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Equal Standards for Equal Protection: Revisiting Race Discrimination in Jury Selection After *SFFA*

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ABSTRACT. Scholars have repeatedly found that prosecutors strike Black prospective jurors at disproportionately high rates, thereby violating the Fourteenth Amendment rights of both the excluded jurors and the people on trial. In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (*SFFA*), the Supreme Court appeared to redefine what constitutes an equal-protection violation—the use of race as a factor in a selection process, no matter how minor. This Essay argues that the new standard the Court established in *SFFA* should be applied to race discrimination in jury selection. Since *SFFA* purports to reflect the current Court's view of the Equal Protection Clause, *SFFA* may present a new avenue for challenging racially biased jury selection.

INTRODUCTION

Racial disparities pervade the U.S. criminal legal system. State actors disproportionately target and harm Black Americans at every stage of the criminal process: police stop Black Americans at higher rates, prosecutors charge Black Americans with more serious crimes, and judges sentence Black Americans to longer prison terms.[1]

Scholars have observed that jury selection is one of the many processes often infected by race discrimination.[2] In April 2024, a federal judge ordered a district

1. *See* Nazgol Ghandnoosh, Celeste Barry & Luke Trinka, *One in Five: Racial Disparity in Imprisonment—Causes and Remedies*, SENT'G PROJECT (Dec. 7, 2023), https://www.sentencingproject.org/publications/one-in-five-racial-disparity-in-imprisonment-causes-and-remedies [https://perma.cc/P4V2-53DW].

2. *See generally* Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *Unequal Jury Representation and Its Consequences*, 4 AM. ECON. REV. 159 (2022) (analyzing both juror demographics and case outcomes in Harris County, Texas); Shari Seidman Diamond, Destiny Peery, Francis J. Dolan & Emily Dolan, *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6

attorney in California to review thirty-five death-penalty sentences after evidence emerged that the office had intentionally excluded Black and Jewish prospective jurors from sitting on juries in capital cases in the 1990s, a practice that violated the U.S. Supreme Court's landmark ruling in *Batson v. Kentucky*.[3] Just one month later, the Court of Criminal Appeals of Alabama restricted courts' ability to review claims about race discrimination during jury selection, likely reacting to the frequency of such claims.[4] Scholars have repeatedly found that prosecutors strike Black prospective jurors at disproportionately high rates and that white jurors are significantly more likely to impose a death sentence when the defendant is Black.[5] Excluding Black prospective jurors from criminal trials violates the Fourteenth Amendment rights of both the excluded jurors and the people on trial.[6]

J. EMPIRICAL LEGAL STUD. 425 (2009) (analyzing the effects of both the jury selection process and the jury size on the diversity of juries); Jacinta M. Gau, *A Jury of Whose Peers? The Impact of Selection Procedures on Racial Composition and the Prevalence of Majority-White Juries*, 39 J. CRIME & JUST. 75 (2016) (exploring how different steps of jury selection change the racial composition of the jury pool).

3. Order Lifting Confidentiality of Jury Selection Files, Dykes v. Martel, No. 11-cv-04454 (N.D. Cal. Apr. 22, 2024) (No. 164); Press Release, Off. of the Alameda Cnty. Dist. Att'y, Alameda County Death Penalty Cases Are Reviewed After Prosecutors Discover Evidence of Prosecutorial Misconduct Excluding Jewish and Black Residents from Jury Service in Death Penalty Cases (Apr. 22, 2024), https://www.alcoda.org/alameda-county-death-penalty-cases-are-reviewed-after-prosecutors-discover-evidence-of-prosecutorial-misconduct-excluding-jewish-and-black-residents-from-jury-service-in-death-penalty-cases [https://perma.cc/7SGW-PZSM]; Emilie Raguso, *Alameda County Death Penalty Cases Under Review over Alleged Misconduct*, BERKELEY SCANNER (Apr. 23, 2024, 3:00 AM), https://www.berkeleyscanner.com/2024/04/23/courts/pamela-price-death-penalty-review-misconduct-claims [https://perma.cc/2RDY-JLMN].

4. Henderson v. State, No. CR-21-0044, 2024 WL 1946585, at *32 (Ala. Crim. App. May 3, 2024). This ruling has been criticized by anti-death-penalty advocates as perpetuating Alabama's "long history of racial bias in the administration of the death penalty." *Alabama Court of Criminal Appeals Categorically Bars Review of Racial Bias in Capital Jury Selection*, DEATH PENALTY INFO. CTR. (Sept. 25, 2024), https://deathpenaltyinfo.org/alabama-court-of-criminal-appeals-categorically-bars-review-of-racial-bias-in-capital-jury-selection [https://perma.cc/HDU5-E6FU].

5. For studies regarding the relationship between a juror's race and the imposition of a death sentence, see, for example, William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 J. CONST. L. 172 (2001) (finding that white jurors are more likely to recommend capital punishment); and Katherine Beckett & Heather Evans, *Race, Death, and Justice: Capital Sentencing in Washington State, 1981-2014*, 6 COLUM. J. RACE & L. 77, 104 (2016) (finding that jurors in Washington were four times more likely to impose a death sentence if the defendant was Black).

6. Batson v. Kentucky, 476 U.S. 79, 86-87 (1986).

In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (*SFFA*),[7] the Supreme Court appeared to take a novel approach to what constitutes a Fourteenth Amendment violation, opening a new avenue for challenging racially biased jury selection. In *SFFA*, the Court found that the "race-conscious" college-admissions processes used by Harvard and the University of North Carolina (UNC) violated the Equal Protection Clause of the Fourteenth Amendment.[8] Many scholars have rightly criticized the Court's reasoning in *SFFA*.[9] Some have identified ways in which *SFFA* appears to be at odds with standard conservative views about race that the Court has articulated in the past.[10] Such critiques are crucial to understanding and challenging the Roberts Court's view of equality in education.

In another area of law, however, *SFFA* might present an unexpected opportunity. A careful examination of the reasoning in *SFFA* demonstrates that the Court put forward a substantively new understanding of what can constitute a Fourteenth Amendment violation—the use of race as a factor in a selection process, no matter how minor. Though there are many ways in which college admissions and criminal cases are disanalogous, in both contexts the Court has relied on the Fourteenth Amendment's Equal Protection Clause to regulate the use of race in a selection process, whether for a spot at an elite university or for a spot on a jury. Since *SFFA* purports to reflect the current Court's view of the Equal Protection Clause, perhaps it can be put to good use to challenge race discrimination in other arenas.

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7. 600 U.S. 181 (2023).

8. *Id.* at 230.

9. For instance, Issa Kohler-Hausmann argues that it is unclear what precisely *SFFA* has banned given the contradictions in the opinion. *See* Issa Kohler-Hausmann, *What Did* SFFA *Ban? Acting on the Basis of Race and Treating People as Equals*, 66 ARIZ. L. REV. 305, 312-14 (2024). Kohler-Hausmann offers four possible interpretations of what *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (*SFFA*) bans: (1) actions when the decisionmaker is not blinded to race, (2) actions when race is one of multiple reasons in an admissions evaluation, (3) actions when the decisionmaker uses racial associations that the applicant did not explicitly indicate, and (4) actions when race is a reason for certain policies or valuations of certain metrics. For each, Kohler-Hausmann outlines how they are either internally incoherent or indeterministic. *Id.* at 354-55.

10. *See, e.g.*, Justin Driver, *The Cure as Disease: The Conservative Case Against* SFFA v. Harvard, 2023 SUP. CT. REV. 1-65 (analyzing "four distinct ways that *SFFA* undermines conservative principles, contending that the right will grow to loathe the regime that *SFFA* created even more than the one that it destroyed"); *see also* Benjamin Eidelson & Deborah Hellman, *Unreflective Disequilibrium: Race-Conscious Admissions After* SFFA, 4 AM. J.L. & EQUAL. 295, 295-325 (2024) (arguing that *SFFA*'s contradiction, namely acknowledging race's significance while opposing affirmative action, creates an unstable legal framework for "race-conscious" admissions).

In this Essay, I argue that *SFFA*'s new standard for equal-protection violations should be applied to race discrimination in jury selection. In Part I, I describe how the Court's argument in *SFFA* about the use of race as a "negative" reveals a significant departure from traditional equal-protection doctrine, one that ultimately establishes a more searching standard. In Part II, I explain how the standard for what constitutes race discrimination in jury selection has evolved from the Court's 1986 *Batson* decision to the present. Finally, in Part III, I contend that the Court's more protective rule in *SFFA* should be applied to claims of race discrimination in jury selection. I end by exploring the implications of these arguments for assessing future *Batson* claims.

I. *SFFA*'S NEW STANDARD

In *SFFA*, the Court held that Harvard's and UNC's admissions programs violated the Equal Protection Clause because the programs used race as a "negative" or "stereotype" in their admissions processes.[11] The Court's earlier landmark affirmative-action cases, *Regents of the University of California v. Bakke* and *Grutter v. Bollinger*, also grappled with the constitutionality of using race in admissions processes.[12] In both *Bakke* and *Grutter*, however, the Court held that using race as one of multiple factors in an admissions process could be constitutional.

In *Bakke*, Justice Powell, who authored the Court's opinion, argued that the university's admissions policy setting aside sixteen out of one hundred seats per year for minority students was unconstitutional.[13] But Powell reversed the lower court's decision that *any* consideration of race was unconstitutional. Instead, race could be considered as "one element—to be weighed fairly against other elements—in the selection process."[14] Though *Bakke* had a splintered majority, it is clear that the four Justices who concurred in the judgment agreed with Powell on this point. Justice Brennan, joined by three other Justices, stated that "Mr.

11. *SFFA*, 600 U.S. at 218-19.

12. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 270 (1978); Grutter v. Bollinger, 539 U.S. 306, 311 (2003).

13. *Bakke*, 438 U.S. at 270. *Bakke* produced a splintered decision with six different opinions: Justice Powell authored the Court's opinion; Justices Brennan and Stevens, each joined by three other Justices, authored opinions concurring in part and dissenting in part with Powell's opinion; and Justices White, Marshall, and Blackmun all wrote separate opinions as well.

14. *Id.* at 318. In an appendix to his decision, Justice Powell pointed to Harvard College's admissions program as an example of how a program could weigh race permissibly. *See Bakke*, 438 U.S. at 323-24 ("[I]n choosing among thousands of applicants who are not only 'admissible' academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.").

Justice Powell agrees that some uses of race in university admissions are permissible and, therefore, he joins with us to make five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future."[15] Despite the many disagreements among the Justices about the permissible aims of affirmative-action programs, a five-Justice majority held that race could be used as a factor.

Twenty-five years later, in *Grutter*, the Court again held that race could be used as a factor in an admissions process. In *Grutter*, the plaintiff argued that the University of Michigan Law School used race as a "predominant" factor, which gave minority students a "significantly greater chance of admission than students with similar credentials from disfavored racial groups."[16] The Supreme Court held that universities can "consider race or ethnicity more flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant."[17] The Court further explained that race was permissible as a potential "plus" factor in University of Michigan Law School admissions, just as it was in the Harvard admissions program that Justice Powell praised in *Bakke*.[18]

In *SFFA*, the Court effectively overturned the precedent set in *Bakke* and *Grutter*.[19] The Court reasoned that, because Harvard admitted to using race as a "plus" and because, according to the Court, college admissions is a "zero-sum" process, race must have been used as a "negative" in the college-admissions processes.[20]

To demonstrate how the admissions processes used race as a "negative," the Court presented the following reasoning. In its brief, Harvard stated that race is only used as a "plus" and never as a "negative," in the same way that excelling at a musical instrument is a "plus" for some applicants but not a "negative" for others.[21] The Court then drew an analogy between musical talents and high test scores and grades. Since admissions is a zero-sum process, the Court reasoned, it would be ridiculous to describe high grades and test scores as a "plus" for some

15. *Id.* at 326 (Brennan, J., concurring in part) (capitalization removed).

16. *Grutter*, 539 U.S. at 317 (citation omitted).

17. *Id.* at 334.

18. *Id.* at 321.

19. Justice Roberts's majority opinion does not explicitly state that *Grutter* was overturned. In Justice Thomas's concurrence, however, he stated that "[t]he Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled." Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 287 (2023) (Thomas, J., concurring).

20. *Id.* at 218-19. Notably, when *SFFA* was decided, Harvard's admissions program had not meaningfully changed since Justice Powell commended Havard's admission program in *Bakke*; it was already clear that Harvard used race as a "plus" and that college admissions were a zero-sum process.

21. *Id.* at 218 (citing Brief for Respondent at 51, *SFFA*, 600 U.S. 181 (No. 20-1199)).

applicants but not as a "negative" for applicants without high grades and test scores.[22] In other words, "[a] benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter."[23] Thus, if race is used as a "plus" for one applicant, race must necessarily be a "negative" for other applicants. The Court concluded that Harvard's admissions program used race as a "negative" in violation of the Fourteenth Amendment.[24]

Though the Court's reasoning here may appear straightforward, several assumptions animate the zero-sum argument. It is therefore helpful to reconstruct the Court's argument to clarify the contours of the reasoning. Harvard only said that race and musical talent are never used as a "negative"—not that grades and test scores are never used as a "negative." The Court, not Harvard, supplied a further assumption: since college admissions is a zero-sum process, any factor that is considered a "plus" must necessarily also be used as a "negative" for other applicants. Thus, every factor, no matter how minor, is a "negative" for every applicant without that factor.[25] Since the Court took the view that all factors necessarily operate as a "negative" for some applicants in a zero-sum process, the Court objected to any use of race at all: no matter how minor the consideration or specific the categorization, race cannot play a role. The Court's view is that admissions programs can consider everything from grades to oboe-playing skills, but not race in any way.

It may seem as though the Court is only concerned with admissions programs that use race as a *determinative* factor. But a closer look reveals that the Court's concern is really an objection to the use of race as a factor in any way. In *SFFA*, the Court described the last stage of Harvard's admissions process as follows:

> The final stage of Harvard's process is called the "lop," during which the list of tentatively admitted students is winnowed further to arrive at the

22. *Id.* The Court does not explain *why* these are equivalent. It could be that academic achievement is used as a "negative" in a way that musical talent is not. For instance, high grades may be necessary (without high grades an applicant is automatically rejected) but not sufficient (high grades alone do not guarantee an applicant a spot) for admission. Musical talent, on the other hand, may be neither necessary nor sufficient for college admissions—plenty of applicants without musical talent are admitted and plenty of talented musicians are rejected. But no one is rejected solely because they are not a talented musician. Thus, that academic achievement is used as a "negative" does not mean that race and musical talent operate as a "negative" in the same way.

23. *SFFA*, 600 U.S. at 218-19.

24. *Id.* at 218.

25. This is a highly counterintuitive description of an admissions process. The Court's view entails that it would be a "negative" for a college applicant to not be an Olympic athlete, just because one person in the admissions pool happens to be an Olympic athlete.

> final class. Any applicants that Harvard considers cutting at this stage are placed on a "lop list," which contains only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. The full committee decides as a group which students to lop. In doing so, the committee can and does take race into account. Once the lop process is complete, Harvard's admitted class is set.[26]

Referring to the "lop" stage of Harvard's process, the Court stated that "race is determinative for at least some—if not many—of the students they admit."[27] Though in other contexts the term "determinative" typically refers to the weight of a given factor, here the Court seemed to be referring to something that makes or breaks a decision. The Court's concern was that race becomes the factor that pushes the applicant into the admit pile, thus "determining" the outcome of that application. If race moves an on-the-fence application into the admit pile—and others are left behind only because they are not of that race—then race is being used as a "negative" for those left behind.[28]

But the Court's concern about race as a "tip" does not require that race be a primary, or even significant, reason that a given applicant is ultimately accepted. To get to the "lop" stage, the admissions officers have already considered the student's test scores, grades, extracurricular activities, letters of recommendations, and more—the "non-race-based" factors. In other words, all of the "non-race-based" factors in one application may stack up to just barely cross the line into the admit pile. One interpretation of the Court's view is that race is prohibited as the last factor, since the last factor considered in every individual case is

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26. *SFFA*, 600 U.S. at 195 (citations omitted).

27. *Id.* at 219. The lower court opinions and the oral arguments focused on race as a "determinative" factor or "tip" for students who were admitted—not rejected. As such, the Court again relies on the assumption that any tip towards admissions (a "plus") is necessarily also a tip towards rejection (a "negative") for other applicants.

28. Notably, for it to be the case that the race "tip" for one applicant is necessarily a "negative" for another applicant, the applicants need to be otherwise the same, all things considered. In *Bakke*, Justice Powell described a similar scenario, demonstrating how race is *not* truly a determinative factor, even when it may appear to be:

> The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower, but who had demonstrated energy and leadership, as well as an apparently abiding interest in black power . . . If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B.

Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 324 (1978). Given the holistic nature of the process, race is only "determinative" if the candidates are otherwise identical.

"determinative" of the outcome. It would be odd, however, for the Court to find "race-conscious" admissions unconstitutional only when race is the last factor considered in certain cases. Indeed, the Court describes the entire admissions processes at Harvard and UNC, not just the last stages.

More plausibly, the Court's view is that every factor is "determinative" in cases where the application barely crossed into the admit pile. If any one factor was removed at any point in the process, the applicant likely would not have made it onto the admit list. Thus, if race is a factor at any point in the process, then race (along with every other "non-race-based" factor) becomes a "determinative" factor in a close case. Because the process is zero-sum, as the Court argued, any "plus" given to one applicant is necessarily a "negative" for all other applicants. If race, like every other factor, is "determinative" in a close case, it must also be a "negative" in all other cases not awarded that "plus." Thus, the Court's concern about the use of race is not limited to close cases.[29]

This understanding aligns with Justice Gorsuch's articulation of the standard in his concurrence. Gorsuch emphasized that, although "universities consider many non-racial factors in their admissions processes," the law prohibits "intentionally treating *any* individual worse even *in part* because of his race."[30] Thus, the Court's concern about race as a "determinative" factor is still an objection to any consideration of race, no matter how minor.[31]

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29. Indeed, this reading of the Court's opinion helps explain why the organization, Students for Fair Admissions, had standing to challenge Harvard's and the University of North Carolina's respective admissions programs. The organization did not need to make the claim that the individual members would have been admitted to Harvard if not for Harvard's policy. Instead, it was sufficient to claim that the members were subjected to an unfair admissions process. *See SFFA*, 600 U.S. at 201 (explaining the organization's membership without making a claim about the specifics of any of the individual applications).

30. *SFFA*, 600 U.S. at 301 (Gorsuch, J., concurring) (emphasis added).

31. One may be concerned that the last paragraph of the Court's decision suggests that race *could* be used in certain ways during the admissions process. Chief Justice Roberts wrote that "all parties agree [that] nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." *SFFA*, 600 U.S. at 230-31. Regardless of one's position on the last paragraph, the same caveat could be translated into the jury selection context, if, for instance, a prosecutor wants to strike a juror after the juror states that they have had negative experiences with police that were influenced by their race. Some courts have held that striking a juror based on negative experiences with police influenced by race does not constitute a *Batson* violation. *See, e.g.*, People v. Austin, 549 P.3d 977, 983 (Colo. 2024) ("[T]he prosecutor didn't strike Juror 32 based on an assumption that, as a person of color, Juror 32 would inherently be biased against law enforcement (i.e., that all people of color are biased against law enforcement) . . . Rather, the prosecutor struck Juror 32 based on the life experiences she had shared and the prosecutor's concern that those experiences might affect her ability to receive evidence from police officers impartially."). Thus, the suggestion in Robert's last paragraph can be applied to jury selection as well.

This reading of *SFFA* appears to be consistent with how universities subsequently changed their admissions programs to conform with their understanding of what *SFFA* required. Across the country, programs stopped using race "check boxes," meaning an application question where an applicant could indicate their race.[32] The elimination of these "check boxes" suggests that universities understood *SFFA* to ban the use of race altogether.[33] In the next Part, I lay out the Court's evolving standard for the extent to which race can be used in jury selection and how it compares to the standard used by the Court in *SFFA*.

II. RACE AS A "FACTOR" IN *BATSON* CHALLENGES

SFFA suggests that race as a factor, no matter how minor, taints the entire decision process in college admissions. This is contrary to how courts handle peremptory strikes in jury selection, where race can be one of multiple factors considered. In *Batson v. Kentucky*, the Supreme Court explained that purposeful race discrimination in jury selection violates the equal-protection rights of both the defendants on trial and the excluded jurors.[34] Though in *Batson* the Court required that the defendant and the struck juror share a race to establish an equal-protection violation, the Court later held that the two need not share the same race, and that the restriction on racially discriminatory strikes also applied to peremptory strikes by the defense.[35] The reason for this, the Court explained, was that "with the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic

32. Eric Hoover, *SFFA Urges Colleges to Shield 'Check Box' Data About Race from Admissions Officers*, CHRON. HIGHER EDUC. (July 12, 2023), https://www.chronicle.com/article/sffa-urges-colleges-to-shield-check-box-data-about-race-from-admissions-officers [https://perma.cc/99YE-9Z8A].

33. Under *Grutter*, admissions programs were restricted in how they used race (i.e., no quotas) but race could still be used as a factor, such that race "check boxes" were permitted. The removal of these boxes post-*SFFA* suggests that programs believe that they can no longer consider race in any way after *SFFA*.

34. 476 U.S. 79, 86-87 (1986). The Court also noted that "[t]he harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community." *Id.* at 87.

35. *Batson*, 476 U.S. at 96 (requiring that the "defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race" (citation omitted)); Powers v. Ohio, 499 U.S. 400, 402 (1991) ("hold[ing] that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race"); Georgia v. McCollum, 505 U.S. 42, 59 (1992) (holding that "the Constitution prohibits a criminal defendant from engaging in purposeful discrimination on the ground of race in the exercise of peremptory challenges").

process."[36] Striking a juror because of their race, regardless of whether it matches the defendant's, impedes the juror's participation in that process and violates their equal-protection rights.

In order to protect the rights of both the excluded juror and the defendant, the Court created a three-step process for raising an objection to potential prosecutorial discrimination in jury selection.[37] First, the defendant must make a prima facie showing of race discrimination in the prosecutor's use of peremptory strikes.[38] Second, the prosecutor must articulate a "neutral" reason for the strike.[39] Third, weighing both the defendant's prima facie showing and the prosecutor's race-neutral reason for the strike, the trial judge must determine whether the defendant met their burden of demonstrating purposeful race discrimination.[40]

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36. *Powers*, 499 U.S. at 407.

37. Although prosecutors can raise "reverse-*Batson*" challenges, defense attorneys raise *Batson* challenges at a much higher rate. *See, e.g.*, Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 457-58 (1996) (finding that "*Batson* is a tool used almost exclusively by criminal defendants," since survey data collected in the year-and-a-half following *McCollum* showed that 187 criminal defendants raised *Batson* challenges, while only 9 prosecutors raised *Batson* challenges). Prosecutors may be disincentivized from raising *Batson* objections at trial, because it increases the risk of having the defendant's conviction vacated on appeal. *See* Caren Myers Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1, 29 n.142 (2014) (finding that defendants challenging reverse-*Batson* objections obtained new trials approximately one quarter of the time, while defendants raising standard *Batson* objections obtained a new trial less than three percent of the time); *see also* Elina Tetelbaum, *The Reverse-*Batson*: Wrestling with the Habeas Remedy*, 119 YALE L.J. 1739 (2010) (exploring the possible remedies for an improperly granted reverse-*Batson* challenge); Audrey M. Fried, *Fulfilling the Promise of* Batson*: Protecting Jurors from the Use of Race-Based Peremptory Challenges by Defense Counsel*, 64 U. CHI. L. REV. 1311, 1319 (1997) (arguing that trial courts should raise *Batson* challenges *sua sponte* because prosecutors are not incentivized to "provide jurors with adequate protection from race-based peremptory challenges by defense attorneys"). Given that the standard setup consists of a defendant objecting to a prosecutor's strike, this Essay will presume that structure going forward.

38. *Batson*, 476 U.S. at 96.

39. *Id.* at 97. The Court's explanation for what constitutes a "neutral" reason for the second step of a *Batson* inquiry highlights just how low a bar the Court's decision set. In defining the boundaries for an appropriate race-neutral reason, the Court "emphasize[d] that the prosecutor's explanation need not rise to the level justifying exercise of a challenge for cause." *Id.* Instead, the Court's standard meant that prosecutors could not exercise peremptory strikes based on assumptions that "arise *solely* from the jurors' race," such as the belief that a prospective juror "would be partial to the defendant because of their shared race." *Id.* at 97-98 (emphasis added). Thus, the Court left open the possibility that an assumption based on a juror's race *and* something else (such as the juror's body language) would not necessarily violate the "core guarantee of equal protection." *Id.* at 97.

40. The Court later explained that the trial judge must determine whether "the prosecutor's reason constitutes a *pretext* for racial discrimination." *See* Hernandez v. New York, 500 U.S. 352,

What standard should judges apply when weighing the defense-presented evidence and the prosecutor's "race-neutral" reason? Courts have generally applied four different standards: (1) the "solely" approach, (2) the "mixed motives" approach, (3) the "per se" approach, and (4) the "substantial motivation" approach.[41] Recently, the Supreme Court endorsed the substantial motivation approach, and lower courts have followed suit.[42] Still, exploring the differences between all four standards illuminates how *SFFA*'s zero-tolerance policy maps onto the peremptory-strike context.

The "solely" standard comes from the Court's language in *Batson*. The Court held that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors *solely* on account of their race."[43] The "solely" standard in *Batson* suggests that any race-neutral reason, no matter how small, would be sufficient to justify a strike. For instance, in *Purkett v. Elem*,[44] the prosecutor provided the following reason in response to a *Batson* challenge for striking two Black men from the jury pool:

> I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to me to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and goatee type beard. Those are the only two people on the jury . . . with the facial hair . . . And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me.[45]

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363 (1991) (emphasis added). Other Justices had previously raised the concern about pretextual reasons in nonmajority opinions. *See* Teague v. Lane, 489 U.S. 288, 324 (1989) (Stevens, J., concurring in part) ("[T]he trial judge should examine whether the race-neutral explanations are genuine or pretextual."); Wilkerson v. Texas, 493 U.S. 924, 927 (1989) (Marshall, J., dissenting from denial of certiorari) ("[T]he factfinder can examine a prosecutor's justifications in light of the characteristics of the jurors actually struck to determine generally whether the justifications were merely pretexts for racially motivated considerations.").

41. For an early analysis of the standards, see generally Russell D. Covey, *The Unbearable Lightness of* Batson*: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279 (2007).

42. *See infra* notes 63-68 and accompanying text.

43. *Batson*, 476 U.S. at 89 (emphasis added).

44. 514 U.S. 765 (1995) (per curiam).

45. *Id.* at 766 (quoting App. to Pet. for Cert. A-41). Viewed in the most charitable light, the prosecutor's reasons were implausible and unrelated to a person's ability to serve on a jury. More likely, however, the prosecutor's reasons were not random but rather drew on racially coded language to exclude Black jurors.

The Supreme Court held that there was no *Batson* violation because the prosecutor's explanation did not need to be "persuasive, or even plausible."[46] Under the "solely" standard, a prosecutor's strike would be permissible even if it were ninety-five percent motivated by racial animosity and five percent motivated by animosity toward people with mustaches.[47]

The Supreme Court's "solely" standard suggested that a strike is unconstitutional only if the juror's race is the sole reason for exclusion—the opposite of the Court's view in *SFFA* that using race even as a minor factor is prohibited. In practice, if the "solely" standard applied to the admissions context, an equal-protection violation would occur only if a school implemented a categorical ban of students of certain races. Otherwise, schools could likely produce at least one "race-neutral" explanation for rejecting an application, especially if the reason need not even be plausible. So long as the school could find any random reason to reject the student, the "solely" standard would place no further limits on the use of race in the admissions process. Given the "solely" standard's ineffectualness as a test to root out race discrimination in jury selection, it is unsurprising that the Supreme Court used the word "solely" only a handful of times when discussing *Batson* violations, last employing the standard in 2000.[48]

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46. *Purkett*, 514 U.S. at 768.

47. A series of cases from all over the country have brought to light different "trainings" or "pamphlets" that prosecutors have circulated amongst themselves that contain "race-neutral" reasons for striking Black prospective jurors. DEATH PENALTY CLINIC, BERKELEY L. SCH., WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS 49-50 (2020) ("District attorney training materials combine 'practical tips' from *Batson* case law with encyclopedias of stock, court-approved 'race neutral' reasons . . . The *Inquisitive Prosecutor's Guide* lists 77 race-neutral reasons for striking a juror. The list of race-neutral justifications encompasses over a fifth of the entire guide, consisting of almost 30 single-spaced pages." (citations omitted)).

48. Holland v. Illinois, 493 U.S. 474, 478 (1990) (describing *Batson* as requiring the prosecutor to show that the peremptory strikes of potential Black jurors were not "solely because of their race"); Powers v. Ohio, 499 U.S. 400, 409 (1991) (repeating that the Equal Protection Clause prohibits prosecutors from striking a prospective juror "solely by reason of their race"); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994) (extending *Batson* to include sex discrimination because "[w]hen persons are excluded from participation in our democratic processes *solely* because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized" (emphasis added)); United States v. Martinez-Salazar, 528 U.S. 304, 315 (2000) (stating that "[u]nder the Equal Protection Clause, a defendant may not exercise a peremptory challenge to remove a potential juror *solely* on the basis of the juror's gender, ethnic origin, or race" (emphasis added)). A Westlaw search of Supreme Court opinions that mention the word "solely" in connection with *Batson* turned up only thirteen opinions (including the four discussed above). The other nine opinions use the term "solely" for other purposes. *See* Allen v. Hardy, 478 U.S. 255, 258 (1986) (explaining *Batson*'s departure from its predecessor case *Swain v. Alabama*, 380 U.S. 202 (1965)); Griffith v. Kentucky, 479 U.S. 314, 318 (1987) (same); Georgia v. McCollum, 505 U.S. 42, 47 (1992) (same); Johnson v. California, 545 U.S. 162, 169 (2005) (same); Dobbs v. Jackson Women's Health Org., 597 U.S. 215,

In the years following *Batson*, lower courts shifted away from the "solely" standard and began applying the "mixed motives" approach, also known as the "dual motivation" approach. Under the mixed motives standard, there is a *Batson* violation only if the prosecutor cannot provide a "race-neutral" reason or set of reasons that would be sufficient to strike the juror. For instance, in *King v. Moore*, the Eleventh Circuit held that "[w]hen the motives for striking a prospective juror are both racial and legitimate, *Batson* error arises only if the legitimate reasons were not in themselves sufficient reason for striking the juror."[49] In that case, the prosecution said that it struck a prospective juror in part because she was a "young black female" and the defendant was a "young black male."[50] The Eleventh Circuit said that the prosecutors had a legitimate reason to strike the juror because she had expressed that her views were "in the middle" about the death penalty, such that the prosecutors would have justifiably struck her for that reason alone.[51] Under the mixed motives standard, courts upheld strikes based on sufficient race-neutral reasons, even when prosecutors admitted that race *was* a factor.[52]

The "per se" approach, also known as the "tainted" approach, sets the standard that any race-based motivation for a strike creates a *Batson* violation.[53] The per se approach is attributed to Justice Marshall's well-known dissent from the denial of certiorari in *Wilkerson v. Texas*.[54] He wrote that accepting a strike that is "based in part" on race "cannot be squared with *Batson*'s unqualified requirement that the state offer 'a *neutral* explanation' for its peremptory challenge. To

app. at 418 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (same); Alvarado v. United States, 497 U.S. 543, 543 (1990) (per curiam) (stating the petitioner's claim); Thaler v. Haynes, 559 U.S. 43, 46 (2010) (using "solely" to describe a paper record); Foster v. Chatman, 578 U.S. 488, 494 (2016) (using "solely" in an unrelated context and elsewhere applying a non-"solely" *Batson* standard); Flowers v. Mississippi, 588 U.S. 284, 298-99 (2019) (using "solely" in a direct quotes from *Batson* and *Swain* and elsewhere applying a non-"solely" *Batson* standard).

49. 196 F.3d 1327, 1335 (11th Cir. 1999).

50. *Id.* at 1333.

51. *Id.* at 1333, 1335.

52. For instance, in *Wallace v. Morrison*, the trial judge asked the prosecutor whether race was a consideration for striking seven of the nine Black prospective jurors. 87 F.3d 1271, 1273 (11th Cir. 1996). The prosecutor replied, "Race was a factor that I considered just as I considered age, just as I considered their place of employment and so on and so forth." *Id.* (quoting the trial transcript) (emphasis omitted). But because the lower court found that the strikes were "based in part on race and in part on legitimate, non-racial factors," the Eleventh Circuit held that there was no *Batson* violation. *Id.* at 1273, 1275.

53. People v. Johnson, 523 P.3d 992, 1001 (Colo. App. 2022), *rev'd*, 549 P.3d 985, 997-98 (Colo. 2024).

54. 493 U.S. 924 (1989) (Marshall, J., dissenting from denial of certiorari).

be 'neutral' the explanation must be based *wholly* on nonracial criteria."[55] The per se approach thus prohibits any racial basis for a strike.

If the mixed motives approach allows partially race-based strikes and the per se approach does not allow any racial basis for a strike, the substantial motivation approach takes the middle path and is less sharply defined. Under the substantial motivation standard, one "race-neutral" reason for a strike, even if it would be sufficient grounds for striking the juror, is not always enough to overcome a *Batson* challenge. In this way, the substantial motivation standard provides more protection than the mixed motives standard.[56] Though the lower bound of the substantial motivation standard is unclear, the standard permits at least some consideration of race. As the name suggests, a prosecutor's race-based reason must be a *substantial* part of the motivation to constitute a *Batson* violation. So long as the race-based reason does not rise to the level of a substantial basis for the strike, the strike is permissible.

The Supreme Court first implicitly endorsed a substantial motivation standard in *Snyder v. Louisiana*.[57] There, the Court recognized that the peremptory strike of a Black juror was "motivated in substantial part by discriminatory intent" because the proffered "race-neutral" explanation applied even more strongly to a white prospective juror whom the prosecution did not strike.[58] Similarly, in *Foster v. Chatman*, the Court held that Georgia "prosecutors were

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55. *Id.* at 926 (citations and parentheticals omitted) (emphasis added).

56. In practice, however, it seems that the mixed motives analysis and the substantial motivation analysis rarely produce different results. But there are scenarios in which the two standards do yield different results. For instance, in *Robinson v. United States*, the trial court found no *Batson* violation because "while [the prosecutor] may have exercised a couple of challenges against black females, he has not exercised peremptory challenges against black males and, therefore, it cannot be said that his strikes are based on race and while he has exercised a number of strikes against black females, he has not exercised a number of strikes against white females, so it cannot be strikes based on gender." 878 A.2d 1273, 1280 (D.C. 2005) (quoting the trial court transcript). The D.C. Circuit later explained: "[W]e confronted a mixed motivation claim that black female jurors specifically were targeted for exclusion because of their race and their gender. Neither race nor gender alone was sufficient to explain the strikes in *(Leon) Robinson*, but the two factors in combination did appear sufficient to do so." Robinson v. United States, 890 A.2d 674, 680 (D.C. 2006) (referring to Robinson v. United States, 878 A.2d 1273, 1286 (D.C. 2005)). Given the problem with a mixed motives analysis, the D.C. Circuit explicitly endorsed the substantial motivation test. *Robinson*, 890 A.2d at 681. Kimberlé Crenshaw famously identified this problem as a basis for her theory of intersectionality. *See generally* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. L. F. 139 (arguing that "Black women are sometimes excluded from feminist theory and antiracist policy discourse because both are predicated on a discrete set of experiences that often does not accurately reflect the interaction of race and gender").

57. 552 U.S. 472, 485 (2008).

58. *Id.* (quoting the race-neutral language of Hernandez v. New York, 500 U.S. 352, 365 (1991)).

motivated in substantial part by race" when an open-records request revealed jury-selection notes from the district attorney's office showing an incessant focus on race.[59] In both cases, the Court found that the peremptory strikes violated the Equal Protection Clause.[60] Though the Court used a substantial motivation standard in *Snyder* and *Foster*, the Court did not explicitly adopt it as the standard, producing uncertainty in the lower courts.[61] A circuit split emerged: the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits used a mixed motives test, and the Ninth Circuit used a substantial motivation test.[62]

Flowers v. Mississippi[63] may have finally resolved this split in favor of the substantial motivation approach. In *Flowers*, the Supreme Court again implicitly used the substantial motivation standard, stating that the peremptory strike of one of the Black prospective jurors had been "motivated in substantial part by discriminatory intent," since "similarly situated" white jurors had been seated on the jury.[64] Sheri Lynn Johnson, who argued *Flowers* before the Supreme Court, has claimed that the case resolved the circuit split, noting that since *Flowers*, "*no* lower court has used 'mixed motives' or 'dual motivation' in its own analysis of the merits of a *Batson* claim."[65]

The Court's implicit endorsement of the extent to which race *can* permissibly influence a decision in jury selection is a far cry from the Court's arguments about the role that race *cannot* play in the college-admissions process. We can clearly observe the role that race *can* play under a substantial motivation standard when we compare it to the per se approach. In *People v. Johnson*, a Colorado

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59. 578 U.S. 488, 513-14 (2016) ("The sheer number of references to race in that file is arresting. . . . An 'N' appeared next to each of the black prospective jurors' names on the jury venire list. An 'N' was also noted next to the name of each black prospective juror on the list of the 42 qualified prospective jurors; each of those names also appeared on the 'definite NO's' list. And a draft affidavit from the prosecution's investigator stated his view that '[i]f it comes down to *having to pick* one of the black jurors, [Marilyn] Garrett, might be okay.'" (citations omitted)).

60. *Snyder*, 552 U.S. at 474 (referencing the Court's holding in *Batson* that race-based exclusion from the jury venire violated the Equal Protection Clause); *Foster*, 578 U.S. at 514.

61. Some lower courts continued, even after *Snyder*, to include the "solely" phrasing in their decisions. *See, e.g.*, United States v. Taylor, 636 F.3d 901, 904 (7th Cir. 2011); United States v. Lewis, 593 F.3d 765, 770 (8th Cir. 2010).

62. *See* Sheri Lynn Johnson, Flowers *for the* Arlington Heights *Footnote: The Slow Demise of Mixed Motives Analysis*, 57 IND. L. REV. 8, 26-28 (2023).

63. 588 U.S. 284 (2019).

64. *Id.* at 288 (quoting *Foster*, 578 U.S. at 513).

65. Johnson, *supra* note 62, at 8. Johnson does add a caveat to her statement by pointing out that "the Fifth Circuit has, in the habeas context, employed a rule in reviewing state court decisions that is even stricter than dual motivation." *Id.* She cites *Sheppard v. Davis*, 967 F.3d 458, 472 (5th Cir. 2020), which states that "a *Batson* claim will not succeed where the defendant fails to rebut each of the prosecutor's legitimate reasons." *Id.*

appellate court applied the per se approach, finding that "the prosecutor's initial stated reason for striking Juror M focused on Juror M's response that 'people of different races were treated differently in her experience with law enforcement'" constituted a "race-based explanation."[66] On appeal, the Colorado Supreme Court agreed that "[u]nder the per se approach, a court must sustain a *Batson* challenge when the striking party gives both race-based and race-neutral reasons to support the strike."[67]

But the Colorado Supreme Court reversed. Citing *Flowers*, the Colorado Supreme Court explained that "the [U.S.] Supreme Court has adopted the substantial-motivating-factor approach," so identifying the existence of a race-based reason was not enough to prevail on the *Batson* claim.[68] Unlike under the per se approach, the substantial motivation standard means that a defendant cannot prevail on a *Batson* challenge only by showing the presence of a race-based reason. Instead, there must be a further inquiry as to whether the race-based reason was a *substantial* reason. As such, it is clear that the substantial motivation standard permits some consideration of race.

If we apply the substantial motivation standard to college admissions, it would be permissible to consider race in the application process. Courts would compare the weight of a race-based reason to the weight of the many other reasons an applicant may be rejected. As long as race was not a *substantial* reason for rejecting an applicant, there would be no equal-protection violation. To prevail on an equal-protection challenge, an applicant would need to show the race played a significant role in the decision to reject them. Under the *SFFA* standard, however, an applicant can prevail on an equal-protection claim just by showing the mere presence of race as a consideration, as the plaintiffs in *SFFA* did.

Whether a strike constitutes an equal-protection violation turns on the extent to which race was a consideration. But, per *SFFA*, any consideration of race—no matter how minor—violates the Equal Protection Clause. Thus, the constitutionality of an admissions process turns on the presence or absence of race as a factor during the process. In short, the current jury-selection standard focuses on the weight of race as a factor, while the new college-admissions standard examines the existence of race as a factor.

Even the structure of a *Batson* challenge—that prosecutors must state one plausible, race-neutral explanation for the strike—demonstrates that the Court's concern in jury selection is not whether race had *any* influence but rather *how much* influence it had. Thus, during jury selection, using race as a factor does not

66. People v. Johnson, 523 P.3d 992, 1003 (Colo. App. 2022), *rev'd*, 549 P.3d 985, 998 (Colo. 2024).

67. People v. Johnson, 549 P.3d 985, 997-98 (Colo. 2024).

68. *Id.* at 998. Though some hail *Flowers* as a step in the right direction, it is noteworthy that the Court's opinion in *Flowers* also limited the use of the more protective per se approach.

automatically render a strike unconstitutional. Yet, in the context of college admissions, the Court's zero-sum argument establishes that the consideration of race, no matter how minor, renders the process unconstitutional.

III. APPLYING THE *SFFA* STANDARD

The Court's new standard for an equal-protection violation in the admissions context should be applied to jury selection. There are two primary grounds for importing this new standard into criminal procedure: to deploy a consistent interpretation of the Fourteenth Amendment across areas of the law and to ensure that people receive heightened protection from race discrimination in circumstances where the stakes are higher than in elite college admissions.

First, in *Batson* cases, drawing from equal-protection doctrine in other areas of the law is nothing new. When the Court fashioned the three-step process in *Batson*, it drew on its own previous analyses of the guarantees of the Fourteenth Amendment in contexts outside of jury selection.[69] Since then, the Supreme Court, lower courts, and scholars have continued to connect *Batson* and equal-protection doctrine in other areas of the law.[70]

Further, existing scholarship has connected the Court's decisions in affirmative-action cases to the jury-selection context.[71] Of course, there are many ways

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69. When explaining the *Batson* test, the Court cited the standard set in *Washington v. Davis*, a landmark case on race discrimination in employment practices. Batson v. Kentucky, 476 U.S. 79, 93-94 (1986) (citing Washington v. Davis, 426 U.S., 229, 239-42 (1976)). Similarly, the notion that a prima facie showing on its own is not enough to prevail on a *Batson* challenge appears to come from another landmark case about housing discrimination. *Batson*, 476 U.S. at 95 (explaining that the standard is "in accordance with the proposition, articulated in *Arlington Heights v. Metropolitan Housing Department Corp.*, that 'a consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause'" (citation omitted)).

70. *See, e.g.*, Hernandez v. New York, 500 U.S. 352, 363 (1991) (quoting the employment law case Washington v. Davis, 426 U.S. 229, 242 (1976), to provide a standard for looking at the "totality of the relevant facts" in the third stage of a *Batson* challenge); Howard v. Senkowski, 986 F.2d 24, 25 (2d Cir. 1993) (explaining that the lower court had applied Texas Department of Community Affairs. v. Burdine, 450 U.S. 248 (1981), an employment discrimination case, when conducting the *Batson* inquiry). For examples of scholarship on this topic, see generally Lisa M. Cox, Note, *The Tainted Decision-Making Approach: A Solution for the Mixed Messages Batson Gets from Employment Discrimination*, 56 CASE W. RSRV. L. REV. 769 (2006), tracing the relevance of the mixed motives approach in employment-discrimination cases to *Batson* challenges, and Andrew Verstein, *The Jurisprudence of Mixed Motives*, 127 YALE L.J. 1106 (2018), examining the role of motivation across several different areas of law, including equal-protection and employment-discrimination cases.

71. After *Grutter*, a handful of scholars considered how the equal-protection principles articulated in the affirmative-action context could be applied to jury selection. *See, e.g.*, Robert A. Caplen, *When* Batson *Met* Grutter: *Exploring the Ramifications of the Supreme Court's Diversity*

in which the college-admissions process and jury selection are disanalogous. College-admissions programs are often filling hundreds, if not thousands, of seats in an incoming class. Juries, on the other hand, are comprised of six to twelve people. The processes also have different durations—the college-admissions process may span multiple months, while the jury-selection process rarely takes more than a day. When selecting an incoming college class, many admissions officers may be involved, while only a handful of attorneys are involved in selecting jurors at a given trial. Moreover, prosecutors are public actors and serving on a jury is a civic service, while many universities are private institutions and securing a college spot is a personal benefit.

But college admissions and jury selection also share many fundamental features. Both are selection processes. And for both, the Fourteenth Amendment regulates how those processes work—not their outcomes. No one has a right to be admitted to Harvard, just as no one has a right to be seated on a jury. That said, every person still has an equal-protection right not to be denied a spot at Harvard or a seat on a jury because of their race. Though there are several factors that decision makers typically consider, there is no clear metric for who deserves a spot at Harvard or what makes someone a good juror. Ultimately, both are selection processes for a set number of spots where race might be one of the many factors considered by decision makers. Since the Fourteenth Amendment applies to both selection processes, applying the *SFFA* standard to jury selection would ensure that the law regulates selection processes in a consistent manner.

Second, lower courts should apply the new standard set out in *SFFA* to *Batson* challenges for a straightforward reason: the stakes are much higher in a criminal trial than in college admissions. Discrimination in jury selection undermines a person's right to a fair trial when their life or liberty is on the line. Surely, high schoolers applying to elite universities should not get *more* protection than people facing the deprivation of life or liberty. Furthermore, racially biased peremptory strikes also prevent prospective jurors from participating in an important civic duty—second only to voting. Just as the right to vote is carefully guarded, the right to be considered to serve on a jury is worthy of extra protection.

Judge Berzon of the Ninth Circuit has made a similar argument. Foreshadowing the Ninth Circuit's later adoption of the substantial motivation test to replace the mixed motives test, Berzon argued that "the *Batson* standard is *no less* protective of racial equality than the standard applied in Equal Protection Clause cases generally. There is, however, a strong argument that the *Batson* standard

Pronouncements Within the Computerized Jury Selection Paradigm, 10 J. CONST. L. 65, 106-22 (2007); Joshua Wilkenfeld, Note, *Newly Compelling: Reexamining Judicial Construction of Juries in the Aftermath of* Grutter v. Bollinger, 104 COLUM. L. REV. 2291, 2292-93 (2004).

should be *stricter* than the one . . . generally embedded in Equal Protection Clause cases."[72]

The argument here, however, is even simpler than Judge Berzon's. Since the Supreme Court has interpreted the Equal Protection Clause to provide *more* protection in college admissions than the substantial motivation test would, courts should, at the very least, apply *SFFA*'s more protective standard to *Batson* challenges.

How would applying the *SFFA* standard change the evaluation of race discrimination in jury selection? First, it would be an automatic equal-protection violation for a prosecutor to announce that race was a factor in their decision to strike a juror. In the past, courts have allowed prosecutors to exercise peremptory strikes against prospective jurors even when prosecutors have explicitly stated that race was a factor in their decision. In *Howard v. Senkowski*, defense counsel moved for a mistrial because the prosecutor had struck the only two Black prospective jurors.[73] The prosecutor responded by simply stating that "neither peremptory challenge was exercised solely on the basis of race."[74] During a hearing on the issue, the prosecutor confirmed that "race itself was a factor" in his decision.[75] The Second Circuit, however, did not find a *Batson* violation and instead remanded the case to determine if the race-neutral reasons that the prosecutor belatedly provided were sufficient grounds to sustain the two strikes.[76] Indeed, the Court approvingly cited the trial judge's recognition of the prosecutor's "candid admission that race was a factor, although a minor one, in his exercise of the peremptory challenges" as a "further indication . . . of the overall credibility of [the prosecutor's] testimony."[77] Thus, this first effect of applying *SFFA* to jury selection—that prosecutors could no longer get away with expressly race-based peremptory strikes—would, in itself, be an improvement upon the status quo.

Second, the presence of a race-based reason would end the *Batson* inquiry—courts would not need to investigate the relative strengths of possible different

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72. Kesser v. Cambra, 465 F.3d 351, 376 (9th Cir. 2006) (Berzon, J., concurring); *see also* People v. Douglas, 232 Cal. Rptr. 3d 305, 307 (Cal. Ct. App. 2018) (rejecting the mixed motives approach, "which arose in employment discrimination cases as a way for defendant-employers to show that they would have taken an adverse action against a plaintiff-employee whether or not an impermissible factor also animated the employment decision"). In *Douglas*, the California Court of Appeals found that the mixed motives test was too lenient, noting that it was "not appropriate to use that test when considering the remedy for invidious discrimination in jury selection, which should be free of *any* bias." *Id.*

73. 986 F.2d 24, 25 (2d Cir. 1993).

74. *Id.*

75. *Id.*

76. *Id.* at 30.

77. *Id.* at 31 (citing People v. Howard, No. 56387, slip op. at 4 (Nassau Cnty. Ct. Nov. 6, 1987)).

reasons. In that way, the *SFFA* standard is akin to the per se standard. Under the current *Batson* standard, some consideration of race is permitted as long as it is not substantial. As we saw in *People v. Johnson*, the reviewing courts evaluated whether the prosecutor's "race-based explanation" for striking a juror who said "people of different races were treated differently in her experience with law enforcement" constituted an equal-protection violation.[78] Applying the per se standard, the lower court found a *Batson* violation: a strike based even in part on a race-based reason was unconstitutional.[79] However, the Colorado Supreme Court, applying the current substantial motivation standard, found that the existence of the race-based reason did not render the strike unconstitutional and remanded the case for fact-finding regarding the weight of the race-based reason.[80] Under the *SFFA* standard, no further investigation would be needed. As the lower court held, the existence of a race-based reason would be enough to render the strike unconstitutional.

Furthermore, because of the confusion around what constitutes a "substantial" motivation, trial courts are applying incorrect standards, which appellate courts must then correct.[81] The *SFFA* standard provides a bright-line rule: any influence of race, no matter how small, is impermissible.

Third, applying the *SFFA* standard would transform *Batson* into a more objective inquiry. The current *Batson* standard asks courts to peer into a decision maker's mind to determine the true reasons for the strikes and the respective weights of all the reasons. But judges are not mind readers. For instance, in *United States v. Darden*, the prosecutor stated:

> I note for the record in my own experience that young black females have a penchant, have a tendency — and I have noted throughout in my trials, over forty or fifty jury drug related trials — tend to testify on behalf and be more sympathetic toward individuals who are involved in narcotics, either because of emotional attachment or family attachment or

78. People v. Johnson, 523 P.3d 992, 1003 (Colo. App. 2022), *rev'd*, 549 P.3d 985, 998 (Colo. 2024).

79. *Id.* at 996 ("As a matter of first impression, we hold that when a prosecutor offers both a race-based and a race-neutral explanation in response to a *Batson* challenge, the trial court must apply the 'per se' approach and uphold the challenge because once a discriminatory reason has been provided, this reason taints the entire jury selection process.").

80. People v. Johnson, 549 P.3d 985, 998 (Colo. 2024).

81. *See, e.g.*, State v. Garcia, 316 A.3d 1223, 1245 (R.I. 2024) (noting that the trial judge had used an improper metric — "whether the State would have expended a [peremptory] challenge were the Juror [an] Anglo-Saxon, Protestant, and had a very sophisticated educational background, and even had friends who were police officers" — when evaluating if a strike constituted a *Batson* violation).

> attachment as a result of financial gains or financial benefits as a result of their relationship with drug dealers.[82]

The trial judge acknowledged that the prosecutor had stated a race-based reason. But the prosecutor had also expressed "other reasons" that were "racially neutral."[83] Unable to read the prosecutor's mind, the judge appeared to settle on upholding the strike, explaining that "the other reasons [the prosecutor] gave give the basis for being a strike."[84]

Under the commonly applied substantial motivation standard, it makes sense to center *Batson* inquiries on the strength of the race-neutral reason provided by the prosecutor. If the prosecutor has strong race-neutral reasons for a peremptory strike, then a race-based reason is unlikely to be a substantial motivation for the strike. Under the *SFFA* standard, however, analyzing the strength of the prosecutor's race-neutral reason would be unnecessary—a person can have a strong race-neutral reason and still have factored in race.[85] As such, it would easier to see when peremptory strikes, even those with strong "race-neutral" reasons such as the one in *Darden*, are unconstitutional.

Deemphasizing the strength of the prosecutor's stated reasons has two upshots. First, it would make *Batson* easier to apply. In cases where prosecutors do not explicitly state that race was a factor in their decision, courts applying the *SFFA* standard would look not for the presence of a nonpretextual race-neutral reason, but for the absence of a race-based reason. Though *SFFA* does not clarify what role (if any) a decision maker's intent plays, a zero-tolerance policy moves the analysis away from guessing the contents of a decision maker's mind and toward looking for external indications that race was used in the decision-

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82. United States v. Darden, 70 F.3d 1507, 1530-31 (8th Cir. 1995) (quoting the trial transcript).

83. *Id.* at 1531 (quoting the trial transcript).

84. *Id.* (quoting the trial transcript). The Eighth Circuit agreed with the lower court that there was no *Batson* violation, because "the statement regarding the tendency of young black women to sympathize with drug dealers was not racially neutral but that the other reasons were, and that those other reasons formed the basis for the strike." *Id.*

85. For example, in *King v. Emmons*, the prosecutor explained a peremptory strike by stating: "My main reason [for the strike] is that this lady is a black female, she is from [the town of] Surrency, [and] she knows the defendant and his family." 144 S. Ct. 2501, 2502-03 (2024) (Jackson, J., dissenting from the denial of certiorari) (quoting King v. Warden, Georgia Diagnostic Prison, 69 F.4th 856, 863 (2023)). Though in reality the prospective juror did not know the defendant and his family, suppose instead that the prospective juror did know them. Under the substantial motivation standard, the question would be how that prosecutor's "race-neutral" reasons—the juror's hometown and familiarity with the defendant and his family—compared to the prosecutor's explicitly race-based reason. But under the *SFFA* approach, that comparison would be irrelevant. The fact that the prosecutor *considered* race would be enough to constitute an equal-protection violation.

making process.[86] Currently, courts turn to proxies to reconstruct a prosecutor's true reasoning.[87] In *Flowers v. Mississippi* for instance, the Court marshalled four different types of evidence to find a *Batson* violation to counter the prosecutor's insistence that the peremptory strikes were not race-based. [88] If, however, the only question is whether race was considered at all, the tools used by courts as proxies for the prosecutor's mind, such as comparing the number of questions asked to Black and white prospective jurors, could instead serve as independent evidence that race was a factor.

The second upshot of deemphasizing the strength of the prosecutor's stated reasons is that judges would be able to place more weight on other types of evidence, such as the prosecutor's past conduct, which could lead to different results.[89] Consider the outcome in *King v. Emmons* in the 2024 Term.[90] In her dissent to the denial of certiorari, Justice Jackson argued that the lower courts did not give sufficient weight to evidence beyond the prosecutor's stated reasons. The prosecutor struck every Black woman and all but two Black men from the jury pool. For one of those strikes, the prosecutor stated, "My main reason [for the strike] is that this lady is a black female, she is from [the town of] Surrency, [and] she knows the defendant and his family."[91] Since the prospective juror did not in fact know the defendant's family, the trial judge found a *Batson* violation and seated the juror. The prosecutor then said:

> If this lady were a white lady there would not be a reason—there would not be a question in this case. And that's the problem I have with all of this is that it's not racially neutral. There was a time when it was racially neutral and that was before *Batson* . . . it was a physical impossibility if you wanted to strike every black off a jury for you to do that. And we had an issue just—you had to reform your whole ideas and then *Batson* came

86. Washington State recently created a new objective standard for challenging race discrimination in jury selection: "If the court determines that an objective observer could view race or ethnicity as a factor in the use of the peremptory challenge, then the peremptory challenge shall be denied. The court need not find purposeful discrimination to deny the peremptory challenge." Washington General Rule 37.

87. *See* Flowers v. Mississippi, 588 U.S. 284, 302 (2019) (listing other types of evidence that can be presented for a *Batson* challenge).

88. *Id.* at 288 (finding that four pieces of evidence, including the fact that the prosecutor struck forty-one of the forty-two Black prospective jurors over the course of the defendant's six trials, "taken together" demonstrate a *Batson* violation).

89. *Flowers*, 588 U.S. at 302.

90. 144 S. Ct. 2501, 2502-03 (2024) (Jackson, J., dissenting from the denial of certiorari).

91. *Id.* (quoting King v. Warden, Georgia Diagnostic Prison, 69 F.4th 856, 863 (2023)).

> out. And *Batson* now makes us look whether people are black or not. Not whether they're black or white, but black or not.[92]

Even though the trial court had already found one *Batson* violation and the prosecutor then ranted about his dislike of *Batson*, the judge still allowed the prosecutor to strike other Black prospective jurors because of "race-neutral" reasons, such as being a minister or a single mother or stating that the death penalty was not the juror's "first choice."[93] The Georgia Supreme Court and the Eleventh Circuit both held that the trial court acted reasonably in accepting the prosecutor's strikes.[94]

In contrast, under the *SFFA* standard, the prosecutor's strikes would violate *Batson* given his expressed attitude toward race in jury selection. Even though the prosecutor supplied race-neutral reasons, the *SFFA* standard requires the absence of race as a factor. Other evidence, including the prosecutor's previous strike and complaint about *Batson*, indicated that race still unconstitutionally influenced his other peremptory strikes.

Fourth, courts would also stop excusing prosecutors' lists of prospective jurors containing notes about the race of each member of the venire.[95] In 2023, after the Court's decision in *SFFA*, a district court in Texas held that the prosecutor's jury list with annotations about the venire members' races did "not give rise to an inference of purposeful prosecutorial discrimination."[96] Rather, the district court accepted the use of lists because the "annotations on jury lists regarding race or ethnicity help prosecutors keep track of each venire member."[97] Similarly, in *Broadnax v. Davis*, the defense presented the prosecutors' spreadsheet listing the race and gender of all of the venire members, with "the remaining black members of the jury venire" highlighted.[98] The district court in this case also applauded the prosecutor's list:

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92. *Id.* at 2503 (quoting *King*, 69 F.4th at 880 (Wilson, J., dissenting)).

93. King v. State, 273 Ga. 258, 268 (2000) ("This Court finds that the trial court did not abuse its discretion in finding that King failed to carry his burden of persuasion as to the jurors challenged in this appeal.").

94. *King*, 273 Ga. at 268; King v. Warden, 69 F.4th 856, 868 (11th Cir. 2023), *cert. denied sub nom.* King v. Emmons, 144 S. Ct. 2501 (2024).

95. Some courts have said that there was no precedent to find a *Batson* violation solely because of lists that annotated jurors' names to highlight Black prospective jurors. *SFFA* could now serve as that precedent. *See, e.g.*, Ricks v. Lumpkin, 120 F.4th 1287, 1290 (5th Cir. 2024) (pointing out that "the notation of racial identity in the prosecution's jury selection notes does not, without more, constitute racial discrimination").

96. Ricks v. Lumpkin, No. 20-CV-1299-O, 2023 WL 8224931, at *8 (N.D. Tex. Sept. 26, 2023).

97. *Id.*

98. No. 15-CV-1758-N, 2019 WL 3302840, at *43 n.73 (N.D. Tex. July 23, 2019), *aff'd sub nom.* Broadnax v. Lumpkin, 987 F.3d 400 (5th Cir. 2021).

> Having twice been criticized by the United States Supreme Court for its exercise of racially discriminatory peremptory strikes in *Miller-El v. Dretke*, 545 U.S. 231 (2005), and *Miller-El v. Cockrell*, 537 U.S. 322 (2003), it would have been professionally irresponsible for the Dallas County District Attorney's Office (in 2009) to have failed to identify the members of the remaining jury venire who were members of a protected class and against whom it might have been preparing to exercise a peremptory challenge.[99]

The court went on to state that "[n]o sinister motive can be inferred rationally simply because the prosecution . . . highlighted those for whom that office would need to be prepared to offer sound, race-neutral, reasons in the event the prosecution chose to exercise a peremptory strike."[100] The Fifth Circuit agreed, again applauding the prosecutors for using the spreadsheet to prepare responses to possible *Batson* challenges.[101]

The reasoning here runs contrary to the Court's decision in *SFFA*. At the very least, the lists demonstrate that the prosecutors were purposefully tracking race when deciding whom to seat and whom to strike.[102] In contrast, colleges stopped receiving information about candidates' races in an attempt to follow the Court's ruling in *SFFA*.[103]

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99. *Id.*

100. *Id.*

101. Broadnax v. Lumpkin, 987 F.3d 400, 410 (5th Cir. 2021) (noting that "[t]he office would have had considerable motivation to identify which jury venire members belonged to a protected class when preparing to defend its use of peremptory challenges," given that the office had already been chastised twice by the Supreme Court).

102. In *Grutter v. Bollinger*, Justice Thomas stated that "[t]he 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." 539 U.S. 306, 353 (2003) (Thomas, J., concurring in part). On that view, the simple use of these lists is "abhorred" by the Constitution and "demeans" us all.

103. One could argue that jury selection cannot be "blinded" the way that college admissions are now "blind" to race check boxes. But there is a way to create an equivalent standard in both contexts. It could be the case that attorneys could continue to see jurors in person in the courtroom, just as it is permissible to still interview college applicants or invite applicants to visit campus. *See* Kohler-Hausmann, *supra* note 9, at 318 (pointing out that the Supreme Court did not ban interviews and other contexts where an admissions officer may perceive an applicant's race). Alternatively, if one were to lean into the Court's problematic view of "colorblindness," one could attempt to create a "race-blind" process in jury selection by gathering information about prospective jurors via questionnaires and then having the attorneys challenge jurors without the jurors present. Regardless, colleges' new eschewal of tracking applicants' race is dramatically different than prosecutors' court-sanctioned use of lists with race and gender annotations in the jury-selection process.

More shocking, however, is the judicial endorsement of maintaining annotated lists so that prosecutors could have a race-neutral reason prepared if challenged. Indeed, in *Broadnax*, the Fifth Circuit stated that "the prosecution was still required to—and did—provide racially neutral reasons for each of the strikes. The spreadsheet alone is no smoking gun; it fails to render all those reasons merely pretextual."[104] In the college-admissions context, this argument is akin to stating that collecting and using information about an applicant's race is permissible as long as the admissions office has a race-neutral reason for rejecting that applicant. The Supreme Court in *SFFA*, however, made this much clear: race-neutral reasons for rejections do not make the process constitutional.

Finally, applying the *SFFA* standard to jury selection would also resolve an open debate about the appropriate trial-level remedy for a *Batson* violation. A footnote at the end of the Court's decision in *Batson* indicated that the Court left open two different routes for redressing a *Batson* violation discovered at trial.[105] One option would be "for the trial court to discharge the venire and select a new jury from a panel not previously associated with the case."[106] Alternatively, a trial court could "disallow the discriminatory challenges and resume selection with the improperly challenged jurors reinstated on the venire."[107] Under the second approach, already-seated jurors remain on the jury.[108]

According to *SFFA*'s standard, however, considering race for some candidates implicates all prospective jurors' rights not to be subjected to an unfair process.[109] A central piece of the Court's reasoning in *SFFA* is that an admissions process is a zero-sum game—a "plus" given to one applicant is a "negative" for another, and vice versa. As such, the Court argued that if a college uses race as a "plus" for some applicants, then the college violates the equal-protection rights of applicants who do not receive that same "plus." Thus, if one part of a selection process in a zero-sum system is unconstitutional, then the whole process is

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104. *Broadnax*, 987 F.3d at 410. Seemingly espousing the belief that a Black prosecutor may permissibly strike a Black venire member in a way that a white prosecutor cannot, the Fifth Circuit included a footnote stating, "At the time of his trial, Dallas had elected the first African-American District Attorney in Texas, and *his* office prosecuted Broadnax." *Id.* at n.10.

105. Batson v. Kentucky, 476 U.S. 79, 99 n.24 (1986). For a discussion of how different lower courts handle trial-level *Batson* violations, see Jason Mazzone, Batson *Remedies*, 97 IOWA L. REV. 1613 (2012).

106. *Batson*, 476 U.S. at 99 n.24 (citing Booker v. Jabe, 775 F.2d 762, 773 (6th Cir. 1985)).

107. *Id.* (citing United States v. Robinson, 421 F. Supp. 467, 474 (Conn. 1976), *mandamus granted sub nom.* United States v. Newman, 549 F.2d 240 (2d Cir,1977)).

108. *See, e.g.*, King v. Emmons, 144 S. Ct. 2501, 2503 (2024) (Jackson, J., dissenting from denial of certiorari) (explaining that after the court found a *Batson* violation and seated the juror, "the court did not revisit its prior conclusions regarding [the prosecutor's] other strikes").

109. *See supra* Part I.

compromised. Since jury discrimination is also a zero-sum process — every juror who is selected takes away from prospective jurors the opportunity to fill that spot — it seems that, under the *SFFA* standard, finding a *Batson* violation regarding one peremptory strike would mean that the whole jury-selection process was tainted.[110] Thus, the *SFFA* standard counsels in favor of the first approach mentioned in the *Batson* remedies footnote: discharging the venire and selecting a new jury from a panel not previously associated with the case.

Even if courts applied the *SFFA* standard to *Batson* challenges, many of the problems inherent to *Batson* inquiries may persist. As many scholars have pointed out, the current structure of *Batson* makes it nearly impossible to police the use of peremptory strikes, since prosecutors may not be forthcoming about the true reasons behind a peremptory strike.[111] State courts and legislatures have tried in recent years to address the problem of racial bias in jury selection in different ways.[112] In 2021, the Arizona Supreme Court, for instance, abolished

110. Suppose that a court finds that a prosecutor improperly excluded a Black prospective juror. Following the reasoning in *SFFA*, all already-seated non-Black jurors would have received a "plus" because of race. If so, then every prospective juror was subjected to an unfair process where race was a consideration for at least one person in the zero-sum process.

111. *See, e.g.*, Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 59 (1988) (arguing that the *Batson* procedures "are less obstacles to racial discrimination than they are road maps" for how to evade review); Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 157 (1989) (arguing that peremptory strikes are fundamentally incompatible with the Equal Protection Clause); Leonard L. Cavise, *The* Batson *Doctrine: The Supreme Court's Utter Failure to Meet the Challenge of Discrimination in Jury Selection*, 1999 WIS. L. REV. 501, 501, 527-28 (contending that *Batson* is "toothless"); Jeffrey Bellin & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More than the Unapologetically Bigoted or Painfully Unimaginative Attorney*, 96 CORNELL L. REV. 1075, 1090-1102 (2011) (drawing on an empirical analysis of judicial decisions to argue that *Batson* is ineffective); Anna Roberts, *Asymmetry as Fairness: Reversing a Peremptory Trend*, 92 WASH. U. L. REV. 1503, 1511-12 (2015) (describing the many reasons that *Batson* is "inadequate to the task of policing purposeful discrimination"); Stephen B. Bright & Katherine Chamblee, *Litigating Race Discrimination under* Batson v. Kentucky, 32 CRIM. JUST. 10, 11-13 (2017) (explaining that *Batson* is a "weak tool" in part because it "requires the judge to conclude not only that the prosecutor intentionally discriminated, but also that he or she lied about it"); Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion in the American Jury*, 118 MICH. L. REV. 785, 786-87 n.1, 787 (2020) (collecting scholarship critical of the efficacy of *Batson* to argue that "[t]here is now broad scholarly consensus that *Batson* has failed to meaningfully limit systemic racial exclusion in jury selection").

112. *See* Thomas Ward Frampton & Brandon Charles Osowski, *The End of* Batson*? Rulemaking, Race, and Criminal Procedure Reform*, 124 COLUM. L. REV. 1, 22-34 (2024); Elizabeth Semel, Batson *Reform: State by State*, DEATH PENALTY CLINIC, BERKELEY L. SCH., https://www.law.berkeley.edu/experiential/clinics/death-penalty-clinic/projects-and-cases/whitewashing-the-jury-box-how-california-perpetuates-the-discriminatory-exclusion-of-black-and-latinx-jurors/batson-reform-state-by-state [https://perma.cc/J9U8-FGHZ] (providing an account of historical and ongoing *Batson* reform proposals in different states).

peremptory strikes altogether.[113] Soon after, California passed legislation to change the standard of what constitutes an improper race-based strike.[114] Though these changes likely have not abolished racial bias in jury selection, they are designed to limit the influence of race. Similarly, applying the *SFFA* standard likely will not eliminate the problem, but it can still serve as a step in the right direction. And state supreme courts and legislators do not have to develop a new standard from scratch—the *SFFA* Court has already provided one.

CONCLUSION

In *SFFA*, the Court rejected the use of an applicant's race as a factor in college admissions, even as a minor consideration. In doing so, the Court adopted a significantly more searching standard for equal-protection violations in the college-admissions context than in the jury-selection context—taking a dramatically different approach to the role of race when a spot at an elite university, as opposed to a person's life or liberty, is on the line.

In addition to the Court's argument in *SFFA* about the extent to which race is considered, a variety of smaller comments and inferences embedded throughout the majority opinion and concurrences appear incongruous with the Court's

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113. Order Amending Rules 18.4 and 18.5 of the Rules of Criminal Procedure, and Rule 47(e) of the Rules of Civil Procedure, No. R-21-0020 (Ariz. 2021). Many scholars have previously called for the abolition of peremptory strikes in some form. *See, e.g.*, Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Use of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994) (drawing on Justice Marshall's views as grounds for eliminating peremptory strikes); Maureen A. Howard, *Taking the High Road: Why Prosecutors Should Voluntarily Waive Peremptory Challenges*, 23 GEO. J. LEGAL ETHICS 369 (2010) (suggesting that prosecutors voluntarily cease the use of peremptory strikes); Abbe Smith, *A Call to Abolish Peremptory Challenges by Prosecutors*, 27 GEO. J. LEGAL ETHICS 1163 (2014) (calling for an asymmetrical elimination of peremptory strikes given prosecutorial patterns of misuse); Daniel Hatoum, *Injustice in Black and White: Eliminating Prosecutors' Peremptory Strikes in Interracial Death Penalty Cases*, 84 BROOK. L. REV. 165 (2018) (explaining the importance of eliminating prosecutorial peremptory strikes when there is an elevated risk of racial discrimination); Ela A. Leshem, *Jury Selection as Election: A New Framework for Peremptory Strikes*, 128 YALE L.J. 2356 (2019) (drawing on political theory to argue for the elimination of prosecutors' but not defendants' peremptory strikes); Alexander Guerrero, *The Interested Expert Problem and the Epistemology of Juries*, 2021 EPISTEME 1, 22-23 (arguing for abolishing peremptory challenges to improve jury deliberation); Nancy S. Marder, *Race, Peremptory Challenges, and State Courts: A Blueprint for Change*, 98 CHI.-KENT L. REV. 65 (2023) (mapping Arizona's path to eliminating peremptory strikes). But other scholars have noted that challenges for cause are also an avenue for race discrimination. *See, e.g.*, Frampton, *supra* note 111, at 792.

114. Assemb. B. 3070, 2019-2020 Leg., Reg. Sess. (Cal. 2020) (explaining that "[i]t is intent of the Legislature to put into place an *effective* procedure for eliminating the unfair exclusion of potential jurors based on race . . . through the exercise of peremptory challenges" (emphasis added)).

stance on race discrimination in jury selection. For instance, Justice Thomas stated that "it is error for a court to defer to the views of an alleged discriminator while assessing claims of racial discrimination."[115] Thomas strongly warned against taking Harvard and UNC at their word vis-à-vis the intentions and goals of their admissions teams. If Thomas's skepticism about deferring to an "alleged discriminator" applies beyond college admissions, then courts should stop relying heavily on the word of prosecutors—the alleged discriminators—to determine whether there has been a *Batson* violation.

Moreover, in *SFFA*, Justice Thomas suggested that "the university respondents' histories hardly recommend them as trustworthy arbiters of whether racial discrimination is necessary to achieve educational goals."[116] If Thomas's skepticism is not reserved exclusively for elite universities, then one would expect him to be similarly wary of prosecutors, like the one in *Flowers*, who have extensive records of discriminatory jury-selection practices. Yet, in *Flowers*, Thomas in dissent wrote that "the Court almost entirely ignores—and certainly does not refute—the race-neutral reasons given by the State," admonishing the Court for not putting *more* weight on the word of an alleged discriminator with a history of racial bias.[117]

In one sense, this Essay's comparison of *SFFA* and *Batson* sheds light on the Court's thinly veiled hypocrisy. But viewed through a more optimistic lens, *SFFA* might signal that the Court has lowered the bar for prevailing on equal-protection claims. If advocates can use the Roberts Court's equal-protection jurisprudence to challenge race discrimination in our criminal system, perhaps some good can come of *SFFA*.

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115. Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 256 (2023) (Thomas, J., concurring).

116. *Id.* at 257-58.

117. Flowers v. Mississippi, 588 U.S. 284, 319 (2019) (Thomas, J., dissenting).