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HARNESSING HYPOCRISY: A CRACK IN THE SUPREME COURT'S COLORBLINDNESS MASK

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INTRODUCTION

On June 29, 2023, the Supreme Court issued *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*,[1] a decision that banned affirmative action in higher education.[2] The Court's opinion painted itself as a crusader for anti-racism since the landmark *Brown v. Board of Education* ruling in 1954.[3] It expressed a commitment to eradicating government-sanctioned racial discrimination throughout the United States and tacitly casts the dissents as supporting Jim Crow segregation.[4] The Court's opinion gives the ignorant reader the impression that it is dedicated to promoting racial justice.

However, one day later, on June 30, 2023, the Supreme Court denied certiorari in *Harness v. Watson*,[5] a case which brought constitutional challenges to § 241 of the Mississippi State Constitution.[6] In 1890, white Mississippi delegates convened and drafted a new state constitution expressly designed to disenfranchise African Americans.[7] While the state constitution itself was silent as to race,[8] the drafters were quite open about the racist motivations behind its creation.[9] This particular section furthered the framers' discriminatory purposes by adding specific crimes the framers thought would yield more convictions of Black people than whites.[10] It then permitted the government to abridge the voting rights of persons convicted of those crimes.[11] In short, § 241 manifested then, and now still manifests, government-sanctioned racial discrimination. Yet, the Supreme Court refused to hear it.

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

2 *Id.* at 230.

3 *See id.* at 203–06 ("In that seminal decision, we overturned *Plessy* for good and set firmly on the path of invalidating all *de jure* racial discrimination by the States and Federal Government . . . .Immediately after *Brown*, we began routinely affirming lower court decisions that invalidated all manner of race-based state action . . . .In the decades that followed, this Court continued to vindicate the Constitution's pledge of racial equality.").

4 *See id.* at 214–21, 229–30. In refuting the dissents, the majority portrays the dissenting justices as opponents of its landmark racial equality precedents. "For what one dissent denigrates as 'rhetorical flourishes about colorblindness,' are in fact the proud pronouncements of cases like *Loving* and *Yick Wo*, like *Shelley* and *Bolling*—they are defining statements of law . . . .Separate but equal is '*inherently* unequal,' said *Brown*. It depends, says the dissent." *See id.* at 227–29 (citation omitted) (quoting Brown v. Bd. of Ed., 347 U.S. 483 (1954)).

5 Harness v. Watson, 143 S. Ct. 2426 (2023).

6 Harness v. Watson, 47 F.4th 296, 299 (5th Cir. 2022), *cert. denied*, 143 S. Ct. 2426 (2023).

7 *Harness*, 143 S. Ct. at 2426.

8 For the original version of § 241 of the Mississippi Constitution of 1890, *see* Williams v. Mississippi, 170 U.S. 213, 217 n.1 (1898).

9 *See Harness*, 143 S. Ct. at 2426.

10 *See id.*

11 *See id.*

This Essay contends that the Court's denial of certiorari in *Harness* stands as a testament to its hypocrisy. The day after the Court professed an allegiance to promoting racial equality, it refused to even consider invalidating a clear barrier to racial equality. The day after the Court struck down a remedy designed to address a long, sad, and painful history of racism, the Court left undisturbed an obvious symbol of this long, sad, and painful history of racism. When juxtaposed against both the denial of certiorari in *Harness* and Justice Ketanji Brown Jackson's searing dissent for denial of certiorari, the *Students for Fair Admissions* majority's lofty pronouncements about opposing racism amount to pure smoke and mirrors. The consistent throughline that connects *Students for Fair Admissions* and *Harness* is the Roberts Court's commitment to preserving anti-Black racism.

This Essay proceeds in three parts. Part I examines the Court's decision and concurrences in *Students for Fair Admissions*, focusing on their declarations of commitment to eliminating racial discrimination. Part II discusses the historical context behind the 1890 Mississippi Constitution and briefly reviews *Harness*' procedural history. It also analyzes Justice Jackson's dissent in denial of certiorari. Part III ties together the first two parts and features a blistering indictment of the Roberts Court. Part III also addresses the potential counterargument to the idea that the Court's denial of certiorari in *Harness* was motivated by its allegiance to white supremacy.

I. *STUDENTS FOR FAIR ADMISSIONS*: THE ROBERTS COURT PRETENDS TO CARE ABOUT RACISM

On June 29, 2023, the Supreme Court declared the affirmative action programs of Harvard and the University of North Carolina to be in violation of both the Fourteenth Amendment and the Civil Rights Act of 1964.[12] Justice John Roberts authored the majority opinion, while Justices Clarence Thomas, Neil Gorsuch, and Brett Kavanaugh filed concurrences.[13] Littered throughout both the majority opinion and the concurrences was a professed commitment to ending government-sanctioned racial discrimination. Putting aside the Court's selective—and deceptive—narration of history, this Part focuses on the anti-racism proclamations contained in all the opinions favoring the judgement.

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12 Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 230–31 (2023).

13 *See id.* at 190, 231, 287, 311.

A. *The Majority Opinion*

After its rendition of the facts of the two cases, the majority opinion tells a story of judicial redemption. The Court, according to the majority, initially "embraced the transcendent aims of the Equal Protection Clause."[14] It then lost its way for a period, symbolized by its decision in *Plessy v. Ferguson*.[15] A little over half a century later, the Court regained its footing with *Brown v. Board of Education* by "set[ting] firmly on the path of invalidating all *de jure* racial discrimination by the States and Federal Government."[16] The Court then recounted a jurisprudential history of invalidating government-imposed segregation in the decade and a half after *Brown*.[17]

Continuing in its self-congratulatory expiation, the Court makes several other pronouncements supporting racial equality and condemning discrimination: "In the decades that followed, this Court continued to vindicate the Constitution's pledge of racial equality;"[18] "As we recounted in striking the State of Virginia's ban on interracial marriage 13 years after *Brown*, the Fourteenth Amendment 'proscri[bes] . . . all invidious racial discriminations;'"[19] "These decisions reflect the 'core purpose' of the Equal Protection Clause: 'do[ing] away with all governmentally imposed discrimination based on race;'"[20] "'The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.'"[21]

The Court then declares: "Eliminating racial discrimination means eliminating all of it."[22] This statement indicates an enduring dedication to eradicating racism. On its face, it evidences an intention to be proactive in stamping out government-sanctioned racial discrimination. Certainly, legal mechanisms enacted during Jim Crow with the express purpose of excluding Black people from participating in democracy should qualify as the kind of government-sanctioned racial discrimination that the Supreme Court has committed itself to upending. After all, such actions "'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'"[23] Throughout its discussion of

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14 *Id.* at 202.

15 *Id.* at 202–03 (citing Plessy v. Ferguson, 163 U.S. 537 (1896)).

16 *Id.* at 203–04 (citing Brown v. Bd. of Ed., 347 U.S. 483 (1954)).

17 *Id.* at 204–06 (citing cases).

18 *Id.* at 205.

19 *Id.* (quoting Loving v. Virginia, 388 U.S. 1, 8 (1967)).

20 *Id.* at 206 (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984)).

21 *Id.* (quoting Loving v. Virginia, 388 U.S. 1, 10 (1967)).

22 *Id.*

23 *Id.* at 208 (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)).

the two affirmative action programs, the majority continues to verbally condemn racism.[24]

The majority opinion concludes by casting the dissenting opinions as endorsements of continued racial discrimination. The majority opinion claims that the dissents deliberately misrepresent and omit what they can to promote "a judiciary that picks winners and losers based on the color of their skin,"[25] and accuses the dissenters of advocating for "a claim to power so radical, so destructive, that it required a Second Founding to undo."[26] Then, in a familiar maneuver by opponents of affirmative action,[27] the Court sets forth Justice Harlan's famous partial quote in *Plessy*: "'[I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.'"[28]

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24 *See, e.g.*, *id.* at 214 ("Because '[r]acial discrimination [is] invidious in all contexts,' we have required that universities operate their race-based admissions programs in a manner that is 'sufficiently measurable to permit judicial [review]' under the rubric of strict scrutiny") (citation omitted) (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 619 (1991)); Fisher v. Univ. of Texas Austin, 579 U.S. 365, 381 (2016))); *id.* at 217 ("As this Court has repeatedly reaffirmed, '[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.'") (quoting Gratz v. Bollinger, 539 U.S. 244, 270 (2003)); *id.* at 220 ("We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those 'who may have little in common with one another but the color of their skin.'") (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993)); *id.* ("'One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.'") (quoting Rice v. Cayetano, 528 U.S. 495, 517 (2000)).

25 *Id.* at 229.

26 *Id.* at 230.

27 Regarding the citation of the partial quote of Justice Harlan's *Plessy* dissent, *see, e.g.*, Matthew D. Reade, *Talking About Affirmative Action*, U. CHI. L. REV. ONLINE 1, 2 (2020) ("[California Assemblyman Bernie] Richter assailed race-based affirmative action as 'government-enforced racism,' no different than Whites' invidious discrimination against Blacks during Jim Crow. He frequently cited Justice John Harlan's immortal dissent in *Plessy v. Ferguson* . . . ."); *see also* Erwin Chemerinsky, *Making Sense of the Affirmative Action Debate*, 22 OHIO N. U. L. REV. 1159, 1171 (1996) ("One frequent argument against affirmative action is that the Constitution commands the government to be color-blind. That argument takes its inspiration from the powerful words of Justice John Harlan, dissenting in *Plessy v. Ferguson*: "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."); Samuel L. Starks, *Understanding Government Affirmative Action and Metro Broadcasting, Inc. v. FCC*, 41 DUKE L.J. 933, 945 (1992) ("Some judges and legal scholars believe that regardless of its nature or intent, government-enacted affirmative action programs are a *per se* violation of the Constitution because the Equal Protection Clause prohibits the government from treating people differently solely on account of their race or minority status. . . . Although articulated in a variety of ways, Justice Harlan's dissenting statement in *Plessy v. Ferguson* is the most commonly cited expression of this view . . . .").

28 *Id.* (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). However, the majority in *Students for Fair Admissions* ignores that, before that quote, Justice Harlan stated:

On its face, the majority opinion reads like an anti-racism screed. The Court apparently eschews government-mandated racial discrimination, the chief evil against which the wording of the Equal Protection Clause was directed; and the Court stands ready to strike down all manifestations of it. After all, says the Court: "'[W]hat cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows,' and the prohibition against racial discrimination is 'levelled at the thing, not the name.'"[29] Thus, if a state or local government enacted a law with the express purpose of discriminating on the basis of race, this Court should excitedly seize the opportunity to invalidate that law.

B. *The Concurrences*

The concurring opinions also profess to favor racial equality and oppose governmental discrimination. Justice Thomas wrote a concurrence in which he sought, among other things, "to clarify that all forms of discrimination based on race . . . are prohibited under the Constitution . . . ."[30] His concurrence cites Justice Harlan's colorblindness reference in his *Plessy* dissent twelve times, more than any other opinion in *Students for Fair Admissions*.[31] His "originalist defense of the colorblind Constitution"[32] concludes that the Fourteenth Amendment was intended "to establish a nondiscrimination rule that could not be repealed by future Congresses."[33] Time and again, Justice Thomas articulates a constitutional commitment to racial equality and a constitutional aversion to government-sanctioned racial discrimination.[34]

"The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth, and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage, and holds fast to principles of constitutional liberty." *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting). Thus, Justice Harlan *endorses* white superiority and deems it compatible with constitutional colorblindness.

29 *Students for Fair Admissions*, 600 U.S. at 230 (quoting Cummings v. Missouri, 71 U.S. 277, 325 (1867)).

30 *Id.* at 232 (Thomas, J., concurring).

31 Justice Harlan's dissenting opinion in *Plessy*, particularly regarding the "colorblind constitution" reference, was cited nearly thirty times in the decision.

32 *Id.* at 232.

33 *Id.* at 241.

34 *See*, *e.g.*, *id.* at 260 ("Indeed, our precedents have repeatedly and soundly distinguished between programs designed to compensate victims of past governmental discrimination from so-called benign race-conscious measures, such as affirmative action. To enforce that distinction, our precedents explicitly require that any attempt to compensate victims of past governmental discrimination must be concrete and traceable to the *de jure* segregated system, which must have some discrete and continuing discriminatory effect that warranted a present remedy. . . . Without

The thrust of Justice Gorsuch's concurrence was that the Civil Rights Act of 1964 uniquely forbade racial discrimination.[35] Justice Gorsuch venerates the Civil Rights Act and emphasizes its prohibition against government-mandated racism.[36] He goes after the principal dissenting opinion, declaring that it ignores the reality that both universities engaged in intentional discrimination in violation of both the Fourteenth Amendment and the Civil Rights Act of 1964.[37] He casts *Bakke* and its progeny as a source of confusion in constitutional law, creating "university exceptionalism" in the Court's anti-discrimination jurisprudence.[38] He finally concludes with a call to operationalize the Civil Rights Act as he understands it, averring that the statute contains nothing that "endorses racial discrimination to any degree or for any purpose."[39]

Finally, Justice Kavanaugh drafted a concurrence to "further explain why the Court's decision today is consistent with and follows from the Court's equal protection precedents . . . ."[40] Justice Kavanaugh's concurrence features a sparse historical narrative before repeatedly emphasizing that government distinctions based upon race, with limited exceptions, violate the Constitution.[41] Kavanaugh's casting of racial discrimination as an evil is most evident in his conclusion: "To be clear, although progress has been made since *Bakke* and *Grutter*, racial discrimination still occurs and the effects of past racial discrimination still persist. Federal and state civil rights laws serve to deter and provide remedies for current acts of racial discrimination."[42]

On their faces, the concurring opinions of Justices Thomas, Gorsuch, and Kavanaugh suggest that these justices oppose government-sanctioned racial discrimination. Justice Thomas' concurrence is arguably the most vigorous of the three; on its face, his opposition to what he calls racial discrimination goes back three decades.[43] Justice

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such guardrails, the Fourteenth Amendment would become self-defeating, promising a Nation based on the equality ideal but yielding a quota- and caste-ridden society steeped in race-based discrimination."); *id.* at 261–62 ("The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all." (quoting Grutter v. Bollinger, 539 U.S. 306, 353 (2003))).

35 *See id.* at 287 (Gorsuch, J., concurring).

36 *Id.* at 287–90.

37 *Id.* at 301–04.

38 *Id.* at 304–07.

39 *Id.* at 310.

40 *Id.* at 311 (Kavanaugh, J., concurring).

41 *Id.* at 311–16.

42 *Id.* at 317.

43 *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 240–41 (1995) (Thomas, J., concurring).

Gorsuch's concurrence demands respect for the Civil Rights Act of 1964, one of the most celebrated anti-discrimination statutes in American history. Given these concurrences, one would think that these justices would rise to the occasion if faced with a state or local law that was enacted for the purpose—indeed, the *primary* purpose—of discriminating against African Americans.

II. *HARNESS V. WATSON*: THE ROBERTS COURT IGNORES CLEAR ANTI-BLACK RACISM

On June 30, 2023, the day after the Supreme Court issued *Students for Fair Admissions*, which boasted of its commitment to eradicating government-sanctioned racial discrimination, the Court denied certiorari in *Harness v. Watson*, a case that challenged an obvious legal product of government-sanctioned racial discrimination. This Part briefly recounts the background and procedural history of *Harness v. Watson* before focusing on the dissenting opinion of Justice Jackson.

A. Harness v. Watson*: Background and Procedural History*

With the fall of Reconstruction in 1877, federal efforts to enforce the newly enacted Reconstruction Amendments grounded to a halt.[44] The Klan-dominated Democratic Party swept through the former confederacy, gaining control of every southern state government.[45] Black politicians were slowly but surely driven out of public office, and white politicians exalted over having ended "negro domination."[46] Then in the early 1880s, the Supreme Court provided the former confederacy with the blueprint to racially subjugate despite the existence of the Reconstruction Amendments: government officials can legally discriminate as long as they don't make it glaringly obvious.[47]

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44 *See* Zamir Ben-Dan & Rigodis Appling, *Breaking the Backbone of Unlimited Power: The Case for Abolishing Absolute Immunity for Prosecutors in Civil Rights Lawsuits*, 73 RUTGERS U. L. REV. 1373, 1402–03 (2021).

45 *Id.* at 1403.

46 *See* Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65, 111 n.266 (2008) (citing to *Gov. Evans Denies Treason*, WASHINGTON POST 1 (May 16, 1895)).

47 In the early 1880s, the Supreme Court decided a slew of cases where African Americans convicted of crimes challenged their convictions on the ground that Black people were excluded from the jury. The Supreme Court overturned convictions where either the statute expressly barred Black people, or where the government openly admitted to excluding Black people. *See*, *e.g.*, Strauder v. West Virginia, 100 U.S. 303, 309–10 (1880) (holding that the Fourteenth Amendment is violated where state statute facially bars African Americans from jury service); Neal v. Delaware,

The following decade, Mississippi's state government took the hint. White Mississippi delegates convened to devise a new constitution designed to disenfranchise African Americans.[48] The end result was a document that authorized facially race neutral mechanisms to bar Black people from voting.[49] Examples included poll taxes, literacy tests, and the deprivation of suffrage rights for persons convicted of certain felonies.[50] In designating the crimes that would cause a convicted person to lose his right to vote, the drafters of the new state constitution focused on offenses they assumed were predominantly committed by Black people.[51] While the state constitution and accompanying legislation made no explicit reference to race, the discriminatory purpose behind the constitution was beyond dispute.[52]

It is this provision of the state constitution, § 241, that Roy Harness, Kamal Karriem, and numerous African Americans convicted of felonies challenged on Fourteenth and Fifteenth Amendment grounds.[53] Mr. Harness was convicted of forgery and Mr. Karriem was convicted of embezzlement.[54] Both of them were consequently deprived of their right to vote under § 241. The district court denied their challenge in August

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103 U.S. 370, 394 (1881) (holding that the Fourteenth Amendment is violated where state conceded that Black people were excluded on the basis of race). However, where no facially discriminatory statute existed, and where the government did not admit to enforcing the law in a racially discriminatory manner, the Supreme Court found no constitutional wrongdoing. *See* Virginia v. Rives, 100 U.S. 313, 318–20 (1880). This put states on notice: admit no racially discriminatory purpose, and the Court more likely than not will find no constitutional infirmity. *See* Williams v. Mississippi, 170 U.S. 213 (1898) (holding no Fourteenth Amendment violation where Mississippi's state constitution made no mention of race); Cumming v. Richmond Cnty. Bd. of Educ., 175 U.S. 528 (1899) (holding no Fourteenth Amendment violation where there was insufficient proof that the closing of the county's only Black public high school was motivated by race); Giles v. Harris, 189 U.S. 475 (1903) (holding no Fourteenth Amendment violation where the Alabama constitution made no mention of race).

48 *See Nov. 1, 1890: Mississippi Constitution*, ZINN EDUC. PROJECT, https://www.zinnedproject.org/news/tdih/mississippi-constitution/#:~:text=On%20Nov.,Americans%20and%20some%20poor%20whites [https://perma.cc/B86W-5KRV].

49 *Id.*

50 *See id.*; Patrick Berry, *Court Strikes Down Mississippi's Lifetime Felony Voting Ban*, BRENNAN CTR. FOR JUSTICE (Dec. 6, 2023), https://www.brennancenter.org/our-work/analysis-opinion/court-strikes-down-mississippis-lifetime-felony-voting-ban [https://perma.cc/XZU2-FEF4].

51 *See* DOROTHY OVERSTREET PRATT, SOWING THE WIND: THE MISSISSIPPI CONSTITUTIONAL CONVENTION OF 1890 79 (2018).

52 Look no further than the president of the Convention, who stated: "We came here to exclude the negro." *See* NEIL R. MCMILLEN, DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW 41 (1989).

53 Harness v. Hosemann, No. 3:17-CV-791, 2019 WL 8113392, at *1 (S.D. Miss. Aug. 7, 2019).

54 Harness v. Watson, 47 F.4th 296, 302 (5th Cir. 2022).

2019.[55] The Fifth Circuit Court of Appeals affirmed the denial of their challenge in August 2022.[56] Harness and company then sought review from the Supreme Court.[57]

B. *Justice Jackson's Dissent*

The Court's denial of certiorari drew the ire of Justices Jackson and Sonia Sotomayor. In response, Justice Jackson penned a dissent that Justice Sotomayor joined. Justice Jackson opened her dissent with a quote from the president of the 1890 Mississippi Constitutional Convention.[58] His words made clear the purpose of the Convention: "We came here to exclude the negro. Nothing short of this will answer."[59] This purpose was openly acknowledged by the Supreme Court of Mississippi six years after the state ratified its constitution;[60] and the U.S. Supreme Court was cognizant of the same two years later.[61] In setting this forward, Justice Jackson shrewdly deployed originalism, the chosen method of constitutional interpretation by most of the judges that joined the majority opinion in *Students for Fair Admissions*.[62] Both the intent of the framers and the public meaning as understood by the courts was that Black people were to be excluded from meaningful participation in democracy in Mississippi.

Justice Jackson then pointed out how the section in question has remained almost completely untouched from its original form.[63] Of the nine crimes designated by the statute as bases for disenfranchisement, eight crimes remain.[64] Justice Jackson further points out that the law continues to have the same effect it was intended to have in 1890: African Americans are disproportionately disenfranchised.[65] Thus, the originalist argument has come full circle: the intended harm in 1890 was that Black people would be targeted for disenfranchisement, and that harm continues

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55 *Harness*, 2019 WL 8113392, at *14.

56 *Harness*, 47 F.4th at 311.

57 Petition for Writ of Certiorari, Harness v. Watson, No. 22-412, 2022 WL 16699076 (2022).

58 *See* Harness v. Watson, 143 S. Ct. 2426, 2426 (2023).

59 *Id.*

60 *See* Ratliff v. Beale, 20 So. 865, 868 (Miss. 1896).

61 *See* Williams v. Mississippi, 170 U.S. 213, 221–22 (1898).

62 *See* Mike Rappaport, *The Year in Originalism*, LAW & LIBERTY (Mar. 24, 2021), https://lawliberty.org/the-year-in-originalism [https://perma.cc/3A4Z-RLV2] ("[T]here are now four avowed originalists on the Court – Thomas, Gorsuch, Kavanaugh, and Barrett."). Unsurprisingly, all four justices joined the majority opinion in *Students for Fair Admissions*.

63 *Harness*, 143 S. Ct. at 2426.

64 *Id.*

65 *Id.*

unabated in the twenty-first century.[66] Finally, Justice Jackson noted how, in deeming the provision constitutionally consonant despite its racist origin, the Fifth Circuit Court of Appeals contravened established Supreme Court precedent.[67]

In her conclusion, Justice Jackson subtly hinted at the Court's contradictory behavior. She quoted the Court's declaration in *Students for Fair Admissions* that the nation's founding document "'deals with substance, not shadows,' and the [constitutional] prohibition against racial discrimination is 'levelled at the thing, not the name.'"[68] Yet, she wrote, while § 241 embodies "only the most toxic of substances," the Court refuses to invalidate it.[69] The Court has let stand a 133-year-old mechanism of government-sanctioned racial discrimination "at the same time that the Court undertakes to slay other giants . . . ."[70] Indeed, the six justices that signed on to the majority opinion in *Students for Fair Admissions*, justifying their votes via pronouncement of their constitutional obligation to eradicate all forms of governmental racism, had no desire to correct the Fifth Circuit's improper affirmance of this racist provision.

III. HARNESS V. WATSON LAYS BARE THE ROBERTS COURT'S HYPOCRISY AND ANTI-BLACK RACISM

Plenty of scholarship exists demonstrating the Roberts Court's juridical adherence to and adoption of rationales and precedents that disadvantage Black people.[71] The Court's decision in *Shelby County v.*

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66 Brief for NAACP Legal Defense & Educational Fund, Inc., and American Civil Liberties Union as Amici Curiae Supporting Plaintiff-Appellants, Harness v. Watson, No. 22-412, 2022 WL 16699076, at *16–17 (2022).

67 *Harness*, 143 S. Ct. at 2426–27; *see* Hunter v. Underwood, 471 U.S. 222, 232–33 (1985) ("At oral argument in this Court, the appellants' counsel suggested that, regardless of the original purpose of § 182, events occurring in the succeeding 80 years had legitimated the provision. Some of the more blatantly discriminatory selections, such as assault and battery on the wife and miscegenation, have been struck down by the courts, and appellants contend that the remaining crimes—felonies and moral turpitude misdemeanors—are acceptable bases for denying the franchise. Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under *Arlington Heights*.").

68 *Harness*, 143 S. Ct. at 2428 (quoting Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023)).

69 *Id.*

70 *Id.*

71 *See, e.g.*, Girardeau A. Spann, *Postracial Discrimination*, 5 MOD. AM. 26 (2009); Tom I. Romero, II, *The Keyes to Reclaiming the Racial History of the Roberts Court*, 20 MICH. J. RACE & L. 415 (2015); Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Court's*

Holder[72] was particularly egregious given how the Court invalidated a portion of the Voting Rights Act despite: a) a voluminous congressional record establishing its continued necessity;[73] and b) the Court's inability to cite to a single constitutional provision allegedly in conflict with the statute.[74] Nonetheless, in times past, the Roberts Court could allegedly be counted on to address obvious examples of anti-Black discrimination. Khiara Bridges observes how the Roberts Court "provides a remedy to people of color seeking relief from racially burdensome laws and policies only when the racism embedded in the challenged law or policy is so closely tied to white supremacy that it would be embarrassing for the Court to do nothing."[75]

Against that backdrop, the Court's refusal to even hear *Harness* now stands as the clearest testament to its anti-Blackness. § 241 of the Mississippi State Constitution symbolizes everything the Court professes to be against. The origin of the section is not colorblind; the intentions of the drafters were as race explicit as it gets. If the Fourteenth Amendment "proscribes . . . all invidious racial discriminations,"[76] as the majority in *Students for Fair Admissions* declares, then it proscribes § 241 of the Mississippi State Constitution. If "all forms of discrimination . . . are prohibited under the Constitution . . . ."[77] as Justice Thomas claims, then this provision is plainly objectionable. If the Court were true to its promise in *Students for Fair Admissions* to eliminate all forms of government-imposed racism, then it should have heard this case and provided judicial correction. Yet, it chose not to grant certiorari.

Criminal Jurisprudence, 110 CALIF. L. REV. 681 (2022); *see also* Lynn Adelman, *The Roberts Court's Assault on Democracy*, 14 HARV. L. & POL'Y REV. 131, 140–48 (2019); Mario L. Barnes, *"The More Things Change…": New Moves for Legitimizing Racial Discrimination in a "Post-Race" World*, 100 MINN. L. REV. 2043, 2067–72, 2078–84, 2088–91, 2093–2100 (2016); D. Marvin Jones, *The Original Meaning of Brown: Seattle, Segregation and the Rewriting of History*, 63 U. MIAMI L. REV. 629 (2009).

72 Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

73 Justice Ginsburg's dissent lays out the successes of the Voting Rights Act, noting that the law led to the blocking of over seven hundred racially discriminatory voting changes that states bound by § 4 of the Act tried to make between 1982 and 2006. *Id.* at 570–76 (Ginsburg, J., dissenting).

74 The Court's basis for voiding § 4 of the Voting Rights Act was that it violated "equal sovereignty," a term which appears nowhere in the federal constitution. *Id.* at 535, 540, 542, 544 (majority opinion). Critics have credibly pointed out that the "equal sovereignty" rationale is a figment of the majority's imagination. *See* Vik Kanwar, *A Fugitive from the Camp of the Conquerors: The Revival of Equal Sovereignty Doctrine in* Shelby County v. Holder, 17 BERKELEY J. AFR.-AM. L. & POL'Y 272, 278–79 (2015); *see also* ERWIN CHEMERINSKY, WORSE THAN NOTHING: THE DANGEROUS FALLACY OF ORIGINALISM 145–46 (2022).

75 Khiara M. Bridges, *Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 25 (2022).

76 Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 205 (2023).

77 *Id.* at 232 (Thomas, J., concurring).

What the Court's refusal demonstrates is what scholars have argued for years: the Roberts Court is not bothered by anti-Black racism. It is this bottom line that harmonizes this refusal with *Students for Fair Admissions*. It harmonizes *Harness* with *Shelby County v. Holder* and other decisions in which the Roberts Court undermined the Voting Rights Act.[78] It harmonizes *Harness* with *Parents Involved in Community Schools v. Seattle School District No. 1*,[79] a decision which involved both an inversion of history and a judgment strikingly similar to *Students for Fair Admissions*. It harmonizes *Harness* with *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*, which upheld a Michigan state constitutional amendment banning affirmative action.[80] The Roberts Court has been consistent in its anti-Black decision making.

The Court's denial of certiorari in *Harness* further indicates that it has moved to the right of both the Rehnquist and Burger Courts. As conservative as the Burger Court was on issues regarding race,[81] it held that Alabama's disenfranchisement scheme for persons convicted of certain criminal offenses spawned out of racial animus and violated the federal constitution.[82] Moreover, as racist as he was, Justice William Rehnquist wrote the unanimous decision of the Court.[83] The racism embodied in the Alabama State Constitution's disenfranchisement provision proved too obvious even for a rightwing court in the 1980s to overlook. Yet in 2023, in the age of colorblindness, the Roberts Court

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78 *See*, *e.g.*, Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321 (2021) (Arizona's ballot rejection law did not violate Section 2 of the Voting Rights Act despite having a disparate impact on nonwhite voters); Abbott v. Perez, 585 U.S. 579 (2018) (Texas' electoral maps, which diluted the votes of African American and Latino residents, did not violate the Fourteenth Amendment and mostly did not violate the Voting Rights Act); Shelby Cnty. v. Holder, 570 U.S. 529 (2013).

79 Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (race-conscious efforts to diversify schools in Seattle and Louisville were violative of the Fourteenth Amendment).

80 *See* Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291, 314 (2014).

81 The Burger Court began the rollback of gains of the Civil Rights Movement. *See, e.g.*, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178–79 (1972) (upholding the state action doctrine and denying relief against racially discriminatory private club); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18–20 (1973) (upholding San Antonio's school financing system despite negative impact on nonwhite students); Milliken v. Bradley, 418 U.S. 717, 745–47 (1974) (invalidating the district court's desegregation plan despite its finding of pervasive government-sanctioned discrimination); Washington v. Davis, 426 U.S. 229, 240–41 (1976) (holding that proof of intent to discriminate is required under the Fourteenth Amendment; disparate impact is relevant but insufficient by itself).

82 *Hunter*, 471 U.S. at 233.

83 *See generally* Paul Butler, *Rehnquist, Racism and Race Jurisprudence*, 74 GEO. WASH. L. REV. 1019 (2006) (making the case that Justice Rehnquist was racially biased and that his racial bias likely affected his decision making).

saw the same egregious constitutional violation and chose to turn a blind eye.[84]

The Court's denial of certiorari in *Harness* also shows that the Roberts Court's concern about racial justice is only triggered by its perception that a government policy disadvantages white people. The Court's eagerness to take up affirmative action cases despite the law being clear evidences this.[85] The Court was so excited to revisit the affirmative action issue that they granted certiorari in the UNC case before the First Circuit could even review the district court's judgement in favor of the university.[86] The Court disfavors affirmative action because white Americans are opposed to affirmative action and dub it "reverse discrimination."[87]

That the Roberts Court only cares about "anti-white racism" is further evidenced by Justices Alito's comment respecting the Court's rejection of certiorari in *Roberts v. Bassett*, a case arising out of New York.[88] In response to a shortage of COVID medication, the state issued a regulation requiring that "high risk" patients be prioritized in getting medication.[89] Race was considered a risk factor for nonwhite patients, but not for white patients.[90] In his statement respecting the denial of certiorari, Justice Alito cites to *Students for Fair Admissions* to charge that the policy was racially discriminatory.[91] He further declared that "in the event that any government again resorts to racial or ethnic classifications to ration medical treatment, there would be a very strong case for prompt review by this Court."[92] Justice Thomas joined Justice

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84 The facts in *Hunter* are almost identical to the facts in *Harness*. *Hunter* dealt with a state constitutional provision birthed out of deep racial animus. The provision in *Hunter* was facially race neutral but enacted with the express purpose of depriving Black people of suffrage rights through felony disenfranchisement. The provision in *Hunter* underwent a few changes, but it still retained vestiges of the Old Jim Crow constitution. *Hunter*, 471 U.S. at 232–33. These facts put *Harness* squarely within *Hunter*'s command and militates a similar outcome.

85 In the past ten years, the Supreme Court has taken up three affirmative action cases. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023); Fisher v. Univ. Texas at Austin, 579 U.S. 365 (2016); Schuette v. BAMN, 572 U.S. 291 (2014).

86 *Students for Fair Admissions*, 600 U.S. at 198.

87 Fifty-seven percent of white Americans opposed affirmative action in admissions decisions by selective colleges and universities. *See* John Gramlich, *Americans and Affirmative Action: How the Public Sees the Consideration of Race in College Admissions, Hiring*, PEW RSCH. CTR. (June 16, 2023), https://www.pewresearch.org/short-reads/2023/06/16/americans-and-affirmative-action-how-the-public-sees-the-consideration-of-race-in-college-admissions-hiring [https://perma.cc/G2MD-QDCJ].

88 *See* Roberts v. McDonald, 143 S. Ct. 2425 (2023).

89 See Roberts v. Bassett, 2022 WL 16936210, at *1 (2d Cir. 2022).

90 *See id.* at *1.

91 *Roberts*, 143 S. Ct. at 2425.

92 *Id.*

Alito's comment.[93] These two justices, both of whom were part of the *Students for Fair Admissions* majority opinion, were evidently moved to comment because New York's policy allegedly impacted white people adversely. Perhaps the biggest irony was that this comment was also published on June 30, 2023, the same day these two justices joined most of the Court to refuse to hear *Harness v. Watson*.[94]

Some might question whether the Court's denial of certiorari in *Harness* was motivated by racial bias, as opposed to other considerations. After all, the Court receives thousands of petitions for a writ of certiorari each Term and only grants roughly one percent of all petitions.[95] Consequently, the Court can only hear so many cases and must be selective in choosing which case to expend resources upon. Some may therefore argue that the Court's denial of certiorari in *Harness* was motivated more so by a judicial desire for efficiency, to conserve resources, and to allow the Court to "keep within manageable proportions . . . the business that is allowed to come before us."[96]

The problem with this argument is that *Harness* embodies all the characteristics that would make the Court inclined to grant certiorari. *Harness* raises a substantial federal question.[97] Given the Court's and the country's publicly professed opposition to racial discrimination,[98] and given the origins of § 241 of the Mississippi State Constitution, *Harness* has national significance. Moreover, the Court has customarily been

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93 *Id.*

94 *Id.*

95 *See* A REPORTER'S GUIDE TO APPLICATIONS PENDING BEFORE THE SUPREME COURT OF THE UNITED STATES, PUBLIC INFORMATION OFFICE SUPREME COURT OF THE UNITED STATES 14, https://www.supremecourt.gov/publicinfo/reportersguide.pdf [https://perma.cc/VWH8-WM8H].

96 *See* Daniels v. Allen, 344 U.S. 443, 491 (1953).

97 The Court only hears matters where a substantial federal issue is raised. *See* A REPORTER'S GUIDE TO APPLICATIONS PENDING BEFORE THE SUPREME COURT OF THE UNITED STATES, PUBLIC INFORMATION OFFICE SUPREME COURT OF THE UNITED STATES at 8. The issue in *Harness* related to whether a state constitutional provision indisputably enacted with racial animus violates the Fourteenth and Fifteenth Amendments to the constitution. Harness v. Watson, 47 F.4th 296, 302 (5th Cir. 2022).

98 *See* discussion, *supra* Part I. Polls show that a majority of Americans, including a majority of Republican voters, identify white supremacy as a problem in America. *See* Tess Owen, *60% of Republican Voters Say White Supremacy Is a 'Problem' in the US*, VICE NEWS (Oct. 27, 2022, 6:54 AM), https://www.vice.com/en/article/n7z9a8/republican-voters-white-supremacy [https://perma.cc/2HZC-3RF8]. The majority of Americans think it is good to teach America's history of racism and slavery. *Deep Divisions in Americans' Views of Nation's Racial History – and How To Address It*, PEW RSCH. CTR. (Aug. 12, 2021), https://www.pewresearch.org/politics/2021/08/12/deep-divisions-in-americans-views-of-nations-racial-history-and-how-to-address-it [https://perma.cc/R9NY-PD9Y]. Most Americans also believe that anti-Black racism is widespread in America. Jeffrey M. Jones & Camille Lloyd, *Larger Majority Says Racism Against Black People Widespread*, GALLUP (July 23, 2021), https://news.gallup.com/poll/352544/larger-majority-says-racism-against-black-people-widespread.aspx [https://perma.cc/HC2S-QPLL]. These statistics indicate that the majority of Americans reject ideas regarding racial superiority and inferiority; otherwise, for example, the majority of Americans wouldn't consider white supremacy a problem.

moved to correct inaccurate applications and blatant disregards of its precedents.[99] In ruling the way it did, the Fifth Circuit ignored the Court's teaching in *Hunter v. Underwood*. Finally, *Harness* would have precedential value as a case that reaffirms that government policies born out of racial animus violate the federal constitution.[100]

Moreover, the Roberts Court's jurisprudential history regarding cases where claims of racial discrimination were made renders its refusal to even hear *Harness* suspect. In 2016, the Court reaffirmed *Grutter v. Bollinger*[101] and upheld the use of affirmative action in higher education in *Fisher v. University of Texas at Austin*.[102] A mere seven years later, the Court changed the standard, refashioning the dissents from *Fisher* and *Grutter* into binding precedent.[103] The three dissenting justices in *Fisher* were part of the *Students for Fair Admissions* majority; and evidently, they were eager to get the last laugh. Additionally, as two of those dissenters-turned-majority members hinted, an instance of government-mandated racial discrimination would make for "a very strong case for prompt review by this Court."[104] Given the history of § 241 of the Mississippi State Constitution, there is no legitimate reason why *Harness* did not also provide "a very strong case for prompt review" by the Supreme Court. Yet here, the Court's excitement to eradicate racial discrimination has suddenly evaporated. Its silence speaks volumes.

Khiara Bridges states: "The Roberts Court's racial common sense is a tactic that allows the Court to do no more than the absolute bare minimum and, in so doing, maintain a modicum of legitimacy."[105] With its denial of certiorari in *Harness*, that "modicum of legitimacy" has officially vanished. Like the Taney Court in the 1850s, the Roberts Court is a palpable agent of white supremacy. Its jurisprudential track record makes clear that African Americans have "no rights which the [Roberts Court is] bound to respect."[106]

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99 For example, the Court in *Students for Fair Admissions* rejected the First Circuit's application of *Grutter* and *Fisher II* to Harvard's and the University of North Carolina's affirmative action programs. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 231 (2023). In 2022, the Supreme Court reversed the Second Circuit's decision upholding New York's gun law on the grounds that it incorrectly applied its precedents in *D.C. v. Heller* and *McDonald v. City of Chicago*. *See* New York State Rifle and Pistol Ass'n v. Bruen, 597 U.S. 1, 19–24 (2022).

100 *See* Washington v. Davis, 426 U.S. 229, 239–41 (1976) ("[It is a] basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.").

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

102 Fisher v. Univ. Texas Austin, 579 U.S. 365, 388–89 (2016).

103 *Students for Fair Admissions*, 600 U.S. at 352–53 (Sotomayor, J., dissenting).

104 *Roberts*, 143 S. Ct. at 2425.

105 Bridges, *supra* note 75, at 25.

106 *See* Dred Scott v. Sanford, 60 U.S. 393, 407 (1857).

CONCLUSION

Having endured sustained criticism for being a judicial vessel of white supremacy, the United States Supreme Court was presented with an opportunity to push back against its critics. *Harness v. Watson* was the Court's slam dunk; it was the Court's chance to legitimize its purported adherence to colorblindness at least faintly. Mississippi State Constitution § 241 plainly violates the federal constitution and conflicts with the Court's own precedent. By denying certiorari in *Harness*, the Court makes plain and undeniable its anti-Black bias.