RACE-CONSCIOUS PROGRAMS IN EDUCATION

EDITED BY ARIE WRIGHT, KATHERINE REDETZKE, JULIA STURGES, MELL CHHOY, AND SELA CARRINGTON

I. INTRODUCTION

According to a job posting released by the Department of Justice, the Civil Rights Division plans to review and possibly sue universities based on their affirmative action admissions policies.[1] While former Attorney General Jeff Sessions adopted a hardline approach for eliminating affirmative action, former Secretary of Education Betsy Devos' approach was to avoid taking a stance and to defer to the Justice Department.[2] The Biden administration, by contrast, has taken a pro-diversity stance following the Supreme Court's decision in *Students for Fair Admissions v. Harvard*, which held that admissions offices around the country can no longer consider race when admitting candidates to their university.[3] In light of SCOTUS' dismantling of affirmative action, this article discusses five dimensions of race-conscious programs. Part I explores the historical underpinnings of Supreme Court jurisprudence in this area, beginning with *Plessy v.*

1. Sari Horwitz & Robert Costa, *Session's Move to Take on Affirmative Action Energizes Trump's Base*, WASH. POST (Aug. 2, 2017), https://perma.cc/TQ9N-DQME.

2. *Education Secretary Betsy Devos Discusses U.S. Educational Issues*, FORTUNE (Aug. 12, 2017), https://perma.cc/K3WX-DFA3.

3. Collin Binkley, *Biden Administration Urges Colleges to Pursue Racial Diversity Without Affirmative Action*, ASSOC. PRESS (Aug. 14, 2023), https://perma.cc/9H9F-M2WV.

Ferguson and the "separate but equal" doctrine. Part II analyzes Court decisions involving voluntary race-conscious admissions policies in public higher education, including supplemental programs and scholarships, and provides a brief overview of state efforts to regulate or eliminate these policies. Part III evaluates the progression of voluntary affirmative action policies in secondary education. Part IV examines the implications of Court decisions surrounding race-conscious programs in education on affirmative action efforts in the workplace.

In evaluating affirmative action policies, courts generally distinguish between public and private contexts. In public institutions of higher and secondary education and public-sector employers, race-conscious admissions or hiring policies are permissible but subject to the strict scrutiny imposed by the Equal Protection Clause of the Fourteenth Amendment. In this context, strict scrutiny requires a showing that (1) diversity is a compelling interest and (2) the policy or program is narrowly tailored to meet that interest.[4] To satisfy the narrow tailoring requirement, a race-conscious admission or hiring policy must consider race as only one factor among many, allow all applicants to compete against each other in one pool, and involve individualized assessments of each candidate.[5]

In private institutions of secondary education and private sector employers, Title VII of the Civil Rights Act applies. Though there is no definitive Supreme Court ruling in this area, courts generally apply a three-pronged test: (1) whether a *prima facie* showing of discriminate impact can be proven; (2) a whether there is a substantial and legitimate justification for the practice resulting in discriminate impact; and (3) whether there is a less discriminatory alternative that would also achieve the legitimate objective.[6]

Generally speaking, broader "diversity policies" tend to be upheld since they are established merely for the benefit of the institution, not to remedy some specific imbalance. Diversity is a nebulous term that could feasibly cover almost any type of classification or categorization.[7]

4. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003).

5. *Id.*

6. *See, e.g.*, New York Urban League v. New York, 71 F.3d 1031, 1036 (1995).

7. Though diversity initiatives are often confused with affirmative action, the two are distinct concepts. First, while affirmative action is remedial in nature, designed to rectify past harm, a diversity program focuses on the benefits a diverse workforce may bring to the workplace. Second, affirmative action is limited to race or gender issues; in contrast, a diversity initiative may include all group identities due to the broad, unclear definition of the term "diversity." Third, diversity initiatives purport to expand the pool of candidates. In other words, diversity initiatives cannot reversely discriminate against a certain class because all candidates with a broad array of diverse features will be considered. As discussed previously, public sector employers' voluntary affirmative action plans are generally upheld when the employers establish the plan to meet a remedial purpose. Diversity initiatives should not be examined under Title VII's three-pronged test if employers promote diversity in a workplace to obtain business benefits rather than to remedy any internal imbalance.

II. DEVELOPMENTS IN PUBLIC SCHOOL INTEGRATION: THE ROAD FROM MANDATORY TO VOLUNTARY

A. *THE PROMISE OF BROWN V. BOARD OF EDUCATION*

In 1896, the Court upheld state-imposed racial segregation in the now infamous case *Plessy v. Ferguson*.[8] Justice Brown conceded that the Fourteenth Amendment was intended to establish racial equality before the law; however, "in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."[9] Separate facilities for Black and white people satisfied the Fourteenth Amendment so long as they were equal, because segregation itself did not constitute unlawful discrimination and did not imply the inferiority of any group.[10]

In announcing the "separate but equal" doctrine, the *Plessy* Court enshrined in law the racially divisive practices that characterized many sectors of public and private life. While racially segregated schooling was already a firmly rooted practice at the time the Court decided *Plessy*, the Court-sanctioned "separate but equal" doctrine provided legal justification for even greater stratification in the public school context. *Plessy* became the foundation for educational segregation and set the stage for cases to follow.[11]

In 1951, just before *Brown v. Board of Education* came before the Supreme Court, seventeen states and the District of Columbia had statutes or constitutional provisions that codified the segregation of the races in public schools.[12] Black children were consistently denied admission to public schools attended by white children under laws requiring or permitting racial segregation so long as the separate schools achieved equality in "objective" factors such as buildings, curricula, qualifications, and teacher salaries.[13]

Despite having enforced the "separate but equal" doctrine established in *Plessy* for over fifty years, the Supreme Court changed course in *Brown* and unanimously rejected the long-held doctrine permitting separate facilities as long as they were equal.[14] Instead, the Court found the *Plessy* framework inherently

8. Plessy v. Ferguson, 163 U.S. 537, 548 (1896).

9. *Id.* at 544.

10. *Id.* at 544, 551.

11. *See, e.g.*, Briggs v. Elliott, 98 F. Supp. 529, 532 (E.D.S.C. 1951) (holding that the segregation of the races in public schools, as required by the constitution and statutes of South Carolina, was not itself a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment), *vacated*, 342 U.S. 350 (1952); Carr v. Corning, 182 F.2d 14, 22 (D.C. Cir. 1950) (stating that if there is an equality in the privileges which the laws give to the separated groups, the races may be separated).

12. Arthur E. Sutherland, *Segregation by Race in Public Schools: Retrospect and Prospect*, 20 L. & CONTEMP. PROBS. 169, 171 (1955).

13. *See generally* PAULI MURRAY, STATES' LAWS ON RACE AND COLOR AND APPENDICES 21–524 (1950) (listing school segregation laws by state).

14. Brown v. Bd. of Educ., 347 U.S. 483, 494–96 (1954).

unequal in the context of public education.[15] The Court concluded that racial segregation in public education has a detrimental effect on minority children because it "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[16] Additionally, the Court acknowledged the incredible role of state and local governments to provide a satisfactory education for citizens within their jurisdiction.[17] This declaration, coupled with the notion that education serves as the very foundation of good citizenship in our democratic society, would prove a recurring theme in the Supreme Court's later desegregation jurisprudence.

B. *BROWN*'S PROGENY: EFFORTS TO MANDATE INTEGRATION

Nationally, *Brown* was met with widespread disapproval and vigorous resistance in the years following the decision. Communities responded differently to the decision, with some resorting to violence and intimidation, and others opting to close public schools rather than accept integration.[18] Unfortunately, many elected leaders in Southern states did not acquiesce to *Brown*'s mandate with any greater ease than their constituencies. For example, the Southern Manifesto, signed in 1956 by nineteen senators and eighty-two members of the House of Representatives, opposed racial integration in public places.[19] In Arkansas, the Governor and State Legislature refused to comply with a federal district court order mandating public school integration by claiming they had sovereign authority to resist the *Brown* decision as unconstitutional.[20] The Supreme Court rejected this argument, reasoning that, because the Constitution was the supreme law of the land[21] and the Court was "supreme in the exposition of the law of the Constitution,"[22] the Court's interpretation of the Fourteenth Amendment in *Brown* was the supreme law of the land and had a "binding effect" on the states.[23]

In the years following *Brown*, the federal judiciary played an instrumental role in mandating integration. In hearing and deciding the cases explained in this section, the Court (1) offered guidance for lower courts in evaluating desegregation plans, (2) established the broad scope of equitable powers available to courts in crafting remedies in desegregation cases, and (3) recognized the power of state and local authorities to implement voluntary desegregation plans.[24] Together,

15. *Id.*
16. *Id.*
17. *Id.* at 493.
18. *See* J. KENNETH MORLAND, VA. ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, THE TRAGEDY OF PUBLIC SCHOOLS: PRINCE EDWARD COUNTY, VIRGINIA (1964) (noting that Prince Edward County, Virginia closed all of its public schools rather than desegregate and that the schools remained closed for five years as part of "massive resistance" throughout the South).
19. 102 CONG. REC. 4443, 4459–61 (1956) (containing statement of Sen. Walter F. George, popularly known as the "Southern Manifesto").
20. Cooper v. Aaron, 358 U.S. 1, 4 (1958).
21. *Id.* at 18.
22. *Id.*
23. *Id.*
24. George B. Daniels & Rachel Pereira, *May It Please the Court: Federal Courts and School Desegregation post*-Parents Involved, 17 J. CONST. L. 625–44 (2015).

these cases had important implications for future voluntary race-conscious policies in elementary, secondary, and higher education.

By 1968, the Supreme Court had lost patience with the token compliance and ineffective desegregation efforts undertaken by many school boards. In *Green v. County School Board*, the Court expressed dissatisfaction with Virginia's failure to integrate their school system until eleven years after *Brown*.[25] Even after implementation of the integration plan, eighty-five percent of Black children in Kent County still attended segregated schools.[26] In response, the Court articulated six factors to provide courts with a framework to determine whether a desegregation plan was acceptable.[27] The *Green* decision was significant for the theoretical guidance it provided to lower courts and the practical effectiveness of its admonitions. *Green* established a clear affirmative duty for school boards to convert to a unitary system that would eliminate racial discrimination and gave federal district courts instructions regarding how to measure progress toward such elimination.[28]

In *Swann v. Charlotte-Mecklenburg Board of Education*, the Court addressed the problem of desegregating schools in large urban areas.[29] In *Swann*, officials had drawn school boundaries that aligned with segregated housing patterns.[30] These new boundaries resulted in a school system where approximately 14,000 Black students attended schools that were either entirely or more than ninety-nine percent Black.[31] The Court held that district courts have broad, equitable power to remedy incongruences when school authorities do not satisfy their obligation to establish remedies to school segregation.[32] In determining when to use that power, four themes emerged from the Supreme Court's decision striking down the school system's policy. In exercising their power, courts should judge remedial plans by their effectiveness and could use mathematical ratios or quotas as legitimate starting points for solutions.[33] Courts should also give close scrutiny to predominantly or exclusively one-race schools located in mixed-race districts.[34] Finally, *Swann* established that courts could create or uphold non-contiguous attendance zones as interim corrective measures, but could not establish rigid guidelines concerning busing students to particular schools.[35]

Swann would serve as the judicial underpinning for future voluntary race-conscious integration policies. In *Swann*, the Court's dicta—that the power to implement voluntary integration programs was within the school board's traditional

25. Green v. Cnty. Sch. Bd. of New Kent, 391 U.S. 430, 438 (1968).
26. *Id.* at 441.
27. *Id.* at 436–37 (stating that the factors include the ratio of Black to white students, staff, faculty, absolute equality of facilities, transportation, and extracurricular activities).
28. *Id.* at 439.
29. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 1 (1971).
30. *Id.*
31. *Id.*
32. *Id.* at 15.
33. *Id.* at 25.
34. *Id.* at 25–26.
35. *Swann*, 401 U.S. at 28, 29.

power to set educational policy—hinted at the permissibility of voluntary plans.[36] In a companion case, the Court expanded on this proposition: "[A]s a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements."[37]

Finally, there were two other notable Supreme Court cases that recognized the broad power of school authorities to formulate and implement voluntary desegregation policies. Writing separately in *Keyes v. School District Number 1*, Justice Powell explained that "[s]chool boards would, of course, be free to develop and initiate further plans to promote school desegregation . . . . Nothing in this opinion is meant to discourage school boards from exceeding minimum constitutional standards in promoting the values of an integrated school experience."[38] In *Bustop, Inc. v. Board of Education of Los Angeles*, Justice Rehnquist denied a petition to stay the California Supreme Court's ruling requiring certain desegregation measures in the Los Angeles Unified School District based on provisions of the California constitution.[39] He explained that the stay was inappropriate because there was "very little doubt" that a desegregation order issued by a state court on state constitutional law grounds was constitutionally permissible even if not constitutionally required by the Equal Protection Clause.[40]

To varying degrees, these cases defer to local school officials to fashion desegregation plans that comport with the needs of the community. These opinions also suggest a value in diverse and pluralistic educational environments, and reserve to the discretion of the respective school boards the responsibility of tailoring and implementing student assignment plans that may exceed constitutionally required remedial measures.

III. VOLUNTARY AFFIRMATIVE ACTION POLICIES IN HIGHER EDUCATION

Brown and its progeny were far from the Supreme Court's final word on race in education. While integration was the question of the middle to late 20th Century, affirmative action is the question of the 21st Century. In the past two decades, judicial decisions,[41] executive action,[42] congressional

36. *Id.* at 16 ("[I]n order to prepare students to live in a pluralistic society, each school should have a prescribed ratio of Negro to white students to reflect the proportion of the district as a whole. To do this as an educational policy is within the broad discretionary power of school authorities.").

37. N.C. State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971).

38. Keyes v. Sch. Dist. No. 1, 413 U.S. 189, 242 (1973) (Powell, J., concurring in part and dissenting in part).

39. Bustop, Inc. v. Bd. of Educ., 439 U.S. 1380, 1383 (1978). *But see* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 721 (2007) (noting that once a school reaches unitary status and remedies the constitutional wrong of segregation, "continued use of race must be justified on some other basis").

40. *Bustop*, 439 U.S. at 1383 (Rehnquist, J., denying stay).

41. *See infra* section II(B)(2) (discussing Hopwood v. Texas, 78 F.3d 932, 934 (5th Cir. 1996)).

42. *See infra* note 172 (describing Florida Governor Jeb Bush's 1999 executive order forbidding affirmative action in public university admissions).

investigation,[43] and state constitutional and other initiatives[44] have attacked policies that consider the race or gender of applicants in higher education admissions. These challenges to the consideration of race or gender in admissions processes are garnering increased sympathy considering the stance of former Attorney General Jeff Sessions. During his tenure, Attorney General Jeff Sessions began to re-evaluate the use of affirmative action practices in higher education admissions.[45] According to some Republican government employees,[46] the decision to investigate the use of race-conscious admissions processes is a rallying cry for support from middle-class and upper-middle-class white voters. Despite this blowback, race-conscious policies historically remained permissible under the Equal Protection Clause of the Fourteenth Amendment, albeit under narrowly defined conditions.[47] However, policies deemed to give effect to racial "quotas" have always been impermissible.[48] Nevertheless, the Supreme Court recognized that the pursuit of diversity, defined broadly as encompassing the individual experiences and backgrounds of all persons beyond race or ethnicity in order to create an enriched educational experience, was a compelling state interest—that is, until *Students for Fair Admissions v. Harvard*.[49] Race-conscious admissions policies that provide individualized assessments of applicants and do not create separate admissions tracks for minorities and others may be sufficiently narrowly tailored to survive the strict scrutiny accorded to all classifications based on race.[50] In *Fisher II*, the Court held that University of Texas' race-conscious admissions program did not violate the Equal Protection Clause of the Fourteenth Amendment.[51] In upholding the Fifth Circuit's decision, the Court found that Texas's diversity goals were sufficiently precise because they provided specific evidence that the race-conscious methods were necessary to achieve diversity goals.[52] *Fisher II* provided guidance for schools designing race-conscious admissions programs: race-conscious admissions practices should be holistic,[53] and institutions must constantly deliberate and reflect over the admissions

43. *See* Rachel F. Moran, *Of Doubt and Diversity: The Future of Affirmative Action in Higher Education*, 67 OHIO ST. L.J. 201, 207–08 (2006) (describing pressure from Congress and investigations by the Office for Civil Rights into admissions practices at some selective public universities and colleges in the 1990s).

44. *See infra* notes 169–78 and accompanying text (listing state legislative attempts to limit affirmative action).

45. *See Education Secretary Betsy Devos Discusses U.S. Educational Issues, supra* note 2.

46. *See infra* notes 169–78 and accompanying text (identifying voter support of state legislative attempts to limit affirmative action).

47. *See* Grutter v. Bollinger, 539 U.S. 306, 341 (2003) (finding law school admission program employing individualized consideration of applicants, including their race, without unduly harming members of other racial groups was permissible under the Equal Protection Clause).

48. *Id.* at 334.

49. *Id.* at 325; *see* Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181 (2023).

50. *Grutter*, 539 U.S. at 334.

51. Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 365 (2016) [hereinafter "Fisher II"].

52. *Id.* at 2211.

53. *Id.* at 2208–09.

policies.[54] However, these affirmative action programs were deemed unconstitutional in 2023.[55] In *Students for Fair Admissions v. Harvard* the Court held that the admissions processes of Harvard College and the University of North Carolina, which considered race as a category for admissions, violated the Equal Protection Clause of the Fourteenth Amendment.[56]

A. EQUAL PROTECTION AND EDUCATIONAL OPPORTUNITY

1. *Bakke*: A First Test for Race-Conscious Policies

The Supreme Court first considered the constitutionality of race-conscious admissions in 1978's *Regents of the Univ. of California v. Bakke*.[57] The Court struck down the University of California at Davis School of Medicine's (California Medical School) policy of providing a separate admissions system for applicants who identified themselves as minorities.[58] However, no majority of the Court agreed on which standard of review to apply to race-conscious admissions policies or what particular state interests such policies could advance.[59]

a. Setting a Standard of Review. The California Medical School provided two separate admissions tracks: one for minority applicants from disadvantaged backgrounds who chose to participate in the special admissions program, and another for all other applicants, including minority applicants who chose not to participate in the special program.[60] No white applicants were ever admitted through the special program.[61] Under this two-track system, the school exclusively considered applicants in the special program for a prescribed number of seats.[62] These applicants were evaluated by a special committee and were not compared to general applicants or subject to the same minimum grade point average requirement.[63]

The California Medical School twice denied admission to Allan Bakke, a white applicant, even though it admitted students through the special program who had lower grade point averages and test and interview scores.[64] Bakke filed suit with a California court claiming that the school's admissions program violated the

54. *Id.* at 2210.

55. Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 223, 230 (2023).

56. *Id.*

57. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). The first Supreme Court decision involving race-conscious admissions in higher education was arguably *DeFunis v. Odegaard*, 416 U.S. 312, 314 (1971) (per curiam), which involved a challenge to a decision by the Supreme Court of Washington upholding a race-conscious admissions plan at the University of Washington School of Law. The Court found that it could not consider the substantive constitutional issues that had been raised as the plaintiff was already about to complete his studies at the law school. *Id.* at 319–20.

58. *Bakke*, 438 U.S. at 271.

59. *Id.* at 272.

60. *Id.* at 273–75.

61. *Id.* at 276.

62. *Id.* at 289.

63. *Id.* at 275.

64. *Bakke*, 438 U.S. at 276–77.

Equal Protection Clause of the Fourteenth Amendment[65] and Section 601 of Title VI of the Civil Rights Act of 1964.[66] In 1976, the California Supreme Court, applying strict scrutiny, upheld a lower court's finding that the admissions policy violated the Equal Protection Clause.[67]

When *Bakke* reached the Supreme Court, it created a major dispute about the appropriate standard of review for classifications based on race.[68] In his dissent, Justice Brennan, joined by three other justices, argued that the standard of review for the admissions policy should be higher than rational basis but lower than strict scrutiny.[69] According to Brennan, the Court could not apply strict scrutiny because the disadvantaged group consisted of white people, who were not a suspect class.[70] Furthermore, Brennan saw no constitutional or Title VI statutory bar to the creation of a race-conscious program so long as it had an important purpose and did not stigmatize any group or disproportionately affect a group already politically ill-represented.[71] Remedying past discrimination was sufficiently important to justify the admissions policy.[72]

Justice Powell's plurality opinion rejected the argument that the Court should apply different standards to racial classifications designed to benefit "discrete and insular" minorities and those designed to disadvantage minorities.[73] Powell saw such distinctions as immaterial to the application of strict scrutiny, writing that "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[74] That the Court characterized a policy as "benign" was of limited relevance because it "may not always be clear that a so-called [racial] preference is in fact benign."[75] Powell wrote that finding a benign racial classification constitutional would also undermine the understanding that the Fourteenth Amendment protects individuals, not groups, from such classifications.[76] Powell considered an individual right against differential treatment to require strict scrutiny for its protection.[77] He found that, under strict scrutiny, government-funded programs distinguishing citizens by race violated the Equal

65. U.S. CONST. amend. XIV, § 1.

66. 42 U.S.C.A. § 2000d (1964) (prohibiting discrimination under federally-assisted programs on grounds of race, color, or national origin). A majority of the Court concluded that Title VI was coextensive with the Equal Protection Clause. *Bakke*, 438 U.S. at 287, 325 (Brennan, J., concurring in the judgment in part and dissenting).

67. Bakke v. Regents of Univ. of Cal., 553 P.2d 1152, 1171–72 (1976).

68. *Bakke*, 438 U.S. at 290.

69. *Id*. at 358–59 (Brennan, J., concurring in the judgment in part and dissenting).

70. *Id*. at 357.

71. *Id*. at 361–62.

72. *Id*. at 362.

73. *Bakke*, 438 U.S. 265, 290 (1978).

74. *Id*. at 291.

75. *Id*. at 298.

76. *Id*. at 299.

77. *Id*.

Protection Clause unless (1) they served a compelling state purpose and (2) where no less restrictive alternative was available.[78]

Applying strict scrutiny, Powell concluded that the separate admissions track for minority applicants was not the least intrusive means of attaining a diverse student body.[79] Instead, he endorsed an individualized assessment program, modeled after Harvard, which had a single admissions track but considered race or ethnic background as a potential "plus" factor.[80] Race might be one factor considered among many, but schools had to give each applicant individualized consideration.[81]

b. Upholding and Defining Diversity as a Compelling Interest. Although the Court struck down the admissions program, it also reversed part of the California Supreme Court's ruling finding consideration of race in admissions decisions necessarily unconstitutional.[82] Rather, Justice Powell's opinion held that the First Amendment protects a university's freedom to select its own students.[83] Powell associated this freedom with the promotion of a diversity of perspectives that would create leaders trained through exposure to "the ideas and mores of students as diverse as this Nation of many peoples."[84] As such, Powell defined the state interest in diversity in terms broader than race or ethnicity: "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[85] Powell wrote that diversity defined solely in terms of race or ethnicity would "hinder rather than further attainment of genuine diversity."[86] Through a fair, individualized assessment of each applicant's "qualifications," a race-conscious admissions policy would maintain individual rights.[87]

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78. *Bakke,* 438 U.S. 265, 305 (1978); *see also* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 227 (1995) (holding that all racial classifications, whether imposed by federal, state, or local authorities, must pass strict scrutiny review); Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (finding that affirmative action programs are subject to strict scrutiny, the purpose of which is to "smoke out" illegitimate uses of race classifications by assuring that the goal pursued by their use are important enough to warrant such a highly suspect tool); Loving v. Virginia, 388 U.S. 1, 11 (1967) (arguing that distinctions drawn according to race were generally "odious to a free people" and subject to the most rigid scrutiny under the Equal Protection Clause); Shelley v. Kraemer, 334 U.S. 1, 20–21 (1948) (finding that enforcement of racially restrictive covenants by state court injunctions constituted state action in violation of the Fourteenth Amendment); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (noting that the guarantees of equal protection "are universal in their application, to all persons . . . without regard to any differences of race, of color, or of nationality").

79. *Bakke*, 438 U.S. at 314–15.

80. *Id.* at 317.

81. *Id.* at 317–18.

82. *Id.* at 320.

83. *Id.* at 311–12.

84. *Bakke*, 438 U.S. 265, 313 (1978).

85. *Id.* at 315.

86. *Id.*

87. *Id.* at 318, 320.

B. GRAPPLING WITH *BAKKE*

Bakke created confusion among lower courts because four justices had never reached the underlying constitutional issue while the remaining five disagreed about the extent to which race-conscious policies were constitutionally permissible and on what grounds.[88] Without definitive guidance, lower federal courts split when faced with challenges to race-conscious higher education admissions policies. The Fifth Circuit, finding *Bakke*'s conception of diversity as a compelling interest to be tenuous, decided that the Equal Protection Clause forbade race-conscious admissions policies.[89] Other federal courts were unwilling to effectively overrule the Supreme Court, but demonstrated confusion about whether diversity was a compelling interest.[90]

1. The Fifth and Seventh Circuits Challenge the Constitutionality of Diversity as a Compelling Interest

In *Hopwood v. Texas*, the Fifth Circuit determined, contrary to Justice Powell's opinion in *Bakke*, that race could not be considered as a plus factor in admissions.[91] The court concluded that only Justice Powell supported considerations of race in *Bakke*.[92] Further, the court found that his rationale—that a diverse set of experiences in education would produce a "robust exchange of ideas"[93]—depended, in the context of race-conscious admissions, on stereotypes that race or ethnicity determined a student's point of view.[94] Taking race into account undermined the ultimate aim of the Fourteenth Amendment: "the end of racially-motivated state action."[95] Critics of *Hopwood* expected the Supreme Court to grant certiorari to uphold its supremacy over the Fifth Circuit and to declare decisively whether diversity was a compelling interest.[96] The Court, however, denied certiorari.[97]

After *Hopwood*, a Georgia district court struck down the University of Georgia's race- and gender-conscious admissions policy.[98] In *Johnson v. Board of Regents of the University System of Georgia*, the district court, citing

88. *See, e.g.*, Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1250 (11th Cir. 2001) ("We think it clear that the status of student body diversity as a compelling interest justifying a racial preference in university admissions is an open question in the Supreme Court and in our Court.").

89. Hopwood v. Texas, 78 F.3d 932, 935 (5th Cir. 1996), *cert. denied*, 533 U.S. 929 (2001).

90. *See, e.g.*, Smith v. Univ. of Wash. Sch. of Law, 233 F.3d 1188, 1200 (9th Cir. 2000) ("We, therefore, leave it to the Supreme Court to declare that the *Bakke* rationale regarding university admissions policies has become moribund, if it has.").

91. *Hopwood*, 78 F.3d at 948.

92. *Id.* at 942.

93. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978).

94. *Hopwood*, 78 F.3d at 946. The court did acknowledge that "the use of some factors such as economic or educational background of one's parents may be somewhat correlated with race." *Id.*

95. *Id.* at 947–48.

96. *See* Peter Applebome, *Universities Troubled by Decision Limiting Admissions Preferences*, N.Y. TIMES (Mar. 21, 1996), https://perma.cc/LSN5-WD2J.

97. Texas v. Hopwood, 533 U.S. 929 (2001).

98. Johnson v. Bd. of Regents of the Univ. Sys. of Ga., 106 F. Supp. 2d 1362, 1375 (S.D. Ga. 2000).

Hopwood, declared, "Justice Powell's opinion regarding the compelling nature of student body diversity in university admissions is not binding precedent."[99] The court then determined that "the promotion of student body diversity in higher education is not a compelling interest."[100] On appeal, the Eleventh Circuit affirmed that UGA's admissions policy violated equal protection standards but refused to affirm the finding that diversity was not a compelling interest.[101] Instead, the court of appeals held that the admissions policy was not narrowly tailored enough regardless of whether or not diversity was a compelling interest.[102] In its decision, the Eleventh Circuit called for greater clarity on diversity's status as a compelling interest: "[W]e think it important to underscore that the constitutional viability of student body diversity as a compelling interest is an open question, and ultimately is one that, because of its great importance, warrants consideration by the Supreme Court."[103]

2. The Ninth Circuit Upholds Diversity as a Compelling Interest

In 2000, the Ninth Circuit, faced with its own challenge to a race-conscious law school admissions policy, found the Fifth Circuit's decision in *Hopwood* flawed and held that "the Fourteenth Amendment permits University admissions programs which consider race for other than remedial purposes, and educational diversity is a compelling governmental interest that meets the demands of strict scrutiny of race-conscious measures."[104] The Court acknowledged that *Bakke* set a confusing precedent,[105] but found that a majority of justices agreed that race-conscious policies were constitutionally permissible to the extent that race could "even come close to being a trump where some disadvantage to a member of a favored group was shown," even in "the absence of any societal discrimination."[106]

C. THE SUPREME COURT STEPS IN: GRATZ, GRUTTER, FISHER, AND STUDENTS FOR FAIR ADMISSIONS

The split over whether or not diversity was a compelling interest finally received Supreme Court attention in 2003 with two cases concerning race-conscious admissions policies at the University of Michigan: *Gratz v. Bollinger*[107] and *Grutter v. Bollinger*.[108] In *Gratz*, the Court struck down an undergraduate admissions policy that awarded additional admissions "points" on the basis of

99. *Id.* at 1369.
100. *Id.* at 1375.
101. Johnson v. Bd. of Regents of the Univ. Sys. of Ga., 263 F.3d 1234, 1244–45 (11th Cir. 2001).
102. *Id.*
103. *Id.* at 1245.
104. Smith v. Univ. of Wash. Sch. of Law, 233 F.3d 1188, 1200–01 (9th Cir. 2000), *aff'd*, 392 F.3d 367 (9th Cir. 2004).
105. *Id.* at 1199.
106. *Id.* at 1200.
107. Gratz v. Bollinger, 539 U.S. 244, 249–50 (2003).
108. *See generally* Grutter v. Bollinger, 539 U.S. 306 (2003).

race.[109] In *Grutter*, the Court upheld the individualized consideration of law school applicants, including their race, in admitting a "critical mass" of minority students.[110] Despite their contrary results, the decisions provided a measure of clarity: the Supreme Court expressly held that diversity was a compelling state interest.[111] This has been borne out by *Fisher I* and *II*, in which the Supreme Court has continued to approve of affirmative action programs which promote "diversity."[112] However, most recently in *Students for Fair Admission Inc*, the Court overturned years of precedent and deemed race-conscious programs as unconstitutional.[113]

1. *Gratz v. Bollinger:* Race in a Point System Fails the Narrow Tailoring Requirement

Jennifer Gratz and Patrick Hamacher, both white, applied for admission to the University of Michigan's College of Literature, Science, and the Arts ("LSA") in 1995 and 1997, respectively.[114] LSA considered Gratz "well qualified" and Hamacher "qualified," but denied admission to both while accepting minority applicants with lower test scores and lower grade point averages.[115] Gratz and Hamacher challenged LSA's admissions policy, which automatically awarded underrepresented minority applicants twenty of the 100 points needed to guarantee admission, as violative of the Equal Protection Clause of the Fourteenth Amendment.[116] The Supreme Court, relying heavily on Justice Powell's *Bakke* opinion, held that while LSA had a compelling state interest in attaining a racially diverse student body, its use of race violated the Equal Protection Clause because its admissions policy was not narrowly tailored to achieve that goal.[117] The admissions policy not only failed to provide a sufficiently individualized assessment of each applicant, but the twenty point assignment also effectively made the factor of race decisive for virtually every minimally-qualified underrepresented minority applicant.[118] Gratz and Hamacher also argued that the admissions policy violated Title VI of the Civil Rights Act and 42 U.S.C.A. § 1981 by racially discriminating against them.[119] Because the court held the policy to violate the Fourteenth Amendment, it was also in violation of both Title VI and 42 U.S.C.A. §1981.[120]

109. *Gratz*, 539 U.S. at 251.
110. *Grutter*, 539 U.S. at 340.
111. *Id.* at 325.
112. *Fisher*, 570 U.S. at 299.
113. *See* Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181 (2023).
114. *Gratz*, 539 U.S. at 244.
115. *Id.* at 251, 253–54.
116. *Id.* at 252.
117. *Id.* at 246.
118. *Id.* at 271–72.
119. *Id.* at 244.
120. *Gratz*, 539 U.S. at 275–76.

The Court reemphasized its *Bakke* holding that an applicant's race may play a part in university admissions, but it may not play a leading role.[121] Race may be considered as one factor among many in the context of a holistic, individualized assessment of an applicant's achievements and ability.[122] The Court rejected LSA's argument that the volume of applications made it impractical for the school to use such a rigorous admissions program: "The fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system."[123] Just as set-aside seats and special admissions tracks were unconstitutional in *Bakke*, the LSA's use of point assignments to increase the number of minority students was also unconstitutional.[124]

2. *Grutter v. Bollinger*: Satisfying the Strict Scrutiny Standard

On the same day the Supreme Court decided *Gratz*, it announced its opinion in *Grutter v. Bollinger*.[125] Writing for the majority, Justice O'Connor noted that the Court granted certiorari specifically to resolve the disagreement among lower courts on the status of diversity as a compelling interest.[126] The Court was clear in its resolution: "[W]e endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."[127] The Court rejected the view that its decisions since *Bakke* had either expressly or impliedly rejected diversity as a compelling interest or indicated that remedying historical discrimination was the only justification for race-based determinations.[128]

The Court analyzed five elements of a narrowly tailored race-conscious admissions policy under strict scrutiny review: (1) individualized consideration for each applicant, (2) the absence of a "quota" system, (3) serious, good faith consideration of race-neutral alternatives, (4) lack of undue harm to members of other racial groups, and (5) time limitations on the program.[129] Two of these issues dominated the Court's opinion—whether the University of Michigan Law School's (Michigan Law School) race-conscious admissions policy operated as a quota, and whether the policy afforded individualized consideration to every applicant regardless of race.[130]

a. Quotas and the Critical Mass. Michigan Law School sought to enroll a "critical mass of underrepresented minority students."[131] According to Michigan

121. *Id.* at 270–71.
122. *Gratz*, 539 U.S. at 270–71; *see also* Regents Univ. of Cal. v. Bakke, 438 U.S. 265, 314 (1978).
123. *Gratz*, 539 U.S. at 275.
124. *Id.* at 275–76.
125. Grutter v. Bollinger, 539 U.S. 306 (2003).
126. *Id.* at 322.
127. *Id.* at 325.
128. *Id.* at 328.
129. *Id.* at 336–43.
130. *Grutter*, 539 U.S. at 336–37.
131. *Id.* at 335–36.

Law School, a "critical mass" of minority students was not a specific number, percentage, or range of numbers or percentages; rather, it was the population of minority students necessary to provide a general sense of "meaningful" representation.[132] The policy had two goals: for individual students belonging to underrepresented minority groups not to feel as though they were "symbols" or "spokespersons" of their race, and for all students to have the opportunity to learn from persons of varying backgrounds and ethnic heritages.[133]

The Court found the notion of a "critical mass," as practiced by Michigan Law School, did not represent an impermissible quota.[134] The Court defined a quota, in this context, as "a program in which a certain fixed number or proportion of opportunities are 'reserved exclusively for certain minority groups.'"[135] By contrast, a program that allowed consideration of race only as a "plus factor" while continuing to permit each candidate to compete with all other qualified applicants was not a quota.[136]

The fact that Michigan Law School paid attention to the number of accepted minority students during the admissions process[137] did not turn the admissions program into a quota system.[138] The Court accepted the uncontradicted testimony of Michigan Law School's admissions officers that tracking minority students did not mean that the race of applicants was given any more or less consideration.[139] The majority also found that "the number of underrepresented minority students who ultimately enroll in the law school differs substantially from their representation in the applicant pool and varies considerably for each group from year to year,"[140] which demonstrated that the "critical mass" was not disguised racial balancing.[141]

b. Individualized Consideration. The Court's finding that the admissions program did not operate as a quota was not, by itself, indicative that the program was narrowly tailored.[142] The program also had to provide for individualized consideration.[143] The Court found that Michigan Law School did grant applicants individualized consideration because it evaluated each applicant and considered an applicant's race as just one factor among many in determining whether to offer

132. *Id.* at 335–38.

133. *Id.* at 318–19. Erica Munzel, Director of Admissions at the law school, testified that she must consider the race of applicants because a critical mass of underrepresented minority students would not be accepted and enrolled if admissions decisions were based on more objective considerations like grade point averages, LSAT scores, college achievements, and activities. *Id.*

134. *Id.* at 335.

135. *Grutter*, 539 U.S. at 335.

136. *Id.*

137. *Id.* at 318.

138. *Id.* at 335–36.

139. *Id.*

140. *Grutter*, 539 U.S. at 336.

141. *Id.*

142. *Id.*

143. *Id.* at 336–37.

admission.[144] Unlike the undergraduate admissions policy the Court struck down in *Gratz*, Michigan Law School's policy allocated points according to race or ethnicity but provided "serious consideration to all the ways an applicant might contribute to a diverse educational environment."[145] Michigan Law School's admissions program therefore provided sufficient individualized consideration to meet the requirements of narrow tailoring.[146]

c. Durational Limitations on Race-Conscious Admissions Policies. The Court also stated that, to meet the Fourteenth Amendment's core purpose of eliminating racial classifications by the State, "race-conscious admissions policies must be limited in time."[147] This requirement could be met by "sunset provisions in race-conscious admissions policies and periodic reviews to determine whether racial preferences are still necessary."[148] The Court expressed its hope that, "25 years from now, the use of racial preferences [would] no longer be necessary to further the interest approved today."[149]

3. *Fisher v. University of Texas at Austin*: Refining the Strict Scrutiny Standard

A decade after *Grutter* and *Gratz*, the Court revisited the issue of race-conscious admissions policies in *Fisher v. University of Texas at Austin*.[150] *Fisher* involved an equal protection challenge to an admissions policy much like that at issue in *Grutter*.[151] The University of Texas ("UT") considered race as one of several admissions factors, with the stated goal of reaching a "critical mass" of minority students.[152] The Court vacated and remanded the lower court's decision in favor of UT, in the process reaffirming its holdings in *Bakke*, *Gratz*, and *Grutter*, and clarifying the "demanding burden of strict scrutiny" and deference regime imposed by those cases.[153] Specifically, the Court found that no deference ought to be given in evaluating the implementation of a race-conscious admissions policy.[154]

Since 1996, UT has changed its admissions process three times in response to jurisprudential shifts.[155] The scheme at issue in *Fisher* asked applicants to classify themselves as one of five racial categories; this classification was a "meaningful factor" considered along with numerous other personal and academic factors,

144. *Id.* at 340.
145. *Grutter*, 539 U.S. at 337.
146. *Id.* at 334.
147. *Id.* at 342.
148. *Id.*
149. *Id.* at 343.
150. Fisher v. Univ. of Tex., 570 U.S. 297, 2419–20 (2013).
151. *See infra* Part II.C.2.
152. *Fisher*, 570 U.S. at 300–01.
153. *Id.*
154. *Id.* at 309.
155. *Id.* at 304. *See* discussion of *Hopwood infra* Part II.B.2.

though it was not assigned any explicit point or numerical value.[156] In 2008, Abigail Fisher, a white Texas resident, applied to and was denied admission to UT.[157] Fisher sued, claiming UT's race-conscious admissions policy violated the Equal Protection Clause of the Fourteenth Amendment.[158] On appeal, the Fifth Circuit Court of Appeals found that *Grutter* required courts to give substantial deference to universities both with respect to the judgment that diversity is a compelling interest and in determining whether an admissions policy is narrowly tailored to meet that interest.[159] The court relied heavily on *Grutter*'s discussion of a university's "serious, good faith consideration of . . . race-neutral alternatives,"[160] adopting a presumption of good faith and placing the burden on the petitioner to rebut that presumption.[161]

Writing for the majority in a seven-to-one opinion,[162] Justice Kennedy held that the court of appeals applied an incorrect standard of scrutiny. Any admissions program that used racial classifications had to meet strict scrutiny both in establishing its "goal of diversity" and in its "implementation," *i.e.*, its narrow tailoring of the program.[163] UT was entitled to limited judicial deference only on the former, not the latter.[164] It remained the burden of the university to demonstrate that each applicant was assessed individually, that race was not the defining feature of an application, and that considering race at all was necessary.[165] Justice Kennedy expanded on the necessity inquiry by noting that strict scrutiny requires courts to carefully examine and not automatically "defer to a university's 'serious, good faith considerations of workable race-neutral alternatives.'"[166] Courts must also be satisfied that no other workable alternatives exist that would produce the educational benefits of diversity.[167] A university's decision to reintroduce race as a factor in admissions, even if done in good faith, would not forgive "an impermissible consideration of race."[168]

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156. *Fisher*, 570 U.S. at 306. The Texas State Legislature has also adopted the Top Ten Percent Law, which grants automatic admission at state public universities, including the University of Texas, to students who graduate high school in the top ten percent of their class. *See* TEX. EDUC. CODE ANN. § 51.803 (West, Westlaw through end of 2023 Reg. & 2nd Called Sess.).

157. *Fisher*, 570 U.S. at 306.

158. *Id.*

159. Fisher v. Univ. of Tex. at Austin, 631 F.3d 213, 246–47 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (2012), *vacated*, 570 U.S. 297 (2013).

160. Grutter v. Bollinger, 539 U.S. 306, 339 (2003).

161. *Fisher*, 631 F.3d at 231–32.

162. Justice Kagan recused herself from the case. *Fisher*, 570 U.S. at 315. Justices Scalia and Thomas concurred in the decision but wrote separately to indicate their belief that race-conscious admissions policies are unconstitutional. *Id.* (Scalia, J., concurring, and Thomas, J., concurring). Justice Ginsburg dissented, arguing that the University had adequately supported its policy and no further determinations were required. *Id.* at 336 (Ginsburg, J., dissenting).

163. *Id.* at 311.

164. *Id.*

165. *Id.* at 311–12.

166. *Id.* at 312 (citing Grutter v. Bollinger, 539 U.S. 306, 339–40 (2003)).

167. *Id.*

168. *Id.* at 313.

4. *Fisher II*: Upholding the Race-Conscious Admissions Program under the Equal Protection Clause

Following the Supreme Court's decision in *Fisher I*, the case returned to the Fifth Circuit for further inquiry. Upon review, the Fifth Circuit once again affirmed The University of Texas' affirmative action program.[169] In 2015, the Supreme Court once again granted certiorari. In a four-three decision written by Justice Kennedy, the Court upheld The University of Texas' program, while simultaneously affirming *Grutter* and *Fisher I*.[170] Justice Kennedy, who had never previously voted to uphold race-based affirmative action, surprised many scholars by holding that "considerable deference is owed to a university in defining . . . intangible characteristics, like student body diversity, that are central to its identity and educational mission."[171] In doing so, the Court gave universities discretion to analyze and implement admissions programs that strike a "sensitive balance" between competing considerations.[172]

In applying the strict scrutiny standard laid out in *Fisher I*, the Court found that UT's program was narrowly tailored to a compelling interest.[173] Specifically, the Court concluded that race was considered by the University to be a "factor of a factor of a factor" in a holistic process which the University consistently reviewed and updated to best facilitate its objectives.[174] The opinion noted, however, that "asserting an interest in the educational benefits of diversity writ large" was insufficient, but found that all of UT's stated objectives mirrored compelling interests approved in previous cases.[175]

Justice Alito wrote a dissent nearly twice the length of Justice Kennedy's majority opinion.[176] In that dissent, which the Chief Justice and Justice Thomas joined, Justice Alito opined that the University has still "not identified with any degree of specificity the interests that its use of race and ethnicity is supposed to serve."[177] Rather, the dissent argued that the Court merely accedes to the University's plea for deference despite the fact that UT's program fails to pass strict scrutiny.[178]

5. Students For Fair Admissions: *Dismantling Race-Conscious Programs As Violating the Equal Protection Clause*

Since *Fisher II*, a group of organizations initiated a lawsuit against Harvard College, claiming the College discriminated against Asian Americans in its

169. Fisher v. Univ. of Tex. at Austin, 771 F.3d 247 (5th Cir. 2014).
170. Fisher v. Univ. of Tex. at Austin, 579 U.S. 365, 367 (2016).
171. *Id.* at 388.
172. *Id.*
173. *Id.*
174. *Id.* at 375.
175. *Id.* at 366.
176. *Fisher,* 579 U.S. at 389–437.
177. *Id.* at 390.
178. *Id.*

admissions process in violation of Title VI and the Equal Protection Clause.[179] In *Students for Fair Admission v. Harvard*, the plaintiff, the nonprofit organization Students for Fair Admissions ("SFFA") that focuses on reverse discrimination in admission policies, claimed that Harvard practiced "racial balancing" by forcing Asian American applicants to compete for a limited number of spots reserved specifically for Asian Americans.[180]

The District Court of Massachusetts heard the case in 2019, and held that Harvard's admissions program survived strict scrutiny, did not intentionally discriminate against Asian Americans, and met the constitutional standard required by the Supreme Court's prior precedent.[181] SFFA appealed to the First Circuit claiming that the district court erred in concluding that Harvard's use of race was narrowly tailored, consistent with precedent, and did not intentionally discriminate against Asian Americans.[182] SFFA argued that Harvard set a quota limiting the amount of Asian American students admitted and used one-pagers that displayed the racial makeup of the admitted class to "closely monitor the racial makeup" of the class.[183] Upon review, the First Circuit rejected SFFA's claims and affirmed the lower court's ruling that Harvard's use of race-based admissions was within the Court's precedent.[184] SFFA appealed to the Supreme Court who granted certiorari.[185]

On June 29, 2023, the Supreme Court held that race-conscious admissions processes violated the Equal Protection Clause of the Fourteenth Amendment, effectively eradicating affirmative action programs.[186] In a 6–3 decision authored by Chief Justice John Roberts, the Court struck down Harvard's race-based admissions program for lacking "sufficiently focused and measurable objectives warranting the use of race, unavoidably" employing "race in a negative manner," and involving "racial stereotyping, and lacking meaningful endpoints."[187]

a. Lack of Judicially Reviewable & Measurable Objectives. For universities to use race-based admissions programs constitutionally there must be compelling interests that can be subjected to judicial review.[188] Harvard recognized several interests like "training future leaders . . . better educating its students through diversity; and producing new knowledge stemming from diverse outlooks" as

179. *See* Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 261 F. Supp. 3d 99, 102 (D. Mass. 2017).

180. *Id.* at 103.

181. *See* Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 397 F.Supp.3d 126, 203–04 (D. Mass. 2019).

182. *See* Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 980 F.3d 157, 187, 188, 195 (1st Cir. 2020).

183. *Id.* at 188.

184. *Id.* at 204.

185. *See* Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 198 (2023).

186. *Id.* at 230.

187. *Id.*

188. *Id.* at 206–07.

supporting the need for race-based admissions programs.[189] Chief Justice Roberts highlighted that even though "commendable," the goals were unable to be subjected to judicial review.[190] The lack of adequate standards for courts to measure and know when goals were met prevented the admissions process from satisfying the requirements necessary to survive strict scrutiny.[191]

The majority was also unconvinced that assigning students to racial categories and then making admissions decisions based on them furthered the educational benefits that the university was pursuing.[192] The existing categories were seen as both overbroad[193] and arbitrary[194] in relation to some racial groups, while being underinclusive towards others.[195] Harvard argued that *Grutter* required the Court to defer to colleges and universities when using race to benefit some applicants over others.[196] While the majority recognized the traditional requirement of deference for academic decisions, in this instance Harvard was still required to act within the confines of constitutional precedent and provide a persuasive justification for the use of race that was both measurable and concrete.[197] The existing race-based program failed to do so, and was not able to satisfy the strict scrutiny standard.[198]

b. Negative Employment of Race & Stereotyping. The Equal Protections Clause prevents both the use of race as a negative against an applicant and stereotyping.[199] The Court perceived Harvard's admissions program as advancing applicants from specific racial groups and simultaneously discriminating against applicants that did not benefit from race-based preferences.[200] The majority opinion, giving credence to the statistics provided by SFFA, found that Harvard's policy used racial considerations to negatively impact Asian American and white students from being admitted.[201] The Court found SFFA's racial balancing argument to be convincing; even speculating that more Asian American students

189. *Id.* at 214.

190. *Id.* (finding that courts could not effectively measure whether diversity created leaders who had been adequately 'trained' or were able to robustly exchange ideas).

191. *Students for Fair Admissions,* 600 U.S. at 215.

192. *Id.* at 216.

193. *Id.* (grouping all Asian students together instead of looking at whether there was adequate representation of South Asian and East Asian students).

194. *Id.* (excluding a clear definition of what qualifies as Hispanic even though there is a "long history of changing labels and shifting categories about what it means to be Hispanic or Latino in the US").

195. *Id.* (classifying applicants from Jordan, Iraq, Iran, and Egypt as being from the Middle East as a whole instead of separating them out).

196. *Students for Fair Admissions,* 600 U.S. at 217 (citing Grutter v. Bollinger, 539 U.S. 306, 328 (2003)).

197. *Id.*

198. *Id.* at 218.

199. *Id.*

200. *Id.* at 218–19.

201. *Id.* at 218.

would have been admitted in larger numbers had there not been race-based admissions.[202]

The Court also regarded Harvard as perpetuating racial stereotypes.[203] By implementing an admissions process that believed minority students consistently expressed characteristically "minority viewpoint[s]," the program furthered the belief that all members of a racial group think the same way.[204] *Grutter* specifically prohibits this form of stereotyping because it strips the individuality of each applicant and instead evaluates their worth based on Constitutionally barred criteria.[205] The respondents' failure to satisfy these two prongs furthered the Court's belief that Harvard's policy using race to admit applicants was unconstitutional.[206]

c. Lack of Meaningful Termination Point. Finally, the majority held issue with the admissions programs lacking a "logical endpoint."[207] Harvard made four pleas to the Court in support of upholding its race-based admissions programs; all of them were rejected by the majority.[208]

Harvard first suggested that race-based admissions programs would end when there was a "meaningful representation and meaningful diversity" on college campuses."[209] While Harvard was not striving for a specific percentage of diverse students, if it seemed like a group was notably underrepresented or suffered a drop compared to prior years the Admissions Committee could decide to give additional attention to that specific group.[210] The Court rejected this plea as an example of "outright racial balancing," and determined that waiting to terminate the use of race until a rough percentage of specific racial groups were admitted effectively assured that race as a criteria would never end.[211]

Harvard next claimed that universities would no longer need race-based admissions when students would still be able to receive the educational benefits that come from diversity without the programs.[212] The majority again rejected this plea and argued that this is an arbitrary standard that could not be effectively measured or judicially reviewed by the courts.[213]

There were also suggestions that *Grutter* required race-based admissions programs to continue for at least 5 more years.[214] The majority, however, saw this as a misinterpretation of *Grutter*, and believed instead that this was the Court's

202. *Students for Fair Admissions,* 600 U.S. at 219.
203. *Id.*
204. *Id.* at 219 (quoting Grutter v. Bollinger, 539 U.S. 306, 333 (2003)).
205. *Id.* at 220–21 (citing Miller v Johnson, 515 U.S. 900, 911–912 (1995)).
206. *Id.* at 221.
207. *Id.* (quoting *Grutter*, 539 U.S. at 342).
208. *Students for Fair Admissions,* 600 U.S. at 221–27.
209. *Id.* at 221.
210. *Id.*
211. *Id.* at 223–24.
212. *Id.* at 224.
213. *Id.*
214. *Students for Fair Admissions,* 600 U.S. at 224 (citing Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (expecting that 25 years after *Grutter* the use of racial preferences would no longer be necessary).

opinion, not a fact, that race-based preferences would be unnecessary by 2028.[215] The Court also doubted that Harvard actually believed that consideration of race would be obsolete by 2028, and expected them to continue using it as a criteria for admission for many more years.[216]

Harvard's final claim is that the admissions programs do not require a strict end point because the board frequently reviews them to determine if they are still necessary.[217] Again, Harvard points to *Grutter* as permitting this process and again the majority views this as a misinterpretation of precedent.[218] While *Grutter* allowed for periodic reviews to determine if racial preferences were still necessary, the holding ultimately required these programs to eventually end.[219] Because Harvard had not provided a valid point of termination it appeared to the Court that there was no endpoint and no reasonable belief that Harvard could "comply with the Equal Protections Clause anytime soon."[220]

d. Conclusion & "Loophole" For Colleges and Universities. Even though the Court rejected Harvard's admissions process, the majority opinion noted that nothing prohibits universities from considering "an applicant's discussion of how race affected his or her life."[221] This loophole has signaled to many colleges and universities that race and racial discrimination experienced by individual applicants may still be considered if highlighted in personal essays.[222] However, schools must still be cautious because even though the Court provided no clear guidance on how to comply, it did highlight that "universities may not simply establish through application essays or other means the regime we hold unlawful today."[223]

Justices Thomas, Gorsuch, and Kavanaugh all authored separate concurring opinions.[224] Both Kavanaugh and Thomas joined the majority opinion in full but wrote their concurring opinions to further explain how discriminatory affirmative action programs are and emphasize how the majority decision is consistent with historical precedent.[225]

Justice Gorsuch, joined by Justice Thomas, emphasized how Title VI of the Civil Rights Act also does not tolerate race-based admissions processes.[226] Title VI requires that "no person shall on the ground of race, color . . . be denied the

215. *Id.*
216. *Id.*
217. *Id.* at 225.
218. *Id.* (citing *Grutter*, 539 U.S. at 342).
219. *Id.*
220. *Students for Fair Admissions,* 600 U.S. at 225.
221. *Id.* at 230.
222. *See* Stephanie Saul, *The Application Essay Will Become a Place to Talk About Race*, N.Y. TIMES (June 29, 2023), https://perma.cc/Y48T-SHDJ.
223. *Students For Fair Admissions*, 600 U.S. at 230.
224. *Id.* at 231 (Thomas, J., concurring), 287 (Gorsuch, J., concurring), 310 (Kavanaugh, J., concurring).
225. *Id.* at 232 (Thomas, J., concurring), 311 (Kavanaugh, J., concurring).
226. *Id.* at 287 (Gorsuch, J., concurring).

benefit of, or be subjected to discrimination under any program receiving Federal financial assistance."[227] The concurrence focused on the key phrases "subjected to discrimination" and "on the ground of" to determine a clear rule for when discrimination has occurred.[228] Justice Gorsuch noted that even if another factor could be seen as contributing to the decision making process, the use of race in any capacity was still violative of Title VI.[229] Congress could have decided to change the law to make exceptions for racial discrimination used to advance a benign intent, but they did not choose to do so.[230] After application of his rule to Harvard's race-based admissions process Justice Gorsuch determined that the process unconstitutionally treated applicants differently based on their race in violation of Title VI.[231]

In the first of two dissents, Justice Sotomayor, joined by Justices Kagan and Jackson, claimed that the majority opinion was neither grounded in fact nor law and directly contradicts the purpose of the Equal Protection Clause.[232] The dissent highlighted how overturning years of precedent has cemented "a superficial rule of colorblindness" in a society far from colorblind.[233] Justice Sotomayor began by providing historical context of race-based litigation and how the majority distorted the holding to fit their narrative.[234] A major concern of the dissent was that ignoring race would not lead to an equal society because "equality requires acknowledgment of inequality."[235] The dissent also voices concerns that the majority holding, by turning a blind eye to the racism faced by communities of color, will further widen the gap in the availability of educational opportunities.[236] The dissent also claimed that the majority erred in its interpretation of the law and argued that Harvard's admissions program was narrowly tailored and a constitutional use of race.[237] SFFA claimed that the process was not narrowly tailored because there are race-neutral alternatives; however, Harvard had implemented some of these alternatives and none were workable.[238] Harvard also complied

227. *Id*. at 287–88 (Gorsuch, J., concurring) (citing 42 U.S.C. §2000d).

228. *Id*. at 288 (Gorsuch, J., concurring) (defining a clear rule that Title VI prohibits a recipient of federal funds from intentionally treating one person worse than another similarly situated person because of their race).

229. *Students For Fair Admissions*, 600 U.S. at 289 (Gorsuch, J., concurring).

230. *Id*. at 289–290 (Gorsuch, J., concurring).

231. *Id*. at 290–91 (Gorsuch, J., concurring).

232. *Id*. at 317 (Sotomayor, J., dissenting).

233. *Id*. at 318 (Sotomayor, J., dissenting).

234. *Id*. at 329–30 (Sotomayor, J., dissenting) (rejecting the majority's interpretation that *Brown v Board of Education* required students be admitted on a racially nondiscriminatory basis and arguing that *Brown* actually requires increased protection of race-conscious admissions programs to remedy the legacy of racial inequality).

235. *Students For Fair Admissions*, 600 U.S. at 334 (Sotomayor, J., dissenting).

236. *Id*. at 334, 341 (Sotomayor, J., dissenting) (highlighting the impact of segregation in schools, housing policies, and school funding that the DOJ continues to combat).

237. *Id*. at 344.

238. *Id*. at 346 (Sotomayor, J., dissenting) (finding that SFFA's model would decrease Black representation by about 32%).

with the Court's precedent in the use of race by not considering a student's race as a mechanical "plus factor" but instead as one of many factors in a holistic individualized review of the applicant.[239] Finally, the dissent rejected SFFA's argument that Harvard participated in racial quotas because there was no statistical evidence presented to show consistency amongst the amount of applicants from particular racial groups admitted.[240] Considering the magnitude of the majority's holding, Justice Sotomayor ended her dissent with a message of hope: that diversity is a fundamental American value and will only continue to grow.[241]

Even though Justice Jackson did not take part in consideration of the decision, she authored the second dissent joined by Justices Sotomayor and Kagan.[242] Justice Jackson wrote separately to further highlight the importance of considering race in the admissions process in response to the decades of government sanctioned discrimination experienced by communities of color.[243] Contrary to the belief of the majority, Justice Jackson saw race-based admissions programs as advancing the core promises of the Fourteenth Amendment.[244] Allowing racial background and other factors[245] to be considered during the admissions process creates a diverse class of students that benefits both the students and society as a whole.[246] Justice Jackson also warned about the approach taken by the majority and concurrences as promoting an idealized "let-them-eat-cake obliviousness" to race.[247] Justice Jackson's dissent ended on a more somber note by warning that the majority, through their holding, turned back the clock in a way that she predicts will lead to a repetition of historical racial discrimination.[248]

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239. *Id*. at 347–48 (Sotomayor, J., dissenting) (using SFFA's expert to show that Harvard rejects over two-thirds of Hispanic applicants and less than half of all African-American applicants who are among the top 10% most academically promising applicants).

240. *Id*. at 350 (Sotomayor, J., dissenting) (finding that Harvard's evidence showed that the admitted classes across racial groups varied considerably year to year).

241. *Students For Fair Admissions*, 600 U.S. at 384 (Sotomayor, J., dissenting) ("As has been the case before in the history of American democracy, 'the arc of the moral universe' will bend toward racial justice despite the Court's efforts today to impede its progress.").

242. *Id*. (Jackson, J., dissenting).

243. *Id*. at 385–93 (Jackson, J., dissenting) (describing the history of slavery, sharecropping, Jim Crow, housing discrimination and other policies used by the government to further disenfranchise communities of color).

244. *Id*. at 398 (Jackson, J., dissenting) (perceiving the use of race as one of many factors to assess the unique individual lives of each applicant on an equal basis).

245. *Id*. at 400 (Jackson, J., dissenting) (considering "socioeconomic status, first-generation college status . . . political beliefs, religious beliefs . . . diversity of thoughts, experiences, ideas, and talents" as diversity factors).

246. *Id*. at 405–06 (Jackson, J., dissenting) (finding that diversity admissions have larger economic benefits and also hold the potential to save lives in marginalized communities, as Black physicians are more likely to accurately assess and treat Black patients' pain tolerance and can double the likelihood of high-risk Black newborns' survival).

247. *Students For Fair Admissions*, 600 U.S. at 407 (Jackson, J., dissenting) ("... deeming race irrelevant in law does not make it so in life.").

248. *Id*. at 410 (Jackson, J., dissenting).

6. The Future of Affirmative Action Litigation

Following *Students for Fair Admissions*, the Department of Education outlined steps that colleges and universities can take to ensure their admissions processes comply with the ruling while still promoting diversity.[249] The Biden-Harris Administration raised ways they plan to support diversity initiatives while also encouraging colleges and universities to continue to find ways to identify students who had overcome severe hardships in the face of discrimination.[250] President Biden has also prompted the Department of Education to look into other admissions policies that may violate Students for Fair Admissions, even if not related to race.[251]

The future of affirmative action litigation is currently in a state of uncertainty due to the lack of articulable standards for colleges and universities to use to guide their admissions programs. Many commentators have also hinted at the possibility of expanding *Students for Fair Admissions* beyond the academic sphere.[252]

After the ruling in June, Edward Blum, the president and founder of SFFA, initiated another lawsuit challenging the race-conscious admissions processes of the U.S. Military Academy at West Point.[253] The majority opinion exempted military academies from its ruling due to the "potentially distinct interests" that military academies present;[254] however, many conservative activists who reject this

249. *Questions and Answers Regarding the Supreme Court's Decision in Students for Fair Admissions, Inc. v. Harvard College and University of North Carolina,* DEP'T OF EDUC. OFF. FOR C.R. (Aug. 14, 2013), https://perma.cc/7C3C-UPA8 (recommending that colleges pursue targeted outreach, recruitment, and pipeline or pathway programs, and work to retain current diverse students among other initiatives).

250. *President Biden Announces Actions to Promote Educational Opportunity and Diversity in Colleges and Universities*, THE WHITE HOUSE (June 29, 2023) https://perma.cc/Z33U-DLRZ (providing resources to colleges and universities to address ways to ensure admissions programs comply with the law, releasing a report on strategies for increasing diversity and educational opportunity, and prioritizing college completion).

251. Michael D. Shear & Anemona Hartocollis, *Education Dept. Opens Civil Rights Inquiry Into Harvard's Legacy Admissions*, N.Y. TIMES (July 25, 2023), https://perma.cc/8G98-7XFN (encouraging the Department of Education's Office of Civil Rights to open an investigation into Harvard's legacy admissions program under Title VI to determine if showing preference towards legacy applicants discriminates against applicants of color).

252. Nate Raymond, *Activist Behind US Affirmative Action Cases Sues Major Law Firms*, REUTERS (Aug. 22, 2023), https://perma.cc/6768-47WZ. SFFA initiated two lawsuits against major U.S. law firms claiming that the 1L diversity fellowship programs unlawfully discriminated "against white candidates by limiting which law students could be considered for paid fellowships. "Both lawsuits have since been dropped following the amendment of eligibility criteria from targeting students who are "members of historically underrepresented groups in the legal industry," to targeting students "with a demonstrated commitment to diversity and inclusion in the legal profession." Tatyana Monnay, *Blum's Group Drops DEI Lawsuit Against Morrison Foerster*, BLOOMBERG LAW (Oct. 6, 2023), https://perma.cc/VSL5-S9Q6.

253. Bianca Quilantan, *Anti-Affirmative Action Group Sues West Point Over Race-Conscious Admissions*, POLITICO PRO (Sept. 19, 2023), https://perma.cc/8MMZ-YX5P.

254. Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll., 600 U.S. 181, 213 n.4 (2023).

interpretation are engaging in litigation to overturn it.[255] On January 3, 2024, the US District Court for the Southern District of New York rejected SFFA's injunction prohibiting West Point from considering an applicant's race when making admissions decisions.[256] Although SFFA had standing to bring the suit, they had not met their burden of proof with respect to "likelihood of success on the merits, irreparable harm, or that the public interest weighs in favor of granting injunctive relief" and the claim was rejected.[257] Even though these prior cases failed at the appellate level, there is still the potential for an appeal as well as additional litigation efforts to overturn any exceptions.

D. STATE EFFORTS TO ELIMINATE AFFIRMATIVE ACTION

Over the past two decades, a number of states have passed, or attempted to pass, legislative measures to regulate affirmative action. California paved the way in 1996 with Proposition 209, which forbade the state from granting "preferential treatment" on the basis of "race, sex, color, ethnicity, or national origin" in public employment, education, or contracting.[258] To ameliorate the potential impact of the ban on diversity enrollment, the University of California Board of Regents soon adopted a percentage plan whereby any student who graduated in the top four percent[259] of their high school was guaranteed eligibility for admission to a college in the University of California system.[260] Florida has a similar arrangement.[261]

The last few years have seen a spate of ballot measures like Proposition 209. Since 2008, voters have passed affirmative action ban initiatives in Nebraska,[262] Arizona,[263] and Oklahoma,[264] while a similar measure narrowly failed in

255. *See* Students for Fair Admissions v. The U.S. Naval Acad., No. RDB-23-2699, *1 (D. Md. Dec. 20, 2023) (denying SFFA's request to prevent the Naval Academy from using race in its admissions process).

256. *See* Students for Fair Admissions v. The U.S. Mil. Acad. at West Point, et al., No. 23-CV-08262, 2024 WL 36026, *1, *13 (S.D.N.Y. Jan. 3, 2024) (holding that an injunction would cause major disruptions to the admissions process).

257. *Id.* at *14.

258. CAL. CONST., art. I, § 31(a).

259. The number has since been increased to include the top nine percent. *See Local Path (ELC)*, U. CAL., perma.cc/A33U-NPQ9.

260. *See California's Four Percent Plan Results in Record Number of Black, Hispanic Applicants at Berkeley*, DIVERSE EDUC. (Feb. 28, 2001), https://perma.cc/843B-2Q6E.

261. *Talented Twenty Program*, FL DEP'T OF EDUC. 1, 3 (2020), https://perma.cc/83TZ-UUC9. Florida now guarantees admission to its state universities to the top twenty percent of its high school graduates who also complete the SAT. *Id.* at (2)(c).

262. Initiative 424 amended the Nebraska constitution to prohibit preferential treatment in public education on the basis of race, sex, color, ethnicity, or national origin. NEB. CONST. art. I, § 30(a) (West, Westlaw through 1st Reg. Sess. of the 108th Leg. 2023).

263. Proposition 107 amended the Arizona constitution to prohibit preferential treatment in public education on the basis of race, sex, color, ethnicity, or national origin. ARIZ. CONST., art. II, § 36 (West, Westlaw through 1st Reg. Sess. of 56th Leg. 2023).

264. State Question No. 759 amended the Oklahoma constitution to prohibit preferential treatment in public education on the basis of race, color, sex, ethnicity, or national origin. OKLA. CONST. art. II, § 36A (West, Westlaw current through June 30, 2020).

Colorado.[265] In 2011, the New Hampshire state legislature passed a law banning affirmative action in public universities.[266] Washington has also outlawed affirmative action.[267] Each of these state bans has created controversy and drawn criticism for negatively impacting minority students,[268] but none more so than Michigan's "Proposal 2," which came before the Supreme Court after being overturned on appeal by the Sixth Circuit.

In *Coalition to Defend Affirmative Action v. Regents of the Univ. of Michigan*, plaintiffs challenged a state constitutional amendment barring programs for state school admissions, public employment, and public contracting that grant preferential treatment on the basis of race or gender.[269] The amendment, dubbed "Proposal 2," passed with approximately 57.9% of voter approval.[270] Plaintiffs claimed that Proposal 2 violated the Equal Protection Clause of the Fourteenth Amendment and the First Amendment, and was preempted by Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.[271]

The district court dismissed the case.[272] The Sixth Circuit Court of Appeals reversed the decision, holding that the portions of Proposal 2 affecting public institutions of higher education violated the Equal Protection Clause.[273] The state Attorney General sought review en banc.[274] Upon rehearing the case en banc, the court again struck down the provisions in Proposal 2 affecting public education, holding that they impermissibly altered the political process in ways that unduly burdened racial minorities and thus violated the Equal Protection Clause's guarantee that "all citizens ought to have equal access to the tools of political change."[275] The Court reasoned that a Black student seeking the adoption of a race-conscious admissions policy would have no other recourse than to lobby for a constitutional amendment, while a student seeking other changes to a public university's admissions policy would have a much easier task.[276] The Supreme

265. *See* Colleen Slevin, *Colorado Voters Reject Affirmative Action Ban*, DENVER POST (Nov. 7, 2008), https://perma.cc/X6M3-KVPZ.

266. N.H. REV. STAT. ANN. § 187-A:16-a (West, Westlaw through 2023 Reg. Sess.).

267. Initiative 200, forbidding preferential treatment in public education on the basis of race, sex, color, ethnicity, or national origin, passed in 1998. WASH. REV. CODE ANN. § 49.60.400 (West, Westlaw through 2023 Reg. & 1st Spec. Sess.).

268. *See*, *e.g.*, Ford Fessenden & Josh Keller, *How Minorities Have Fared in States With Affirmative Action Bans*, N.Y. TIMES (June 24, 2013), https://perma.cc/NY7H-N8WN (examining educational outcomes for minority students affected by state affirmative action bans).

269. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary v. Regents of Univ. of Mich., 701 F.3d 466, 473 (6th Cir. 2012), *cert. granted*, 133 S. Ct. 1633 (2013).

270. Coal. to Defend Affirmative Action v. Regents of Univ. of Mich., 539 F. Supp. 2d 924, 931 (E. D. Mich. 2008).

271. *Id.* at 933–35.

272. *Id.* at 930.

273. Coal. to Defend Affirmative Action, 701 F.3d at 491.

274. *Id.* at 473.

275. *Id.* at 470.

276. *Id.* at 484.

Court granted certiorari in *Schuette v. Coalition to Defend Affirmative Action*.[277] In 2014, the Court reversed the Sixth Circuit's judgment, holding "[t]here is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters."[278]

E. THE LEGALITY OF RACE-CONSCIOUS SUPPLEMENTAL PROGRAMS IN HIGHER EDUCATION

Beyond race-conscious admissions programs, questions about and challenges to race-conscious supplemental programs in higher education—such as scholarships, financial aid, and outreach programs like tutoring, mentoring, and summer bridge programs—have become increasingly prominent in recent years. However, no judicial opinion has addressed the legality of such programs since 1994.[279] In 1994's *Podberesky v. Kirwan*, a Latino student who had been denied a scholarship by the University of Maryland, on the grounds that he did not meet the program's academic requirements, challenged another scholarship program offered by the University exclusively for Black students.[280] The Fourth Circuit's analysis turned on (1) whether strong evidence showed that remedial action was necessary, and (2) whether the University narrowly tailored its program to meet that end.[281] The court found that the program did not meet either criterion.[282] Evidence of general societal discrimination against African-Americans was not "sufficient ground[s] for employing a race-conscious remedy," and the University did not allege underrepresentation with reference specifically to African-Americans.[283] The University's scholarship program failed the narrowly tailored prong because the program was not sufficiently related to the goal of remedying low retention and graduation rates as well as underrepresentation.[284]

While *Grutter v. Bollinger* established that race-conscious admissions could be sufficiently premised on an interest in diversity alone,[285] it did not discuss race-conscious supplemental programs.[286] In 1994, before *Grutter* was decided, the U.S. Department of Education ("DOE") issued a notice of final policy guidance

277. Schuette v. Coal. to Defend Affirmative Action, 568 U.S. 1249 (2013).

278. Schuette v. Coal. to Defend Affirmative Action, 572 U.S. 291, 314 (2014).

279. *See* Podberesky v. Kirwan, 38 F.3d 147, 152–62 (4th Cir. 1994). *But see* Honadle v. Univ. of Vt., 56 F. Supp. 2d 419, 428–29 (D.Vt. 1999) (holding that the university's "minority faculty incentive fund" to recruit minority faculty applicants did not call for strict scrutiny since it imposed no burdens or benefits).

280. *See Podberesky*, 38 F.3d at 152.

281. *Id.* at 153.

282. *Id.* at 161.

283. *Id.* at 155.

284. *Id.* at 158.

285. *Grutter*, 539 U.S. at 327–28.

286. *But see id.* at 349 (Scalia, J., concurring and dissenting) (criticizing "minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies").

on the legality of racial preferences in supplemental programs.[287] According to the DOE, in general, financial aid may be awarded with consideration of race or national origin if it is awarded under a federal statute authorizing the use of race or national origin or if the "aid is necessary to overcome the effects of past discrimination."[288] The DOE also specified that colleges may consider race in efforts to "attract and retain" students, provided that these efforts meet constitutional standards—including the requirement for narrow tailoring.[289] The compelling interest in diversity may permit colleges to consider race in awarding financial aid or in establishing eligibility for financial aid.[290]

Nonetheless, the rulings in *Gratz* and *Grutter* have led universities to reevaluate the means they use to attract and retain minority students.[291] Some of these changes have been self-initiated, while others arose due to pressure from the DOE's Office for Civil Rights.[292] Where states have banned affirmative action, public universities have sometimes resorted to altering their supplemental programs to meet legal requirements. For example, the University of Michigan has targeted some of its outreach efforts toward high schools that have significant minority populations and students whose backgrounds show indicators of particular socioeconomic classes.[293] An alumni association has also created a scholarship fund for minority students.[294]

IV. VOLUNTARY DESEGREGATION AND AFFIRMATIVE ACTION POLICIES IN PUBLIC SECONDARY EDUCATION

Despite the desegregation promise of *Brown* and the subsequent decades of judicial intervention mandating compliance, primary and secondary schools remain, by many accounts, substantially segregated. In 2021, the overall student population was comprised of 45% white students, 15% Black students, and 28% Latin American students.[295] During the fall of 2021, 77% of white students were enrolled in public schools that had 50% or greater white enrollment, 40% of Black students were enrolled in public schools with 50% or greater Black student

287. Nondiscrimination in Federally Assisted Programs, 59 Fed. Reg. 8756 (proposed Feb. 23, 1994) (to be codified at 34 C.F.R. pt. 100).

288. *Id.*

289. *Id.*

290. *Id.*

291. Peter Schmidt, *Not Just for Minority Students Anymore*, CHRON. OF HIGH. EDUC. at A17 (Mar. 19, 2004), https://perma.cc/A87C-MUQ9 (describing expansion of scholarships and programs to non-minority students from fear of discrimination charges).

292. Peter Schmidt, *From 'Minority' to 'Diversity,'* CHRON. OF HIGH. EDUC. (Feb. 3, 2006), https://perma.cc/LPX3-UX96. Schmidt details changes in minority recruitment by several universities including the California Institute of Technology, Carnegie Mellon University, Harvard, and Saint Louis University. The Office for Civil Rights at the Department of Education is responsible for enforcing federal civil rights laws that prohibit discrimination in education. *See, e.g.*, 34 C.F.R. §§ 101.1 et seq. (West, Westlaw through Apr. 12, 2024) (effectuating Title VI).

293. Reeves Wiedeman, *Ban on Preferences Succeeds in Nebraska; Colorado Measure Remains Undecided*, CHRON. OF HIGHER EDUC. (Nov. 5, 2008), https://perma.cc/FFA5-Q7MM.

294. *Id.*

295. *Report: Racial/Ethnic Enrollment in Public Schools*, NAT'L CTR. FOR EDUC. STATISTICS (May 2023), https://perma.cc/4WZU-829D.

enrollment, and 56% of Latin American students were enrolled in institutions with 50% or greater Latin American student enrollment.[296] The data show many of these schools are highly segregated: of all public schools, 44% of white students were enrolled in public schools with predominantly (greater than 75%) white enrollment.[297] About 22% of Black students were enrolled in public schools that were predominantly Black, and 31% of Latin American students were enrolled in schools that were predominantly Latin American.[298]

This shows an increase in segregation since the mid-2000s. In 2003-2004, the average white student attended a public school where white students comprised 78% of the student body, even though white students comprised only 58% of the overall public school population.[299] In that same year, the average Black student attended a public school where Black students comprised 53% of the student body, even though Black students comprised just 17% of the overall school age population.[300] The average Latin American student attended a school where Latin American students comprised 55% of the student body, even though Latin American students comprised just 19% of the overall student population.[301]

Not only has the number of students who attend a school where the majority of the student body is their own race increased, but the concentration within those numbers has increased as well. As the National Center for Education Statistics found: "In fall 2021, about 33 percent of all public elementary and secondary school students attended schools where students of color made up at least 75 percent of total enrollment. This represents an increase from 27 percent of all public school students who attended such schools in fall 2010."[302]

The regional segregation numbers of large portions of the country are even starker. In the 2016 school year, for example, 37.7% of Black students attended intensely segregated schools (*i.e.*, schools in which non-white minorities make up between 90-100% of the student body) in the West, 36.4% of Black students attended such schools in the South, and 51.5% of Black students attended such schools in the Northeast.[303] During the same school year, 46.2% of Latin American students attended intensely segregated schools in the West, 41.9% attended such schools in the South, and 43.5% attended such schools in the Northeast.[304]

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296. *Id.*

297. *Id.*

298. *Id.*

299. Gary Orfield & Chungmei Lee, *Racial Transformation and the Changing Nature of Segregation*, CIV. RTS. PROJECT AT HARV.UNIV. 1, 9 (2006), https://perma.cc/B2Y4-JTUR.

300. *Id.*

301. *Id.*

302. *Report: Racial/Ethnic Enrollment in Public Schools*, NAT'L CTR. FOR EDUC. STATISTICS (May 2017), https://perma.cc/5M7P-VXY7.

303. *See* Erica Frankenberg, Jongyeon Ee, Jennifer Ayscue, & Gary Orfield, *Harming Our Common Future: America's Segregated Schools 65 Years After Brown*, CIV. RTS. PROJECT AT UCLA 1, 26–27 (2019), https://perma.cc/54PM-L65Y.

304. *Id.* at 29.

A report published in September 2019 found the trend of resegregation to be significant.[305] In spite of the dramatic suburbanization of non-white families across the nation for the past several decades, 55.9% of Latin American students and 42% of Black students attend majority non-white schools (>50% minority population).[306] Additionally, in 2016 studies found that 41.6% of Latin American and 40.1% of Black students attended intensely segregated schools.[307] Furthermore, though white people make up just over half of the nation's enrollment, the typical white student attends a school where three-quarters of their peers are white.[308]

As courts release more school districts from longstanding desegregation court orders and schools return to neighborhood assignment systems that mirror patterns of residential segregation, schools have become even more racially homogenous.[309] In the last twenty years, school districts have attempted to address this issue in elementary and secondary education by implementing voluntary student assignment plans utilizing race-conscious factors.[310] Working under the precedent set forth in *Swann*—that a school board's traditional power to set educational policy permits it to implement voluntary integration programs—school districts have experimented with numerous race-conscious programs that seek to achieve diversity within the student bodies.[311]

A. A FIRST ATTEMPT AT VOLUNTARY SCHOOL DESEGREGATION

Seattle was the first major city to adopt a comprehensive desegregation program without a court order.[312] The school district laid the groundwork for the program in the early 1960s through a variety of experimental strategies aimed at desegregating its high schools.[313] First, it implemented small-scale exchange programs in which a limited number of students switched high schools for five-week periods.[314] In 1963, expanding on this concept, the District implemented a "Voluntary Racial Transfer" program through which a student could transfer to any school with available space if the transfer would improve the racial balance at the receiving school.[315]

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305. *See id.* at 13.

306. *See* Katherine Schaeffer, *U.S. Public School Students Often Attend Schools Where at Least Half of Their Peers Are the Same Race or Ethnicity*, PEW RSCH. CTR. (Dec. 15, 2021), https://perma.cc/X4SJ-RH77.

307. See *Harming Our Common Future: America's Segregated Schools 65 Years After Brown*, *supra* note 303 at 26, 29.

308. *Id.* at 32.

309. Jeremy Anderson & Erica Frankenberg, *Voluntary Integration in Uncertain Times*, KAPAN (Jan. 21, 2019), https://perma.cc/SY6P-XW8F.

310. *Id.*

311. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

312. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 426 F.3d 1162, 1168 (9th Cir. 2005).

313. *Id.* at 1166–67.

314. *Id.* at 1167.

315. *Id.*

In 1977, the district created the "Seattle Plan," a comprehensive desegregation program dividing the district into zones.[316] White-dominated elementary schools were paired with minority-dominated elementary schools and mandatory high school assignments were linked to elementary school assignments.[317] Seattle residents opposing the plan passed a statewide initiative to block its implementation.[318]

Plaintiffs contested this initiative in *Washington v. Seattle School District No. 1*.[319] The Supreme Court held the initiative to be an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment.[320] The Court found that when a state allocates governmental power non-neutrally by explicitly using the racial nature of a decision to determine the decision-making process, its action places special burdens on racial minorities within the governmental process thereby making it more difficult for certain racial and religious minorities than for other members of the community to achieve legislation that is in their interest.[321]

B. PRE-*GRUTTER* APPLICATION OF RACE-CONSCIOUS STUDENT ASSIGNMENT PLANS IN PUBLIC SECONDARY SCHOOLS

Three circuit courts decided major cases regarding race-based student assignment plans in secondary education prior to the Court's decision regarding higher education in *Grutter*. The First Circuit decided *Wessmann v. Gittens* in late 1998.[322] Although the case expressly dealt with a school admissions plan in the K-12 context, the decision came on the heels of the Fifth Circuit's decision in *Hopwood*, which rejected diversity as a compelling state interest in the University of Texas Law School's admissions program.[323] At first, it was unclear what the magnitude of *Hopwood*'s aftershocks would be, leading courts to vary about whether or not diversity could be a compelling state interest. In *Wessmann*, the Boston Latin School operated an affirmative action program that sought to create a diverse student body that was a fair representation of a cross-section of the students of the Boston public schools.[324] In determining admission to the highly competitive school, half of the positions were allocated solely based on an applicants' composite scores, derived from combining an applicant's grade point average and test scores.[325] The remaining slots were then allocated based on flexible racial and ethnic guidelines.[326] Evaluating the program under strict scrutiny, the Court refused to decide whether diversity could serve as a compelling state

316. *Id.* at 1167–68.
317. *Id.* at 1168.
318. *Parents Involved in Cmty. Sch.*, 426 F.3d at 1168.
319. Washington v. Seattle Sch. Dist., 458 U.S. 457 (1982).
320. *Id.*
321. *Id.*
322. Wessmann v. Gittens, 160 F.3d 790 (1st Cir. 1998).
323. Hopwood v. Texas, 78 F.3d 932, 944 (5th Cir. 1996).
324. *Wessman*, 160 F.3d at 798.
325. *Id.* at 793.
326. *Id.*

interest, but assumed, *arguendo*, that *Bakke* controlled and that some form of diversity might be compelling in specific circumstances to justify race-conscious actions.[327] In striking down the plan, however, the Court found that the district's use of diversity as a rationale for its admissions policies was merely a pretext for racial balancing and its means were not narrowly drawn to attain actual diversity.[328]

In 1999, the Fourth Circuit analyzed the Arlington County School Board's weighted admissions policy, which considered race in its review of candidates' files.[329] The issue presented to the court was whether an oversubscribed public school, where student demand exceeded the available slots, could use a weighted lottery system in its admissions plan to promote racial and ethnic diversity in the student body; to which the Court answered no.[330] Because the program utilized race-conscious criteria, the Fourth Circuit used strict scrutiny to analyze it.[331] Adopting the First Circuit's wait-and-see strategy from *Wessmann*,[332] the Court assumed, without holding, that the school district had a compelling interest in diversity and instead attacked the narrow tailoring prong of strict scrutiny.[333] After analyzing the plan according to five "narrow tailoring factors," the Court concluded that the school district's program, which used the lottery system as a means to achieve a racial balance in schools proportional to the school district average, was akin to impermissible racial balancing and was thus unconstitutional.[334]

In *Brewer v. West Irondequoit Central School District*, the Second Circuit considered a voluntary inter-district transfer plan of the Rochester School District.[335] The program's goal was to reduce the racial isolation resulting from segregated housing patterns in urban Rochester by allowing minority students to transfer from predominantly minority city schools to participating suburban schools, and by enabling non-minorities to transfer from suburban schools to city schools, provided the transfers did not negatively affect the racial balance of the receiving

327. *Id.* at 796.

328. *Id.* at 798, 799.

329. Tuttle v. Arlington Cmty. Sch. Bd., 195 F.3d 698, 702 (4th Cir. 1999).

330. *Id.* at 701.

331. *Id.* at 703.

332. *Id.* at 705 (stating that "[u]ntil the Supreme Court provides decisive guidance, we will assume, without holding, that diversity may be a compelling government interest"); *see also* Eisenberg v. Montgomery Cnty. Pub. Sch., 197 F.3d 123, 125–34 (4th Cir. 1999) (examining a Montgomery County Public Schools magnet program that assigned students to neighborhood schools but permitted voluntary transfers after considering diversity as one factor in approval decisions). The Fourth Circuit again did not reach a decision on whether the state has a compelling interest in diversity. *Eisenberg*, 197 F.3d at 130. The Court ultimately found that the plan was unconstitutional because it failed strict scrutiny by utilizing racial balancing in its student allocation that was equivalent to the percentage of each race throughout the entire school system. *Id.* at 133.

333. *Tuttle*, 195 F.3d at 705.

334. *Id.* at 706–07 (explaining that the five "narrow tailoring" factors the court considered included (1) the efficacy of alternative race-neutral policies, (2) the planned duration of the policy, (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population or work force, (4) the flexibility of the policy, and (5) the burden of the policy on innocent third parties).

335. Brewer v. W. Irondequoit Cent. Sch. Dist., 212 F.3d 738, 741 (2d Cir. 2000).

schools.[336] The Second Circuit found that the district's goal of reducing racial isolation to eliminate de facto segregation resulting from housing patterns was a compelling state interest.[337] The Court concluded that because this was a constitutionally permissible goal, there was no more effective means of achieving that goal than to base decisions on race.[338] In the end, the Second Circuit vacated the lower court decision and remanded the case to apply a narrow tailoring analysis to the compelling interest that it identified.[339]

C. POST-*GRUTTER* PLANS USING RACE AS A FACTOR IN STUDENT ASSIGNMENT PLANS IN PUBLIC SECONDARY SCHOOLS

After *Grutter* recognized diversity as a compelling state interest, the First, Sixth, and Ninth Circuits confronted three cases related to race-conscious student assignment plans in the K-12 educational context.

1. The First Circuit

In *Comfort v. Lynn School Committee*, a school district in Massachusetts implemented a voluntary desegregation program featuring a student assignment plan that allowed students to attend their neighborhood schools.[340] Race was only considered when a student sought to transfer to another school.[341] The school district approved the transfer if it did not increase the racial imbalance at either the sending or the receiving school.[342] Asserting that the district's plan aspired to create many of the same benefits that the *Grutter* Court approved, the First Circuit recognized diversity as a compelling interest in a K-12 setting.[343]

The court also found the district's plan was sufficiently tailored to this interest.[344] Specifically, it found that the plan did not seek racial balancing for its own sake, nor did it use rigid quotas to ensure a predetermined level of diversity at each of Lynn's schools.[345] "Rather, the transfer policy conditioned on district demographics . . . reflect[ed] the defendants' efforts to obtain the benefits of diversity in a stable learning environment."[346] The plan thus provided a sufficiently close "fit" to the district's compelling interest to ensure that "the motive for the classification was not illegitimate racial prejudice or stereotype."[347]

The Supreme Court overruled this conclusion in *Parents Involved in Community Schools v. Seattle School District No. 1*.[348] There, the Court reviewed two cases

336. *Id.* at 742.
337. *Id.* at 752.
338. *Id.*
339. *Id.* at 752–53.
340. Comfort v. Lynn Sch. Comm., 418 F.3d 1, 6–7 (1st Cir. 2005).
341. *Id.* at 6.
342. *Id.* at 8.
343. *Id.* at 15–16.
344. *Id.* at 21.
345. *Id.* at 21.
346. Comfort v. Lynn Sch. Comm., 418 F.3d 1, 21 (1st Cir. 2005).
347. *Id.*
348. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 748 (2007).

involving similar questions of law. The first case reviewed a 2005 challenge to a Seattle student assignment plan through which the Seattle School District operated ten public high schools: four schools located north of downtown in a predominately white section of the city, five located south of downtown in mostly nonwhite neighborhoods, and one located west of downtown.[349]

2. The Ninth and Sixth Circuits

Struggling to maintain school integration due to Seattle's segregated housing patterns,[350] the school district instituted an "Open Choice" plan that allowed students to rank high schools in order of their preference and then be assigned to a school based on the rankings.[351] Pursuant to the "Open Choice" plan, if a high school had more applicants than seats, the district used a series of four tie-breakers to determine admission, including whether an applicant had a sibling at the school; the applicant's race; the distance from the school to an applicant's home; and the results of a lottery.[352] As noted in the decision, the school district considered factors in the order listed, only using race as a tiebreaker if the sibling preference tiebreaker did "not bring the oversubscribed high school within plus or minus 15 percent" of the "racial make-up of the students in the Seattle public schools as a whole."[353]

The Ninth Circuit analyzed the district's admissions policy under strict scrutiny, and, relying heavily on *Grutter*, found the policy constitutional. Specifically, the court held that racial desegregation in Seattle's public high schools was a compelling state interest, and that the district's admissions program was narrowly tailored to achieve that objective.[354]

The second case that the Court reviewed was a Sixth Circuit per curiam decision finding a Kentucky plan that used race as a factor in student assignment constitutional.[355] In *McFarland ex rel. McFarland v. Jefferson County Public Schools*, the county implemented a voluntary integration plan to achieve its goal of racial diversity after it was released from a court-ordered desegregation plan.[356] The central component of the plan required schools to seek a broad range of Black student enrollment between 15% and 50%.[357] The school district considered other factors, such as place of residence, school program popularity, and

349. *Id.* at 712–13.

350. *Id.*

351. *Id.* at 712–13, 715.

352. *Id.* at 714–15.

353. *Parents Involved in Cmty. Sch.*, 426 F.3d at 1169–70.

354. *Id.* at 1173, 1175. The court noted that a school district's "compelling interests in diversity [had] been endorsed by Congress" in the Magnet Schools Assistance Act, in which Congress declared that "[i]t is in the best interests of the United States . . . to continue the Federal Government's support of local educational agencies that are *voluntarily* seeking to foster meaningful interaction among students of different racial and ethnic backgrounds . . ." *Id.* (emphasis in original) (citing 20 U.S.C. § 7231(a)(4))

355. McFarland v. Jefferson Cnty. Pub. Sch., 330 F. Supp. 2d 834 (W.D. Ky. 2004).

356. *Id.* at 841–42.

357. *Id.*

school capacity prior to any consideration of race; however, in circumstances where the racial composition of a school was at either end of the percentile range, race could determine a child's school assignment.[358]

After recognizing a compelling diversity interest in the K-12 setting, the Sixth Circuit found the plan narrowly tailored because: (1) the use of the racial guidelines lacked the attributes of an impermissible quota system; (2) its use of race did not unduly harm members of any racial group; (3) the school board not only considered, but actually implemented, a variety of race-neutral strategies to achieve its goals prior to implementing the race-conscious plan; and (4) it was sufficiently flexible to determine school assignments for all students by considering a host of factors with race not serving as the "defining" factor.[359]

Applying strict scrutiny, the Court ultimately reversed and remanded both of the above Ninth Circuit and Sixth Circuit decisions by a narrow majority, holding that primary and secondary public schools that had not operated legally segregated schools or that had already achieved unitary status may not make school assignments solely based on race.[360] Because neither the Seattle district nor the Jefferson County district operated under a desegregation decree, neither could claim the compelling interest of remedying the effects of past intentional discrimination; accordingly, both claimed to be promoting the compelling state interest of diversity as recognized in *Grutter*.[361] The Court distinguished *Grutter*, concluding that it did not control because its holding was limited to individualized assessment aimed at "broad-based diversity" in the "unique context of higher education," and noted that cases that had found race-based assignments in secondary and primary schools permissible based on *Grutter* had erred, including the two cases before the court.[362] Whereas in *Grutter*, where the holistic assessment focused on many qualifications and characteristics to promote diversity, of which race was but one factor, the Court emphasized that the Seattle and Jefferson County district schemes used race as the sole determinative factor.[363] After determining that the districts used race in a "non-individualized and mechanical way," thus indicating a goal of pure racial balancing,[364] the plurality further concluded that racial balancing linked to demographics was not a compelling state interest.[365]

The Court also found that the districts' systems were not narrowly tailored.[366] The court highlighted the fact that the method of classification used to determine a student's school placement was limited to white/nonwhite in Seattle and black/

358. *Id.*
359. *Id.* at 857–61.
360. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 723–24 (2007).
361. *Id.* at 702–03, 725–28.
362. *Id.* at 722–24.
363. *Id.* at 722–23.
364. *Id.* at 723.
365. *See id.* at 726, 732.
366. *Parents Involved in Cmty. Sch.*, 551 U.S. at 726, 732–35.

other in Jefferson County, often leading to perverse results.[367] The plans were also insufficiently tailored because they had only a nominal impact.[368] Where the policy in *Grutter* resulted in tripling the minority enrollment, both the Seattle and Jefferson County schemes resulted in shifting only a small number of students to a different school.[369] The Court finally noted that the districts had failed to establish that they had examined other means of achieving diversity in good faith.[370] The Court indicated that narrow tailoring requires such consideration because it goes to the necessity of the program.[371]

D. PRIVATE SCHOOLS' VOLUNTARY AFFIRMATIVE ACTION IN RESPONSE TO EXTERNAL IMBALANCE

The Supreme Court has not definitively resolved whether private schools may voluntarily institute affirmative action programs.[372] The Ninth Circuit in *Doe v. Kamehameha Schools* held private schools' voluntary affirmative action to respond to a manifest imbalance does not violate 42 U.S.C. § 1981.[373] John Doe, a student with no Hawaiian ancestry, applied for admission to the Kamehameha Schools, a private, non-profit K-12 education institution in Hawaii that received no federal funds.[374] The Kamehameha Schools' admission policy gives preference to students of Hawaiian ancestry.[375] Although the Kamehameha Schools deemed John Doe a "competitive applicant" and put him on the waiting list, he was repeatedly denied admission.[376] Even the Kamehameha Schools conceded that John Doe would have been admitted if he possessed Hawaiian ancestry.[377]

John Doe challenged the Kamehameha Schools' admissions policy under Section 1981.[378] The district court granted summary judgment in favor of the Kamehameha Schools and held that the challenged admission policy had a legitimate justification because it remedied Native Hawaiians' socioeconomic and

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367. *Id*. at 723, 725 (finding that "[u]nder the Seattle plan, a school with 50% Asian-American students and 50% white students but no African-American, Native-American or Latino students would qualify as balanced, while a school with 30% Asian-American, 25% African-American, 25% Latino and 20% white students would not").

368. *See id*. at 705–06.

369. *Id*. at 733–35 (suggesting, as Justice Kennedy noted in his *Croson* concurrence, that the ends could have been achieved by other means); City of Richmond v. J.A. Croson Co., 488 U.S. 469 at 519 (1989) (Kennedy, J., concurring).

370. *Id*. at 735.

371. *Id*. at 734.

372. Sharon Hsin-Yi Lee, Comment, *Justifying Affirmative Action in K-12 Private Schools*, 23 HARV. BLACK LETTER L.J. 107, 120 (2007).

373. Doe v. Kamehameha Sch., 470 F.3d 827, 835 (9th Cir. 2006) ("Title 42 U.S.C. § 1981 provides, in pertinent part, that '[a]ll persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.'").

374. *Id*. at 829.

375. *Id*.

376. *Id*. at 834.

377. *Id*.

378. *Id*.

educational disadvantages that resulted from an influx of western civilization.[379] The Ninth Circuit affirmed the district court's decision and concluded the principles of the Title VII of the Civil Rights Act applied because the Kamehameha Schools was a pure private entity that received no federal funds.[380] Under Title VII's rationale, a private school's affirmative action is legally justified if the school can demonstrate (1) that specific, significant imbalances in educational achievement presently affect the group favored by its admissions policy in the relevant community, or population; (2) that the admissions policy does not unnecessarily trammel the rights of the members of the non-preferred class; and (3) that the admissions policy does no more than is necessary to correct the manifest imbalance suffered by the preferred class.[381] Applying the three prong test, the Ninth Circuit concluded the Kamehameha Schools demonstrated (1) that specific, significant imbalances in educational achievement currently affect Native Hawaiians in Hawaii and that the schools' admission policy aimed to remedy that imbalance; (2) that the schools admitted qualified children with Native Hawaiian ancestry before admitting children with no such ancestry, so the rights of the non-Hawaiian students were not unnecessarily trammeled; and (3) that the admissions policy would exist only for so long as is necessary to remedy the external imbalances.[382] While the majority opinion in *SFFA* applied to colleges and universities, there is still a possibility that the holding may be extended to K-12 learning.[383] For the time being, however, private elementary and secondary schools have not been significantly impacted by the ruling.

V. AFFIRMATIVE ACTION IN PUBLIC HIGHER EDUCATION VS. WORKPLACE AFFIRMATIVE ACTION PLANS OR DIVERSITY INITIATIVES

Following *SFFA*, the question still remains whether the Supreme Court's prohibition of racially conscious efforts undertaken by public institutions of higher education will influence the validity of affirmative action plans or diversity initiatives in the workplace.[384] Based on the current Supreme Court jurisprudence,

379. *Kamehameha Schools*, 470 F.3d at 835.

380. *Id*. at 829, 839.

381. *Id*. at 843–45.

382. *Id*.

383. *See* David Hinojosa, *K-12 Schools Remain Free to Pursue Diversity Through Race Neutral Programs*, 32 POVERTY & RACE RSCH. ACTION COUNCIL 1, 5 (2023) (highlighting that the Court limited its holding to university race-based admissions not K-12). *But see* Patrick Wall, *Supreme Court Affirmative Action Cases Could Bolster Attacks on School Integration*, CHALKBEAT (Oct. 28, 2022, 5:53 PM), https://perma.cc/FE45-M9J6 (finding that school districts in Virginia have begun to face legal challenges on the basis of their admissions policies consideration of race). Thomas Jefferson High School for Science & Technology in Fairfax County, Virginia has already had its diversity plan challenged in federal courts under claims of discrimination against Asian Americans. *Id.*

384. *See generally* Andrew Turnbull, Carrie Cohen, Michael Schulman, & Sadé Tidwell, *Impact of College Admissions Affirmative Action Case on Employer DEI Initiatives*, BLOOMBERG LAW (May 2023), https://perma.cc/Y9P8-ZLVK (predicting that DEI initiatives are unlikely to be impacted). *But see* Barbara Hoey & Patrick Soundy, *The Future of Diversity, Equity, and Inclusion and Reverse*

both public and private sector affirmative action efforts may be affected.[385] In view of the facts that (1) Title VII applies to workplace diversity policies and (2) employers are not compelled to initiate affirmative action or to promote workplace diversity, affirmative action plans or diversity initiatives in private employers' workplace may be upheld in courts, however; the current collection of cases before the Court leave cause for concern.[386]

A. PUBLIC SECTOR: STRICT SCRUTINY

The Supreme Court in *Adarand Constructors, Inc. v. Pena* held that all racial classifications imposed by federal, state, or local government actors must be analyzed by a reviewing court under the strict scrutiny standard when facing an equal protection challenge.[387]

B. PRIVATE SECTOR: TITLE VII

In *United Steelworkers v. Weber*, the Supreme Court first upheld a corporation's voluntary affirmative action plan, which granted preference to black employees over more senior white employees in admission to in-plant craft training programs.[388] The Court held that a private sector employer's voluntary adoption of affirmative action plans designed to eliminate conspicuous racial imbalance in traditionally segregated job categories does not violate Title VII.[389] Since this ruling, *SFFA* has muddied the waters for employers using race conscious or selective criteria. Even though there hasn't been an affirmative application of *SFFA* to the employment sector yet, several conservative activist groups

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Discrimination Suits, EMP. BENEFIT PLAN REV., Mar.–Apr. 2024, at 1, 2–3, https://perma.cc/A9JU-8264 (recognizing that even though DEI programs are still lawful, employers should expect to see an uptick in reverse racism claims and ensure that all programs are compliant with the law and do not favor certain groups for hiring or promotion within an organization); Alexandra Olson, Haleluya Hadero, & Anne D'Innocenzio, *As Diversity, Equity and Inclusion Comes Under Legal Attack, Companies Quietly Alter Their Programs*, ASSOC. PRESS (Jan. 14, 2024), https://perma.cc/826B-2DU8 (highlighting that major companies like Pfizer and Comcast have already removed race-based and sex-based eligibility criteria from a variety of their programs).

385. *See, e.g.*, Cynthia L. Estlund, *Putting Grutter to Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 2–6 (2005).

386. See Simone Francis, Linda Goldman, & Zachary Zagger, *DEI Under Scrutiny, Part VII: Re-Examining the Implementation of Rooney Rule Diverse Slate Initiatives*, THE NAT'L L. R. (Feb. 29, 2024), https://perma.cc/H3CF-T3ZL (highlighting how the NFL's Rooney Rule focused on hiring Black head coaches has been challenged as being in conflict with SFFA); Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC, No. 23-13138 (11th Cir. 2023) (bringing a lawsuit against the Fearless Foundation a Black female owned venture capital fund dedicated to providing $20,000 grants to Black female owned small businesses as violating the holding from SFFA). *See generally* Andrew Turnbull, Carrie Cohen, Michael Schulman, & Sadé Tidwell, *Impact of College Admissions Affirmative Action Cases on Employee DEI Initiatives*, BLOOMBERG LAW (May 2023) https://perma.cc/7ZFQ-D43Z (noting that while employers are entitled to create affirmative action plans they must be voluntary and cannot "trammel the interests of non-diverse candidates'').

387. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 222 (1995).

388. United Steelworkers of Am., AFL-CIO-CLC v. Weber, 443 U.S. 193, 197 (1979).

389. *Id.* at 209.

have advanced various litigation efforts to eradicate race conscious policies from the use of employment decisions.[390]

VI. CONCLUSION

The future of affirmative action and diversity initiatives in American education remains uncertain. Segregation in many public institutions is demonstrably increasing, with a clear trend of students attending schools where the enrollment is predominantly of their same race. At the same time, a growing body of case law has diminished the ability of schools to consciously use race as a factor in their admissions and enrollment processes.

Although the Supreme Court in *Fisher II* reemphasized the legitimacy of diversity as a compelling interest for administrators of higher education, that ruling was tempered by both the relatively narrow facts of the case, and the directive that the school continuously re-evaluates its admissions process or policies. Following the Court's ruling in *SFFA*, using diversity as a consideration for college admissions is no longer a viable option for schools. Without a clear landscape to provide guidance for colleges and universities to follow, the likelihood of future litigation remains high, and this area of law remains unsettled.

390. *See Activist Behind US Affirmative Action Cases Sues Major Law Firms*, *supra* note 252.