Policies of the Past Contributes to the Ongoing Achievement Gap*, ECON. POL'Y INST. (Dec. 12, 2013),

In addition to the challenges of overcoming political inertia and addressing complex political, social, and legal concerns, the United States must also contend with the reality that many citizens have limited interaction with people of different racial or cultural backgrounds, an isolation that ultimately works to their detriment.<sup>64</sup> Geographical divisions along racial lines make policies addressing these disparities easier to undermine, as they can be framed as benefitting an undeserving “other” and readily reduced to ridicule and caricature.<sup>65</sup>

Geographical segregation denies opportunity for members of different races to have positive interactions with one another.<sup>66</sup> Studies indicate that exposure to members of other races and cultures can mitigate racial hostility while improving sense of community.<sup>67</sup> Geographical segregation thus serves to further racist sentiment within the United States, preventing positive interactions between members of different races and rendering future generations less capable of handling racial tensions caused by inequality.<sup>68</sup> In addition, pervasive racial polarization created in large part by geographic segregation has led to a political situation wherein political leaders may pander to a sense of racial entitlements while advocating for policies that result in inferior economic opportunities for all, including whites.<sup>69</sup> For instance, in 2015, the majority Black city of Birmingham, Alabama, enacted a local ordinance that set the minimum wage within the city to be above the federal minimum.<sup>70</sup> Despite the fact that the measure likely would have led to improved outcomes for all residents of the city, not just the Black residents, the majority white Alabaman legislature swiftly enacted a law preempting

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<https://www.epi.org/publication/misteaching-history-racial-segregation-ignoring>  
[<https://perma.cc/A7ET-SYKY>].

<sup>64</sup> ROTHSTEIN, *supra* note 3, at 196.

<sup>65</sup> Patrick Bayer, *The Enduring Legacy of Our Separate and Unequal Geography*, NYU FURMAN CTR. (Mar. 2017), <https://furmancenter.org/research/iri/essay/the-enduring-legacy-of-our-separate-and-unequal-geography> [<https://perma.cc/9KJ3-XDCG>].

<sup>66</sup> *See id.*; Kao et al., *supra* note 61; Don C. Bennett, *Segregation and Racial Interaction*, 63 ANNALS ASSOC. AM. GEOGRAPHERS 48, 48-49 (1973).

<sup>67</sup> Leslie A. Zebrowitz, Benjamin White & Kristen Wieneke, *Mere Exposure and Racial Prejudice: Exposure to Other-Race Faces Increases Liking for Strangers of That Race*, 26 SOC. COGN. 259, 268-269 (2008); Kristin Pauker et al., *The Role of Diversity Exposure in Whites' Reduction in Race Essentialism Over Time*, 9 SOC. PSYCH. PERSONALITY SCI. 944, 944 (Sep. 2017); B. Rose Huber, *For People in Diverse Areas, Community Identity Supersedes Racial, Ethnic Differences*, PRINCETON U. (May 19, 2020), <https://www.princeton.edu/news/2020/05/19/people-diverse-areas-community-identity-supersedes-racial-ethnic-differences> [<https://perma.cc/CG9E-LKH6>].

<sup>68</sup> ROTHSTEIN, *supra* note 3, at 195-96; Bayer, *supra* note 60; Kao et al., *supra* note 61.

<sup>69</sup> ROTHSTEIN, *supra* note 3, at 195-96.

<sup>70</sup> HUNTER BLAIR, DAVID COOPER, JULIA WOLFE & JAIMIE WORKER, ECON. POL'Y INST., PREEMPTING PROGRESS: STATE INTERFERENCE IN LOCAL POLICYMAKING PREVENTS PEOPLE OF COLOR, WOMEN, AND LOW-INCOME WORKERS FROM MAKING ENDS MEET IN THE SOUTH 9 (2020), <https://www.epi.org/publication/preemption-in-the-south> [<https://perma.cc/QH6F-PJC4>].

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the local ordinance and setting the minimum wage across the state to be the federal minimum.<sup>71</sup> In 2020, another majority black city in Alabama attempted to impose an occupational tax to improve funding for public utilities, and was shut down by the legislature once again.<sup>72</sup> Taking such measures not only harmed the Black workers of the city, but also prevented any poor white workers from taking advantage of such local ordinances across the state.<sup>73</sup> In 2021, the same Alabama legislature attempted to further dilute political representation of these two Black majority cities through passing heavily gerrymandered districting maps.<sup>74</sup> While events in Alabama are used in this Note as the primary example, such preemptory laws exist across the country, and are regularly enacted under similar conditions.<sup>75</sup>

*D. Race-Conscious Policies Can Address Issues  
Caused by Segregation*

Race-conscious policies that take into account systematic issues caused by racism, such as poor infrastructure design or systematic discrimination in bidding or admissions process, can directly remedy such issues. Policies specifying where infrastructure is to be located, how it should be built, and who should perform the construction can have transformative effects upon the social fabric of the United States.<sup>76</sup> Therefore, by exerting influence over how infrastructure funding is granted to states and setting goals for employers and developers to follow, the federal government may address issues of inequity.<sup>77</sup> An example of a race-conscious federal program is the Disadvantaged Business Enterprise (“DBE”) program, which establishes a goal for hiring minority workers or otherwise socially or economically disadvantaged enterprises and subcontractors as a condition for receiving

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<sup>71</sup> *Id.* at 10.

<sup>72</sup> *Id.* at 11.

<sup>73</sup> *Id.*

<sup>74</sup> Debbie Elliott, *Court Rules Alabama Redistricting Discriminates Against Black Voters*, NPR (May 9, 2025), <https://www.npr.org/2025/05/09/nx-s1-5392385/alabama-redistricting-discriminates-black-voters> [<https://perma.cc/VKW4-X52F>].

<sup>75</sup> See Blair et al., *supra* note 70, at 24; JULIA WOLFE, SEBASTIAN MARTINEZ HICKEY, DAVE KAMPER & DAVID COOPER, ECON. POL’Y INST., PREEMPTING PROGRESS IN THE HEARTLAND: STATE LAWMAKERS IN THE MIDWEST PREVENT SHARED PROSPERITY AND RACIAL, GENDER, AND IMMIGRANT JUSTICE BY INTERFERING IN LOCAL POLICYMAKING 15 (Oct. 14, 2021), <https://progov21.org/Download/Document/1LQ632> [<https://perma.cc/25E7-PSMD>].

<sup>76</sup> See generally Jason *supra* note 17, at 158.

<sup>77</sup> Katharine I. Toledo, *After Adarand: Re-Prioritizing Race-Conscious Programs in Federal Procurement*, 53 PUB. CONT. L.J. 377, 402 (2024).

federal aid and investment.<sup>78</sup> Race-conscious programs, such as these, are necessary in order to address the effects of segregation in the United States.<sup>79</sup>

Moreover, entirely race-neutral policies fail to reduce racial economic inequalities in the United States.<sup>80</sup> Alternative policies that rely on substitutions of race (such as income, etc.) often fail in comparison to race-conscious approaches in undoing segregation.<sup>81</sup> For example, according to statistics from the Small Business Administration, 27.47% of total federal contracting dollars were dedicated towards small businesses in 2024.<sup>82</sup> Despite the fact that 13.7% of Americans identify as Black, only 1.54% of federal funding was granted towards Black owned small businesses: less than half of what would be expected, should race-conscious means be utilized to ensure equitable distribution of federal contracts.<sup>83</sup> These values fall short of each minority's share of the population, indicating that there is a "dearth" of opportunities, in particular, for minority contractors.<sup>84</sup>

The difficulty that involved implementing any kind of race-conscious policies at the federal level to address effects of past discrimination was compounded by *SFFA*. Despite lingering and visible effects of past discrimination, the Supreme Court in *SFFA* invalidated the use of race-based admissions in higher education, finding the policy unconstitutional under the

<sup>78</sup> *Disadvantaged Business Enterprise (DBE) Program*, U.S. DEP'T OF TRANSP. (Oct. 30, 2025), <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise> [https://perma.cc/TR62-DFWJ].

<sup>79</sup> Tiffani Burgess, *Race-Conscious Policies—Including Affirmative Action—Are Necessary For Addressing Racial Inequity*, ACLU (Dec. 1, 2020), <https://www.aclu.org/news/racial-justice/race-conscious-policies-including-affirmative-action-are-necessary-for-addressing-racial-inequity> [https://perma.cc/YHK6-9J7K].

<sup>80</sup> Adewale A. Maye, *The Myth of Race-Neutral Policy*, ECON. POL'Y INST. (June 15, 2022), <https://www.epi.org/publication/the-myth-of-race-neutral-policy/> [https://perma.cc/42T9-Q8Q4]; TIFFANY JONES & ANDREW NICHOLS, *HARD-TRUTHS WHY ONLY RACE CONSCIOUS POLICIES CAN FIX RACISM IN HIGHER-EDUCATION*, 5-6 (2020), <https://edtrust.org/wp-content/uploads/2014/09/Hard-Truths-Why-Only-Race-Conscious-Policies-Can-Fix-Racism-in-Higher-Education-January-2020.pdf> [https://perma.cc/6LYK-6NLY]; Brad Blower, Josh Silver, Jason Richardson, Gleen Schlactus & Sacha Markano-Stark, *Adding Robust Consideration of Race to Community Reinvestment Act Regulations: An Essential and Constitutional Proposal*, NCRC (Sep. 16, 2021), <https://ncrc.org/adding-robust-consideration-of-race-to-community-reinvestment-act-regulations-an-essential-and-constitutional-proposal/> [https://perma.cc/W5M4-WFPE].

<sup>81</sup> JONES & NICHOLS, *supra* note 80, at 5-6.

<sup>82</sup> *FY 2024 Disaggregated Data*, U.S. SMALL BUS. ADMIN. (Jan. 10, 2025), <https://www.sba.gov/federal-contracting/contracting-data/disaggregated-data/fy-2024-disaggregated-data> [https://perma.cc/PK5A-YF7E].

<sup>83</sup> *Id.*; U.S. CENSUS BUREAU, *QUICKFACTS: UNITED STATES — POPULATION ESTIMATES (V2024)* (July 1, 2024), <https://www.census.gov/quickfacts/fact/table/US/PST045224> [https://perma.cc/TV7K-GFZW].

<sup>84</sup> CURRAN MCSWIGAN, *SHUT OUT: THE DEARTH OF OPPORTUNITY FOR MINORITY CONTRACTING* (2022), <https://www.thirdway.org/report/shut-out-the-dearth-of-opportunity-for-minority-contracting.pdf> [https://perma.cc/AAB9-UPJ8].

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Equal Rights Clause and Title VI of the Civil Rights Act.<sup>85</sup> While the holding was restricted to non-military educational institutions, opportunistic plaintiffs seeking to overturn federal race-conscious programs elsewhere were quick to repeat the arguments used in *SFFA*.<sup>86</sup> In *Mid-America Milling Company, LLC v. U.S. Department of Transportation*, plaintiffs alleged that a section of the legislatively mandated DBE program which allowed for consideration of race in determining whether or not a business is disadvantaged was a violation of the Equal Protection Clause.<sup>87</sup> Finding for the plaintiffs, the Eastern District Court of Kentucky repeated much of the same arguments as the Supreme Court, holding that DBE programs did not address any specific wrongs committed by the federal government, that they were inconsistent in their treatment of different minority groups, and that they did not have any set “end date” for their programs.<sup>88</sup>

### PART 3: THE LEGAL BACKGROUND

#### A. *Affirmative Action and Race-Conscious Policies*

Race-conscious policies, such as affirmative action, are policies designed to address racial discrimination by recognizing structural barriers that have caused systemic exclusion and discrimination against underrepresented peoples.<sup>89</sup> Race-conscious policies include affirmative actions at school, which are policies designed to counter unlawful discrimination by encouraging entrance by historically discriminated groups, or policy proposals that aim to provide loan forgiveness for members of specific race.<sup>90</sup>

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<sup>85</sup> Christopher Slottee & Paige Spratt, *Unraveling the Latest District Court Decision on DOT's DBE Program*, SCHWABE (Sep. 30, 2024), <https://www.schwabe.com/publication/unraveling-the-latest-district-court-decision-on-dots-dbe-program/> [<https://perma.cc/M4PH-3A7B>]; *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.* 600 U.S. 18, 223 (2023).

<sup>86</sup> *Mid-Am. Milling Co. v. U.S. Dep't of Transp.*, No. 3:23-cv-00072, 2024 WL 4267183, at \*15 (E.D. Ky. Oct. 26, 2023).

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at \*20; Slottee & Spratt, *supra* note 85.

<sup>89</sup> Giridhar Mallya, *Race-Conscious Policymaking: A Key Way Forward for Health Equity*, ROBERT WOOD JOHNSON FOUND. (June 20, 2024), <https://www.rwjf.org/en/insights/blog/2024/06/race-conscious-policymaking-a-key-way-forward-for-health-equity.html> [<https://perma.cc/ZE4E-6MWX>].

<sup>90</sup> Shekinah A. Fashaw-Walters & Cydney M. McGuire, *Proposing a Racism-Conscious Approach to Policy Making and Health Care Practices*, 42 HEALTH AFF. 1351, 1353 (2023).

*B. Pre-SFFA*

## 1. Strict Scrutiny and Its Application to Racial Classifications in Education

In early cases, the court limited restrictions that curtail the civil rights of a single racial group, holding them to the “most rigid judicial scrutiny.”<sup>91</sup> Under the most rigid judicial scrutiny standard, “public necessity” justified racial classification.<sup>92</sup> It was not until the *Regents of the University of California v. Bakke* in 1978 wherein the plurality of the Court applied what Justice Powell termed “strict” or “most exacting scrutiny” to gauge the constitutionality of affirmative action programs, specifically in educational context.<sup>93</sup> In *Bakke*, Alan Bakke sued the University of California under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, after being twice denied admissions to its medical school, alleging that he would have been accepted into the medical school if not for the quota system that reserved a certain number of admissions into the school for members of specified minority groups.<sup>94</sup> According to the controlling opinion, “[the] Constitution guarantees” that when a program touches upon “an individual’s race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear . . . is precisely tailored to serve a compelling governmental interest.”<sup>95</sup> This language became the embodiment of “strict scrutiny” review.<sup>96</sup> While Justice Powell accepted that pursuit of diversity is a compelling governmental interest,<sup>97</sup> the Court held that a racial quota system in admissions was too extreme as it fully denied a specific percentage of seats from students not in the protected class.<sup>98</sup> Taken together with previous Supreme Court holdings, the Supreme Court in *Bakke* indicated that a limited race-conscious affirmative action

<sup>91</sup> *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (holding that exclusion of persons of Japanese ancestry from the West coast war area in 1942 was within the power of Congress and the President to use as a preventative measure against espionage and sabotage); *see also* *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) (holding Florida statute which prohibits Negro man and white woman or white man and Negro woman who are not married to each other from habitually living in same room in the nighttime denies Equal Protection); *see also* *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding that “separate, but equal” is inherently unequal in educational institutions).

<sup>92</sup> *Korematsu*, 323 U.S. 214.

<sup>93</sup> Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1277-78 (2007).

<sup>94</sup> *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

<sup>95</sup> *Bakke*, 438 U.S. at 299 (citing *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938)).

<sup>96</sup> Leslie Y. Garfield, *Back to Bakke: Defining the Strict Scrutiny Test for Affirmative Action Policies Aimed at Achieving Diversity in the Classroom*, 83 NEB. L. REV. 631, 637 (2005).

<sup>97</sup> Justice Powell noted that educational excellence is widely believed to be promoted by a diverse student body. *Bakke*, 438 U.S. at 312-14 (1978).

<sup>98</sup> *Id.* at 315.

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policy, not based upon a numerical quota, was tolerable under the Equal Protection Clause.<sup>99</sup> This would be the rule until *Harvard vs. Students for Fair Admission*.<sup>100</sup>

## 2. Affirmative Action in Government Held to Deferential Standard

Outside of educational institutions, the Court was initially willing to offer a more deferential review standard to government policy. For example in *Fullilove v. Klutznick*, decided one year after the *Bakke* decision, the Supreme Court proved sympathetic to the idea of race-conscious affirmative action in federal procurement.<sup>101</sup> When challenged on the constitutionality of a federal statute requiring at least 10% of federal contracting dollars to be granted to minority held business enterprises, Chief Justice Warren Burger easily accepted the constitutionality of the statute under a highly deferential intermediate scrutiny standard of review, declining to apply the strict standard of review used in *Bakke* against benign, federally-legislated, and race-conscious government policies.<sup>102</sup> Justice Powell, who wrote the controlling opinion of *Bakke*, even crafted a concurrence suggesting that such race-conscious policies would fulfill even the strict scrutiny standard he articulated in *Bakke*.<sup>103</sup> For a time, the holding indicated that the Court would treat government-legislated affirmative action policies under a different standard than the one applied to educational institutions.

## 3. Subsequent Developments Gradually Stripped Deferential Standards

The deferential intermediate standards of review established in *Fullilove* enabled federal programs to continue their minority preference programs.<sup>104</sup> Nine years later, in *City of Richmond v. J.A. Croson Company*, the Supreme Court began to coalesce around a more defined framework for evaluating race-conscious programs.<sup>105</sup> In that case, the Richmond City Council adopted the Minority Business Utilization Plan, which required

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<sup>99</sup> Lackland H. Bloom, Jr., *Hopwood, Bakke and the Future of the Diversity Justification*, 29 TEX. TECH L. REV. 1, 8 (1998); *Bakke*, 438 U.S. at 314-15 (holding that the special admissions program was not narrowly tailored).

<sup>100</sup> CONG. RSCH. SERV., LSB10893, THE SUPREME COURT STRIKES DOWN AFFIRMATIVE ACTION AT HARVARD AND THE UNIVERSITY OF NORTH CAROLINA 2-3 (2023).

<sup>101</sup> *Fullilove v. Klutznick*, 448 U.S. 448, 473, 490 (1980).

<sup>102</sup> *Id.* at 473, 490-92; *Amdt14.S1.8.4.1 Early Doctrine on Appropriate Scrutiny*, CONST. ANNOTATED, [https://constitution.congress.gov/browse/essay/amdt14-S1-8-4-1/ALDE\\_00000823/](https://constitution.congress.gov/browse/essay/amdt14-S1-8-4-1/ALDE_00000823/) [<https://perma.cc/GL3V-PSYJ>].

<sup>103</sup> *Fullilove*, 448 U.S. at 448, 496.

<sup>104</sup> Drew S. Days, *Fullilove*, 96 YALE L.J. 453, 454 (1987).

<sup>105</sup> *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (justifying application of strict scrutiny to benign racial classification as “there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics”).

construction contractors to subcontract at least 30% of awarded funds to minority business enterprises (“MBEs”).<sup>106</sup> The city justified its classification system with virtually the same argument offered by the federal government in *Fullilove*: simply barring discrimination was insufficient to impede discriminatory behavior.<sup>107</sup> Despite the fact that more than 50% of the urban population of Richmond was Black, less than 1% of the city’s construction contracting dollars went to Black-owned firms.<sup>108</sup> Nevertheless, for the first time, a plurality of the Court held that even ostensibly benign racial classifications enacted by states or local government must satisfy a strict standard of review, and that the state failed to offer a compelling interest in remedying past societal discrimination in the instant case.<sup>109</sup> At the time of its decision, the Court’s holding in *Croson* was limited to state and local government-enacted affirmative action programs.<sup>110</sup> Merely a year later, in *Metro Broadcasting, Inc. v. FCC*, the Court reaffirmed that federal race-conscious policies enacted by Congress would continue to be evaluated under the intermediate level of scrutiny established in *Fullilove*.<sup>111</sup> The Court’s justification for separate treatment of state and federal programs was that Congress had a specific mandate to enforce the dictates of the Fourteenth Amendment, and that this enforcement power came with the authority to define situations, which threatens the principles of equality, and adopt policies to combat these situations.<sup>112</sup>

1995 marked a major turning point in the status of race-conscious federal programs as the plurality of the Supreme Court ruled in *Adarand Constructors, Inc. v. Peña* that strict scrutiny applied to even race-conscious

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<sup>106</sup> *City of Richmond*, 488 U.S. at 477-78.

<sup>107</sup> *Id.* at 549-50.

<sup>108</sup> *Id.* (“The virtual absence of minority businesses from the city’s contracting rolls, indicated by the fact that such businesses have received less than 1% of public contracting dollars, strongly suggests that this ban has not succeeded in redressing the impact of past discrimination or in preventing city contract procurement from reinforcing racial homogeneity.”).

<sup>109</sup> *Id.* at 493-94.

<sup>110</sup> *Id.* at 490.

<sup>111</sup> NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 887 (21st ed. 2023).

<sup>112</sup> In *City of Richmond*, Justice O’Connor wrote:

Congress, unlike any state or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to “enforce” may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state powers over matters of race.

488 U.S. at 490. Justice Scalia in his concurrence writes: “[I]t is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment . . . and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed.” *Id.* at 521-22.

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federal programs intended to help or assist specific groups.<sup>113</sup> Overruling its own refusal to apply strict scrutiny in *Fullilove* and the decision to apply intermediate scrutiny in reviewing federal race-conscious programs in *Metro Broadcasting v. F.C.C.*, the Supreme Court ruled that it will apply strict scrutiny standards to “all racial classifications, imposed by whatever federal, state or local governmental actor.”<sup>114</sup>

Justice O’Conner laid out three general propositions regarding racial classification, concluding that any person, regardless of race, had the right to demand strict scrutiny review of all race-based classification systems.<sup>115</sup> First, “[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination.”<sup>116</sup> Strict scrutiny would apply to racial or ethnic classifications utilized by the government. Second, citing *Croson*, that “consistency” demanded that the standard of review under the Equal Protection Clause not be dependent upon the race of those burdened or benefited by the classification.<sup>117</sup> Both benign and invidious forms of discrimination would be treated the same way by the Court. Third, “congruence” plays a role since the equal protection standard for the Fifth and Fourteenth Amendments must be the same.<sup>118</sup> Federal programs would now be treated the same way as state or local programs. As such, Justice O’Connor ruled that any person of any race had the right to demand any state actor, federal or otherwise, to justify a racial classification system based on a strict standard of review.<sup>119</sup>

Although strict scrutiny is often described as “fatal in fact,” its application to affirmative action policies did not signal the end of such programs in the United States. Even in the context of educational institutions, affirmative action persisted. In *Grutter v. Bollinger*, the Court upheld the University of Michigan Law School’s admissions program, recognizing diversity as a compelling interest and concluding that its race-conscious policy was sufficiently narrowly tailored to satisfy constitutional scrutiny

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<sup>113</sup> R. Brad Malone, *Marginalizing Adarand: Political Inertia and the SBA 8(a) Program*, 5 TEX. WESLEYAN L. REV. 275, 276 (1999).

<sup>114</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

<sup>115</sup> *Id.* at 224.

<sup>116</sup> *Id.* at 223-34.

<sup>117</sup> *Id.* at 224; *see also id.* at 243 (Stevens, J. dissenting) (“The Court’s concept of ‘consistency’ assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority.”).

<sup>118</sup> *Id.* at 224; *see also id.* at 249 (Stevens, J. dissenting) (“The Court’s concept of ‘congruence’ assumes that there is no significant difference between a decision by the Congress of the United States to adopt an affirmative-action program and such a decision by a State or a municipality. In my opinion that assumption is untenable. It ignores important practical and legal differences between federal and state or local decision makers.”).

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

under the Fourteenth Amendment.<sup>120</sup> However, Justice O'Connor, writing for the majority, emphasized that "race-conscious admissions policies must be limited in time," expressing the expectation that such measures would no longer be necessary in "25 years."<sup>121</sup>

#### 4. Government Programs Under *Adarand*

*Adarand* imposed a high bar for federal legislators and agencies seeking to implement race-conscious programs.<sup>122</sup> In that case, a low-bidding subcontractor was denied a federal contract in favor of a higher bidding minority-owned enterprise.<sup>123</sup> *Adarand* brought suit, alleging that the federal government's minority preference program violated the Equal Protections Clause.<sup>124</sup> The shift in the standard of review, building on the Court's earlier rejection of race-based quota systems in *Bakke*, had an immediate impact on federal regulations.<sup>125</sup> Although the Court did not hold that all race-conscious programs were unconstitutional and emphasized that strict scrutiny does not automatically invalidate such measures, the decision nonetheless discouraged federal policymakers from maintaining existing race-conscious procurement programs, contributing to a slowdown in the growth of minority-owned firms.<sup>126</sup>

Despite the chilling effect of the *Adarand* decision, some policymakers continued affirmative action by changing their policies to meet the "narrowly tailored" requirement as set by the Supreme Court.<sup>127</sup> Federal institutions responsible for granting significant amounts of federal contracts to private enterprises, such as the Small Business Administration and the Department of Transportation ("DOT"), shifted their focus to utilizing broad categories of social and economic disadvantage, as opposed race-based set-aside

<sup>120</sup> *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003).

<sup>121</sup> *Id.* at 342; *U.S. Supreme Court Limits Affirmative Action*, JONES DAY (June 2023), <https://www.jonesday.com/en/insights/2023/06/us-supreme-court-limits-affirmative-action> [https://perma.cc/ZSQ6-UKLW].

<sup>122</sup> Toledo, *supra* note 77, at 387.

<sup>123</sup> *Adarand*, 515 U.S. at 205.

<sup>124</sup> *Id.* at 211.

<sup>125</sup> Toledo, *supra* note 77, at 387-88.

<sup>126</sup> Patrick E. Tolan, *Government Contracting with Small Businesses in the Wake of the Federal Acquisitions Streamlining Act, the Federal Acquisition Reform Act, and Adarand: Small Business As Usual?*, 44 AIR FORCE L. REV. 75, 107 (1998) ("On October 23, 1995, the DOD issued a directive suspending certain SDB set-aside provisions of the Defense Federal Acquisition Regulation Supplement, in light of *Adarand*."); Trent Taylor, *The End of an Era? How Affirmative Action in Government Contracting Can Survive After Rothe*, 39 PUB. CONT. L.J. 853, 860 (2010).

<sup>127</sup> *The New DOT Disadvantaged Business Enterprise Rule Is Narrowly Tailored - Meeting the Adarand Test*, U.S. DEP'T OF TRANSP., <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/new-dot-disadvantaged-business-enterprise-rule> [https://perma.cc/5FCA-9UX8].

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contracts.<sup>128</sup> Prior to the second Trump administration, race was merely one of many ways to meet the criteria of socioeconomic disadvantage.<sup>129</sup> Members of a certain race or gender were considered “rebuttably presumed” by the Court to be socially or economically disadvantaged and were therefore not required to provide additional evidence of disadvantage.<sup>130</sup> Firms that were at least 51% owned by individuals within these statutorily recognized groups qualified for participation.<sup>131</sup> Although this presumption could be overcome with “credible evidence to the contrary,” in practice there were no formal mechanisms for third parties to challenge an individual’s disadvantaged status. Instead individuals were instructed to submit relevant information and evidence to the appropriate agencies without clear guidance as to the criteria by which that evidence would be evaluated.<sup>132</sup> Despite these concerns, the rebuttable presumption framework has withstood numerous Equal Protections challenges since *Adarand*, including subsequent litigation brought by the original plaintiffs and in *Midwest Fence Corp. v. United States Dep’t of Transportation*.<sup>133</sup>

*C. SFFA: “Remedying Past Discrimination” No Longer  
“Compelling Interest”*

On January 24, 2022, the Supreme Court agreed to hear challenges to affirmative action policies in college admissions at Harvard University.<sup>134</sup> The plaintiff, SFFA, an organization led by conservative activist Edward Blum—who had previously and unsuccessfully challenged similar policies at

<sup>128</sup> See, e.g., 15 U.S.C. § 657(a) (SBA’s HUBZone Program); 15 U.S.C. § 637(a) (SBA’s 8(a) Program).

<sup>129</sup> 8(a) Bus. Development Program, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program> (last updated Jan. 23, 2026) [<https://perma.cc/Y883-TDAH>]; see also U.S. DEP’T OF JUSTICE, Letter from Solicitor General D. John Sauer to Hon. Mike Johnson (June 25, 2025), <https://www.justice.gov/oip/media/1404871/dl?inline> [<https://perma.cc/YK5U-EVFG>]. The second Trump administration changed its stance as of June 25, 2025, now claiming that the previous USDOT policy was unconstitutional. *Id.*

<sup>130</sup> Toledo, *supra* note 77, at 388.

<sup>131</sup> 49 C.F.R. § 26.5 (2025).

<sup>132</sup> SBA Business Development Rule, 13 C.F.R. § 124.103 (2023); *Ultima Servs. Corp. v. U.S. Dep’t of Agric.*, 683 F. Supp. 3d 745 (E.D. Tenn. 2023) (“John Klein, an employee of Defendant SBA, confirmed that ‘[t]here’s no process for a third party to question someone’s social disadvantage as part of the application process.’”).

<sup>133</sup> *Midwest Fence Corp. v. U.S. States Dep’t of Transp.* 84 F. Supp. 3d 705 (N.D. Ill. 2015) (holding that Federal DBE program’s rebuttable presumption of social and economic disadvantage met the “narrowly tailored” requirement on its face to survive strict scrutiny).

<sup>134</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 980 F.3d 157 (1st Cir. 2020); NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *LDF Issues Statement on Supreme Court’s Decision to Grant Cert in SFFA v. Harvard and SFFA v. UNC* (Jan. 24, 2022), <https://www.naacpldf.org/wp-content/uploads/SCOTUS-Harvard-Cert-Granted-1.24.22-FINAL-2.pdf> [<https://perma.cc/FS9Y-NVRX>].

the University of Texas at Austin in 2016—asked the Court to overrule its prior precedents and hold that race could not be used as a factor in admissions.<sup>135</sup> Specifically, SFFA argued that the defendant universities failed to comply with *Grutter v. Bollinger* by not adequately pursuing race-neutral alternatives before adopting race-conscious ones.<sup>136</sup> In fact, SFFA asked the Court to explicitly overrule the precedent established in *Grutter*, arguing that any consideration of race violated the Fourteenth Amendment.<sup>137</sup>

While the Supreme Court declined to overrule *Grutter*, suggesting that some forms of racial classification could survive judicial review, it opined that Harvard's admissions program violated the Equal Protections Clause.<sup>138</sup> While the majority posited that its strict scrutiny analysis was consistent with their decision in *Grutter*, its articulation of the standard renders the invention of effective race-conscious policy more difficult.<sup>139</sup> The Court grounded its decision on a misguided historical understanding of the Equal Protections Clause.<sup>140</sup> Despite evidence that the framers of the Equal Protections Clause and the Civil Rights Act clearly rejected explicitly race-neutral language, suggesting an intent not to mandate strict colorblindness, the Court has interpreted the Clause as embodying a principle of colorblindness. Under this view, only narrowly limited forms of racial classification, such as those addressing past harms inflicted by a government, are constitutionally permissible.<sup>141</sup>

In *SFFA*, the district and appeals courts found that the defendant had a legitimate interest in pursuing diversity in the classroom, in accordance with

<sup>135</sup> Brief for Petitioner at 49, *Students for Fair Admissions Inc. v. President & Fellows of Harv. Coll.*, 142 S.Ct. 895 (2022) (No. 20-1199); see also Brief for Petitioner, *Students for Fair Admissions Inc. v. Univ. of N.C.* (2022) (No. 21-707).

<sup>136</sup> *Id.*; see also Brief for Petitioner, *Students for Fair Admissions v. Univ. of N. C.* (2022) (No. 21-707).

<sup>137</sup> *Id.* SFFA also alleged that Harvard intentionally discriminated against Asian American students and favored white, Black and Latinx students. *Id.* at 72. The majority did not address this claim, though Justice Thomas noted it in his concurrence. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 272 (2023).

<sup>138</sup> *Students for Fair Admissions*, 600 U.S. at 223.

<sup>139</sup> *Id.* at 367 (2023) (Sotomayor, J., dissenting) (“It creates a legal framework where race-conscious plans must be measured with precision but also must not be measured with precision. That holding is not meant to infuse clarity into the strict scrutiny framework; it is designed to render strict scrutiny ‘fatal in fact.’”).

<sup>140</sup> LAW.’S COMM. FOR C.R. UNDER L., SUMMARY OF THE SUPREME COURT’S DECISIONS (2023), [https://www.lawyerscommittee.org/wp-content/uploads/2023/08/LC\\_Harvard-UNC-Cases\\_D.pdf](https://www.lawyerscommittee.org/wp-content/uploads/2023/08/LC_Harvard-UNC-Cases_D.pdf) [<https://perma.cc/V86D-67PF>]; Sheryll Cashin, *The Framers of the 14th Amendment Weren’t Color Blind*, POLITICO (Oct. 10, 2022), <https://www.politico.com/news/magazine/2022/10/31/why-supreme-court-conservatives-should-back-affirmative-action-00064308> [<https://perma.cc/RGL4-3WGU>].

<sup>141</sup> *Students for Fair Admissions*, 600 U.S. at 207; LAW.’S COMM. FOR C.R. UNDER L., *supra* note 140; Cashin, *supra* note 140.

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previous Supreme Court holdings.<sup>142</sup> SFFA also did not present any evidence disputing these findings.<sup>143</sup> However, the Supreme Court held that the University's stated interests in diversity, while "commendable" were not "sufficiently coherent" for the purposes of strict scrutiny, according to the Supreme Court, and that the measures taken by Harvard's admission program were not sufficiently narrowly tailored for its stated goals.<sup>144</sup>

The Court identified four characteristics a race-conscious program would have to meet in order to prevail in a strict-scrutiny review.<sup>145</sup> First, there must be a "meaningful connection between the means they employ and the goals they pursue."<sup>146</sup> Second, race-conscious programs must not use race in the negative.<sup>147</sup> Third, admissions programs must not use race in a way that furthers stereotypes.<sup>148</sup> Finally, citing Justice O'Connor in *Grutter*, the Court claimed that Harvard's affirmative action was flawed as it lacked a "logical end point."<sup>149</sup> While Harvard stated that its program's endpoint would be reached when meaningful diversity and representation on their campus was achieved, the Supreme Court equated the desire to see proportional representation within the campus as being akin to impermissible racial quotas.<sup>150</sup> At the end of the opinion, however, the Court admitted that its holding would not affect institutions from considering individual experiences of racial discrimination as a factor in assessing a candidate, as that could speak to an individual's courage or determination in the face of hardship, rather than be a consideration of said individual's race.<sup>151</sup> In other words, while the Supreme Court fully admitted that it expected individuals to face hardship due to racial discrimination, it forbade universities from directly considering race when making application decisions.

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<sup>142</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 980 F.3d 157, 185 (1st Cir. 2020).

<sup>143</sup> *Students for Fair Admissions*, 600 U.S. at 272.

<sup>144</sup> *Id.* at 214.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 215.

<sup>147</sup> The Supreme Court held that Harvard failed to meet strict scrutiny standard under this criteria as its admissions program allowed for a tip or a plus to be given to consideration for a student's application on the basis of their race, holding that "zero-sum" nature of admissions program meant that such an advantage could not be granted without burdening other racial groups. *Id.* at 218.

<sup>148</sup> The Court specifically objected to Harvard's claim that a black student could bring something to Harvard that a white student could not. *Id.* at 220. SFFA offered no evidence or argument to contest this claim. LAW'S COMM. FOR C.R. UNDER THE L., *supra* note 140.

<sup>149</sup> *Student for Fair Admissions, Inc.*, 600 U.S. at 223.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

1. Expansion of the *SFFA* Holding by District Courts

There has been a rush of challenges to extend the holding of *SFFA* to apply to federal procurement programs such as the DOT's DBE programs or the 8(a) program, the modern versions of the pre-*Adarand* race-conscious programs.<sup>152</sup> Despite the fact that the Supreme Court specifically warned against application of its holdings outside of the context of educational institutions, conservative litigators seeking to end affirmative action in federal procurement are eager to use *SFFA* to form the legal backbone of their attacks against federal programs.<sup>153</sup> One such case was *Ultima Service Corporations v U.S. Department of Agriculture*, in which the plaintiff alleged that section 8(a) of the Small Business Act under which the Department of Agriculture and Small Business Administration applied a "rebuttable presumption" of "social disadvantage" to members of certain racial and ethnic groups when awarding government contracts to minority-owned businesses was inconsistent with the Equal Protections Clause.<sup>154</sup> In *Ultima Services Corporations v. U.S. Department of Agriculture*, the District Court of Eastern District of Tennessee held that the rebuttable presumption standard utilized by the 8(a) program violated the Equal Protection Clause of the Constitution, finding that the program was not narrowly tailored to pursue compelling government interest.<sup>155</sup> The District Court concluded that the 8(a) program failed to satisfy a compelling state interest, finding that it lacked a clearly discernible and achievable goal and did not identify a specific instance of racial discrimination to justify its use.<sup>156</sup> Second, applying the reasoning from *SFFA*, which emphasized that race-conscious programs must be closely tied to remedying past governmental discrimination, the court held that the state failed to demonstrate a direct link between the broader economic disparities among racial groups and any specific act of discrimination by the federal government; in doing so, the court interpreted the Supreme Court's limitations on affirmative action as extending beyond the educational

<sup>152</sup> Christopher Slottee, *Mid-America Case Challenges the DOT's Use of a Rebuttable Presumption*, SCHWABE (Nov. 22, 2023), <https://www.schwabe.com/publication/new-case-mid-america-challenges-the-dots-use-of-a-rebuttable-presumption/> [<https://perma.cc/874R-H9G5>].

<sup>153</sup> Footnote 4 of the opinion exempted institutions such as military academies from the holding of *SFFA*, ruling that such institutions may have potentially distinct interests: "The United States as amicus curiae contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present." *Student for Fair Admissions, Inc.* 600 U.S. at 181, 213.

<sup>154</sup> *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, 683 F. Supp. 3d 745, 771 (E.D. Tenn. 2023).

<sup>155</sup> *Id.* at 753.

<sup>156</sup> *Id.* at 765.

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context.<sup>157</sup> Third, the court held that the program was not sufficiently narrowly tailored, noting the absence of meaningful procedures to rebut the presumption of discrimination.<sup>158</sup>

*Mid-America Milling Company* followed shortly afterwards, similarly ruling that the DOT's use of a rebuttable presumption of societal discrimination for certain racial minorities was an unconstitutional violation of the Equal Protection Clause.<sup>159</sup> Two construction contractors sought to enjoin the DOT from using its DBE program in any federal-bidding process potentially involving them.<sup>160</sup> While the judge limited the holding to apply specifically to the contractors involved in the case, the effect of this decision can have far-reaching consequences.<sup>161</sup>

Despite the supposed limitation upon the holding of *Mid-America Milling Company* to the two large construction firms who brought the case, the federal government can only comply with such an injunction by removing its DBE policies from every procurement auction the named contractors can conceivably join.<sup>162</sup> As the plaintiffs operate in almost half of the states in the U.S., the agency may eliminate the DBE goals program in many more states than merely Kentucky, the state of the court's venue, which handed down the decision.<sup>163</sup> *The Mid-American Milling Company* decision therefore constitutes a dire threat against many similar affirmative action programs within the United States: it provides a blueprint for attack wherein a lawsuit may be brought to a conservative court by a conservative activist and thereafter be applied across state boundaries.<sup>164</sup> Such attacks mirror actions taken by Ed Blum, the president of SFFA following the wake of *SFFA* decision, wherein the organization purportedly sent hundreds of letters to educational institutions across the country with a broad and distorted interpretation of the holding of *SFFA* to encourage educational institutions to drop consideration of race altogether.<sup>165</sup> However, it is likely that certain

<sup>157</sup> *Id.* at 766.

<sup>158</sup> *Id.* at 770.

<sup>159</sup> Slottee & Spratt, *supra* note 85; *Mid-America Milling Co., v. U.S. Dep't of Transp.*, No. 3:23-CV-00072-GFVT, 2024 WL 4267183, at \*9 (E.D. Ky. Sept. 23, 2024).

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

<sup>161</sup> Joe Bousquin, *Judge Clarifies Scope of DBE Injunction to Include More States*, CONSTR. DIVE (Nov. 8, 2024), <https://www.constructiondive.com/news/dbe-injunction-more-states/732223/> [https://perma.cc/Z2JA-BUA8]; Joe Bousquin, *Judge Partially Blocks DOT's DBE Program*, CONSTR. DIVE (Sep. 24, 2024), <https://www.constructiondive.com/news/dots-dbe-program-blocked-in-2-states/727953/> [https://perma.cc/2SHA-LL9Q].

<sup>162</sup> Slottee & Spratt, *supra* note 85.

<sup>163</sup> Bousquin, *supra* note 161.

<sup>164</sup> Slottee & Spratt, *supra* note 85; Joe Bousquin, *Judge Partially Blocks DOT's DBE Program*, CONSTR. DIVE (Sep. 24, 2024).

<sup>165</sup> LAW'S COMM. FOR C.R. UNDER THE L., *supra* note 140 at 4. Ed Blum, in one letter, argued "based on SFFA's extensive experience" that a six percent decrease in Asian American admissions at Duke

race-conscious programs can survive strict scrutiny in spite of the holding of *SFFA*.

## 2. Compelling Interest Under *SFFA*

Not all racial classifications were considered to be without compelling interest by the state under *SFFA*.<sup>166</sup> Actions taken by the government to remediate past identified instances of discrimination were explicitly noted by both the majority of *SFFA* and its concurrences as being examples of compelling interest.<sup>167</sup> Actions taken to reverse housing discrimination and unequal exposure to environmental pollution by discriminatory zoning laws may qualify under this narrow exception.<sup>168</sup> Importantly, however, these “past instances of discrimination” must be interpreted in light of *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, which held that “[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.”<sup>169</sup> A state or federal government entity seeking to advance race-conscious programs would thus likely be required to demonstrate evidence that its policies are designed to directly remediate its own past illegal action.<sup>170</sup> Remediating the creation of Levittown<sup>171</sup> in Long Island, New York, and the denial of veterans’ benefits to Black Americans would likely be considered compelling interest under these standards.<sup>172</sup>

In addition, there remains room in current jurisprudence for a more expansive view of what constitutes state-sponsored racial discrimination.<sup>173</sup> In *Village of Arlington Heights*, the Supreme Court defined five characteristics of state-sponsored racial discrimination: (1) the impact of the official action, namely, whether it bears more heavily on one race than another; (2) the historical background of the decision; (3) the specific sequence of events leading up to the challenged decision; (4) any procedural and substantive departures from the norm in connection with the decision or action; and (5) the legislative or administrative history of the decision or

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University was ‘impossible’ under ‘true racial neutrality,’ and that colleges were forbidden from considering race altogether, even in application essays.” Letter from Ed Blum, President of Students for Fair Admissions, to Princeton, Duke, and Yale (Sep. 17, 2024).

<sup>166</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 207 (2023).

<sup>167</sup> *Id.* at 207, 248, 317 (2023).

<sup>168</sup> Jack Jones, *Defending Race-Conscious Policy: New York State’s Criteria for Identifying Disadvantaged Communities*, 49 COLUM. J. ENV’T L. 425, 465 (2024).

<sup>169</sup> *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

<sup>170</sup> Jones, *supra* note 168, at 466.

<sup>171</sup> See *supra* Part 2.

<sup>172</sup> *First-of-Its-Kind Challenge to Racial Discrimination in Veterans Benefits Brought by Clinic Moves Forward*, *supra* note 35; see generally ROTHSTEIN, *supra* note 3, at 182-83 (arguing that racially discriminatory practices that denied benefits to black veterans cannot be remedied by merely ending said discriminatory practices, as the advantages granted to white veterans had become permanent by then).

<sup>173</sup> Jones, *supra* note 168, at 467.

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action.<sup>174</sup> The language focusing on the historical background of the decision points towards a context-sensitive review of past state action or inaction, wherein evidence of disparate impact can be considered.<sup>175</sup> Under this expanded view of racial discrimination, a state or federal government may classify historical instances wherein evidence of the state's intent are more nebulous, but "disparate impact suggests an intent by policymakers to support or further racial segregation or discrimination," as being an example of past discriminatory conduct.<sup>176</sup> Examples of such conduct could be financial institutions' denial of credit to low-income and minority neighborhoods, displacement of black communities by highway construction projects, exclusive zoning laws, disinvestment of infrastructure in minority communities, and much more.<sup>177</sup>

A state seeking to specifically invest in repairing conditions in a minority community may show history of intentional discrimination in the area to justify its infrastructural investment programs.<sup>178</sup> An example of a sign of intentional discrimination may be the presence of racially exclusive covenants in the deeds of neighborhoods in the area.<sup>179</sup> In 1972, the D.C. Court of Appeals held that the recording of racial covenants, in and of itself, may constitute a discriminatory state action.<sup>180</sup> If a similar argument is adopted by the federal government or a state, there would likely be a significant amount of evidence upon which government entities draw to show past acts of intentional racial discrimination.<sup>181</sup>

### 3. Narrowly Tailored Under *SFFA*

Government institutions seeking to employ race-conscious programs will also need to overcome "narrowly-tailored" requirements further

<sup>174</sup> *Village of Arlington Heights*, 429 U.S. 252.

<sup>175</sup> Jones, *supra* note 168, at 467.

<sup>176</sup> *Id.*

<sup>177</sup> George Fatheree, *A Brief History of Racial Zoning and How to Reverse the Lasting Effects of Housing Discrimination*, URB. LAND (Feb. 20, 2024), <https://urbanland.uli.org/a-brief-history-of-racial-zoning-neighborhood-associations-and-municipal-zoning> [https://perma.cc/4TLT-G6GQ]; Noel King, *A Brief History of How Racism Shaped Interstate Highways*, NPR (Apr. 7, 2021), <https://www.npr.org/2021/04/07/984784455/a-brief-history-of-how-racism-shaped-interstate-highways> [https://perma.cc/E3TM-RNMC]; Jay A. Fernandez, *Racism by Design: the Building of Interstate 81*, ACLU (Aug. 10, 2023), <https://www.aclu.org/news/racial-justice/racism-by-design-the-building-of-interstate-81> [https://perma.cc/PTW2-4SPJ]; see also *supra* Part 2 (detailing how past acts of discrimination have reverberating effects upon modern day economic and social livelihoods of Black Americans).

<sup>178</sup> Jones, *supra* note 168, at 469.

<sup>179</sup> Cheryl W. Thompson et al., *Racial Covenants a Relic of the Past Are Still on the Books Across the Country*, NPR (Nov. 17, 2021), <https://www.npr.org/2021/11/17/1049052531/racial-covenants-housing-discrimination> [https://perma.cc/K6VA-GCSA].

<sup>180</sup> *Mayers v. Ridley*, 465 F.2d 630, 639 (D.C. Cir. 1972).

<sup>181</sup> Jones, *supra* note 168, at 469.

restricted under *SFFA*.<sup>182</sup> As seen in cases such as *Ultima* and *Mid-American Milling Company*, the plaintiffs' likely argument against any race-conscious program would be that it is inconsistent in its treatment of different minority groups and did not have an "end point."<sup>183</sup> While the Court left open the possibility that its admittedly difficult standards could be satisfied by a race-conscious program with a specific end point, government institutions seeking to overcome the new standard currently often do so either by adopting the exception for the individual experience of racial discrimination articulated by the Supreme Court in *SFFA* or by offering similar but less effective race neutral methods.<sup>184</sup>

#### 4. Circumnavigating the *SFFA*

The DOT attempted to sidestep the constitutional issues in its race-conscious affirmative action program.<sup>185</sup> The DOT justified its program's race-conscious nature on the section in the *Croson* decision, which provided the federal government with guidelines concerning when to determine if a pattern of discriminatory exclusion exists.<sup>186</sup> It stated:

Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.<sup>187</sup>

Once a disparity study determines that a pattern of exclusionary discrimination exists, the DOT sets "aspirational goals."<sup>188</sup> While a 10% aspirational goal to be paid out to DBEs is defined statutorily for the DOT, the actual goals are established by each recipient of a federal contract and the regulations typically preclude penalties for failing to meet aspirational goals set by various agencies so long as the recipient of the benefit shows a "good faith" effort to comply.<sup>189</sup> Put another way, the federal government placed

<sup>182</sup> LAW.'S COMM. FOR C.R. UNDER L., *supra* note 140, at 3; Jones, *supra* note 168, at 469.

<sup>183</sup> Slottee & Spratt, *supra* note 85.

<sup>184</sup> See LAW.'S COMM. FOR C.R. UNDER L., *supra* note 140, at 4.

<sup>185</sup> George R. LaNoue, *Setting Goals in the Federal Disadvantaged Business Enterprise Programs*, 17 GEO. MASON U.C.R. L. J. 423, 439-40 (2007).

<sup>186</sup> City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989).

<sup>187</sup> *Id.*

<sup>188</sup> 49 C.F.R. § 26.41 (2025).

<sup>189</sup> U.S. DEPT. OF TRANSP. FED. HIGHWAY ADMIN., CIVIL RIGHTS DISADVANTAGED BUSINESS ENTERPRISE: DBE CONTRACT GOALS 1 (2012). Various agencies use different race-conscious methods of sorting government contracts to meet aspirational goals. DOT's DBE program, for instance, has a system under which goals are in fact individually set by the prime contractor of its infrastructure building contracts. Such distinctions are likely legally significant. *DBE Final Rule Section by Section Analysis*, U.S. DEP'T OF TRANSP., <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/dbe-final-rule-section-section-analysis> (last updated Dec. 22, 2014); See Bruckner v. Biden, 666 F. Supp. 3d

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into contractual terms wherein the prime contractor would represent that it would make a “good faith” effort to hire subcontractors owned by certain protected classes (women, veterans, members of certain racial groups, etc.).<sup>190</sup> To meet the “good faith” effort requirement in a typical DOT contract, the prime contractor must establish that they made every necessary, appropriate and active step to meet the goals.<sup>191</sup> While there is no penalty for failing to meet DBE goals, a contractor that fails to show “good faith” efforts may face serious civil and criminal penalties.<sup>192</sup> As it does not establish a strict quota or expressly “set aside” a specific portion of its contractual positions for members of the protected class, the DOT argued that its DBE program does not implicate the prohibition against racial quotas established in the *Adarand* decision.<sup>193</sup>

For federal and state programs seeking to avoid similar lines of attack against their affirmative action goals, an alternative may be to seek race-neutral programs that consider socio-economic status, overcoming of adversity, or other such disadvantaged criteria aside from race.<sup>194</sup> However, race-neutral policies are often less effective at addressing issues caused by racism.<sup>195</sup> Yet another alternative may be to seek the specific exception

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1237, 1241 (M.D. Fla. 2023) (dismissing a lawsuit against the 10% national aspirational goal due to lack of standing since plaintiff could not identify any particular contract where he would have been affected by the national goal).

<sup>190</sup> U.S. DEP’T TRANSP., GOOD FAITH EFFORTS: DISADVANTAGED BUSINESS ENTERPRISE (DBE) PROGRAM 16 <https://www.transportation.gov/sites/dot.gov/files/2022-06/Community%20of%20Practice%20Training-%20DBE%20Good%20Faith%20Efforts.pdf> [https://perma.cc/AWP4-PE6B].

<sup>191</sup> *Id.* at 4.

<sup>192</sup> Shawn R. Farrell, *Disadvantaged Business Enterprise Fraud: No Slowdown in the Prosecution for Criminal and Civil Liability*, 8 NUCA BUS. J. 11 (2021), <https://www.cohenseglia.com/news-article/disadvantaged-business-enterprise-fraud-no-slowdown-in-the-prosecution-for-criminal-and-civil-liability/> [https://perma.cc/MRV9-CALD].

<sup>193</sup> *DBE Final Rule Section by Section Analysis*, U.S. DEP’T OF TRANSP., <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/dbe-final-rule-section-section-analysis> (last updated Dec. 22, 2014) [https://perma.cc/5MKW-AVBT]. As noted previously, however, the constitutionality of such practices is under attack in the courts in the wake of the *SFFA* decision. As of this writing, however, the DOT has not changed its policies or positions, although it has expressed that it is reviewing its policies in the wake of Trump’s executive orders targeting affirmative action. For more information, see Christopher Slottee & Paige Spratt, *90 Day Stay Requested in Mid-America Milling Co. v. U.S. DOT*, SCHWABE (Feb. 11, 2025), <https://www.schwabe.com/publication/90-day-stay-requested-in-mid-america-milling-co-v-u-s-dot/> [https://perma.cc/PYX6-YURE].

<sup>194</sup> LAW.’S COMM. FOR C.R. UNDER L., *supra* note 140, at 4.

<sup>195</sup> While equal employment and fair pay policies have measurably improved lives for minorities, Black unemployment rates still often exceed 10%, while white unemployment rates has never exceeded 10% even in the worst economic downturns within the last fifty years. The gap in wages have remained persistent and, in fact, widened since 1979. Maye, *supra* note 45. See also NEIL BHUTTA, ANDREW C. CHANG, LISA J. DETTLING & JOANNE W. HSU, *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances* (Board of Governors of the Federal Reserve System, Sep. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in->

granted for individual experiences of racism.<sup>196</sup> While the holding of *Ultima* enjoined the SBA from using the “rebuttable presumption” standard, the 8(a) program was not dismantled in its entirety.<sup>197</sup> SBA shifted its affirmative action programs to require “evidence of individual social disadvantage” as laid out in 13 C.F.R. § 124.103(c)(1) to maintain some form of affirmative action programs despite the injunction.<sup>198</sup> Under such programs, in a manner consistent with *SFFA*, the SBA accepted social disadvantage narratives from 8(a) contractors to determine beneficiaries of its program, including from those who suffered individual experiences of racism.<sup>199</sup> New guidelines now call for those who previously enjoyed the benefits of the set-aside program to submit narratives of social disadvantage in order to prove their eligibility for the program.<sup>200</sup> Similar measures may be taken by the DOT’s DBE and other such affirmative action programs at risk under *Mid-America* and *Ultima* in order to preserve its affirmative action programs.<sup>201</sup>

Finally, race-conscious programs may distinguish themselves from the affirmative action programs at issue in *SFFA*.<sup>202</sup> One concern the Court raised Harvard’s program was its “zero-sum” nature: due to the limited pool of openings at the college, the Court argued that a bonus granted to an applicant on the basis of race necessarily translated to a disadvantage for everyone else.<sup>203</sup> By contrast, race-conscious programs that do not operate within a fixed and competitive allocation, such as programs targeting investment in neighborhoods victimized by racist zoning policies or

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the-2019-survey-of-consumer-finances-20200928.html [https://perma.cc/PX7Q-KC4D] (According to a 2019 study, a “typical White family has eight times the wealth of the typical Black family and five times the wealth of the typical Hispanic family.”).

<sup>196</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181 (2023) (syllabus) (“[N]othing prohibits universities from considering an applicant’s discussion of how race affected the applicant’s life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university.”).

<sup>197</sup> *Updates on the 8(a) Business Development Program*, U.S. SMALL BUS. ADMIN (Apr. 5, 2024), <https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program/updates-8a-business-development-program> [https://perma.cc/5LYZ-QZU7]; *Ultima Servs. Corp. v. U.S. Dep’t of Agric.*, 683 F.Supp.3d 745, 774 (E.D. Tenn., 2023).

<sup>198</sup> A definition of “socially disadvantaged individuals” has been offered as those “who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control,” and allows for individuals to prove that they match the description through preponderance of evidence. Slottee & Spratt, *supra* note 85.

<sup>199</sup> Christopher Slottee, *Ultima Files Motion for Additional Equitable Relief*, SCHWABE (Sep. 19, 2023), <https://www.schwabe.com/publication/ultima-files-motion-for-additional-equitable-relief/> [https://perma.cc/Q5BS-QLE7].

<sup>200</sup> *Updates on the 8(a) Business Development Program*, *supra* note 197.

<sup>201</sup> Slottee & Spratt, *supra* note 85.

<sup>202</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 218, 249, 253-54 (2023).

<sup>203</sup> *Id.* at 181, 218-19.

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government redlining, are meaningfully distinguishable.<sup>204</sup> Unlike college admissions, where applicants compete for a specific and discrete number of seats, government spending and classification are not similarly constrained in the same way and may allow for more flexible, non-zero-sum approaches.<sup>205</sup>

5. Promoting Economic Equity May Be Distinguishable from *SFFA*

Furthermore, as an alternative to federal procurement policy, state and federal governments may directly invest into disadvantaged communities in order to undo geographic segregation.<sup>206</sup> Black Americans are additionally more vulnerable to the negative consequences of economic turmoil, such as layoffs, and less likely to receive salary increases compared to white Americans.<sup>207</sup> Government policy that seeks full employment for all Americans, increases minimum wage, and continues to match it with inflation can help reduce racial inequities by alleviating the economic pressures that disproportionately affect Black Americans.<sup>208</sup>

While such programs can be carried out in a race-neutral manner, and thus less likely to trigger the Supreme Court's strict scrutiny review, this Note hesitates to fully endorse such policies. As discussed previously, there is a risk that fully race-neutral policies will not effectively reduce racial inequality.<sup>209</sup> Some form of race-conscious measures are likely necessary in order to efficiently address racial inequalities in the United States, such as by considering racial composition of a neighborhood in assessing areas in need of intervention or investment.<sup>210</sup>

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<sup>204</sup> Jones, *supra* note 168, at 471-72.

<sup>205</sup> *Id.* at 471; *Student for Fair Admissions, Inc.* 600 U.S. at 181, 218-19.

<sup>206</sup> Jones, *supra* note 168, at 431; *see also* LAW.'S COMM. FOR C.R. UNDER L., *supra* note 140, at 4 (suggesting Harvard may react to *SFFA* by specifically expanding targeted recruitment to underrepresented communities).

<sup>207</sup> Kyle K. Moore & Asha Banerjee, *Black and Brown Workers Saw the Weakest Wage Gains Over a 40-year Period in Which Employers Failed to Increase Wages with Productivity*, ECON. POL'Y INST. (Sep. 16, 2021), <https://www.epi.org/blog/black-and-brown-workers-saw-the-weakest-wage-gains-over-40-year-period/> [<https://perma.cc/EDR5-63ZR>]; Max Zahn, *The Black Unemployment Rate is Consistently Twice That of White Workers. Here's Why*, ABC NEWS (Feb. 3, 2024), <https://abcnews.go.com/Business/black-unemployment-rate-consistently-white-workers/story?id=106910140> [<https://perma.cc/EUF8-RHR8>].

<sup>208</sup> *See generally* ROTHSTEIN, *supra* note 3, at 197.

<sup>209</sup> Wonyoung So & Catherine D'Ignazio, *Explicitly Acknowledging Racism Is Key to Reducing Racial Housing and Wealth Gaps*, HOUS. MATTERS (July 24, 2024), <https://housingmatters.urban.org/research-summary/explicitly-acknowledging-racism-key-reducing-racial-housing-and-wealth-gaps> [<https://perma.cc/9SV4-YRGA>]; *see also supra* Part 2.D (describing disparity within the United States as the result of active federal, state, and local policies, and will likely require an equally active policy decisions to dismantle fully).

<sup>210</sup> *See supra* Part 2.D; Jones, *supra* note 168.

#### PART 4: FEDERAL AND STATE INVESTMENTS SHOULD PRIORITIZE SMALL BUSINESSES AND UNDERSERVED COMMUNITIES

Federal, state, and municipal governments should prioritize procurement spending in ways that incentivize the growth of small businesses, directly invest in underserved communities, and make publicly available data assessing the projected the impact of their economic policies on racial minorities. Accordingly, government entities can avoid or even justify their race-conscious policies under *SFFA* standards: namely improve the economic health of the United States overall or remedying past discrimination.<sup>211</sup>

##### *A. Small Businesses Should Be Encouraged to Grow*

Bundling is a process wherein multiple requirements for goods and services are merged into a single contract.<sup>212</sup> While theoretically more efficient in terms of government spending, the bundling of federal contracts often renders small businesses unable to compete for lucrative government contracts due to increases in the number of requirements.<sup>213</sup> Contract bundling practices skyrocketed during the first Trump presidency before reaching an all-time high during Biden's administration.<sup>214</sup> DOT's decision to award contracts for repairing and maintaining multiple bridges at once to a single prime contractor, as opposed to dividing them up into multiple projects, is an example of such bundling.<sup>215</sup> While this practice may reduce costs for the government, it can also prevent many small businesses, including minority-owned small businesses, from competing for prime contracts.<sup>216</sup> The bundling of infrastructure projects can effectively confine these businesses to subcontracting roles, limiting their ability to gain the

<sup>211</sup> *How Do Small Businesses Help the Economy*, ELAVON, <https://www.elavon.ca/resources/insights/how-do-small-businesses-help-the-economy.html> [https://perma.cc/5LQA-3W6A]; Jones, *supra* note 163, at 469.

<sup>212</sup> KATE M. MANUEL, CONG. RSCH. SERV., R41133, CONTRACT "BUNDLING" UNDER THE SMALL BUSINESS ACT: EXISTING LAW AND PROPOSED AMENDMENTS 1 (2012).

<sup>213</sup> U.S. SMALL BUS. ADMIN., FISCAL YEAR 2023 CONTRACT BUNDLING AND CONSOLIDATION REPORT TO CONGRESS 17 (2024), <https://www.sba.gov/sites/default/files/2024-12/Final%20FY2023%20Bundling%20and%20Consolidation%20Report%20with%20Agency%20Reports.pdf> [https://perma.cc/99AW-YJ9K].

<sup>214</sup> *Id.* at 17.

<sup>215</sup> U.S. DEPT. OF TRANSP. FED. HIGHWAY ADMIN., PROJECT BUNDLING FACTSHEET, [https://www.fhwa.dot.gov/innovation/everydaycounts/edc\\_5/docs/project-bundling-factsheet.pdf](https://www.fhwa.dot.gov/innovation/everydaycounts/edc_5/docs/project-bundling-factsheet.pdf) [perma.cc/4CG4-YRTN].

<sup>216</sup> Bruce Katz et al., *How Federal Infrastructure Spending Can Close the Racial Wealth Gap*, NOWAK METRO FIN. LAB (June 9, 2021), <https://drexel.edu/nowak-lab/publications/newsletters/2021/federal-infrastructure-spending-close-racial-wealth-gap/> [perma.cc/QS3K-C99M]; McSwigan, *supra* note 84.

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experience and knowledge needed to become prime contractors and, ultimately, grow.<sup>217</sup> Unbundling federal contracts also serves valuable policy purpose. Available data suggests that contract bundling leads to an overall decline in the amount of contracts granted to small businesses, not just to minority contractors, and reduces the creation of new contracting opportunities.<sup>218</sup> By contrast, unbundling may expand competition and increase the pool of qualified contractors over time, thereby increasing efficiency.<sup>219</sup>

Unbundling infrastructure projects may address this issue by providing for more prime-contracting opportunities for a minority-owned small business to develop expertise and reputation as a prime contractor, and additionally provide a larger range of opportunities for a small business to exit sheltered public bidding projects and thrive in the open market.<sup>220</sup> Within public contracting itself, race-conscious means can also be utilized to specifically prevent racism from influencing federal procurement decisions. These means can take the form of policies wherein narratives of socio-economic disadvantage caused by race may be accepted in order for the state to grant access to set-aside programs.<sup>221</sup> However, race-conscious programs may be more easily enacted and justified in the form of direct investments into low-income and minority neighborhoods.<sup>222</sup>

### B. *Direct Investments into Minority Neighborhoods*

Federal, state, and local municipalities should direct additional funding to low-income and minority neighborhoods for the construction of green spaces, improved access to public transit, education, and healthcare

<sup>217</sup> MARÍA E. ENCHAUTGUI, MICHAEL FIX, PAMELA LOPREST, SARAH C. VON DER LIPPE & DOUGLAS WISSOKER, DO MINORITY OWNED BUSINESSES GET A FAIR SHARE OF GOVERNMENT CONTRACTS? 41 (1997).

<sup>218</sup> Jennifer Jones, *Contracting Concepts: Bundling and Consolidation*, DEF. ACQUISITION MAG., <https://www.dau.edu/library/damag/november-december2024/contracting-concepts> [https://perma.cc/CHM4-HC2X]; OFF. OF FED. PROCUREMENT POL'Y, OFF. OF MGMT & BUDGET, CONTRACT BUNDLING: A STRATEGY FOR INCREASING FEDERAL CONTRACTING OPPORTUNITIES FOR SMALL BUSINESS 4 (2002), [https://trumpwhitehouse.archives.gov/sites/whitehouse.gov/files/omb/assets/procurement/contract\\_bundling\\_oct2002.pdf](https://trumpwhitehouse.archives.gov/sites/whitehouse.gov/files/omb/assets/procurement/contract_bundling_oct2002.pdf) [perma.cc/HU7H-9EBZ].

<sup>219</sup> *Id.*

<sup>220</sup> Bruce Katz et al., *How Federal Infrastructure Spending Can Close the Racial Wealth Gap*, NOWAK METRO FINANCE LAB (June 9, 2021). For evidence that increase in small funding for small businesses may lead to increases in funding for specifically minority-owned small businesses see *Biden-Harris Administration Awards Record-Breaking \$178 Billion in Federal Procurement Opportunities to Small Businesses*, SBA (Apr. 29, 2024), <https://www.sba.gov/article/2024/04/29/biden-harris-administration-awards-record-breaking-178-billion-federal-procurement-opportunities> [perma.cc/4XME-3GRT].

<sup>221</sup> *See supra* Part 2.B.

<sup>222</sup> Jones, *supra* note 163, at 469.

facilities.<sup>223</sup> While such investments may lead to gentrification, that outcome can be mitigated, and even made beneficial, if paired with inclusionary zoning policies that ensure the availability of affordable housing in the neighborhood to prevent displacement.<sup>224</sup> These programs can be structured in a race-neutral manner by targeting economically disadvantaged neighborhoods rather than explicitly segregated neighborhoods, thereby reducing the risk of a legal challenge.<sup>225</sup> However, a race-conscious approach may be preferable where the goal is to remedy the effects of past federal policies that produced and entrenched racial disparities.<sup>226</sup> The discriminatory nature and consequences of federal redlining practices are well documented, and courts may be receptive to such historical evidence when evaluating the justification for targeted investments.<sup>227</sup>

Segregated neighborhoods often suffer from failing infrastructure, poor access to public transportation and jobs, and under-resourced educational systems.<sup>228</sup> Strategic public investment can address these deficiencies while also encouraging private investment and expanding the labor force.<sup>229</sup> Despite these potential benefits, capital investment on public transportation has been historically small within the United States.<sup>230</sup> The United States only spends about 0.1% of the GDP on public transportation infrastructure, significantly less than other developed countries, with China notably spending ten times as much.<sup>231</sup> Focusing on increasing funding to public transportation can not only provide access to jobs, markets, healthcare, and

<sup>223</sup> See Keunhyun Park, Alessandro Rigolon, Dong-ah Cahoi, Torrey Lyongs & Simon Brewer, *Transit to Parks: An Environmental Justice Study of Transit Access to Large Parks in the U.S. West*, URB. FORESTRY & URB. GREENING, May 2021, at 3; Jones, *supra* note 163, at 469.

<sup>224</sup> ROTHSTEIN, *supra* note 3, at 237.

<sup>225</sup> Stephanie Gidigbi Jenkins, *How Infrastructure Can Help Bridge the Racial Divide*, NRDC (May 18, 2022), <https://www.nrdc.org/bio/stephanie-gidigbi-jenkins/how-infrastructure-can-help-bridge-racial-divide> [https://perma.cc/6KK6-CD3C]. It may, however, be constitutionally permissible to consider racial makeup of a community to determine disadvantaged community status. See Jones, *supra* note 168, at 469.

<sup>226</sup> Jones, *supra* note 168, at 469; see also Joseph Dean, *The Racial Wealth Divide and Black Homeownership: New Data Show Small Gains, Deep Fragility*, NAT'L CMTY. REINVESTMENT COAL. (Feb. 28, 2024), <https://nrcr.org/the-racial-wealth-divide-and-black-homeownership-new-data-show-small-gains-deep-fragility/> [perma.cc/FC4N-C4LT] (showing that despite some improvements to the average quality of life for Black Americans, the wealth gap has worsened since).

<sup>227</sup> Cunningham & Keith, *supra* note 16, at 25.

<sup>228</sup> Somin Park, *Public Investment Is Crucial to Strengthening U.S. Economic Growth and Tackling Inequality*, WASH. CTR. FOR EQUITABLE GROWTH (Sep. 23, 2019), <https://equitablegrowth.org/public-investment-is-crucial-to-strengthening-u-s-economic-growth-and-tackling-inequality/> [perma.cc/2HL5-8Z4W]; ROTHSTEIN, *supra* note 3, at 184.

<sup>229</sup> Park, *supra* note 228.

<sup>230</sup> Eric Van Nostrand, *Infrastructure Investment in the United States*, DEP'T. OF TREASURY (Nov. 15, 2023), <https://home.treasury.gov/news/featured-stories/infrastructure-investment-in-the-united-states> [perma.cc/2FRQ-NHYP].

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

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other such places previously inaccessible to low-income neighborhoods, but also generate a return on investment to the federal government in the form of economic revitalization and an increase in the GDP.<sup>232</sup>

Segregated neighborhoods will likely also benefit from increased spending on schools and building of new and affordable housing.<sup>233</sup> Lack of affordable housing costs the American economy hundreds of billions of dollars per year due to constraining of economic opportunity, and so investments into affordable housing projects is not only equitable, but also beneficial to the US economy.<sup>234</sup> Similarly, investments in public schooling in the United States have stalled and are likely inadequate for children in low-income neighborhoods to compete effectively with children born into wealthier localities.<sup>235</sup> While federal intervention in the form of increased education and affordable housing projects appears unlikely in the current political climate, local governments may nevertheless seek to improve equity by endorsing similar programs as the Moderately Priced Dwelling Units Program (“MPDU”) enacted by Montgomery County, Maryland.<sup>236</sup> In MPDU, the government set aside a percentage (about 12-15%) of new units constructed in the county for moderate-income families, and further set aside a third of these units for rental to the lowest income families, allowing moderate, low income, and racial minority families to live together within the county alongside higher income families.<sup>237</sup> Access to integrated schools

<sup>232</sup> ECON. DEV. RSCH. GRP., ECONOMIC IMPACT OF PUBLIC TRANSPORTATION INVESTMENT 33 (2020), <https://www.apta.com/wp-content/uploads/APTA-Economic-Impact-Public-Transit-2020.pdf> [perma.cc/W9RY-QWR8] (prepared for the American Public Transportation Association); CHYE-CHING HUANG & RODERICK TAYLOR, ANY FEDERAL INFRASTRUCTURE PACKAGE SHOULD BOOST INVESTMENT IN LOW-INCOME COMMUNITIES, 3-4 (2019) (Ctr. on Budget & Pol’y Priorities).

<sup>233</sup> See ECON. DEV. RSCH. GRP., *supra* note 232, at 33; HUANG & TAYLOR, *supra* note 232, at 6, 11.

<sup>234</sup> *Why Do Affordable Homes Matter?*, NAT’L LOW INCOME HOUS. COAL., <https://nlihc.org/explore-issues/why-we-care#:~:text=Research%20shows%20that%20the%20shortage,earnings%2C%20causing%20slower%20GDP%20growth> [https://perma.cc/PR4Q-GVD3]; Makinzi Hoover, *The State of Housing in America*, U.S. CHAMBER OF COM. (March 17, 2025), <https://www.uschamber.com/economy/the-state-of-housing-in-america> [https://perma.cc/TM9C-RKFP].

<sup>235</sup> Sylvia Allegretto, Emma García & Elaine Weiss, *Public Education Funding in the U.S. Needs an Overhaul: How a Larger Federal Role Would Boost Equity and Shield Children from Disinvestment During Downturns*, ECON. POL’Y INST. (July 12, 2022), <https://www.epi.org/publication/public-education-funding-in-the-us-needs-an-overhaul/%20> [https://perma.cc/6PPU-4HRY].

<sup>236</sup> *MPDU Program Overview*, DEP’T OF HOUS. & CMTY. AFFS, MONTGOMERY CNTY., MD., <https://www.montgomerycountymd.gov/DHCA/MPDU/mpdu-program.html> [https://perma.cc/K427-FYY7]; ROTHSTEIN, *supra* note 3, at 206; see generally Dan Gooding & Shane Croucher, *Trump Administration Freezes \$18 Billion in New York City Infrastructure Projects Over DEI Concerns*, NEWSWEEK (Oct. 1, 2025), <https://www.newsweek.com/trump-admin-nyc-dei-infrastructure-projects-10811893> [https://perma.cc/2MLX-DG8P] (citing reports that the Trump administration paused roughly \$18 billion in federal infrastructure funding for New York City projects to review diversity, equity, and inclusion requirements).

<sup>237</sup> DEP’T OF HOUS. & CMTY. AFFS, MONTGOMERY CNTY., MD, *supra* note 236; ROTHSTEIN, *supra* note 3, at 206.

improve academic results, and low-income and minority students in Montgomery County have shown marked improvements in educational achievements compared to national averages.<sup>238</sup> This program exemplifies an effective method for improving access to both housing and education through integration and offers a model that could be replicated in other jurisdictions.<sup>239</sup>

These projects would not only improve racial equity but may also be carried out in a largely race-neutral manner, circumnavigating the restrictive holding in *SFFA*.<sup>240</sup> Doing so is likely tempting for policymakers keen on avoiding a complex legal challenge, but keen on still pursuing effective policies to undo the effects of discrimination.

In addition, exclusionary zoning laws that prohibit construction of low and middle-income housing in wealthy localities were often drafted with racial animus, and should be investigated or forbidden if not at the federal level, then at state levels.<sup>241</sup> While investments into low-income neighborhoods and reforms that make housing affordable may disproportionately benefit racial minorities in the United States, such investments are also simply good policies, and should be constitutionally permissible with the defense of remedying past acts of official discrimination.<sup>242</sup>

### C. *Racial Impact Studies Should Be Required for Large Infrastructural Developments*

Race-neutral infrastructure development, economic planning, and housing allotment have the potential to increase racial inequality rather than address it.<sup>243</sup> Infrastructure projects in the past have created both positive and

<sup>238</sup> Heather L. Schwartz, *Integrating Schools Is a Matter of Housing Policy*, in FINDING COMMON GROUND: COORDINATING HOUSING AND EDUCATION POLICY TO PROMOTE INTEGRATION 15 (Philip Tegeler ed., 2011), <https://www.prrac.org/pdf/HousingEducationReport-October2011.pdf> [<https://perma.cc/2VS6-WE9C>]; Jeanne L. Reid, *Socioeconomic Diversity and Early Learning*, in *The Future of School Integration* 67, 100 (Richard D. Kahlenberg ed., THE CENTURY FOUN., 2012).

<sup>239</sup> Benjamin Kraft & Casey Anderson, *Growing Inclusively is Possible . . . If We Build Enough Housing*, THE THIRD PLACE (Sep. 8, 2022), <https://montgomeryplanning.org/blog-design/2022/09/growing-inclusively-is-possible-if-we-build-enough-housing/> [<https://perma.cc/ME4U-YCH5>]; Schwartz, *supra* note 238, at 15; *see generally* ROTHSTEIN, *supra* note 3, at 203-06.

<sup>240</sup> *Id.*; Adjii Fatou Diagne, Haydar Kurban & Benoît Schmutz, *Are Inclusionary Housing Programs Color-Blind? The Case of Montgomery County MPDU Program* (Ctr. for Rsch. in Econ. & Stat., Working Paper No. 2017-47).

<sup>241</sup> Jabari Simama, *The Troubling Connection Between Zoning and Racism*, GOVERNING (Oct. 2, 2023), <https://www.governing.com/community/the-troubling-connection-between-zoning-and-racism> [<https://perma.cc/XR3V-UHLL>]; ROTHSTEIN, *supra* note 3, at 52-53.

<sup>242</sup> *Why Do Affordable Homes Matter?*, *supra* note 234; ROTHSTEIN, *supra* note 3, at 203; HUANG & TAYLOR, *supra* note 232, at 2.

<sup>243</sup> Grete Gansauer, *The Biden Administration's Infrastructure Investments May Not Be a Silver Bullet for Historically Disadvantaged Regions*, THE LOND. SCH. OF ECON. & POL. SCI. (Jan 25, 2024),

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negative impacts in the nation's communities.<sup>244</sup> However, minority neighborhoods usually suffered the negative consequences of infrastructural developments.<sup>245</sup> Racial impact studies may be an option for federal and local programs seeking to invest in infrastructure without furthering racial segregation.<sup>246</sup> Racial impact studies are tools that serve to inform policymakers by collecting data concerning the demographics of areas likely to be impacted by infrastructure investment or economic reforms.<sup>247</sup> Electing to change an economic reform proposal to halt furthering racial segregation based on the result of the racial impact study is likely constitutionally permissible even if it is a race-conscious decision.<sup>248</sup> The Supreme Court's holdings in *Croson* and *Harvard* were ambiguous as to whether limited, race-conscious programs would be tolerated if they were based on statistical evidence and could be meaningfully reviewed by the courts.<sup>249</sup> Adjustments to infrastructure planning in reaction to a racial impact study would naturally be limited to a single package and the decision would be reviewable by the courts, satisfying the standards established by *SFFA*.<sup>250</sup>

## PART 5: CONCLUSION

Over the decades, the Supreme Court has significantly restricted the circumstances in which the government may consider race in pursuing equality. Nevertheless, race-conscious efforts remain both relevant and necessary to combat inequality and remedy past harms caused by past government action.<sup>251</sup> Although the continued use of such policies may invite

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<https://blogs.lse.ac.uk/usappblog/2024/01/25/the-biden-administrations-infrastructure-investments-may-not-be-a-silver-bullet-for-historically-disadvantaged-regions/> [https://perma.cc/QK68-EWTK]; Rajninger, *supra* note 46.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*; Morgan Sherburne, *Targeting Minority, Low-Income Neighborhoods for Hazardous Waste Sites*, Univ. of Mich. (Jan. 19, 2016), <https://news.umich.edu/targeting-minority-low-income-neighborhoods-for-hazardous-waste-sites/> [https://perma.cc/NQS3-7FWR]; Oliver Milman, *Revealed: 1.6m Americans Live Near the Most Polluting Incinerators in the US*, THE GUARDIAN (May 21, 2019), <https://www.theguardian.com/environment/2019/may/21/us-pollution-incinerators-waste-burning-plants-report> [https://perma.cc/ED4Z-59UK]; Emily G. Bergeron, *A Right to Nature: Addressing Disparities in Green Space Access*, HUM. RTS. MAG. (Oct. 30, 2024), <https://www.americanbar.org/groups/crsj/resources/human-rights/2024-october/right-to-nature/> [https://perma.cc/27CF-PYXX].

<sup>246</sup> Rajninger, *supra* note 46; William West, *Racial Impact Assessment in Land Use Planning and Zoning Comes to New York*, 22 NEW YORK ZONING LAW AND PRACTICE REPORT, May-June 2022, at 2.

<sup>247</sup> *Id.*

<sup>248</sup> See generally *Otero v. N.Y.C. Hous. Auth.*, 484 F.2d 1122, 1125 (2d Cir. 1973); *Linmark Assocs. v. Willingboro*, 431 U.S. 85, 94–95 (1977) (citing *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972)); *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 160 (2023).

<sup>249</sup> *Toledo*, *supra* note 77, at 395; *Students for Fair Admissions, Inc.*, 600 U.S. at 214.

<sup>250</sup> *Students for Fair Admissions, Inc.*, 600 U.S. at 214.

<sup>251</sup> See *supra* Part 2.D.

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constitutional challenges considering *SFFA*, viable legal arguments remain for distinguishing these programs from the admission policies at issue in that case.<sup>252</sup>

While the restrictions imposed by *SFFA*, particularly the requirement that remedies be tied to identifiable cases of past discrimination, may appear daunting, a search of American history shows no shortage of such government discrimination.<sup>253</sup> Framing policies within these doctrinal constraints may force the state and federal government to recognize the harm it has inflicted upon minority and low-income communities. This Note makes the claim that such a step is desirable even in the absence of *SFFA*. If we as the public and the state can look back upon our past with clear eyes and acknowledge that federal, state, and local governments segregated our society, we may yet finally open ourselves to considering what must be done to desegregate.

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<sup>252</sup> See *supra* Part 3.

<sup>253</sup> See *supra* Part 3.B.1.