

DID THE COURT IN *SFFA* OVERRULE *GRUTTER*?

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In Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA), the Supreme Court held that affirmative action programs designed to comply with the precedent set in Grutter v. Bollinger were unlawful. Yet the Court nowhere said that it was overruling Grutter and, in fact, relied on Grutter as authority. Neither the Justices themselves nor subsequent commentators have been able to agree on what, if anything, remains of Grutter today. Did SFFA overrule Grutter or not? This Essay analyzes that question and its normative fallout. The Essay concludes that SFFA at least partially overruled Grutter and that the Court's failure to acknowledge as much should trouble us. What exactly is left of Grutter will be a question for future parties to litigate and for lower courts to resolve as they struggle to apply SFFA's opaque reasoning.

INTRODUCTION

The Supreme Court's decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA)* came as a surprise in one respect.¹ The case addressed whether race-conscious admissions at Harvard and the University of North Carolina (UNC) violated Title VI of the Civil Rights Act of 1964 or the Equal Protection Clause of the Fourteenth Amendment.² The admissions programs at those schools were materially identical to an admissions program that the Court had upheld twenty years earlier in *Grutter v. Bollinger*.³ So, when the Court granted certiorari in *SFFA*, many onlookers expected the Court to overrule *Grutter* en route to concluding that Harvard

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1 143 S. Ct. 2141 (2023).

2 *Id.* at 2154, 2156.

3 539 U.S. 306 (2003).

and UNC's admissions programs were unlawful.⁴ But that is not what the Court did—at least not explicitly.

The Court did decide that Harvard and UNC's admissions programs were unlawful,⁵ but it nowhere said that it was overruling *Grutter*. To the contrary, Chief Justice John Roberts's majority opinion relied heavily on *Grutter* as authority,⁶ and Justice Brett Kavanaugh wrote separately to “explain why the Court’s decision . . . is consistent with and follows from . . . the Court’s precedents on race-based affirmative action.”⁷ At the same time, however, Justice Clarence Thomas's concurrence stated that “*Grutter* is, for all intents and purposes, overruled.”⁸ And Justice Sonia Sotomayor's dissent accused the Court of “overruling decades of precedent” while “‘disguis[ing]’ its ruling as an application of ‘established law.’”⁹

So, did the Court overrule *Grutter* or not? As the Justices' varying statements suggest, and as subsequent commentary confirms,¹⁰ answering that question is not simple and requires clarifying what it means to overrule precedent. My goal in this Essay is to leverage work on the philosophy of precedent to analyze how the Court treated *Grutter* and whether we should be troubled by the Court treating precedent that way. I will argue that the Court must have at least partially overruled *Grutter*, given the absence of any nonarbitrary factual difference between *Grutter* and *SFFA*. Moreover, I will propose that the Court's doing so should trouble us—even those who cheered *SFFA*'s result should regret *how* the Court reached that result.

4 E.g., Mitchell F. Crusto, *A Plea for Affirmative Action*, 136 HARV. L. REV. F. 205, 213 (2023); Khiara M. Bridges, *The Supreme Court, 2021 Term—Foreword: Race in the Roberts Court*, 136 HARV. L. REV. 23, 135 (2022).

5 *SFFA*, 143 S. Ct. at 2175.

6 See *infra* note 100.

7 *SFFA*, 143 S. Ct. at 2221 (Kavanaugh, J., concurring).

8 *Id.* at 2207 (Thomas, J., concurring).

9 *Id.* at 2239 (Sotomayor, J., dissenting) (quoting *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2450 (2022) (Sotomayor, J., dissenting)).

10 Compare Jeannie Suk Gersen, *The Supreme Court Overturns Fifty Years of Precedent on Affirmative Action*, NEW YORKER (June 29, 2023), <https://www.newyorker.com/news/daily-comment/the-supreme-court-overturns-fifty-years-of-precedent-on-affirmative-action> [<https://perma.cc/RC5M-S9YC>] (suggesting that *SFFA* effectively overruled *Grutter*), and Amy Howe, *Supreme Court Strikes Down Affirmative Action Programs in College Admissions*, SCOTUSblog (June 29, 2023, 12:31 PM), <https://www.scotusblog.com/2023/06/supreme-court-strikes-down-affirmative-action-programs-in-college-admissions/> [<https://perma.cc/2EC4-NVQN>] (same), with 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/ATZ6-KG2J>] (emphasizing that *SFFA* did not overrule *Grutter*), and Jeffrey S. Lehman, *Don't Misread SFFA v. Harvard*, INSIDE HIGHER ED (July 17, 2023), <https://www.insidehighered.com/opinion/views/2023/07/17/dont-misread-sffa-v-harvard-opinion> [<https://perma.cc/U987-Z2CP>] (same).

Asking whether *SFFA* overruled *Grutter* may sound formalistic or too far removed from *SFFA*'s impact on the ground, but the question is practically significant. Whether the Court overruled *Grutter* matters not just to how parties litigate, and lower courts resolve, the challenges to universities' admissions systems that will inevitably follow but also to how we normatively assess what the Court did in *SFFA*. If the Court partially overruled *Grutter* without saying so, then that choice calls into doubt the Court's sincerity and good faith. It also creates needless legal uncertainty, making it harder for parties to comply with the Court's holdings. And it risks causing further harm to the Court's already dwindling legitimacy in the public eye.¹¹

The Essay proceeds in four Parts. Part I considers how precedent factors into courts' reasoning and what it means to overrule precedent. Part II briefly summarizes the Court's affirmative action precedents. Part III argues that *SFFA* at least partially overruled *Grutter*. And Part IV analyzes the normative fallout of that conclusion, drawing on Barry Friedman's work on "stealth overruling"¹² and my own work on "obstructing precedent."¹³

I. PRECEDENTIAL REASONING

Like riding a bicycle or whistling a tune, reasoning with precedent is something that experienced lawyers do intuitively, often without being able to describe exactly how they do it. Lawyers all share a loose sense of what it means to follow, distinguish, or overrule precedent, and that loose sense ordinarily suffices in day-to-day practice. But answering a complex question like "Did *SFFA* overrule *Grutter*?" requires that we be more precise. My aim in this Part is to sketch a descriptive model of precedential reasoning that will allow us to analyze that question more rigorously.

How does a court's decision in one case constrain subsequent courts' reasoning in other cases? A precedent, I will assume, lays down a rule specifying the facts that sufficed to conclude something about the parties' legal rights.¹⁴ We can call this rule the precedent's

11 See Katy Lin & Carroll Doherty, *Favorable Views of Supreme Court Fall to Historic Low*, PEW RSCH. CTR. (July 21, 2023), <https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/> [<https://perma.cc/9Q35-QCZC>].

12 Barry Friedman, *The Wages of Stealth Overruling (With Particular Attention to Miranda v. Arizona)*, 99 GEO. L.J. 1, 4 (2010).

13 Bill Watson, *Obstructing Precedent* (Aug. 10, 2023) (unpublished manuscript) (on file with author).

14 In this Part, I offer a rule model of precedent, drawing on the work of Joseph Raz. See JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 180, 183–89 (2d ed. 2009); see also FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* 182 (1993) (presenting a

“holding.”¹⁵ Using letters from the start of the alphabet to denote facts and letters from the end of the alphabet to denote legal conclusions, we can represent a holding like so: “If *A, B, C, . . .*, then *X*.”¹⁶ For example, the holding in *Miranda v. Arizona* might be: “If [*A*] someone makes a statement to police [*B*] in custodial interrogation [*C*] without warnings safeguarding their right against self-incrimination, then [*X*] the statement is inadmissible against that person at trial.”¹⁷

The precedent court might expressly state its holding, but often-times, its holding must be inferred from an opinion’s recorded facts, reasoning, and disposition of a legal issue. Indeed, very often, the content of the holding will be severely underdetermined, leaving substantial room to disagree over what exactly the holding is.¹⁸ It may be unclear which facts belong in the holding’s antecedent (its “if” clause) or whether to describe some facts at a lower or higher level of generality (e.g., in a holding regarding liability for a dog bite, does the holding concern bites by a certain breed of dog, by any kind of dog, or by any kind of animal?).

A precedent court’s holding constrains courts of equal or lower rank in its jurisdiction. When the precedent governs a later case, those courts face a choice: they can follow, distinguish, or—if they have the power—overrule the precedent.¹⁹ More specifically, a precedent governs a later case when every fact in the holding’s antecedent (*A, B, C, . . .*) is instantiated in that case. A court *follows* the prec-

version of the rule model); Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 1, 17–28 (1989) (same). The rule model is not the only model of precedent. See, e.g., Barbara Baum Levenbook, *The Meaning of a Precedent*, 6 LEGAL THEORY 185, 186 (2000) (offering a result model of precedent); John F. Horty, *Rules and Reasons in the Theory of Precedent*, 17 LEGAL THEORY 1, 3 (2011) (offering a reason model of precedent). Ultimately, the choice of model is immaterial to whether *SFFA* overruled *Grutter* because the answer is yes on all of these models. See *infra* note 87. If anything, it is harder to show that *SFFA* overruled *Grutter* on the rule model than on the result or reason models.

15 Lawyers use the term “holding” in different ways. Some use it to describe just a court’s resolution of the parties’ concrete legal dispute and use “*ratio decidendi*” to describe a rule abstracted from the holding. BRYAN A. GARNER ET AL., *THE LAW OF JUDICIAL PRECEDENT* 46 (2016). But others use the word “holding,” as I do here, to describe the precedent’s rule. *Id.*

16 More precisely, these letters stand for *types* of facts and *types* of legal conclusions, individual tokens of which are instantiated in specific cases. For the sake of readability, I will not distinguish between types and tokens in the main text. On the type-token distinction, see generally Linda Wetzel, *Types and Tokens*, STAN. ENCYCLOPEDIA PHIL. (2018), <https://plato.stanford.edu/entries/types-tokens/> [<https://perma.cc/TMH9-G4FM>].

17 See 384 U.S. 436, 444–45 (1966).

18 See SCHAUER, *supra* note 14, at 184.

19 See RAZ, *supra* note 14, at 183–86.

edent if it reaches the same legal conclusion as the precedent (*X*).²⁰ By contrast, a court *distinguishes* the precedent if it reasons that a fact present in the precedent case but absent from the instant case warrants reaching the opposite legal conclusion (not-*X*).²¹

Distinguishing thus involves interpreting or narrowing a holding to make clear that it does not govern the case at hand. For instance, the Supreme Court in *Harris v. New York* arguably distinguished *Miranda* when it ruled that un-Mirandized statements could be admitted to impeach a testifying defendant.²² The Court, in essence, narrowed *Miranda*'s holding by adding a factual condition: "If [A] someone makes a statement to police [B] in custodial interrogation [C] without warnings safeguarding their right against self-incrimination and [D] the statement is not used for impeachment, then [X] the statement is inadmissible against that person at trial." That freed the Court to conclude that the statement in *Harris* was properly admitted.²³

Courts' discretion to distinguish is not unlimited. Legal practice in common law jurisdictions like ours puts at least three constraints on distinguishing. First, a court can only add fact-types to the holding's antecedent; it cannot modify or remove fact-types from the antecedent.²⁴ It cannot, for instance, change "If A, B, C, then X" to "If A, B, then X." Call this the *narrowing constraint*.²⁵ Second, the holding cannot be modified in a way that would make it cease to require the precedent's outcome.²⁶ The Court in *Harris* was able to distinguish *Miranda* as it did only because *Miranda* itself did not involve using an out-of-court statement to impeach a testifying defendant.²⁷ Call this the *conservation constraint*.

20 See *id.* at 183.

21 See *id.* at 185.

22 *Harris v. New York*, 401 U.S. 222, 226 (1971).

23 To be clear, distinguishing does two things: (1) it interprets or narrows the precedent's holding in such a way as to free the court to decide not-*X*; and (2) it creates a new holding to justify the decision in the instant case—a new rule whose consequent is not-*X*.

24 RAZ, *supra* note 14, at 186.

25 The narrowing constraint is most intuitive when we consider lower courts distinguishing a higher court's precedent (vertical precedent). If a lower court were to reason that *C* was superfluous and that the new rule should be just "If A, B, then X," the lower court would be overstepping its authority. Violating the narrowing constraint is something that courts can at most do to horizontal precedent and so is more akin to overruling. I propose below that violating the narrowing constraint while adhering to the other constraints is a special form of overruling, i.e., "revising precedent." See text accompanying *infra* note 34.

26 RAZ, *supra* note 14, at 186.

27 See *Miranda v. Arizona*, 384 U.S. 436, 445 (1966).

Third, any alteration to the precedent's holding must be related to the parties' desert or public policy.²⁸ Call this the *nonarbitrariness constraint*. Imagine that the statement in *Miranda* was offered into evidence on a Monday but that the statement in *Harris* was offered into evidence on a Friday. The Court in *Harris* could not have distinguished *Miranda* by narrowing its holding to be: "If [A] someone makes a statement to police [B] in custodial interrogation [C] without warnings safeguarding their right against self-incrimination and [D] the statement is offered into evidence on a Monday, then [X] the statement is inadmissible against that person at trial." The day of the week has no moral or political significance in this context.

All courts have the power to distinguish but only some have the power to overrule. To *overrule* a precedent is to either erase its holding from the law altogether or amend it in a way that violates one of the foregoing constraints on distinguishing.²⁹ A court that can overrule precedent is bound by precedent in only a thin sense: the court must follow, distinguish, or overrule any precedent that governs the case at hand; and if the court elects to overrule, then it has a legal duty to explain why it does so.³⁰ (Whether the Court in *SFFA* violated such a legal duty to explain itself is partly what this Essay is about.) The doctrine of horizontal stare decisis governs what shape that explanation must take but imposes relatively little constraint.³¹

Two more distinctions bear noting. First, overruling can be full or partial. To fully overrule a precedent is to erase *all* of its holdings from the law.³² By contrast, partial overruling can take two forms. A court can erase some but not all of a precedent's holdings. Or a court can modify or remove fact-types from a holding but without calling into doubt the precedent's outcome (think of how *Planned Parenthood of Southeastern Pennsylvania v. Casey* partially overruled *Roe v. Wade* by amending *Roe*'s trimester framework to an undue-burden standard).³³ It will help to give the latter form of partial overruling its

28 Raz does not explicitly identify this constraint, but it may be implicit in his analysis. See RAZ, *supra* note 14, at 187. Regardless, I take this constraint to be part of our practice.

29 *Id.* at 189.

30 See Andrei Marmor, *Presumptive Reasons and Stare Decisis*, in *PHILOSOPHICAL FOUNDATIONS OF PRECEDENT* 255, 265 (Timothy Endicott, Hafsteinn Dan Kristjánsson & Sebastian Lewis eds., 2023) (contending that horizontal precedent gives courts a "strong presumptive reason" and hence a legal obligation to either follow it or explain why the reasons for normally following horizontal precedent are defeated).

31 See Frederick Schauer, *Stare Decisis—Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT. REV. 121, 132.

32 See GARNER ET AL., *supra* note 15, at 392.

33 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 872–79 (1992) (plurality opinion), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *Roe*

own name, so let us call it “revising precedent” and reserve the term “overruling” for erasing one or more holdings from the law.³⁴

Second, overruling can be explicit or implicit—though the Supreme Court disfavors implicit overruling.³⁵ A court explicitly overrules a precedent when it says outright that it is overruling the precedent. By contrast, a court implicitly overrules a precedent when it does not say that it is overruling the precedent but its holding in the case at hand is irreconcilable with the precedent’s outcome. The court’s holding would, if applied to the prior case, require that case to come out differently than it did. In that event, there is no way to harmonize the holdings of the instant case and the prior case, so we assume that only the more recent holding remains the law.

Precedential reasoning is a complex topic, and we have only scratched the surface. But the foregoing provides a foothold from which to start our analysis of *SFFA*. In sum, a precedent lays down a rule. When that rule governs a later case, a court has a choice: it can follow, distinguish, or—if it has the power—revise or overrule the precedent. To follow a precedent is to adopt its legal conclusion. To distinguish a precedent is to interpret or narrow its holding so that it still governs the precedent case but no longer governs the instant case. To revise a precedent is to amend its holding without calling into doubt the precedent’s outcome. And to overrule a precedent is to erase, explicitly or implicitly, one or more of its holdings from the law.

II. THE COURT’S AFFIRMATIVE ACTION PRECEDENTS

Let us turn now to the Court’s affirmative action precedents leading up to *SFFA*. In 1978, in *Regents of the University of California v. Bakke*, a deeply fractured Court addressed challenges under Title VI and the Equal Protection Clause to race-conscious admissions at the Medical School of the University of California.³⁶ The Medical School set aside sixteen of its one hundred spots in each entering class for “disadvantaged” minority students.³⁷ Four Justices would have upheld the program on grounds that it was substantially related to the state’s interest in remediating past discrimination.³⁸ Four other Jus-

v. Wade, 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228 (2022).

34 Watson, *supra* note 13, at 30.

35 See, e.g., *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) (“This Court does not normally overturn . . . earlier authority *sub silentio*.”).

36 438 U.S. 265, 277–78 (1978) (Powell, J.).

37 *Id.* at 278–79.

38 *Id.* at 362 (Brennan, White, Marshall & Blackmun, JJ., concurring in judgment in part and dissenting in part).

tices would have concluded that the program was unlawful under Title VI, without reaching the equal-protection question.³⁹

Justice Lewis Powell took a middle road. He reasoned that, under both Title VI and the Equal Protection Clause, the use of race in university admissions was subject to strict scrutiny and so was lawful only if narrowly tailored to serve a compelling state interest.⁴⁰ He stated that, while remediating past discrimination was not a compelling state interest, obtaining the educational benefits of a racially diverse student body was.⁴¹ In this case, however, the Medical School's quota system was not narrowly tailored to achieve that interest and so failed strict scrutiny.⁴² Notably, Justice Powell held up Harvard's admissions plan, which treated race not as a quota but as a "plus" factor, as an example of how to pass legal muster.⁴³

In the decades that followed, lower courts divided over whether Justice Powell's opinion stated *Bakke's* holding.⁴⁴ Any need to answer that question, however, was obviated in 2003 when the Court decided *Grutter* and *Gratz v. Bollinger*.⁴⁵ *Grutter* dealt with the University of Michigan Law School's admissions system, which, like the Harvard plan, treated race as a "plus" factor in an applicant's file.⁴⁶ Justice Sandra Day O'Connor, writing for a bare majority of the Court, expressly adopted Justice Powell's reasoning in *Bakke*.⁴⁷ Applying that framework, she upheld Michigan Law's admissions system because it was narrowly tailored to serve the compelling state interest of obtaining the educational benefits of diversity.⁴⁸

More specifically, the Court in *Grutter* reasoned that, under both Title VI and the Equal Protection Clause, the use of race in university admissions was lawful only if narrowly tailored to serve a compelling state interest.⁴⁹ Obtaining the educational benefits of diversity was such a compelling state interest, and given the principle of academic freedom implicit in the First Amendment, the Court would defer to universities' "assessment that diversity will, in fact, yield educational

39 *Id.* at 412 (Stevens, J., concurring in judgment in part and dissenting in part).

40 *Id.* at 287, 299 (opinion of Powell, J.).

41 *Id.* at 310–12.

42 *Id.* at 315.

43 *Id.* at 316–18.

44 *Compare* Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996) (deciding that Justice Powell's diversity rationale was not precedential), *abrogated by* Grutter v. Bollinger, 539 U.S. 306 (2003), *with* Smith v. Univ. of Wash. L. Sch., 233 F.3d 1188, 1200 (9th Cir. 2000) (reasoning that Justice Powell's diversity rationale was precedential).

45 *Gratz v. Bollinger*, 539 U.S. 244 (2003).

46 *Grutter*, 539 U.S. at 321.

47 *Id.* at 325.

48 *See id.* at 343–44.

49 *See id.* at 326, 343.

benefits.”⁵⁰ Moreover, Michigan Law’s use of race as a “plus” factor in the context of an “individualized, holistic review of each applicant’s file”⁵¹ was narrowly tailored to serve that interest (again, the Court held up Harvard’s plan as an exemplar).⁵²

In *Grutter*’s closing—and subsequently much discussed⁵³—paragraphs, the Court noted that “race-conscious admissions policies must be limited in time” and that universities could meet this “requirement . . . by sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”⁵⁴ Here, it sufficed that Michigan Law had said that it would “terminate its race-conscious admissions program as soon as practicable.”⁵⁵ Finally, observing that it had been twenty-five years since *Bakke*, the Court stated: “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”⁵⁶

On the same day that it decided *Grutter*, the Court ruled in *Gratz* that the admissions system employed by the University of Michigan’s College of Literature, Science, and the Arts (LSA) did violate Title VI and the Equal Protection Clause.⁵⁷ LSA automatically awarded twenty points—“one-fifth of the points needed to guarantee admission”⁵⁸—to applicants who identified as underrepresented racial minorities.⁵⁹ The Court distinguished *Grutter* on the ground that, whereas Michigan Law used race as a “plus” factor in an individualized assessment of each applicant, LSA mechanically awarded points in a manner that proved dispositive for “virtually every minimally qualified underrepresented minority applicant.”⁶⁰

Little changed in the next twenty years. In *Fisher v. University of Texas at Austin* (*Fisher I*), the Court addressed the University of Texas at Austin’s unique admissions system.⁶¹ By state statute, the university granted automatic admission to students in the top ten percent of

50 *Id.* at 328.

51 *Id.* at 337.

52 *Id.* at 334–35.

53 *E.g.*, Joel K. Goldstein, *Justice O’Connor’s Twenty-Five Year Expectation: The Legitimacy of Durational Limits in Grutter*, 67 OHIO ST. L.J. 83 (2006); Vikram David Amar & Evan Caminker, *Constitutional Sunsetting?: Justice O’Connor’s Closing Comments in Grutter*, 30 HASTINGS CONST. L.Q. 541 (2003).

54 *Grutter*, 539 U.S. at 342.

55 *Id.* at 343.

56 *Id.*

57 *Gratz v. Bollinger*, 539 U.S. 244, 249–51 (2003).

58 *Id.* at 270.

59 *Id.*

60 *Id.* at 271–72.

61 *See* 570 U.S. 297 (2013).

their class in certain Texas high schools.⁶² It then used race as a nonnumerical “plus” factor while filling in the remaining admission spots.⁶³ The Court at first sent the case back down to the lower court for a closer look at whether the university’s admissions system was narrowly tailored to serve its interest in obtaining the educational benefits of diversity.⁶⁴ Then, upon the case’s return, in *Fisher II*, the Court ruled that the university’s admissions system was lawful.⁶⁵

For our purposes, the key takeaways from the *Fisher* decisions are these. The Court clarified that courts should defer only to a university’s judgment that a racially diverse student body yields educational benefits; courts should not defer to a university on whether its admissions system is narrowly tailored to that end.⁶⁶ The Court also clarified that narrow tailoring requires that there be no “workable” race-neutral alternative through which to meet a university’s educational goals, as the university understands them.⁶⁷ Lastly, the Court suggested that a university could satisfy *Grutter*’s “limited in time” requirement by continually reassessing the need for race-consciousness and determining that race-consciousness remains necessary to achieve its educational goals.⁶⁸

As noted above, a precedent’s holding is often underdetermined, leaving substantial room to disagree over its exact contours, and that is certainly true of these cases. Still, we need to start somewhere. Let us tentatively suppose that *Grutter*’s holding, as distinguished and elaborated by *Gratz* and the *Fisher* cases, was this: “If a university [A] uses race as a nonmechanical ‘plus’ factor in an individualized assessment of each applicant, [B] reasonably judges that a racially diverse student body yields educational benefits, [C] can show that there is no workable race-neutral means of achieving its educational goals, and [D] continually reassesses and determines that race-consciousness remains necessary to achieving those goals, then [X] the university’s conduct satisfies Title VI and the Equal Protection Clause.”

III. THE COURT’S DECISION IN *SFFA*

In *SFFA*, the Court addressed whether race-conscious admissions programs at Harvard and UNC violated Title VI or the Equal Protec-

62 *Id.* at 305.

63 *See id.* at 306.

64 *Id.* at 314–15.

65 *See Fisher v. Univ. of Tex. at Austin (Fisher II)*, 136 S. Ct. 2198, 2214 (2016).

66 *See id.* at 2208.

67 *See id.* at 2214 (quoting *Fisher I*, 570 U.S. at 312).

68 *See id.* at 2212.

tion Clause.⁶⁹ Both universities used race as a nonmechanical “plus” factor in a manner designed to comply with the requirements that we just listed.⁷⁰ The Court nevertheless concluded that both universities’ programs were unlawful.⁷¹ The Court clearly did not follow *Grutter* in the sense of “following” defined above, since the Court reached the opposite legal conclusion in *SFFA* than it did in *Grutter*. The question for us is: Did the Court in *SFFA* distinguish, revise, or overrule (in part or in whole) *Grutter*?

Recall that a court distinguishes precedent when it reasons that a fact present in the precedent case but absent from the instant case warrants reaching a different legal conclusion than the precedent court did. Distinguishing is a discretionary power to develop the law but one that is limited by the narrowing, conservation, and nonarbitrariness constraints. In *SFFA*, the Court reasoned that Harvard’s and UNC’s admissions programs were unlawful for three reasons: their benefits were insufficiently “measurable to permit judicial [review]”;⁷² they employed race as a “negative” and a “stereotype”;⁷³ and they lacked a “logical end point.”⁷⁴ Let us consider each of these reasons to see whether it could be a basis for distinguishing *Grutter*.

The Court’s first point was that the educational benefits that Harvard and UNC sought to achieve via diversity—e.g., “training future leaders” and “promoting the robust exchange of ideas”—were insufficiently measurable.⁷⁵ But the Court did not, nor could it, identify any difference between these benefits and the benefits that Michigan Law sought to achieve in *Grutter*.⁷⁶ (Indeed, in *Grutter* and *Gratz*, the Court rejected an argument that the benefits of diversity were insufficiently measurable.)⁷⁷ If the Court in *Grutter* had demanded

69 *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2154 (2023).

70 *See id.* at 2154–56.

71 *See id.* at 2175.

72 *Id.* at 2166 (alteration in original) (quoting *Fisher II*, 136 S. Ct. at 2211).

73 *Id.* at 2168.

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

75 *Id.* at 2166, 2166–68 (first quoting *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157, 173 (1st Cir. 2020); and then quoting *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 567 F. Supp. 3d 580, 656 (M.D.N.C. 2021)).

76 *See Grutter*, 539 U.S. at 330–32 (reasoning that diversity contributes to “cross-racial understanding,” *id.* at 330, makes “classroom discussion . . . livelier,” *id.* at 330, trains students to be the “Nation’s leaders,” *id.* at 332, etc.).

77 *See Gratz v. Bollinger*, 539 U.S. 244, 268 (2003) (rejecting the argument that “diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite” (quoting Brief for the Petitioners at 17, *Gratz*, 539 U.S. 244 (No. 02-516))). One could perhaps understand the *SFFA* majority’s comments about measurability as a critique of the workability of *Grutter*’s holding. But if a precedent’s holding is unworkable, that is not a basis for distinguishing the precedent; it can only be a basis for

the same level of measurability as the Court in *SFFA*, then *Grutter* would have come out differently. Given the conservation constraint, measurability cannot be a basis for distinguishing *Grutter*.⁷⁸

The Court's second point was that Harvard and UNC used race as a "negative" and a "stereotype."⁷⁹ The Court observed that university admissions are "zero-sum," such that any benefit to applicants who identify as underrepresented minorities is a negative to students who do not.⁸⁰ But that is not new: elite university admissions have always been zero-sum. The Court also reasoned that giving a preference to applicants "on the basis of race alone" amounted to racial stereotyping.⁸¹ Whether or not the Court was right that Harvard and UNC used race as a "stereotype"—whatever the Court meant by that—this cannot be a basis for distinguishing *Grutter* because Michigan Law employed race in basically the same way.⁸²

The Court's third point, drawing on *Grutter*'s final paragraphs, was that the universities' use of race lacked a "logical end point."⁸³ The universities neither specified a date on which they would end race-conscious admissions nor offered sufficiently measurable metrics for assessing when they would do so; and while they claimed that they would "frequently review" the need for race-consciousness, that was not enough.⁸⁴ But the Court did not identify any way in which Harvard's or UNC's admissions programs differed in this regard from Michigan Law's or the University of Texas's programs. All of these programs relied on frequent review by roughly the same standards to satisfy *Grutter*'s "limited in time" requirement.⁸⁵

In short, none of the Court's stated reasons for its decision identified a factual difference between *SFFA* and *Grutter*—none of them

overruling the precedent. See, e.g., *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018).

78 The Court also reasoned that the universities' use of "opaque racial categories" failed to promote the benefits that Harvard and UNC claimed to pursue. *SFFA*, 143 S. Ct. at 2167–68. But again, the Court did not, nor could it, claim that these categories were importantly different from those employed in *Grutter*. See *Grutter*, 539 U.S. at 316.

79 *SFFA*, 143 S. Ct. at 2168–70.

80 *Id.* at 2169.

81 *Id.* at 2170. Remarkably, the Court stated that "by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping." *Id.* at 2169–70. But how could that be, given that Michigan Law employed race in the same way? Perhaps what the Court meant was that *Grutter* was wrongly decided by its own lights because the majority in *Grutter* somehow failed to see that Michigan Law was "stereotyping." Yet that could only be a reason to overrule *Grutter*, not to distinguish it.

82 See *Grutter*, 539 U.S. at 316, 336–37.

83 *SFFA*, 143 S. Ct. at 2170–73 (quoting *Grutter*, 539 U.S. at 342).

84 *Id.*

85 See *Fisher II*, 136 S. Ct. 2198, 2212 (2016); *Grutter*, 539 U.S. at 343.

identified anything about Harvard's or UNC's admissions systems that made them different from Michigan Law's admissions system and that warranted reaching a different legal conclusion than *Grutter*. The Court did not distinguish—and could not have distinguished—*Grutter* in a manner that was consistent with the conservation constraint. Put another way: while it is not clear exactly what *SFFA* held, it is clear that applying *SFFA*'s holding (whatever it was) to *Grutter* would require *Grutter* to come out differently than it did. That being so, *Grutter* has been at least partially overruled.⁸⁶

Recall that we previously differentiated two sorts of partial overruling: (1) erasing some but not all of a precedent's holdings from the law, and (2) revising a precedent, in the sense of amending the precedent's holding without calling into doubt its outcome. Did *SFFA* partially overrule *Grutter* in the latter way? That is: Did *SFFA* revise *Grutter* by amending its holding in a way that violated the narrowing constraint but still satisfied the conservation and nonarbitrariness constraints? For the same reasons that we just saw, *SFFA* did not revise *Grutter* because *SFFA*'s reasoning cannot be reconciled with the conservation constraint. Rather, *SFFA* must have overruled *Grutter* in the sense of erasing at least one of *Grutter*'s holdings from the law.⁸⁷

Before proceeding further, we should consider a few objections to this conclusion. First, what about *Grutter*'s twenty-five-year expectation? It is important that we differentiate *Grutter*'s requirement that race-conscious admissions programs be limited in time (an issue of fact) from any suggestion that *Grutter*'s holding was itself limited in time (an issue of law). We saw that the Court could not have distinguished *Grutter* on the basis that Harvard's and UNC's admissions programs lacked an end point because those programs were no different in this regard from Michigan Law's program. But is it possible

86 That conclusion should come as no surprise, given that *Grutter* held up Harvard's admissions system as an exemplar. See *Grutter*, 539 U.S. at 335. Moreover, there was no indication that Harvard's system meaningfully changed between 2003 and 2023. See Transcript of Oral Argument at 71, *SFFA*, 143 S. Ct. 2141 (2023) (No. 20-1199) (Harvard's counsel stating that *Bakke* "fairly presented how the Harvard admissions process worked then and works now").

87 I have been assuming a rule model of precedential reasoning, but our conclusion that *SFFA* overruled *Grutter* also holds true on other models. The result model claims that just a precedent's result constrains subsequent courts; those courts must reach the same type of result in all cases that are relevantly similar and have no relevant differences. See, e.g., Levenbook, *supra* note 14, at 186. Since *SFFA*'s reasoning cannot be squared with *Grutter*'s result, *SFFA* overruled *Grutter* on the result model. Another model, the reason model, claims that a precedent constrains subsequent courts by requiring them to reach decisions that cohere with a precedent's balancing of reasons. See, e.g., Horty, *supra* note 14, at 13. Because *SFFA* cannot be squared with *Grutter*'s balancing of reasons, see text accompanying *infra* notes 125–27, *SFFA* also overruled *Grutter* on this model.

that *Grutter's* holding had somehow expired, such that there was actually no need for the Court to distinguish it?

As an initial matter, it is doubtful that the Court in *Grutter* intended for its twenty-five-year remark to put a sunset on its holding; it is more likely that the Court was merely expressing a wish that race-conscious admissions would no longer be needed in twenty-five years.⁸⁸ Regardless, the Court in *Grutter* could not have prospectively legislated an end to its holding because it lacked the power to do so: courts in our legal system can reach only holdings that are necessary, or at least material, to resolving the case before them.⁸⁹ They can say what the law is now (and by saying so make it so), but they have no authority to say what the law will become someday in the future. To do so would be to render an impermissible advisory opinion.⁹⁰

Still, could the Court in *SFFA* have distinguished *Grutter* based on the bare passage of time? Could the Court, in essence, have narrowed *Grutter's* holding by adding the factual condition “[E] the university’s conduct occurs before 2023”? The problem here is not the conservation constraint because this condition does identify a factual difference between *SFFA* and *Grutter*.⁹¹ The problem instead has to do with nonarbitrariness. To distinguish a precedent solely on the basis that we are in a different year is arbitrary; a court cannot distinguish precedent by saying “that was then, this is now.” Moreover, distinguishing on such a basis would be functionally equivalent to overruling: narrowing a holding to include an expiration date that has already passed is no different from erasing that holding from the law.

To be sure, it would be different if the Court had identified something about the extent of racial inequality in our society or the need for race-conscious admissions that had changed in the years since *Grutter* and that warranted reaching a different legal conclusion

88 See Goldstein, *supra* note 53, at 91; Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. 761, 789 n.141 (2015).

89 GARNER ET AL., *supra* note 15, at 45.

90 See, e.g., Dep’t of Educ. v. Brown, 143 S. Ct. 2343, 2351 (2023). Admittedly, there has been some scholarly disagreement on this issue. Compare Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1093 (2005) (“What is a holding today should remain so in 2028, and the statement setting out a time limit itself should be relegated to the status of dicta.”), and Amar & Caminker, *supra* note 53, at 551 (“Traditionally, judicial power exists so that judges can say what the law is now . . .”), with David Schraub, *Doctrinal Sunsets*, 93 S. CAL. L. REV. 431, 457–58 (2020) (arguing that courts do have the power to put sunsets on holdings), and Neal Katyal, *Sunsetting Judicial Opinions*, 79 NOTRE DAME L. REV. 1237, 1244–45 (2004) (same).

91 This condition identifies a factual difference between the conduct at issue in *Grutter* and the future conduct that *SFFA* sought to enjoin Harvard and UNC from engaging in.

today. The Court would then be distinguishing *Grutter* not based on the bare passage of time but based on what *happened* during that time. The Court, however, made no effort to distinguish *Grutter* based on anything that happened in the last twenty years, and it is hard to see how the Court could have done so. The evidence overwhelmingly suggested that not much had changed in terms of the need for race-conscious admissions between 2003 and 2023.⁹²

An instructive comparison is *Shelby County v. Holder*'s⁹³ treatment of *South Carolina v. Katzenbach*.⁹⁴ *Katzenbach* upheld the Voting Rights Act of 1965 against constitutional challenge.⁹⁵ Forty-some years later, *Shelby County* struck down the "coverage formula" in section 4(b) of the Act,⁹⁶ reasoning that the racial voting disparities that *Katzenbach* had deemed relevant to upholding the Act had diminished.⁹⁷ The Court thus distinguished *Katzenbach* based not on the bare passage of time but on what had happened. We can debate whether the Court accurately represented voting conditions or whether the Court was right to distinguish *Katzenbach* as it did, but there is little doubt that the Court was purporting to distinguish precedent. By contrast, in *SFFA*, the Court made no effort to show that conditions had changed since *Grutter* (and certainly not since *Fisher II*).

A second and related objection is that *Grutter* (supposedly) never condoned race-conscious admissions but merely granted universities a temporary reprieve from complying with the Equal Protection Clause. Some of *SFFA*'s reasoning seemed to presuppose that the use of race as a "plus" factor in university admissions had always been "unconstitutional conduct" and that *Grutter* turned a blind eye to such conduct for a limited time.⁹⁸ But that misreads *Grutter*. *Grutter* was not about choosing or delaying a remedy for a recognized constitutional violation. Rather, *Grutter* upheld the constitutionality of Michigan Law's admissions system. If the *SFFA* majority disagreed

92 See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2234–36 (2023) (Sotomayor, J., dissenting); *id.* at 2268–70 (Jackson, J., dissenting). Moreover, it is even more clear that not much had changed between 2016 when the Court decided *Fisher II* and 2023 when it decided *SFFA*.

93 570 U.S. 529 (2013).

94 383 U.S. 301 (1966).

95 *Id.* at 308.

96 *Shelby County*, 570 U.S. at 556–57.

97 *Id.* at 535, 545–50 ("There is no denying . . . that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions.").

98 See *Students for Fair Admissions, Inc., v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2165 (2023) ("[T]he Court [in *Grutter*] was willing to dispense temporarily with the Constitution's unambiguous guarantee of equal protection."); *id.* at 2173 ("*Grutter* never suggested that periodic review could make unconstitutional conduct constitutional.").

with that conclusion, then that could at most be a reason to overrule *Grutter*, not a basis on which to distinguish *Grutter*.

Concededly, *Grutter*'s endorsement of race-conscious admissions was at most half-hearted. At no point—not in *Bakke*, not in *Grutter*, and not in *Fisher II*—did the Court give anything approaching a full-throated defense of affirmative action in higher education.⁹⁹ That half-heartedness, however, is irrelevant to whether *SFFA* overruled *Grutter*. The Court can express hesitation about its holdings, but it cannot make its holdings only halfway law. When the Court expresses hesitation about a holding, it invites future litigation on whether the holding should be overruled. It might even reduce parties' justified reliance on the holding and thus make the holding easier to overrule. But the holding remains fully law until the Court overrules it.

A third objection is that *Grutter*'s deference to universities was predicated on their good-faith efforts to wind down race-conscious admissions and the last twenty years had shown that universities were in no hurry to actually do so. Could the Court have distinguished *Grutter* on the ground that, whereas Michigan Law could credibly claim in 2003 that its admissions system was limited in time, Harvard and UNC could not credibly claim as much in 2023 because twenty years had already passed? The problem, again, is that the bare passage of time is an arbitrary reason to refuse to give the same deference to Harvard's and UNC's efforts to wind down race-conscious admissions that the Court showed in earlier cases.

To distinguish *Grutter* on such a basis, the Court would have to show that something changed in the last twenty years to lessen diversity's educational benefits or to make race-conscious admissions less necessary to achieving those benefits and that Harvard and UNC had failed to take that change into account. After all, if nothing changed, why would there be any more reason to be suspicious of a university's representation now that it will end race-conscious admissions as soon as practicable than of a similar representation in 2003? As I argued above, the Court made no effort to identify such a change; instead, it seems that the Court simply lost patience and decided that it would no longer defer to universities' judgment in the way that it once did (no longer apply the sort of reduced strict scrutiny that characterized its affirmative-action precedents before *SFFA*).

Lastly, we should ask: Did *SFFA* overrule *Grutter* in whole or in part? Did the Court erase some of *Grutter*'s holdings or all of its hold-

99 See *id.* at 2175 (emphasizing “[t]he serious reservations that *Bakke*, *Grutter*, and *Fisher* had about racial preferences”).

ings? Given that *SFFA* relied heavily on *Grutter* as authority,¹⁰⁰ the best answer—and certainly the most charitable answer that requires attributing the least amount of deception or confusion to the Justices—is that *SFFA* partially overruled *Grutter* by removing some but not all of its holdings from the law. The question thus becomes: Which of *Grutter*'s holdings did the Court overrule? Answering that question is not easy. Not only does it raise complex issues regarding how to individuate holdings, but also the Court's opinion offers next to no guidance (indeed, I will argue in Part IV that the resulting legal uncertainty is one reason to regret how the Court reasoned in *SFFA*).

Although I previously portrayed *Grutter*'s holding as one long “if, then” statement, we could also think of *Grutter* (together with later cases) as standing for a series of shorter decision rules:

1. If a university uses race in admissions, its conduct must be narrowly tailored to serve a compelling state interest (“the strict-scrutiny holding”).¹⁰¹
2. If using race in admissions yields educational benefits, then it serves a compelling state interest (“the diversity-interest holding”).¹⁰²
3. If a university reasonably judges that its use of race in admissions yields educational benefits, then courts must defer to that judgment (“the deference holding”).¹⁰³
4. If a university uses race as a nonmechanical “plus” factor in an individualized assessment of each applicant,¹⁰⁴ can show that there is no workable alternative race-neutral means of obtaining its educational goals,¹⁰⁵ and continually reassesses and determines that using race remains necessary to achieving those goals,¹⁰⁶ then its use of race is narrowly tailored to serve its interest in diversity's educational benefits (“the narrow-tailoring holding”).

100 See *id.* at 2164–66 (reasoning that *Grutter* “permitted race-based admissions only within the confines of narrow restrictions” and that Harvard's and UNC's admissions programs “fail[ed] each of these criteria”); *id.* at 2169–70 (“[B]y accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that *Grutter* foreswore: stereotyping.”); *id.* at 2170 (reasoning that respondents' admissions programs were constitutionally infirm under *Grutter* because they lacked a “logical end point” (quoting *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003))).

101 *Grutter*, 539 U.S. at 326.

102 *Id.* at 328.

103 *Id.*

104 See *Gratz v. Bollinger*, 539 U.S. 244, 270–71 (2003).

105 See *Fisher II*, 136 S. Ct. 2198, 2208 (2016).

106 See *id.* at 379–80.

Nothing about the Court's opinion called into doubt the strict-scrutiny holding. The Court's remarks about measurability may suggest that the Court overruled both the diversity-interest and the deference holdings. But those remarks could also be more narrowly construed as overruling just the deference holding (although the Court mentioned deference to universities in passing, it clearly did not apply deference to Harvard's and UNC's judgments of diversity's benefits in the way that *Grutter* did).¹⁰⁷ Finally, the Court's remarks about negatives, stereotypes, and end points all seem directed to the narrow-tailoring holding, suggesting that the Court may have overruled that holding as well. Ultimately, however, the most that we can confidently say is that the Court overruled some part of *Grutter*. Which part or parts of *Grutter* remain good law will be a question for future parties to litigate and for lower courts to resolve—at least until the Supreme Court decides to weigh in again.

IV. EVALUATING *SFFA*'S TREATMENT OF PRECEDENT

Perhaps it is past time for a dose of realism. My analysis so far has been a formal analysis of what the law, based on existing precedent, was at the time that the Court decided *SFFA*. But it seems likely that the Court would have reached the same result that it did in *SFFA* regardless of what any precedent held. It is no secret that some of the Justices in the majority believed *Grutter* and related cases to be wrongly decided,¹⁰⁸ and as of 2020, they comfortably had the votes to do something about it. That being so, debating whether *SFFA* distinguished, revised, or partially or wholly overruled *Grutter* may seem like idle nitpicking. One of my goals in this final part is to show why these distinctions still matter, even if they were practically irrelevant to the Court reaching the outcome that it did.

We just saw that *SFFA* partially overruled *Grutter* without saying that it was doing so or offering any explanation for why it was doing so. The Court therefore violated its stare decisis-based obligation to explain why it overrules precedent when it does. Let us assume for the sake of argument that the Court could have given an explanation for overruling *Grutter* that would have satisfied the doctrine of stare decisis (after all, the doctrine is largely indeterminate and imposes relatively little constraint on when to overrule precedent). The issue

107 See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2168 (2023).

108 See, e.g., *Fisher II*, 136 S. Ct. at 2215 (Thomas, J., dissenting) (stating that he "would overrule *Grutter*"); *id.* at 2217 (Alito, J., dissenting) (criticizing the majority's decision in *Fisher II*).

that I want to focus on is not the quality of any explanation that the Court could have given for overruling *Grutter* but rather its failure to give an explanation at all.

The Court's decision in *SFFA* seems to be an instance of what Friedman calls "stealth overruling."¹⁰⁹ Stealth overruling (in one form) involves "reducing a precedent to essentially nothing" while "dissembling" about doing so.¹¹⁰ I am ordinarily hesitant to use the label "stealth overruling" or the concept behind it. Much of what writers put under the label "stealth overruling" is neither stealthy nor overruling.¹¹¹ It is uncharitable and often overly hasty to assume that judges are lying about or concealing the true reasons for their decisions in the sort of cases that Friedman discusses.¹¹² And those cases generally look quite different from genuine overruling—from erasing one or more of a precedent's holdings from the law.¹¹³

Here, however, the shoe fits. If ever there was an example of stealth overruling, *SFFA* is it. The Court's stealth overruling of *Grutter* raises at least three concerns. First, it calls into doubt the Justices' sincerity. Let us stipulate that judges act *sincerely* when they believe that the reasoning expressed in their opinions actually justifies their decisions; judges are sincere when they do not lie about the reasons that they regard as justifying their decisions.¹¹⁴ The majority in *SFFA* relied heavily on *Grutter* as authority and so implied that *Grutter* supported concluding that Harvard's and UNC's admissions programs were unlawful¹¹⁵—when, in fact, the sum of *Grutter*'s holdings required the opposite conclusion. One wonders whether the Justices were really convinced by the reasons that they gave.

Second, the Court's stealth overruling of *Grutter* suggests that the Justices acted in bad faith. As with "sincerity," I use the term "bad faith" in a specific sense. Judges act in *bad faith* when they deceive "themselves about the strength or the inevitability of their views"; they fail—due to cognitive bias or overhastiness—to adequately attend to the full range of reasons or arguments bearing on their decisions.¹¹⁶ Judges may be sincere (in the sense of being convinced by their opinion's reasoning) and yet still act in bad faith by failing to

109 Friedman, *supra* note 12, at 4.

110 *Id.* at 15–16.

111 Watson, *supra* note 13, at 19–22.

112 *Id.* at 22.

113 *Id.* at 20–21; see also Richard M. Re, *Narrowing Precedent in the Supreme Court*, 114 COLUM. L. REV. 1861, 1870–74 (2014) (critiquing Friedman's use of the term "stealth overruling").

114 See Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 992–94 (2008).

115 See *supra* note 100.

116 David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 947 (2016).

take adequate steps to assure themselves that their conclusion is right. The Justices in the majority in *SFFA* acted in bad faith by failing to recognize the lack of any nonarbitrary factual difference between *Grutter* and the case at hand. They ignored a critical argument for deciding *SFFA* differently; or put another way, they failed to make any effort to either distinguish *Grutter* or give an explanation for overruling it.¹¹⁷

Third, the Court's stealth overruling of *Grutter* resulted in needless doctrinal confusion. We saw above that, while the Court must have overruled some part of *Grutter*, it remains unclear exactly which part or parts the Court did overrule. The Court could have avoided this lack of clarity by making its partial overruling of *Grutter* explicit—by saying, for instance, that it would no longer defer to universities' judgment that their use of race in admissions yields educational benefits but would otherwise leave *Grutter* intact. Instead, the Court's decision left universities (and for that matter, a wide range of other actors subject to federal antidiscrimination norms) largely in the dark as to how to proceed. The result will be heightened uncertainty and, no doubt, increased litigation.¹¹⁸

By focusing as I have on *SFFA*'s formal treatment of precedent, I do not mean to minimize the negative consequences that the decision will have for students, universities, and others. The dissenting Justices made clear what the impact of the Court's decision will likely be,¹¹⁹ as did many of the amici briefs filed in the case,¹²⁰ and other

117 These problems of insincerity and bad faith are compounded by the *SFFA* majority's, at times, shockingly contemptuous tone. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2175 (2023) ("That is a remarkable view of the judicial role—remarkably wrong."); *id.* at 2168 n.5 ("An opinion professing fidelity to history (to say nothing of the law) should surely see the folly in that approach."). Cf. Nina Varsava, *Professional Irresponsibility and Judicial Opinions*, 59 HOUS. L. REV. 103, 106 (2021) ("Judicial opinions . . . should conform to an even-keeled and restrained institutional style.").

118 Cf. Andrew Goudsward, *US Law Firms Capitalize on Affirmative Action Ruling as Ripples Spread*, REUTERS (July 26, 2023, 7:10 AM), <https://www.reuters.com/legal/legalindustry/us-law-firms-capitalize-affirmative-action-ruling-ripples-spread-2023-07-26/> [<https://perma.cc/TJ9W-D69E>] (reporting increased demand for legal services from universities and others post-*SFFA*).

119 See *SFFA*, 143 S. Ct. at 2234–36 (Sotomayor, J., dissenting); *id.* at 2268–70 (Jackson, J., dissenting).

120 See, e.g., Brief for Students and Alumni of Harvard College as Amici Curiae in Support of Respondent at 4, *SFFA*, 143 S. Ct. 2141 (No. 20-1199); Brief for Major American Business Enterprises as Amici Curiae Supporting Respondents at 5, *SFFA*, 143 S. Ct. 2141 (No. 20-1199).

scholars' work.¹²¹ I have emphasized the Court's treatment of *Grutter* not because I think that the Court's treatment of precedent is the most practically important aspect of *SFFA*. Rather, I have done so because it is worth understanding how the Court is treating precedent and whether it is living up to widely shared expectations in that regard. As I suggested at the outset, we should be concerned about how the Court reasoned in *SFFA*—even those who cheered *SFFA*'s result should regret *how* the Court reached that result.

Lastly, I want to shift gears slightly and consider how the Court's treatment of *Grutter* relates to an idea that I call "obstructing precedent."¹²² Unlike stealth overruling, obstructing precedent need not involve dissembling, nor need it look or function like overruling. A court obstructs precedent when its holding in the instant case cannot be justified by the same weighting of values or purposes as justified its holding in the precedent case. The court demonstrates by its decision that it now values things differently than it once did: it shows that it now holds cheap what it previously deemed important or now holds important what it previously deemed cheap. The result is that the same institution seems over time to speak not with one voice but with multiple voices that reflect no unified political vision.

SFFA obstructed *Grutter* in that sense. Given the absence of any nonarbitrary factual difference between the two cases, the only explanation for the Court reaching different conclusions in them is that the Court was prioritizing values or purposes differently in one than in the other. Although *Grutter* hardly gave a full-throated defense of affirmative action, it did (following Justice Powell in *Bakke*) strongly emphasize the value of academic freedom.¹²³ The Court deferred to a significant extent to universities' judgment regarding how to select and educate their students.¹²⁴ By contrast, the Court in *SFFA* devalued academic freedom as compared to promoting colorblindness in public accommodations.¹²⁵ The two decisions presuppose different political visions.

121 See, e.g., Crusto, *supra* note 4, at 219–24; Adam Chilton, Justin Driver, Jonathan S. Masur & Kyle Rozema, *Assessing Affirmative Action's Diversity Rationale*, 122 COLUM. L. REV. 331, 397–402 (2022).

122 Watson, *supra* note 13, at 17.

123 See *Grutter v. Bollinger*, 539 U.S. 306, 328–29 (2003) (“[G]iven the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”).

124 See *id.*

125 See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2168, 2176 (2023) (“[T]he student must be treated based on his or her experiences as an individual—not on the basis of race.” *Id.* at 2176.).

Why care that the Court is now valuing things differently than it did in 2016 when it decided *Fisher II* or 2003 when it decided *Grutter*? I do not mean to suggest that such a change in what the Court values is always problematic; surely, there have been times when the Court was right to make such a change.¹²⁶ What worries me about *SFFA* is that it joins a rapidly growing list of recent cases in which the Court has steadily worked to shift the normative underpinnings of our law.¹²⁷ To name just a few examples, think of *Egbert v. Boule* (obstructing *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*),¹²⁸ *Shinn v. Ramirez* (obstructing *Martinez v. Ryan*),¹²⁹ *Oklahoma v. Castro-Huerta* (obstructing *McGirt v. Oklahoma*),¹³⁰ and *Edwards v. Vannoy* (obstructing *Teague v. Lane*).¹³¹

SFFA is thus part of a larger pattern of conduct that stands in stark contrast with the sort of impersonal decisionmaking that judges ordinarily aspire to.¹³² We cannot attribute the Court changing so much, so fast to it having learned from decades of experience or to changed circumstances on the ground. Rather, the only explanation for the Court's pattern of decisions seems to be that *who* is on the Court changed. It seems that the Court is looking not to some prior decisionmaker's weighting of values or purposes to guide its reasoning in these cases but instead to the present Justices' own weighting of values or purposes. The Justices, in short, give the impression that they are pursuing not preexisting institutional objectives but their own privately held objectives—that they are *not* reasoning impersonally.

126 Watson, *supra* note 13, at 45–46 (showing how cases leading up to and following *Brown v. Board of Education*, 347 U.S. 483 (1954), may be examples of the Court obstructing precedent while being justified in doing so).

127 See *id.* at 56.

128 *Egbert v. Boule*, 142 S. Ct. 1793, 1809 (2022); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

129 *Shinn v. Ramirez*, 142 S. Ct. 1718, 1739 (2022); *Martinez v. Ryan*, 566 U.S. 1 (2012).

130 *Oklahoma v. Castro-Huerta*, 142 S. Ct. 2486, 2499 (2022); *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020).

131 *Edwards v. Vannoy*, 141 S. Ct. 1547, 1555 (2021); *Teague v. Lane*, 489 U.S. 288 (1989).

132 Granted, some of the Justices may claim that they are reasoning impersonally in these cases; they may claim that, although they are not adhering to the weighting of values or purposes implicit in certain precedents, they are adhering to the weighting of values or purposes implicit in the Constitution itself. I cannot address that claim here; I can only say that I find it hard to believe given the Constitution's extreme indeterminacy in this regard (e.g., the Constitution nowhere expresses how much emphasis to put on academic freedom as compared to colorblindness or how much emphasis to put on the separation of powers as compared to vindicating personal rights). See Watson, *supra* note 13, at 59.

If the Court eschews impersonal reasoning too often, the result may be that the public loses trust in the Court as a neutral arbiter of constitutional controversy.¹³³ That result is all the more likely in today's hyperpolarized political environment.¹³⁴ Granted, most people who are not lawyers do not read the Court's opinions and would likely not be able to assess how the Court is treating precedent if they did. But certainly, many lawyers, lower-court judges, and other government officials are aware of how the Court has been treating precedent in recent terms, and these actors' trust in the Court is of particularly high importance to the effective functioning of our legal system.¹³⁵ If these actors stop seeing the Court as an at least comparatively neutral arbiter of constitutional controversy, the result may be increased resistance or even outright defiance of the Court's pronouncements.

Notably, the sort of institutional concerns discussed above may be exactly what motivated the majority in *SFFA* to not explicitly overrule *Grutter*. Perhaps some Justices worried that explicitly overruling another major precedent so soon after *Dobbs v. Jackson Women's Health Organization*¹³⁶ would cause too much harm to the Court's perceived legitimacy. If that was the Justices' motivation for not explicitly overruling *Grutter*, then they severely miscalculated. No one should be fooled into thinking that *SFFA* merely followed or distinguished *Grutter*, and the Court's failure to own up to overruling precedent harms its reputation more, not less.

CONCLUSION

The answer to my title question is yes. Given the absence of any nonarbitrary factual difference between *Grutter* and *SFFA*, the Court in *SFFA* did not follow, distinguish, or revise *Grutter*; rather, the Court must have at least partially overruled *Grutter* in the sense of erasing at least one of its holdings from the law. That the Court did so without saying as much should trouble us on a number of fronts. The Court's failure to explain its overruling of *Grutter* calls into question the Jus-

133 Cf. Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1142 (1995) (arguing that the Court "has a powerful normative reason to make sure that its decisions appear principled").

134 See Drew Desilver, *The Polarization in Today's Congress Has Roots That Go Back Decades*, PEW RSCH. CTR. (Mar. 10, 2022), <https://www.pewresearch.org/fact-tank/2022/03/10/the-polarization-in-todays-congress-has-roots-that-go-back-decades/> [<https://perma.cc/7ZBP-VZE9>] ("[O]n average, Democrats and Republicans are farther apart ideologically today than at any time in the past 50 years.").

135 Moreover, lawyers can convey how the Court is treating precedent to popular audiences. *E.g.*, Gersen, *supra* note 10.

136 142 S. Ct. 2228, 2284 (2022).

tices' sincerity and good faith. It also injects needless confusion into the law, making it harder to comply with the Court's holdings and contributing to further litigation. And it undermines the impersonality of the Justices' decisionmaking and thereby risks further eroding the Court's perceived legitimacy.