

Race-Conscious Damages Calculations After *SFFA*

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For over a century, courts have calculated damages in personal injury and wrongful death cases by taking the plaintiff's race into account. The size of damages awards in those cases depends in part on how long the plaintiff (or their decedent) would have lived and how much they would have made absent their injury. To calculate those figures, courts frequently rely on racial averages of life expectancy and income. Because of racial disparities in both longevity and earnings, the result is that minority plaintiffs consistently receive less in damages than they would have if they were white.

*This Note argues that the Supreme Court's 2023 affirmative action decision in *Students for Fair Admissions v. President and Fellows of Harvard College* establishes that the use of race to calculate damages is unconstitutional. *SFFA* teaches that the government may not allocate benefits to citizens on the basis of race, notwithstanding several arguments that were previously thought to justify that practice. Applying these principles to the context of damages calculations leads unavoidably to the conclusion that a plaintiff's race may not be used to determine how much he or she receives.*

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INTRODUCTION	1096
I. BACKGROUND	1098
A. Race-Based Damages Calculations	1098
B. Commentary and Pushback	1101
II. CONSTITUTIONAL DEFENSES OF RACE-CONSCIOUS DAMAGES CALCULATIONS	1102
A. The State Action Argument.....	1103
B. Substantive Constitutional Defenses of Race-Based Damages Calculations	1104
1. The Argument that Racial Statistics Merely Reflect Reality	1104
2. The “One Factor Among Many” Argument.	1105
3. The Tradition Argument	1105
4. The No-Invidious-Purpose Argument	1106
III. <i>SFFA</i> CONFIRMS THAT RACE-CONSCIOUS DAMAGES CALCULATIONS ARE UNCONSTITUTIONAL	1107
A. <i>Students for Fair Admissions v. President and Fellows of Harvard College</i>	1107
B. <i>SFFA</i> Defeats Potential Defenses of Race-Conscious Damages Calculations	1110
1. The Argument that Racial Statistics Merely Reflect Reality	1110
2. The “One Factor Among Many” Argument	1116
3. The History and Tradition Argument	1117
4. The No-Invidious-Purpose Argument	1119
C. Counterarguments	1120
1. The Argument that <i>SFFA</i> Only Got Serious About Strict Scrutiny and Didn’t Establish New Law.....	1120
2. The Argument that Race-Based Damages Calculations Are Based on Statistics, Not Stereotypes.....	1122
CONCLUSION.....	1124

Introduction

Alfred Gilmore drowned when the ship on which he worked sank off the coast of Virginia in 1903.¹ His father, Primus Gilmore (and seven other plaintiffs whose decedents died in the accident), sued the ship’s corporate

1. *The Saginaw*, 139 F. 906, 907, 910 (S.D.N.Y. 1905); *In re Clyde S.S. Co.*, 134 F. 95, 95, 98–99 (S.D.N.Y. 1904).

owners.² The company was found liable, and the court ordered a commissioner to calculate and recommend the damages to be paid to each plaintiff.³ Relying on statistics from mortality tables used in insurance, the commissioner determined based on Alfred's age and income that Primus should receive \$3,500.⁴ The company challenged the commissioner's calculations, and the court agreed that the mortality tables he used were of "little real aid" in court.⁵ This was especially true in Primus's case for an additional reason: Alfred was Black.⁶ The tables could not be relied upon "where colored persons are concerned," the court explained, because they did not distinguish by race.⁷ As a result, they failed to account for the "difference in the vitality of the two races."⁸ It was therefore appropriate to instead rely on tables that did take account of that difference, which the court found in a book titled *Race Traits and Tendencies of the American Negro*.⁹ The court concluded that because of the "great difference in the expectation of life for the two races," it was appropriate to decrease Primus's damages from the \$3,500 recommended by the commissioner to only \$2,000.¹⁰

One might expect such a decision from a court in 1905. What is far more shocking, however, is that racial statistics of exactly the same kind are still used to calculate damages today.¹¹ Courts routinely rely on race-based statistical tables to calculate the life expectancy and future earnings of plaintiffs and their decedents—calculations the court then uses to set damages.¹² Because of racial disparities in life expectancy and income, the result is that people of color are consistently awarded less in damages than they would have been if they were white.¹³

This Note analyzes the effect of the Supreme Court's decision in *Students for Fair Admissions v. President and Fellows of Harvard College*¹⁴

2. *The Saginaw*, 139 F. at 907.

3. *Id.* at 906–07.

4. *Id.* at 910.

5. *Id.* at 913.

6. *Id.* at 910.

7. *Id.* at 914.

8. *Id.* (quoting FREDERICK L. HOFFMAN, *RACE TRAITS AND TENDENCIES OF THE AMERICAN NEGRO* 57–58 (1896)).

9. *Id.* (citing HOFFMAN, *supra* note 8, at 57). The year after the publication of Hoffman's book, W.E.B. DuBois wrote a seven-page book review thoroughly discrediting it. See generally W.E.B. DuBois, *Race Traits and Tendencies of the American Negro*, 9 ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1897–June 1897, at 127–33 (reviewing HOFFMAN, *supra* note 8).

10. *The Saginaw*, 139 F. at 914 (quoting HOFFMAN, *supra* note 8, at 57).

11. See MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 158–59 (2010) (discussing the use of gender- and race-based work-life expectancy and earnings tables to calculate damages for plaintiffs today).

12. *Id.*

13. *Id.* at 159–60.

14. 143 S. Ct. 2141 (2023).

on the constitutionality of using race to calculate damages. I argue that, while the constitutional infirmities of race-conscious damages calculations were already severe, *SFFA* is surely the fatal blow. Part I provides background on this practice, including academic discussion of it and judicial and legislative pushback against it. Part II describes potential constitutional defenses of the practice. In Part III, I argue that, under *SFFA*, none of these defenses can save race-conscious damages calculations from being unconstitutional.

I. Background

A. Race-Based Damages Calculations

In personal injury and wrongful death cases, plaintiffs are generally entitled to recover compensatory damages for both present and future harm.¹⁵ For future harm, that includes actual costs, such as future medical expenses, and speculative costs, such as lost future income.¹⁶ Of course, that requires an estimate of how much the plaintiff or their decedent would have made and how long they would have lived absent their injury.

Statistical tables inform those estimates.¹⁷ Mortality tables, for example, provide the average number of years that persons of a given age will live.¹⁸ They are used to estimate a plaintiff’s lost future earnings and (in non-death cases) future medical expenses.¹⁹ The following is an example of a typical mortality or “life” table:²⁰

Table A. Expectation of life, by age, Hispanic origin and race, and sex: United States, 2021

Age (years)	Non-Hispanic																									
	All origins						Hispanic				American Indian and Alaska Native				Asian				Black				White			
	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female	Total	Male	Female					
0	76.4	73.5	79.3	77.8	74.6	81.1	65.6	62.2	69.2	83.5	81.2	85.6	71.2	67.6	75.0	76.7	74.0	79.5								
1	75.8	73.0	78.7	77.2	74.0	80.5	65.1	61.7	68.8	82.8	80.5	84.9	71.0	67.4	74.7	76.0	73.4	78.8								
5	71.9	69.1	74.8	73.3	70.1	76.5	61.2	57.8	64.9	78.8	76.5	80.9	67.1	63.5	70.8	72.1	69.4	74.9								
10	66.9	64.1	69.8	68.3	65.1	71.5	56.3	52.9	59.9	73.9	71.6	75.9	62.2	58.6	65.9	67.1	64.5	69.9								
15	62.0	59.2	64.9	63.4	60.2	66.6	51.3	48.0	55.0	68.9	66.6	71.0	57.3	53.7	61.0	62.1	59.5	64.9								
20	57.1	54.4	60.0	58.5	55.4	61.7	46.7	43.4	50.3	64.0	61.7	66.0	52.7	49.2	56.1	57.3	54.7	60.0								
25	52.5	49.8	55.2	53.8	50.8	56.9	42.4	39.2	45.8	59.2	56.9	61.1	48.2	44.9	51.4	52.6	50.1	55.2								
30	47.8	45.4	50.4	49.2	46.3	52.1	38.3	35.3	41.5	54.3	52.1	56.2	43.8	40.7	46.8	47.9	45.6	50.4								
35	43.3	41.0	45.7	44.6	41.9	47.3	34.5	31.7	37.5	49.5	47.3	51.3	39.5	36.6	42.3	43.4	41.2	45.7								
40	38.8	36.6	41.1	40.1	37.5	42.6	31.0	28.4	33.7	44.7	42.6	46.4	35.3	32.5	37.8	38.9	36.8	41.1								
45	34.4	32.3	36.5	35.6	33.2	37.9	27.5	25.1	30.0	39.9	37.9	41.6	31.1	28.6	33.5	34.5	32.5	36.5								
50	30.1	28.2	32.1	31.2	28.9	33.3	24.5	22.3	26.7	35.2	33.3	36.8	27.1	24.8	29.3	30.2	28.3	32.1								
55	26.0	24.2	27.8	27.0	24.9	29.9	21.5	19.6	23.4	30.7	28.8	32.1	23.3	21.1	25.3	26.0	24.3	27.8								
60	22.1	20.5	23.7	23.0	21.1	24.7	18.8	17.2	20.3	26.2	24.6	27.5	19.8	17.8	21.6	22.1	20.5	23.7								
65	18.4	17.0	19.7	19.3	17.6	20.6	16.3	15.0	17.3	21.9	20.5	23.0	16.7	14.9	18.1	18.4	17.0	19.7								
70	14.9	13.7	16.0	15.8	14.4	16.8	13.6	12.6	14.4	17.9	16.7	18.7	13.7	12.3	14.9	14.9	13.7	15.9								
75	11.6	10.6	12.5	12.4	11.3	13.2	11.2	10.4	11.7	14.0	13.0	14.6	11.0	9.8	11.8	11.5	10.6	12.4								
80	8.7	7.9	9.4	9.4	8.5	9.9	9.1	8.5	9.4	10.5	9.7	10.9	8.5	7.6	9.1	8.7	7.8	9.3								
85	6.3	5.6	6.7	6.9	6.1	7.1	7.2	6.8	7.3	7.5	6.9	7.7	6.4	5.6	6.7	6.2	5.6	6.6								
90	4.4	3.9	4.6	4.8	4.3	4.9	5.6	5.4	5.6	5.0	4.7	5.1	4.7	4.2	4.9	4.3	3.8	4.5								
95	3.0	2.7	3.2	3.4	3.0	3.3	4.5	4.3	4.3	3.4	3.1	3.3	3.4	3.1	3.5	3.0	2.6	3.1								
100	2.2	1.9	2.2	2.4	2.2	2.3	3.6	3.5	3.4	2.3	2.2	2.2	2.6	2.4	2.6	2.1	1.9	2.2								

15. See, e.g., *Kay v. Menard*, 754 A.2d 760, 763, 771–72 (R.I. 2000) (affirming award of damages for both present injuries and future medical costs).

16. Sonja Starr, *Statistical Discrimination*, 58 HARV. C.R.-C.L. L. REV. 579, 602 (2023).

17. CHAMALLAS & WRIGGINS, *supra* note 11.

18. *Id.* at 162.

19. Starr, *supra* note 16, at 602.

20. Elizabeth Arias, Jiaquan Xu & Kenneth Kochanek, *United States Life Tables, 2021*, 72 NAT’L VITAL STAT. REP., Nov. 7, 2023, at 1, 3, <https://www.cdc.gov/nchs//data/nvsr/nvsr72/nvsr72-12.pdf> [<https://perma.cc/Y7KU-8UDJ>].

Similar tables are used to estimate work-life expectancy and future earnings.²¹ Usually, an expert witness uses the tables to perform the relevant calculations, and then provides estimates—as well as the bases on which they were made—to the judge or jury to consider in setting damages.²² In some cases, the tables or the statistics therein may be entered directly into evidence without accompanying expert testimony, including by stipulation or judicial notice.²³ In any event, the tables are not necessarily determinative; rather, they are merely data points that can be given more or less weight depending on the strength of other relevant evidence.²⁴ For this reason, they are most impactful in cases involving infants and young children without an extensive medical or professional history because, without such a history, there is little else on which a finder of fact can rely.²⁵

The twist, of course, is that the statistics in these tables are usually broken down by race.²⁶ For example, an expert calculating a plaintiff's future earnings typically conducts that calculation not just for, say, a twenty-three-year-old woman with a high school diploma in Seattle, but for a *Black* twenty-three-year-old woman with a high school diploma in Seattle.²⁷ Because of racial disparities in life expectancy and income, this practice consistently results in lower damages awards for minority plaintiffs.²⁸

The two consolidated cases in *United States v. Bedonie*²⁹ helpfully illustrate how this works in practice. There, defendants Bedonie and Serawop were found guilty of involuntary and voluntary manslaughter, respectively, and ordered to pay criminal restitution to the respective estates of their two victims, a man and a young girl, both of whom were Native American.³⁰ The court retained an expert, Dr. Paul Randle, to conduct lost income calculations

21. CHAMALLAS & WRIGGINS, *supra* note 11, at 158–59.

22. Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 *FORDHAM L. REV.* 73, 105 (1994).

23. *See, e.g.*, *Kay v. Menard*, 754 A.2d 760, 769–70 (R.I. 2000) (affirming lower court's admission of life and work-life expectancy tables without expert testimony); *Smith v. United States*, No. 08-2375-JWL, 2009 WL 5126623, at *8 (D. Kan. Dec. 18, 2009) (“The parties stipulated that the average life expectancy for a thirty year old black female such as [the plaintiff] is 47.2 years.”); *Knoche v. Meyer Sanitary Milk Co.*, 280 P.2d 605, 614 (Kan. 1955) (“[W]e take judicial notice of standard mortality tables.”).

24. *See* CHAMALLAS & WRIGGINS, *supra* note 11, at 159 (discussing the use of these tables in conjunction with facts specific to an individual and noting the particular importance of these tables where no such facts exist).

25. *Id.*

26. *Id.*

27. *See, e.g.*, *G.M.M. ex rel. Hernandez-Adams v. Kimpson*, 116 F. Supp. 3d 126, 129 (E.D.N.Y. 2015) (noting an expert's calculation of a four-year-old plaintiff's future earnings based on the average education and income of Hispanics).

28. CHAMALLAS & WRIGGINS, *supra* note 11, at 159.

29. 317 F. Supp. 2d 1285 (D. Utah 2004).

30. *Id.* at 1289, 1292, 1299, 1315–16.

for each of them.³¹ Dr. Randle presented his calculations to the court in the form of expert testimony.³² He explained that he multiplied the female victim's lost income by 0.77 to account for the fact that Native American women make, on average, only 77% of what white women make.³³ Similarly, he multiplied the male plaintiff's lost income by 0.58 to account for the fact that Native American men make only 58% of what white men make.³⁴ In a typical case, this would leave the plaintiffs (or crime victims entitled to restitution) with only 77% and 58%, respectively, of what they would have gotten had they been white.

But in *Bedonie*, the court did something unusual. It asked Dr. Randle to perform additional lost income calculations without regard to the race of the victims.³⁵ Incredibly, despite having performed *thousands* of such calculations, Dr. Randle had *never* been asked to do so in a race-neutral manner in a wrongful death case.³⁶ He complied with the court's request and performed the calculations again, resulting in higher restitution for both victims.³⁷

Unfortunately, cases like *Bedonie* are the exception, not the rule. Many courts still rely on race-based statistics to set damages.³⁸ In fact, some states actually require that race-based statistical tables be admitted into evidence, and a number of others include them in pattern jury instructions.³⁹

31. *Id.* at 1312.

32. *Id.* at 1312–13.

33. *Id.* at 1316.

34. *Id.* at 1315.

35. *Id.* at 1314.

36. *Id.* at 1315.

37. *Id.* at 1321–22.

38. *See, e.g.,* McMichael v. Akron Gen. Med. Ctr., 97 N.E.3d 756, 778 (Ohio Ct. App. 2017) (affirming jury instruction containing plaintiff's race-based life expectancy); Smith v. United States, No. 08-2375-JWL, 2009 WL 5126623, at *8 (D. Kan. Dec. 18, 2009) (accepting the parties' stipulation that "the average life expectancy for a thirty year old black female such as [the plaintiff] is 47.2 years"); Rhoades v. Walsh, No. 08-368-P-H, 2009 WL 2600094, at *11 & n.24 (D. Me. Aug. 19, 2009) (using statistical tables that take race into consideration to estimate the plaintiff's work-life expectancy).

39. *See, e.g.,* COLO. REV. STAT. § 13-25-102 (2014) (providing that race-based mortality tables from the Census Bureau must be received as evidence); R.I. GEN. LAWS § 9-19-38 (2000) (providing that official government work-life expectancy tables which take race into account shall be admissible); KAN. CIV. PATTERN INSTRUCTIONS § 171.45 (2024) (providing standard jury instructions to consider race-based mortality tables in estimating life expectancy).

B. *Commentary and Pushback*

For many years, this practice went unquestioned.⁴⁰ Recently, however, the role of race (and sex) in damages calculations has received more attention and criticism from academic, judicial, and legislative quarters. In the academy, Professor Martha Chamallas has argued that using racial data in damages calculations is a race-based classification and is therefore subject to strict scrutiny.⁴¹ Professor Jennifer Wriggins has also written extensively on the subject (including a book she co-authored with Professor Chamallas) and on the role of race in tort law generally.⁴² More recently, Professors Kimberly Yuracko and Ronen Avraham criticized race-conscious damages calculations on both constitutional and policy grounds.⁴³ And in 2023, Professor Sonja Starr further argued that the practice is unconstitutional.⁴⁴

Some state legislatures have also acted. California and Oregon, for example, have prohibited the use of race in setting damages.⁴⁵ On the federal level, there have been several bills introduced in Congress in recent years that would have outlawed the practice in federal courts, though none have become law.⁴⁶

The judiciary has also expressed skepticism about the constitutionality of race-conscious damages calculations. In *Bedonie*, the court chose not to

40. *Bedonie*, 317 F. Supp. 2d at 1317; *see, e.g.*, *Bulala v. Boyd*, 389 S.E.2d 670, 677 (Va. 1990) (noting without further discussion that the expert witness performed a race-conscious calculation of lost income).

41. *See* Chamallas, *supra* note 22, at 116 (arguing that reliance upon racial data in damages calculations is unconstitutional); Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 Loyola L.A. L. Rev. 1435, 1441 (2005) (arguing that using racial data in damages calculations is a race-based classification and should therefore be subject to strict scrutiny); CHAMALLAS & WRIGGINS, *supra* note 11, at 160 (“[R]eliance on race[-]based tables is . . . overt discrimination of the kind that the U.S. Constitution . . . ha[s] long outlawed or at least ha[s] made very hard to justify.”).

42. *See* CHAMALLAS & WRIGGINS, *supra* note 11, at 1–2 (providing an overview of the role of a litigant’s gender and race in tort litigation); Jennifer B. Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865–2007*, 27 REV. LITIG. 37, 57–59 (2007) (highlighting racial disparities in the amount of damages awarded in tort cases); Jennifer Wriggins, *How to Include Issues of Race and Racism in the 1-L Torts Course: A Call for Reform*, 23 RUTGERS RACE & L. REV. 259, 293–94 (2021) (discussing the negative effects of using race-based statistics in damages calculations).

43. *See generally* Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CALIF. L. REV. 325 (2018) (arguing that the use of race-based statistical tables to calculate damages for torts is unconstitutional under the equal protection clause); Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661 (2017) (arguing that the use of race-based statistical tables to calculate damages not only perpetuates racial inequalities but also encourages potential tortfeasors to target disadvantaged groups).

44. Starr, *supra* note 16, at 602–03, 606–08.

45. CAL. CIV. CODE § 3361 (West 2020); OR. REV. STAT. ANN. § 31.770 (West 2019).

46. *E.g.*, H.R. 4980, 118th Cong. (2023); H.R. 6758, 117th Cong. (2022); S. 2512, 116th Cong. (2019); H.R. 6417, 114th Cong. (2016).

rely on race-based tables out of “fairness,” thus avoiding a “serious” constitutional question.⁴⁷ Most notably, Judge Jack Weinstein held in 2008 that judicial reliance on racial statistics to calculate damages violates equal protection, though he did not thoroughly explain why.⁴⁸ He came to the same conclusion in a 2015 case and analyzed the issue more extensively, relying largely on the unreliability of race-based tables and the negative effects that their use has on minority groups who have long been discriminated against.⁴⁹

In short, although race-based damages calculations were accepted uncritically for many years, there are signs that may be slowly changing—and for good reason. Supreme Court precedent has long made clear that the race-based allocation of benefits and burdens is inconsistent with equal protection, and it is therefore permissible only under rare and narrow circumstances.⁵⁰ As I shall explain, damages calculations are not one of those circumstances.⁵¹

II. Constitutional Defenses of Race-Conscious Damages Calculations

For reasons familiar to every first-year student of constitutional law, race-conscious damages calculations raise serious constitutional concerns. The Equal Protection Clause of the Fourteenth Amendment prohibits racial discrimination by states,⁵² and the equal protection component of the Fifth Amendment’s Due Process Clause does the same with respect to the federal government.⁵³ These provisions generally bar the race-based allocation of government benefits,⁵⁴ and the use of race to set damages would seem to run afoul of that prohibition. But despite that glaring constitutional infirmity, there are several arguments that might be offered in defense of race-conscious damages calculations.

47. *United States v. Bedonie*, 317 F. Supp. 2d 1285, 1319 (D. Utah 2004).

48. *McMillan v. City of New York*, 253 F.R.D. 247, 255 (E.D.N.Y. 2008).

49. *G.M.M. ex rel. Hernandez-Adams v. Kimpson*, 116 F. Supp. 3d 126, 152 (E.D.N.Y. 2015).

50. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 745–46 (2007) (“[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 214 (1995))); *id.* at 720 (“[W]hen the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”).

51. *See infra* subpart III(B).

52. *See* U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

53. *See Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (holding that racial segregation in D.C. public schools violates the Due Process Clause of the Fifth Amendment).

54. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (“[W]hen the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny.”); *e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 366, 374 (1886) (holding that San Francisco’s practice of refusing to grant laundry business licenses to Chinese applicants violated the Equal Protection Clause).

A. *The State Action Argument*

A threshold defense of the use of race in damages calculations is that it does not involve state action and therefore is not subject to constitutional equal protection requirements at all.⁵⁵ Upon closer examination, however, that argument does not hold water. Damages are set by either a judge or a jury, both of which are state actors whose acts are state action.⁵⁶ Therefore, the act of setting damages—whether done by a judge or a jury—constitutes state action subject to the constraints of the Constitution.

Academic literature on the issue has not, for the most part, found the question of state action to be quite so simple.⁵⁷ Professors Yuracko and Avraham opine that the issue is “trick[y]” because statistical tables reflect not “the private bias of the individual expert, but [a] social reality[.]”⁵⁸ For this reason, they analyze the state action question under *Shelley v. Kraemer*⁵⁹ on the theory that courts impermissibly enforce or perpetuate private discrimination when they calculate damages in reliance on racial disparities that are the result of such discrimination.⁶⁰ Yuracko and Avraham consider four possible readings of *Shelley*—each with a different view of exactly how far that decision reaches—to determine whether it forbids the use of race in damages calculations.⁶¹

As Professor Starr has recognized, however, “one need not parse . . . *Shelley*’s limits” to conclude that race-conscious damages calculations constitute racially discriminatory state action.⁶² *Shelley* is difficult because the discrimination in the case was embodied in a private legal instrument—a restrictive covenant—that the court was only being asked to enforce.⁶³ In other words, the discriminatory choice seemed on its face to have been made by private parties rather than a state actor.⁶⁴ But that difficulty is not present here, for a court calculating damages on the basis of race is itself

55. See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” (emphasis added)); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) (“Racial discrimination, though invidious in all contexts, violates the Constitution only when it may be attributed to state action.”).

56. See *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948) (holding that “the action of state courts and judicial officers in their official capacities is to be regarded as action of the State”); *Edmonson*, 500 U.S. at 624 (explaining that the jury is a “quintessential governmental body, having no attributes of a private actor”).

57. See, e.g., Chamallas, *supra* note 22, at 105–11 (discussing the state action question at length); Yuracko & Avraham, *Valuing Black Lives*, *supra* note 43, at 348–58 (same).

58. Yuracko & Avraham, *supra* note 43, at 349.

59. 334 U.S. 1 (1948).

60. Yuracko & Avraham, *supra* note 43, at 352, 354.

61. *Id.* at 350–58.

62. Starr, *supra* note 16, at 607.

63. See *Shelley*, 334 U.S. at 13 (noting that the discrimination at issue was “determined, in the first instance, by the terms of agreements among private individuals”).

64. *Id.*

discriminating, not just enforcing private discrimination. Therefore, because “the state’s role here is primary in a way that it wasn’t even in *Shelley* itself[,]” race-conscious damages calculations constitute racially discriminatory state action regardless of how broadly one reads *Shelley*.⁶⁵

B. Substantive Constitutional Defenses of Race-Based Damages Calculations

Even having concluded that the use of race to calculate damages constitutes state action, several substantive defenses of the practice’s constitutionality might be raised. I shall next discuss four such defenses before explaining why none is plausible after *SFFA*.⁶⁶

1. The Argument that Racial Statistics Merely Reflect Reality.—A common argument for the constitutionality of using racial statistics to calculate damages is that such statistics merely reflect the fact that race, unfortunately, still matters in American society.⁶⁷ Therefore, the argument goes, racial disparities are a sad reality that must be considered in order to achieve accurate estimates.⁶⁸ As the United States put it in *Bedonie*:

[T]he economic data relied upon in [the expert’s] report accurately reflects economic reality and the role that race and gender play in earnings today. As much as we wish that the average earning potential of all groups could be equal, the data relied upon by economists in calculating lost earnings show that, on average, whites earn more than Native Americans Th[is is a] relevant fact[] in determining the victims’ actual losses.⁶⁹

In other words, it would be foolish not to take race into account, just as it would be foolish not to take health into account when estimating life span or education into account when estimating life income. Numerous other “relevant facts” are considered, and there is no reason why race should not be also.⁷⁰ In the words of one forensic economist who defends the practice: “If there’s a difference in society, it is what it is. It’s a difference, and the

65. Starr, *supra* note 16, at 607.

66. See *infra* subpart III(B).

67. See, e.g., *United States v. Bedonie*, 317 F. Supp. 2d 1285, 1316 (D. Utah 2004) (citing Government’s Position on Calculation of Future Lost Income Restitution at 8, *United States v. Bedonie*, 317 F. Supp. 2d. 1285 (D. Utah 2004) (No. 2:03-CR-00690 PGC) [hereinafter Government’s Position]) (describing the Government’s argument that racial disparities in income, while unfortunate, are a reality that must be considered when calculating lost future earnings).

68. See *id.* (citing Government’s Position, *supra* note 67) (acknowledging the Government’s argument that racial disparities in income bear on the question of lost future earnings).

69. *Id.* (quoting Government’s Position, *supra* note 67).

70. See *id.* at 1316–17 (citing Government’s Position, *supra* note 67) (acknowledging the Government’s argument and noting other relevant factors such as age and physical or mental characteristics).

economist's job is to figure out what would have happened [had the plaintiff not been injured]."⁷¹

Furthermore, considering race may be necessary in order to adequately capture other criteria correlated to race that could not be adequately considered by reference only to race-neutral criteria. For example, studies have shown that racial discrimination has adverse health effects on Black Americans and tends to decrease life expectancy.⁷² In a similar vein, higher rates of alcoholism among Native Americans are believed to be related to discriminatory policies stretching back many generations.⁷³ Phenomena like these are highly relevant to life expectancy but very difficult to capture using only race-neutral criteria.

The argument, simply put, is that race is an appropriate consideration when assessing damages because it is tied to physical and economic well-being.

2. *The "One Factor Among Many" Argument.*—An additional argument for the constitutionality of race-based damages calculations is that in such calculations, race is only one factor among many.⁷⁴ Because race is considered among numerous other factors, the argument goes, it is less constitutionally problematic because it will not have as great an impact on the amount the plaintiff ultimately receives.⁷⁵ That is, it is just one small aspect of who a person is, and it is only considered as such.⁷⁶

3. *The Tradition Argument.*—Another possible argument for the constitutionality of using race-based statistics to calculate damages is that it has been done for a long time; that is, it is supported by history and tradition. The Supreme Court relies on historical practice to interpret vague constitutional text, in part because it is evidence of what the text was understood to mean when it was adopted and in part because there are few other objective guideposts on

71. Kim Soffen, *In One Corner of the Law, Minorities and Women Are Often Valued Less*, WASH. POST (Oct. 25, 2016), <https://www.washingtonpost.com/graphics/business/wonk/settlements/> [<https://perma.cc/5Q4M-JSVQ>] (quoting a private interview with James Woods, forensic economist in Houston, Texas).

72. Cf. Thomas A. LaVeist, *Racial Segregation and Longevity Among African Americans: An Individual-Level Analysis*, 38 HEALTH SERVS. RSCH. 1719, 1725–26 (2003) (finding that “exposure to racial segregation is associated with greater odds of death”).

73. Mary-Anne Enoch & Bernard J. Albaugh, *Review: Genetic and Environmental Risk Factors for Alcohol Use Disorders in American Indians and Alaskan Natives*, 26 AM. J. ON ADDICTIONS 461, 462 (2017).

74. Yuracko & Avraham, *supra* note 43, at 340.

75. Cf. CHAMALLAS & WRIGGINS, *supra* note 11, at 159 (noting that statistical tables have the greatest impact in cases involving children with fewer other data points to consider).

76. See Yuracko & Avraham, *supra* note 43, at 340 (acknowledging that tort damages are not determined solely on the basis of race).

which judges can rely.⁷⁷ Applying that methodology in this context, one could argue that the practice of using race to calculate damages should be upheld as constitutional in light of its long history.⁷⁸ Indeed, courts have been using race-based statistical tables to calculate damages for well over a century, as the 1905 *Saginaw* case demonstrates.⁷⁹ That argument is not without merit, especially in light of the Court's increased reliance on history and tradition in recent constitutional cases.⁸⁰

4. *The No-Invidious-Purpose Argument.*—An additional constitutional defense of race-conscious damages calculations is that they are not motivated by any invidious purpose.⁸¹ Rather, race is used only to achieve accurate estimates of life expectancy, work-life expectancy, and life income—not to subjugate or disadvantage anyone on account of their race.⁸² The strongest version of this argument contends that the purpose of strict scrutiny is to “determin[e] what [racial] classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”⁸³ Because the use of race to calculate damages is not driven by racist motives, the argument goes, it should be subject to a more forgiving form of judicial scrutiny.

In theory, the argument that “benign” racial classifications should be subject to less than strict scrutiny was rejected by the Supreme Court some time ago.⁸⁴ It nonetheless finds some support in the case law, albeit more

77. *United States v. Rahimi*, 144 S. Ct. 1889, 1912 (2024) (Kavanaugh, J., concurring).

78. *See, e.g., The Saginaw*, 139 F. 906, 914 (S.D.N.Y. 1905) (lowering a black plaintiff's damages based on purported racial differences in longevity in 1905); *see also* Yuracko & Avraham, *supra* note 43, at 326 & n.3 (collecting cases to show that reliance on race-based data to calculate tort damages is “standard practice”).

79. *See The Saginaw*, 139 F. at 914 (relying on race-based life-expectancy tables to calculate damages in 1905).

80. *See, e.g., N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2126 (2022) (holding that a firearm regulation is unconstitutional unless it is “consistent with this Nation's historical tradition”); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (holding that “the Establishment Clause must be interpreted by ‘reference to historical practices and understandings’” (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014))).

81. *See, e.g., Government's Position*, *supra* note 67 (“As much as we wish that the average earning potential of all groups could be equal, the data relied upon by economists in calculating lost earnings show that, on average, whites earn more than Native Americans[.]”).

82. *See* Soffen, *supra* note 71 (“If there's a difference in society, it is what it is. It's a difference, and the economist's job is to figure out what would have happened [had the plaintiff not been injured].” (quoting a private interview with forensic economist James Woods)).

83. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

84. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 741 (2007) (“Our cases clearly reject the argument that motives affect the strict scrutiny analysis.”). *But see* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 246 (1995) (Stevens, J., dissenting) (“[A] . . . standard that purports to equate remedial preferences with invidious discrimination cannot be defended in the name of ‘equal protection.’”).

from what the Court has done than from what it has said.⁸⁵ As a number of commentators have observed, while the Supreme Court nominally applies strict scrutiny to all racial classifications, the version it applies to those that disadvantage underrepresented minorities is significantly stricter than the version it applies to those that do not.⁸⁶ The most likely reason for this asymmetry is that the Court's real concern is weeding out invidious motives, and it is less suspicious that such motives are present when the law at issue disadvantages a privileged group.⁸⁷ Therefore, although using race to calculate damages does disadvantage minority plaintiffs, what matters is that it is done with a legitimate motive (i.e., achieving accurate estimates of life expectancy, work-life expectancy, and life income), not an invidious one. For that reason, the argument goes, it should be subject to a more forgiving form of judicial scrutiny.

* * *

As I shall explain next, none of these arguments—however persuasive they may once have been—survive *SFFA* as a plausible basis on which to uphold race-conscious damages calculations.

III. *SFFA* Confirms that Race-Conscious Damages Calculations Are Unconstitutional⁸⁸

The Supreme Court's decision in *Students for Fair Admissions v. President and Fellows of Harvard College* establishes that none of the four arguments discussed above can save race-conscious damages calculations from being unconstitutional.

A. *Students for Fair Admissions v. President and Fellows of Harvard College*

Prior to *SFFA* and the consolidated case, *Students for Fair Admissions v. University of North Carolina*,⁸⁹ both Harvard and University of North

85. As Justice Scalia once said, “Watch what we do, not what we say.” Transcript of Oral Argument at 40, *United States v. Georgia*, 546 U.S. 151 (2006) (No. 04-1203).

86. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 380 (2003) (Rehnquist, C.J., dissenting) (criticizing the majority's application of strict scrutiny as “unprecedented in its deference”); Conference, *Showcase Panel II: Why, or Why Not, Be an Originalist?*, 69 CATH. U. L. REV. 683, 721 (2020) (noting that the litigants who lost in *Grutter* said, “Well, it's strict scrutiny, but it's not the same strict scrutiny that you apply in these other cases.”) (statement of Prof. Michael C. Dorf).

87. See *Grutter*, 539 U.S. at 327 (“Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.”).

88. I take no position in this Note on whether *SFFA* was correctly decided. Rather, I argue only that, right or wrong, its reasoning establishes that race-conscious damages calculations are unconstitutional.

89. 142 S. Ct. 896 (2022) (granting certiorari).

Carolina (UNC) operated race-conscious admissions programs with the goal of achieving a racially diverse student body and, as a result, “the educational benefits of diversity.”⁹⁰ In 2014, both schools were sued by Students for Fair Admissions (SFFA), a nonprofit organization aimed at ending “racial classifications and preferences in college admissions[.]”⁹¹ SFFA alleged that Harvard operated its race-conscious admissions policy in violation of Title VI of the Civil Rights Act of 1964 and that UNC operated its policy in violation of the Equal Protection Clause of the Fourteenth Amendment.⁹² In 2022, the Supreme Court granted certiorari in both cases and consolidated them.⁹³

On the merits, the Court first explained that, because the programs employed racial classifications, strict scrutiny applied, meaning they could be upheld only if they were narrowly tailored to serve a compelling government interest.⁹⁴ And, the Court noted, that interest had to be “sufficiently measurable to permit judicial review.”⁹⁵ In addition, precedent required that race never “be used as a ‘negative’” or “operate as a stereotype” in a university’s admissions process.⁹⁶ And finally, race-conscious admissions programs had to have a “logical end point.”⁹⁷

Both schools’ programs flunked all these requirements.⁹⁸ First, the interests asserted by the universities were not “sufficiently measurable to permit judicial review.”⁹⁹ In Harvard’s case, those interests were: “(1) training future leaders in the public and private sectors; (2) preparing graduates to adapt to an increasingly pluralistic society; (3) better educating its students through diversity; and (4) producing new knowledge stemming from diverse outlooks.”¹⁰⁰ UNC’s asserted interests were similar: “(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; and (5) enhancing appreciation,

90. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2167 (2023).

91. *Help Us Eliminate Race and Ethnicity from College Admissions*, STUDENTS FOR FAIR ADMISSIONS, <https://studentsforfairadmissions.org/> [<https://perma.cc/GP2E-TTUY>].

92. *Students for Fair Admissions*, 143 S. Ct. at 2156; *see also* 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race in federally assisted programs); U.S. CONST. amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

93. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S. Ct. 895 (2022); *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 142 S. Ct. 896 (2022).

94. *Students for Fair Admissions*, 143 S. Ct. at 2162, 2166.

95. *Id.* (quoting *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365, 381 (2016)) (cleaned up).

96. *Id.* at 2168.

97. *Id.* at 2170 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003)).

98. *Id.* at 2166.

99. *Id.* (quoting *Fisher*, 579 U.S. at 381) (cleaned up).

100. *Id.* (quoting *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 173–74 (1st Cir. 2020), *rev’d*, 143 S. Ct. 2141 (2023)) (cleaned up).

respect, and empathy, cross-racial understanding, and breaking down stereotypes.”¹⁰¹ Despite being “commendable goals,” the Court held that these interests were “not sufficiently coherent for purposes of strict scrutiny” because it was “unclear how courts [were] supposed to measure” them.¹⁰²

Second, the universities’ programs were not narrowly tailored because they lacked “a meaningful connection between the means they employ[ed] and the goals they pursue[d].”¹⁰³ Specifically, the racial categories the universities used were “plainly overbroad.”¹⁰⁴ For example, an applicant from India and an applicant from Japan would both be classified as “Asian.”¹⁰⁵ Thus, under Harvard’s and UNC’s metrics, a classroom with two Japanese students would be just as diverse as a classroom with one Japanese student and one Indian student.¹⁰⁶ Strict scrutiny, the Court explained, requires more precision than that.¹⁰⁷

Third, the universities’ programs failed to satisfy the requirement that race not be used as a negative.¹⁰⁸ In the zero-sum game of college admissions, using race as a “positive” for some races is the same as using it as a “negative” for others.¹⁰⁹

Fourth, the schools’ programs were constitutionally infirm because they used race as a “stereotype”—that is, as a proxy for other traits the universities believed to be typical of persons of a given race.¹¹⁰ In particular, the universities’ stated goal—achieving the educational benefits of diversity—seemed to rest on the assumption that persons of certain races would be more likely to bring certain perspectives and experiences to the table.¹¹¹ In other words, it assumed, as Harvard argued in its brief in the earlier affirmative action case of *Regents of the University of California v. Bakke*,¹¹² that “a [B]lack student can usually bring something that a white person cannot

101. *Id.* (quoting *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580, 656 (D.N.C. 2021), *rev’d sub nom.*, 143 S. Ct. 2141 (2023)) (cleaned up).

102. *Id.*

103. *Id.* at 2167.

104. *Id.*

105. *See id.* (noting that South Asian and East Asian students were classified under the same label of “Asian” in the universities’ admissions programs).

106. *See id.* (“[B]y grouping together all Asian students, for instance, [the universities] are apparently uninterested in whether *South Asian* or *East Asian* students are adequately represented, so long as there is enough of one to compensate for a lack of the other.”).

107. *Id.* at 2168.

108. *Id.*

109. *Id.* at 2168–69.

110. *Id.* at 2169–70.

111. *Id.* at 2170.

112. 438 U.S. 265 (1978).

offer.”¹¹³ That assumption was a “pernicious stereotype” and incompatible with the requirements of equal protection, the Court held.¹¹⁴

Fifth and finally, Harvard’s and UNC’s race-conscious admissions programs lacked any logical endpoint, as the Court’s precedents suggested they must.¹¹⁵

For these reasons, the Court held that the universities’ race-conscious admissions programs violated equal protection and could not stand.¹¹⁶

B. *SFFA Defeats Potential Defenses of Race-Conscious Damages Calculations*

The Supreme Court’s decision in *SFFA* defeats the four arguments most likely to be made in defense of the constitutionality of race-conscious damages calculations.

1. *The Argument that Racial Statistics Merely Reflect Reality.*—As explained above, a common argument for the constitutionality of using racial statistics to calculate damages is that such statistics merely reflect the sad reality that race still matters in American society.¹¹⁷ Therefore, the argument goes, it is appropriate to consider them to accurately estimate longevity and earnings.¹¹⁸ *SFFA* establishes, however, that the continued salience of race in American society does not justify using it to calculate damages.

A similar argument was made in the context of race-conscious college admissions. In order to achieve the educational benefits of diversity, the argument went, universities should be able to understand “the full person” when evaluating an applicant.¹¹⁹ And in a society where race still impacts people’s lives in significant ways, considering “the full person” includes considering their race.¹²⁰ As Justice Sotomayor remarked in dissent in *SFFA*, it is a “basic truth that young people’s experiences are shaded by a societal structure where race matters.”¹²¹

113. *Students for Fair Admissions*, 143 S. Ct. at 2170 (quoting *Bakke*, 438 U.S. at 316 (opinion of Powell, J.)).

114. *Id.*

115. *Id.* at 2170 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003)).

116. *Id.* at 2175.

117. *See United States v. Bedonie*, 317 F. Supp. 2d 1285, 1316 (D. Utah 2004) (describing the government’s contention that “[a]s much as we wish that the average earning potential of all groups could be equal, the data relied upon by economists in calculating lost earnings show that, on average, whites earn more than Native Americans[.]”) (quoting Government’s Position, *supra* note 67, at 8).

118. *See id.* (quoting the Government’s argument that race and sex are “relevant facts in determining the victims’ actual losses”) (quoting Government’s Position, *supra* note 67, at 8).

119. *See Students for Fair Admissions*, 143 S. Ct. at 2273 (Jackson, J., dissenting) (emphasis omitted) (noting UNC’s goal of conducting a holistic review of applicants).

120. *Id.*

121. *Id.* at 2252 (Sotomayor, J., dissenting).

On this view, race is a component of an applicant's identity that should be considered like any other. Just as being from a rural area or playing a musical instrument is part of who a person is, so is race.¹²² As the Court said in *Grutter v. Bollinger*,¹²³ “[j]ust as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters.”¹²⁴ Because of that reality, it was argued, universities should be able to consider an applicant's race in order to fully understand who they are and the experiences and perspectives they bring to the table.¹²⁵ That, in turn, would allow universities to foster campuses and classrooms that are rich with the educational benefits of diversity.¹²⁶

In *SFFA*, the Supreme Court squarely rejected this argument as one based on “pernicious stereotype[s].”¹²⁷ Universities could “not operate their admissions programs on the ‘belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.’”¹²⁸ Justice Sotomayor protested in dissent that it is not “a stereotype to acknowledge that race imposes certain burdens on students of color that it does not impose on white students” or that “young people's experiences are shaded by a societal structure where race matters.”¹²⁹ The Court disagreed.¹³⁰

Nor was the Court convinced by the related argument that an applicant's race is just another relevant component of their identity. In an exchange at oral argument that foreshadowed the Court's opinion, Harvard's lawyer said that race is relevant to the school's evaluation of an applicant just as it would be relevant that an applicant plays the oboe.¹³¹ Chief Justice Roberts responded that “[w]e did not fight a civil war about oboe players.”¹³² His

122. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978) (opinion of Powell, J.) (quoting Harvard's argument that “[a] farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a [B]lack student can usually bring something that a white person cannot offer.”).

123. 539 U.S. 306 (2003).

124. *Id.* at 333.

125. See *Bakke*, 438 U.S. at 316 (opinion of Powell, J.) (quoting Harvard's view that a person's race impacts their lived experiences and perspective).

126. See *id.* at 322–23 (appendix to opinion of Powell, J.) (reprinting Harvard's admissions program statement, which claimed that considering an applicant's race (among other factors) was important for “achieving the benefits to be derived from a diverse student body”).

127. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2170 (2023).

128. *Id.* at 2169 (quoting *Grutter*, 539 U.S. at 333).

129. *Id.* at 2252 (Sotomayor, J., dissenting).

130. *Id.* at 2169–70, 2173–74 (majority opinion).

131. Transcript of Oral Argument at 67–68, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (No. 20-1199).

132. *Id.* at 68.

opinion for the Court reflected that view: “The entire point of the Equal Protection Clause is that treating someone differently because of their skin color is not like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.”¹³³ Race, the Court held, is not just another element of an applicant’s identity to be considered like any other.¹³⁴

Importantly, however, the Court’s decision in *SFFA* does not mean that universities are prohibited from considering any aspect of an applicant’s identity that is in some way related to race. Indeed, the Court went out of its way to note 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.”¹³⁵ For example, a university may still consider the fact that an applicant persevered through racial discrimination or was inspired by their culture or heritage to pursue certain goals.¹³⁶ But any benefit to such an applicant must be given on the basis of their *individual* experiences, achievements, and attributes, not on the basis of their race in general.¹³⁷ In other words, universities may consider an applicant’s relevant attributes, including those that are related to or caused by race.¹³⁸ But they may not use race as a proxy for those attributes instead of assessing each applicant individually.¹³⁹

SFFA establishes that the continued salience of race in American society¹⁴⁰ does not justify the race-based allocation of state-conferred benefits.¹⁴¹ Applying that principle to this context, the use of race to calculate damages cannot be justified as merely reflective of an unfortunate “social reality.”¹⁴² As explained above, an analogous argument was raised and squarely rejected in *SFFA*.¹⁴³ Therefore, just as the Constitution prohibits reliance on racial generalizations about how a person will contribute to a

133. *Students for Fair Admissions*, 143 S. Ct. at 2170 (emphasis omitted).

134. *Id.*

135. *Id.* at 2176.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *See id.* at 2263 (Sotomayor, J., dissenting) (emphasizing that in today’s society, “race continues to matter”); *id.* at 2268 (Jackson, J., dissenting) (“The race-based gaps that first developed centuries ago are echoes from the past that still exist today. By all accounts, they are still stark.”).

141. *See id.* at 2175 (majority opinion) (holding, nevertheless, that Harvard’s and UNC’s race-conscious admissions programs are unconstitutional).

142. *See Yuracko & Avraham, supra* note 43, at 349 (noting that “there is good reason to view the social reality of the actuarial tables as reflective . . . of both private and public racial bias”).

143. *See Students for Fair Admissions*, 143 S. Ct. at 2277 (Jackson, J., dissenting) (arguing that “race still matters to the lived experiences of all Americans”); *id.* at 2175 (majority opinion) (holding, despite the argument that race still matters, that Harvard’s and UNC’s race-conscious admissions programs are unconstitutional).

university in deciding whether to admit them, it also bars reliance on racial generalizations about how long a person would have lived, how long they would have worked, or how much they would have made when calculating the amount of damages they will receive.

This understanding of *SFFA* is supported by Justice Alito’s opinion respecting the denial of certiorari in *Roberts v. McDonald*,¹⁴⁴ handed down just one day after *SFFA*. *Roberts* involved a challenge to a New York policy regarding the distribution of certain novel COVID-19 treatments, which were then in short supply.¹⁴⁵ The state instructed providers administering the treatments to prioritize persons with certain risk factors, one of which was “[n]on-white race or Hispanic/Latino ethnicity.”¹⁴⁶ This, the state explained, was because “longstanding systemic health and social inequalities have contributed to an increased risk of severe illness and death from COVID-19” for such persons.¹⁴⁷ Justice Alito, joined by Justice Thomas, agreed with the denial of certiorari because the “circumstances underlying the dispute . . . ha[d] long since come and gone,” but he expressed concerns about the constitutionality of using race as a basis on which to “prioritize the treatment of patients.”¹⁴⁸ Citing *SFFA*, he noted that “government actors may not provide or withhold services based on race or ethnicity as a response to generalized discrimination or as a convenient or rough proxy for another trait that the government believes to be ‘characteristic’ of a racial or ethnic group.”¹⁴⁹

If that is an accurate statement of the law, it is difficult to see how using a plaintiff’s race to calculate damages could possibly withstand constitutional scrutiny. Indeed, “provid[ing] or withhold[ing] services based on race or ethnicity . . . as a convenient or rough proxy for another trait . . . believe[d] to be characteristic of a racial or ethnic group” is exactly what a judge or jury does when it uses a plaintiff’s race to calculate damages.¹⁵⁰ Specifically, it

144. 143 S. Ct. 2425 (2023) (Alito, J., statement respecting the denial of certiorari).

145. *Id.* at 2425.

146. *Roberts v. Bassett*, No. 22-622-cv, 2022 WL 16936210, at *1 (2d Cir. Nov. 15, 2022) (quoting *Prioritization of Anti-SARS-CoV-2 Monoclonal Antibodies and Oral Antivirals for the Treatment of COVID-19 During Times of Resource Limitations*, N.Y. DEP’T OF HEALTH, at 3 (Dec. 29, 2021), https://coronavirus.health.ny.gov/system/files/documents/2021/12/prioritization_of_mabs_during_resource_shortages_20211229.pdf [<https://perma.cc/6UAK-JWLG>] [hereinafter *State Guidance*]).

147. *Roberts v. Bassett*, No. 22-CV-710 (NGG) (RML), 2022 WL 785167, at *2 (E.D.N.Y. Mar. 15, 2022), *aff’d*, 2022 WL 16936210 (quoting *State Guidance*, *supra* note 146).

148. *Roberts*, 143 S. Ct. at 2425 (quoting in the second part *Roberts*, 2022 WL 16936210, at *3 n.2 (Cabranes, J., concurring)).

149. *Id.* (citing *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2164–65 (2023)).

150. *Id.*; see *Students for Fair Admissions*, 143 S. Ct. at 2169–70 (holding that universities may not make admissions decisions based on the “offensive and demeaning assumption that [students] of a particular race, because of their race, think alike” or express some “characteristic viewpoint”).

either provides or withholds damages by using race as a proxy for whatever life expectancy, work-life expectancy, or life income it believes to be “characteristic” for persons of the plaintiff’s race.¹⁵¹ Under *SFFA*, and especially as reflected by Justice Alito’s statement respecting the denial of certiorari in *Roberts*, that is unconstitutional.

As in the admissions context, none of this is to say that relevant factors related to or even caused by race may not be factored into damages calculations.¹⁵² For example, if a Black plaintiff’s infant decedent would have grown up in a neighborhood with low-quality public schools, a judge or jury may take that into account in estimating future earnings.¹⁵³ That is so even if the quality of the schools and the decedent’s residency in the neighborhood are the results of structural racial injustice.¹⁵⁴ Likewise, a plaintiff’s health problems may be considered in calculating life expectancy, even if racial discrimination contributed to those health problems. To paraphrase Justice Thomas:

If [a plaintiff] has less [educational opportunity], then surely a [judge or jury] may take that into account. If [a plaintiff] has medical struggles . . . [a judge or jury] may consider that too. What it cannot do is use the [plaintiff’s] skin color as a heuristic, assuming that because the [plaintiff is] “[B]lack” he therefore conforms to [patterns suggested by racial statistics].¹⁵⁵

That conclusion follows even if considering race is necessary to adequately capture other criteria correlated to race (such as the effects of discrimination on a person’s health) that could not be taken into account by reference only to race-neutral criteria. An analogous argument was made in *SFFA* by Justice Sotomayor, who contended that some aspects of an applicant’s identity cannot be captured by reference to anything independent of race because “racial identity informs some students’ viewpoints and experiences in unique ways” that may transcend “any other aspect of a student’s self-identification.”¹⁵⁶ She gave the example of a Black UNC alumna who testified that it was important to her that the university be able to consider “how the color of her skin and the texture of her hair impacted her upbringing.”¹⁵⁷ Certain aspects of an applicant’s background and

151. *Id.*

152. *Cf. Students for Fair Admissions*, 143 S. Ct. at 2176 (“[N]othing 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.”).

153. *Cf. id.* (noting that aspects of an applicant’s identity and experiences that are related to race may still be considered).

154. *Cf. id.* (allowing consideration of the effects of discrimination on an affected individual).

155. *Cf. id.* at 2203–04 (Thomas, J., concurring) (making the analogous argument in the context of university admissions).

156. *Id.* at 2252 (Sotomayor, J., dissenting).

157. *Id.* at 2251 (alterations omitted).

experiences—like how their skin color or hair texture has affected their lives—would be nearly impossible to consider by any means other than race.¹⁵⁸ As UNC said in its brief, it is often “hard . . . to separate race out from other things . . . about a student.”¹⁵⁹ Therefore, it was argued, considering race was necessary to evaluate applicants fully and fairly.¹⁶⁰

The Court in *SFFA* rejected that contention. While its opinion did not explicitly address the point, the majority was evidently unconvinced by Justice Sotomayor’s contrary argument in dissent.¹⁶¹ She argued that because some things about an applicant cannot be adequately considered apart from race, the Court’s assurance that race-related experiences and achievements could still be considered was “nothing but an attempt to put lipstick on a pig.”¹⁶² The majority was not convinced.¹⁶³

SFFA therefore establishes that consideration of race in the allocation of state-conferred benefits cannot be justified on the ground that it is necessary in order to capture relevant facts about a person that could not be adequately considered by reference to race-neutral criteria. It follows that analogous arguments should be rejected in the context of damages calculations. The most likely such argument relates to life expectancy. As explained above, research has demonstrated that racial discrimination has adverse health effects on Black Americans and tends to decrease life expectancy regardless of socioeconomic status.¹⁶⁴ Similarly, higher rates of alcoholism among Native Americans are likely related to discriminatory policies stretching back many generations.¹⁶⁵ Those sad realities may be nearly impossible to capture by reference to race-neutral criteria, especially in cases involving infants and young children with almost no medical history of their own. Nonetheless, courts (like admissions officers) will have to make

158. *See id.* (noting students’ testimony that “without [racial self-identification] they would not be able to present a full version of themselves”).

159. Brief by Univ. Respondents at 11, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 143 S. Ct. 2141 (2023) (No. 21-707) (cleaned up) [hereinafter Brief by Univ. Respondents]; *see also* Brief for Respondent at 50, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (No. 20-1199) [hereinafter Brief for Respondent] (explaining that Harvard’s admissions process allows “minority applicants . . . to receive a tip, regardless of whether they . . . feature [race] in their application” in order to “account for the many ways race may affect one’s background, without presuming that such influence matters only when an applicant chooses to write about it”).

160. *See* Brief by Univ. Respondents, *supra* note 159, at 10–11 (explaining the importance of considering race as part of a holistic review of an applicant).

161. *See Students for Fair Admissions*, 143 S. Ct. at 2175 (holding Harvard’s and UNC’s race-conscious admissions programs unconstitutional).

162. *Id.* at 2251 (Sotomayor, J., dissenting).

163. *See id.* at 2175 (majority opinion) (criticizing the dissent’s view of precedent and the proper role of the judiciary, and holding the universities’ programs unconstitutional).

164. *See* LaVeist, *supra* note 72 (finding that “exposure to racial segregation is associated with greater odds of death”).

165. Enoch & Albaugh, *supra* note 73.

do with less information. Just as a university might have to evaluate an applicant without relevant information that cannot be adequately captured by race-neutral criteria—like how “the color of [one’s] skin and the texture of [one’s] hair impacted [one’s] upbringing”¹⁶⁶—courts will have to set damages without certain relevant information, too.

2. *The “One Factor Among Many” Argument.*—As explained above, another argument for the constitutionality of race-conscious damages calculations is that race is considered as only one factor among many.¹⁶⁷ *SFFA* defeats this argument, too.

An analogous argument was made—and for a time, accepted by the Supreme Court—in the context of race-conscious college admissions. In *Bakke*, Justice Powell wrote that in order for a university’s consideration of an applicant’s race to be constitutional, it had to be “simply one element—to be weighed fairly against other elements—in the selection process.”¹⁶⁸ This, he explained, would ensure that even if race were dispositive in an admissions decision, it would only be after considering the applicant’s “combined qualifications,” not just their race.¹⁶⁹ Twenty-five years later, the Court in *Grutter* reaffirmed that race may only be considered “as one of many factors.”¹⁷⁰ Even Justice Kennedy in dissent accepted the premise that affirmative action in college admissions was permissible as long as, among other requirements, race was considered as “one, nonpredominant factor[.]”¹⁷¹ And in *SFFA*, Harvard considered the “one factor among many” feature of its admissions program to be of such importance that it included it in the “Questions Presented” page of its brief in opposition to certiorari.¹⁷²

Nonetheless, the Court struck down Harvard’s and UNC’s race-conscious admissions programs even though—as the universities’ briefs and the dissent emphasized—race was used as only one of many relevant factors.¹⁷³ While the Court did not directly address this point, it was not

166. *Students for Fair Admissions*, 143 S. Ct. at 2251 (Sotomayor, J., dissenting) (alterations omitted).

167. Yuracko & Avraham, *supra* note 57, at 340.

168. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1978) (opinion of Powell, J.).

169. *Id.*

170. *See Grutter v. Bollinger*, 539 U.S. 306, 338–39 (2003) (approving of a school’s admission program that also considers “a wide variety of characteristics besides race and ethnicity”).

171. *Id.* at 387 (Kennedy, J., dissenting).

172. Brief in Opposition at (i), *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (No. 20-1199).

173. *See* Brief for Respondent, *supra* note 159, at 15 (explaining that Harvard considers race as “one factor among many”); Brief by Univ. Respondents, *supra* note 159, at 8 (explaining that UNC employs the same tactic); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2251–52 (2023) (Sotomayor, J., dissenting) (noting that no individual would be admitted solely on the basis of race).

swayed by the emphasis placed on it in both universities' briefs and by the dissents.¹⁷⁴

If the “one factor among many” argument could not save the race-conscious admissions programs at issue in *SFFA*, it should not save race-conscious damages calculations, either. While race may be one factor among many, it remains true that once all the other factors have been considered and the damages sum adjusted accordingly, a Black plaintiff will still have his damages reduced for no reason apart from his race.¹⁷⁵ If he were white, he would have gotten, say, \$15 million; because he is Black, he will only get, say, \$12 million.

3. The History and Tradition Argument.—Next, *SFFA* establishes that race-conscious damages calculations are unconstitutional even if their use is consistent with the nation's history and tradition.

Arguments based on history and tradition were also made in the admissions context. For example, Justice Marshall's separate opinion in *Bakke* surveyed the history of race-conscious laws enacted by Congress to help newly freed slaves in the wake of the Civil War.¹⁷⁶ In their briefs in *SFFA*, Harvard and UNC cited similar history to argue that the original meaning of the Fourteenth Amendment did not require colorblindness.¹⁷⁷ Justice Sotomayor protested in dissent that the Reconstruction “Congress[']s enact[ment of] a number of race-conscious laws to fulfill the [Fourteenth] Amendment's promise of equality[] leav[es] no doubt that the Equal Protection Clause permits consideration of race to achieve its goal.”¹⁷⁸

Indeed, historical examples of race-conscious government programs designed to benefit people of color are truly numerous.¹⁷⁹ To offer one of many examples cited by Harvard and UNC, the Reconstruction Congress provided funding to Berea College in Kentucky, which used a race-conscious admissions policy to maintain a “fifty-fifty ratio of black and white

174. See *Students for Fair Admissions*, 143 S. Ct. at 2166 (majority opinion) (invalidating the admissions policies without considering these arguments explicitly).

175. Cf. *id.* at 2169 (noting that the universities “acknowledge that race is determinative in at least some—if not many—of the students they admit”).

176. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 396–98 (1978) (opinion of Marshall, J.) (citing historical evidence contemporary to the ratification of the Fourteenth Amendment to argue that race-consciousness is permissible).

177. Brief for Respondent, *supra* note 159, at 22–25 (“[I]n this case, the history is anything but inconclusive; a strong record of legislation, state and federal, clearly refutes SFFA's ‘rule of racial neutrality.’” (quoting Brief for Petitioner at 60, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (No. 20-1199))); Brief by Univ. Respondents, *supra* note 159, at 28–33 (citing examples of race-conscious government programs during Reconstruction, the same period in which the Fourteenth Amendment was ratified).

178. *Students for Fair Admissions*, 143 S. Ct. at 2228 (Sotomayor, J., dissenting).

179. See Brief by Univ. Respondents, *supra* note 159, at 28–33 (citing examples of race-conscious government programs during Reconstruction).

students.”¹⁸⁰ The policy remained in place until 1904, when Kentucky enacted a law banning interracial education in the state.¹⁸¹ The Supreme Court upheld that law.¹⁸² About 50 years later in *Brown v. Board of Education*,¹⁸³ however, the Court cited *Berea* and implicitly recognized that the Kentucky law was unconstitutional.¹⁸⁴ But the Court never even remotely suggested that Berea’s fifty-fifty admissions policy was problematic.

Nevertheless, the majority in *SFFA* was not persuaded by that history. It addressed the Reconstruction-era examples by acknowledging that there is a compelling interest in remedying specific instances of unconstitutional discrimination.¹⁸⁵ But the Court did not directly address the post-Reconstruction history (like pre-1904 Berea College), opting instead to rely on more recent precedents like *City of Richmond v. J.A. Croson Co.*¹⁸⁶ and *Shaw v. Hunt*,¹⁸⁷ both of which held that alleviating the effects of general societal discrimination (as opposed to specific instances of discrimination by the state) does not constitute a compelling interest.¹⁸⁸ Those cases established that “[t]he dissents’ [contrary] interpretation of the Equal Protection Clause [was] not new” and that the Court “ha[d] long rejected” their view that race-conscious measures are broadly permissible for remedial purposes.¹⁸⁹

Justice Thomas engaged more seriously with the historical evidence, largely by relying on the legislative history of the Fourteenth Amendment’s passage by Congress.¹⁹⁰ In a footnote, he disputed the premise that Berea’s admissions policy was race-conscious by quoting a statement by the school’s then-president that it “would welcome ‘all races of men, without

180. See Paul David Nelson, *Experiment in Interracial Education at Berea College, 1858-1908*, 59 J. NEGRO HIST. 13, 13 (1974) (describing Berea College’s principle of “total equality” between black and white students); RICHARD SEARS, A UTOPIAN EXPERIMENT IN KENTUCKY: INTEGRATION AND SOCIAL EQUALITY AT BERE, 1866–1904, at 56, 63, 89 (1996) (noting that the Freedmen’s Bureau, a federal agency, provided financial support for Berea College during this period).

181. See *Berea Coll. v. Kentucky*, 211 U.S. 45, 46 (1908) (explaining that the law made it “unlawful . . . to maintain or operate any college . . . where persons of the white and negro races are both received as pupils for instruction” (quoting 1904 Ky. Acts 181)).

182. *Id.* at 58.

183. 347 U.S. 483 (1954).

184. See *id.* at 491 & n.7, 495 (citing *Berea* as a “separate but equal” case and ultimately holding that “separate but equal” in public education is unconstitutional).

185. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2162 (2023).

186. 488 U.S. 469 (1989).

187. 517 U.S. 899 (1996).

188. *Students for Fair Admissions*, 143 S. Ct. at 2173–74 (first citing *Hunt*, 517 U.S. at 909–10; and then citing *Croson*, 488 U.S. at 505).

189. *Id.* at 2173.

190. See *id.* at 2180–85 (Thomas, J., concurring) (surveying the relevant history and concluding that “[o]ur Constitution is color-blind” (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))).

distinction”—a statement that hardly contradicts the school’s consideration of race to achieve a fifty-fifty ratio between white and Black students.¹⁹¹ And in the end, Justice Thomas, like the other Justices in the majority, was not swayed by the longstanding historical *practice* of remedial, race-conscious government programs.¹⁹²

If that longstanding practice could not save race-conscious admissions programs from being unconstitutional, surely race-conscious damages calculations cannot be upheld on that basis, either. Admittedly, there does exist a long historical practice of using race to calculate damages.¹⁹³ But there existed an even longer history of race-conscious government benefit programs—including in higher education—and that was not enough to save Harvard and UNC’s admissions policies.¹⁹⁴ If, as *SFFA* strongly suggests, the Equal Protection Clause requires the government to be colorblind despite contrary historical practice, it must be colorblind in setting damages.

4. *The No-Invidious-Purpose Argument.*—Finally, *SFFA* refutes the argument, discussed above, that the use of race to calculate damages should be subject to a more lenient form of strict scrutiny because it is not motivated by any invidious purpose.

Nowhere could the phenomenon of watered-down strict scrutiny be seen more vividly than in the college admissions context. In *Grutter*, for example, the Court purported to apply strict scrutiny to the University of Michigan Law School’s race-conscious admissions policy.¹⁹⁵ But as Chief Justice Rehnquist pointed out in dissent, the Court’s “application of [strict scrutiny was] unprecedented in its deference.”¹⁹⁶ He lamented that “[b]efore the Court’s decision today . . . [w]e rejected calls to use more lenient review in the face of claims that race was being used in ‘good faith.’”¹⁹⁷ Nonetheless, the Court seemed to have done exactly that.¹⁹⁸

In *SFFA*, the Court abandoned its unspoken practice of subjecting racial classifications to varying levels of scrutiny depending on the legitimacy of the classification’s purpose or the propriety of its motive. It affirmed that

191. *Id.* at 2186 n.3 (quoting SHANNON H. WILSON, *BEREA COLLEGE: AN ILLUSTRATED HISTORY* 2 (2006)). *But see* Nelson, *supra* note 180, at 13 (describing the race-conscious admissions program of Berea College during and after Reconstruction).

192. *Id.* at 2187–88.

193. *See, e.g., The Saginaw*, 139 F. 906, 914 (S.D.N.Y. 1905) (using race-based mortality statistics to calculate damages in 1905).

194. *See supra* notes 176–84 and accompanying text.

195. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

196. *Id.* at 380 (Rehnquist, C.J., dissenting).

197. *Id.* at 379 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995)).

198. *See id.* at 380–82 (arguing that the Court applied a particularly deferential version of strict scrutiny analysis given evidence that the school’s program bore “little to no relation to its asserted goal of achieving ‘critical mass’”).

“racial discrimination is invidious in *all* contexts,” and strict scrutiny must therefore apply “however well intentioned” the racial classification at issue.¹⁹⁹ The Court then went on to apply proper strict scrutiny. First, it held that the goals asserted by the universities were not concrete enough to be measured by courts for purposes of strict scrutiny.²⁰⁰ That holding stands in sharp contrast to *Grutter*, where the Court held that “the educational benefits that flow from a diverse student body” qualified as a compelling interest and deferred to “[t]he Law School’s educational judgment that such diversity is essential[.]”²⁰¹ The *SFFA* Court further held that the universities’ admissions practices flunked strict scrutiny’s narrow tailoring requirement, as they were “plainly overbroad” and presented a “mismatch” between the goals being sought and the means used to achieve them.²⁰² Thus, *SFFA* establishes that even those racial classifications that are “well intentioned and implemented in good faith” are subject to strict scrutiny of the most daunting kind.²⁰³ Therefore, the use of race in damage calculations must undergo serious, non-watered-down strict scrutiny, even assuming it is done with the best of intentions.

* * *

C. Counterarguments

I next address and rebut three potential counterarguments to the contention that *SFFA* is the nail in the constitutional coffin of race-conscious damages calculations.

1. *The Argument that SFFA Only Got Serious About Strict Scrutiny and Didn’t Establish New Law.*—One potential counterargument could be that *SFFA* did not really establish any new principles of law; rather, it only represents the Court “getting serious” about applying strict scrutiny to all racial classifications.²⁰⁴ Therefore, the argument would go, there is not much from *SFFA* that changes the constitutional landscape surrounding the use of race in damages calculations.

199. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2166 (emphasis added) (cleaned up) (quoting *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 619 (1991)).

200. *Id.* at 2166–67.

201. See *Grutter*, 539 U.S. at 328 (quoting in the first part Brief in Opposition at (i), *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. 02-241)).

202. *Students for Fair Admissions*, 143 S. Ct. at 2167–68.

203. *Id.* at 2166.

204. See Reginald C. Oh, *What the Supreme Court Really Did to Affirmative Action*, WASH. MONTHLY (July 20, 2023), <https://washingtonmonthly.com/2023/07/20/what-the-supreme-court-really-did-to-affirmative-action/> [https://perma.cc/5QF2-YJB7] (arguing that “race-conscious policies are not categorically barred after [*SFFA*], but] schools must comply with a new strict scrutiny standard”).

The obvious response is that, if nothing else, *SFFA* establishes that a racial classification is subject to the serious kind of strict scrutiny notwithstanding any of the contrary arguments discussed above (namely, that the classification (1) merely reflects the sad reality that race still matters in our society; (2) is one factor among many; (3) is supported by history and tradition; and (4) is motivated by legitimate purposes, not invidious ones).

And the practice of using race to calculate damages would very likely be invalidated under strict scrutiny. For one, marginal improvements in accuracy in damages calculations is almost certainly not a “compelling interest.”²⁰⁵ And even if it were, the use of race in damages calculations lacks the “exact connection between justification and classification” that strict scrutiny requires.²⁰⁶ The Court in *SFFA* held that the universities’ admissions policies did not satisfy this requirement because the six racial categories they used—“(1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American”—were “plainly overbroad.”²⁰⁷ For example, applicants from India, Japan, and Thailand would all be classified as “Asian,” meaning a classroom with three Indian students in it would be considered just as diverse as a classroom with one Indian student, one Japanese student, and one Thai student.²⁰⁸ And when questioned at oral argument, UNC’s counsel could not say how applicants of Middle Eastern descent would be classified.²⁰⁹ Strict scrutiny, the Court explained, would not tolerate such imprecision.²¹⁰

The use of race in damages calculations in pursuit of greater accuracy, like the use of race in college admissions in pursuit of diversity, lacks the “exact connection between justification and classification” required by strict scrutiny.²¹¹ Here, too, the classifications used are “plainly overbroad.”²¹² Much like the admissions policies at issue in *SFFA*, mortality tables typically categorize all persons into only five racial and ethnic groups: (1) Hispanic, (2) American Indian or Alaska Native, (3) Asian, (4) Black, and (5) White.²¹³

205. Starr, *supra* note 16, at 609; *cf. Grutter*, 539 U.S. at 357 (Thomas, J., concurring in part and dissenting in part) (“[M]arginal improvements in legal education do not qualify as a compelling state interest.”).

206. See *Students for Fair Admissions*, 143 S. Ct. at 2167–68 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)) (criticizing the overbreadth of the universities’ racial classifications).

207. *Id.* at 2167.

208. See *id.* at 2167–68 (“[B]y grouping together all Asian students, for instance, respondents are apparently uninterested in whether *South* Asian or *East* Asian students are adequately represented, so long as there is enough of one to compensate for a lack of the other.”).

209. *Id.* at 2168 (quoting Transcript of Oral Argument at 107–08, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (No. 21-707)).

210. *Id.*

211. *Cf. id.* (quoting *Gratz*, 539 U.S. at 270).

212. *Cf. id.* at 2167 (holding that overbroad and undefined racial categories elide diversity within racial groups).

213. See, e.g., Arias et al., *supra* note 20, at 50.

That papers over massive differences in the experiences of persons of different racial and ethnic backgrounds such as, say, those of Pakistani descent and those of Chinese descent, both of whom would presumably be classified as “Asian.”²¹⁴ It also ignores differences in the experiences of persons of the same race.²¹⁵ And finally, like in the admissions context, it is unclear how certain plaintiffs would be classified under this five-category system.²¹⁶ For these reasons, the use of race is by no means narrowly tailored to achieve accurate estimates of earnings and longevity.²¹⁷

Thus, even if *SFFA* only represents the Court “getting serious” about strict scrutiny, race-based damages calculations cannot survive and are unconstitutional all the same.²¹⁸

2. *The Argument that Race-Based Damages Calculations Are Based on Statistics, Not Stereotypes.*—Another possible counterargument is that using race in damages calculations is different from using it in college admissions because it uses measurable statistical facts, usually presented by an expert, instead of amorphous stereotypes. While the two practices differ in that way, it is unclear how that difference would alter the analysis. The Supreme Court has made crystal clear that all racial classifications are subject to strict scrutiny.²¹⁹ It has never carved out an exception to that principle for classifications based on statistics rather than stereotypes.²²⁰ And while one could argue that reliance on statistics is more likely to satisfy strict scrutiny’s narrow tailoring requirement than reliance on stereotypes, both involve predicting a person’s future based on generalizations about their race—which would seem to be the essence of what equal protection forbids.²²¹

214. *See id.* (dividing people into racial and ethnic groups that are themselves internally diverse); *McMillan v. City of New York*, 253 F.R.D. 247, 251 (E.D.N.Y. 2008) (“[T]he tables frequently employed by courts in determining tort damages fail to account for the nuanced reality of ‘racial’ heritage in the United States today.”).

215. *See McMillan*, 253 F.R.D. at 252 (“[D]etailed investigations into the life expectancy gap between ‘White’ and ‘Black’ Americans have shown that life expectancy varies within ‘racial’ groups by economic characteristics and geography.”).

216. *See id.* at 249 (highlighting the ambiguity and absurdity associated with categorizing mixed-race individuals into strict racial categories).

217. *See Starr, supra* note 16, at 608–09 (noting that racial categories often lack predictive value as there is a large degree of variation within groups).

218. *See Oh, supra* note 204 (arguing that “race-conscious policies are not categorically barred after [*SFFA*], but] schools must comply with a new strict scrutiny standard”).

219. *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (quoting *Adarand Constructors Co. Inc. v. Pena*, 515 U.S. 200, 224 (1995)).

220. *Starr, supra* note 16, at 592–93.

221. *Cf. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2170 (2023) (rejecting “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)).

Consider, for example, the case of *Buck v. Davis*.²²² *Buck* was a capital habeas case in which Buck sought relief for ineffective assistance of his trial counsel.²²³ Texas law provides that before a jury may sentence a defendant to death, it must find that there is “a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.”²²⁴ During the penalty phase of Buck’s trial, his counsel elicited testimony from his own expert that his race (Black) made it statistically more likely that he would pose a danger to others in the future.²²⁵ As a result, the Court held that Buck’s counsel was indeed ineffective and granted his request for habeas relief.²²⁶

The Court explained that “[i]t would be patently unconstitutional for a State to argue that a defendant is liable to be a future danger because of his race.”²²⁷ And it was no less problematic coming from a defense expert.²²⁸ Indeed, the expert’s presentation of “hard statistical evidence . . . to guide an otherwise speculative inquiry[,]” if anything, made the situation worse, not better.²²⁹ The same was true of his status as an expert, which communicated to jurors that he bore “the court’s imprimatur.”²³⁰ Thus, *Buck* stands for the proposition that racial discrimination is unconstitutional even (or perhaps especially) when it is based on an expert’s statistics instead of a university’s stereotypes.²³¹ Although *Buck* was a capital case, the same equal protection principles should apply in the context of civil damages calculations.²³²

Just like in the criminal context, civil judges and juries should be barred from using racial statistics to decide what benefits or burdens to bestow upon

222. 580 U.S. 100 (2017).

223. *Id.* at 105, 118–19.

224. *Id.* at 105–06 (quoting Tex. Code Crim. Proc. Ann. art. 37.071, § 2(b)(1) (West)).

225. *Id.* at 107.

226. *Id.* at 128.

227. *Id.* at 119.

228. *See id.* at 125–26 (“[I]t is inappropriate to allow race to be considered as a factor in our criminal justice system [regardless of] whether the prosecutor or ineffective defense counsel initially injected race into the proceeding.” (quoting Joint Appendix at 213A, *Buck v. Davis*, 580 U.S. 100 (2017) (No. 15-8049) (internal quotations omitted))).

229. *See id.* at 121 (noting the “poten[cy]” of the expert’s testimony).

230. *Id.*

231. *See Starr, supra* note 16, at 593 (arguing that *Buck* represents a “resoundin[g] reject[ion of] race-based statistical discrimination”).

232. *Cf. San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30–33 (1973) (rejecting the proposition that the appropriate level of equal protection scrutiny varies based on “the importance of the interest affected”).

a litigant.²³³ The fact that race-based damages calculations are based on statistics instead of stereotypes cannot render them constitutional.²³⁴

That conclusion is reinforced by Justice Alito’s statement respecting the denial of certiorari in *Roberts v. McDonald*.²³⁵ As explained above, New York had directed healthcare providers administering a novel COVID-19 treatment, which was then in limited supply, to prioritize patients with certain “risk factors,” one of which was “non-white race or Hispanic/Latino ethnicity.”²³⁶ This, the state explained, was based on data from the Centers for Disease Control and Prevention (CDC) showing that persons of color—especially Black and Hispanic individuals—were significantly more likely than whites to be hospitalized or die of COVID-19.²³⁷ Justice Alito, apparently unpersuaded by that data, cited *SFFA* to warn that “government actors may not provide or withhold services based on race or ethnicity as a response to generalized discrimination or as a convenient or rough proxy for another trait the government believes to be ‘characteristic’ of a racial or ethnic group.”²³⁸ If racial preferences were unconstitutional in *Roberts* despite statistical support, they must be unconstitutional here, too.

Conclusion

SFFA confirms that the use of race to calculate damages cannot be squared with the demands of equal protection. In appropriate cases, litigants should object to this practice and pursue the issue on appeal. Courts should be forced to distinguish the use of race in college admissions from the use of race in setting damages. For the reasons I have explained, they will be hard-pressed to do so.

233. Cf. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2202 (2023) (Thomas, J., concurring) (“[A]ny statistical gaps between the average wealth of [B]lack and white Americans is constitutionally irrelevant.”).

234. See Starr, *supra* note 16, at 593, 606 (arguing that “without the ability to rely on statistical generalizations,” which the Court in *Buck* squarely rejected, “any coherent defense of [statistical tables to calculate damages] falls apart”).

235. *Roberts v. McDonald*, 143 S. Ct. 2425 (2023) (Alito, J., statement respecting the denial of certiorari).

236. *Roberts v. Bassett*, No. 22-622-cv, 2022 WL 16936210, at *1 (2d Cir. Nov. 15, 2022) (quoting State Guidance, *supra* note 146).

237. Brief in Opposition for Respondent Department of Health and Mental Hygiene of the City of New York at 4, *Roberts v. McDonald*, 143 S. Ct. 2425 (2023) (No. 22-757).

238. *Roberts*, 143 S. Ct. at 24a25 (Alito, J., statement respecting the denial of certiorari) (citing *Students for Fair Admissions*, 143 S. Ct. at 2164–65).