OREGON LAW REVIEW

2024

VOLUME 103
NUMBER 1

Articles

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DEI Hard: The Future of DEI After *Students for Fair Admissions v. Harvard College*

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INTRODUCTION

Brown v. Board of Education occupies a preeminent role in the civil rights movement.[1] It overruled *Plessy v. Ferguson* and repudiated the separate-but-equal doctrine that had long stymied the education of Black children.[2] But *Brown* accomplished far more than placing Black and white students on an equal footing in the classroom, for it recognized that equality in education is indispensable to any lasting progress toward racial equality.

University of California v. Bakke,[3] *Grutter v. Bollinger*,[4] and *Fisher v. University of Texas*[5] continued the progress the Court began in *Brown*. These three cases acknowledged that the Equal Protection Clause recognizes America's history of racial injustice.[6] The Equal Protection Clause is not colorblind. Its vision is clear. It addresses this country's sordid history of racial inequality. *Bakke*, *Grutter*, and *Fisher* affirmed this vision, holding that racial diversity was a compelling state interest sufficient to justify affirmative action in institutions of higher learning.[7] It is difficult to overlook the relationship between *Brown* and the three affirmative action decisions.[8] *Brown* and these three cases

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1 Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (repudiating the "separate-but-equal" doctrine in segregated public schools).

2 *Id.*; Plessy v. Ferguson, 163 U.S. 537 (1896).

3 Univ. of Cal. v. Bakke, 438 U.S. 265, 269–71 (1978) (invalidating a quota system for admission to the University of California medical school at Davis).

4 Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (recognizing diversity as a compelling state interest for affirmative action).

5 In *Fisher v. University of Texas*, the Supreme Court affirmed *Grutter* and remanded the case to the Fifth Circuit because it had failed to properly apply the requirements of strict scrutiny by deferring uncritically to the university's assertion that it had narrowly tailored its plan in good faith. Fisher v. Univ. of Tex., 570 U.S. 297, 313–14 (2013). On remand, the Fifth Circuit analyzed whether the university had narrowly tailored its affirmative action plan and found the plan constitutional. Fisher v. Univ. of Tex., 758 F.3d 633, 654 (5th Cir. 2016). The Supreme Court granted certiorari to review the Fifth Circuit's decision and affirmed its ruling. Fisher v. Univ. of Tex., 579 U.S. 365, 388 (2016).

6 *See supra* notes 3–5 and accompanying text.

7 *Id.*

8 *See* Students for Fair Admissions, Inc. v. President of Harvard Coll. (*SFFA*), 600 U.S. 181, 332 (2023) (Sotomayor, J., dissenting) (recognizing that "*Bakke*, *Grutter*, and *Fisher*

bookended the educational experience with assurances of equal opportunity. *Brown* without *Grutter* is a job half done. Achieving educational equality requires that both bookends be in place.[9]

In *Students for Fair Admissions v. Harvard College* ("*SFFA*" when referring to the case and "SFFA" when referring to the organization), the Supreme Court effectively overruled *Bakke*, *Grutter*, and *Fisher* by declaring that racial diversity in higher education is no longer a compelling state interest.[10] This ruling led the Court to hold that the affirmative action programs of Harvard College (Harvard) and University of North Carolina (UNC) violated the Equal Protection Clause.[11]

SFFA raises concerns about the future of affirmative action and other Diversity, Equity, and Inclusion (DEI) initiatives[12] under the Equal Protection Clause, Title VII of the Civil Rights Law of 1964, and § 1981 of the Civil Rights Act of 1866. In the aftermath of *SFFA*, organizations opposed to DEI, including SFFA and the American Alliance for Equal Rights (AAER), have intensified their attacks on

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are an extension of *Brown*'s legacy" because "[r]acially integrated schools improve cross-racial understanding, 'break down racial stereotypes,' and ensure that students obtain 'the skills needed in today's increasingly global marketplace . . . through exposure to widely diverse people, cultures, ideas, and viewpoints.'") (quoting Grutter v. Bollinger, 539 U.S. 306, 330 (2003)).

9 A college degree yields several benefits, including expanded career opportunities, higher earning potential, and an overall boost in the quality of life. *See, e.g.*, Eric J. Gertler, *Is College Worth It?*, U.S. NEWS & WORLD REP. (Mar. 23, 2023, 9:48 AM), https://www.usnews.com/opinion/articles/2023-03-23/is-college-worth-it. Over a college graduate's lifetime, research reveals that the financial return on investment of the cost of a college education is 287.7%. *Id.* Empirical research also reveals that, compared to those who do not graduate from college, college graduates experience "a deeper sense of purpose, [and] exposure to diverse populations." *Id. See also* Jaison R. Abel & Richard Deitz, Fed. Rsrv. of N.Y. *Do the Benefits of College Still Outweigh the Costs?* 20 CURRENT ISSUES IN ECON. & FIN. no. 3, 2014, at 2 (finding, as of 2014, that the "college wage premium [was] near an all-time high").

10 *SFFA*, 600 U.S. at 220.

11 *Id.* at 230. The *SFFA* case also challenged the Harvard and UNC admissions programs under Title VI of the 1964 Civil Rights Act, which provides: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The Court applied the same analysis to both the Equal Protection challenge and the Title VI challenge. *SFFA*, 600 U.S. at 198 n.2. *See* Gratz v. Bollinger, 539 U.S. 244, 276 n.23 (2003) (explaining that an institution that violates the Equal Protection Clause also violates Title VI if the institution has accepted federal funds).

12 This Article defines "DEI Initiatives" as any initiative, strategy, program, or plan, whether formal or informal, to increase racial diversity, equity, or inclusion in any institution of government, business, or education. This definition includes affirmative action plans.

DEI initiatives. In the coming months and years, the courts will shape the future of DEI.

Part I of this Article begins with an analysis of the majority opinion of *SFFA*. In that opinion, Chief Justice Roberts, writing for a six-justice majority, faulted the affirmative action programs of Harvard and UNC for using racial categories that were vague, sometimes overinclusive, other times underinclusive,[13] and for having unmeasurable goals.[14] He also criticized these programs for having no end point.[15]

Although Chief Justice Roberts did not suggest how universities might remedy these deficiencies, one might deem them correctable.[16] If the Chief Justice had stopped at this point, affirmative action in higher education might have survived. But he raised another objection that doomed affirmative action in higher education. Following a literalist interpretation of the Equal Protection Clause, which guarantees that no state shall "deny any person . . . the Equal Protection of the law,"[17] the Chief Justice concluded that the Equal Protection Clause is colorblind, meaning that its prohibition of racial preferences does not provide exceptions for Black people.[18] The Chief Justice characterized affirmative action as a zero-sum game.[19] Even if race is only one factor among many in the college admissions process, in some cases that factor will tip the scales in favor of a Black person and inevitably result in the denial of admission to a non-Black person.[20] Such a result, he concluded, is precisely what the Equal Protection Clause forbids.[21]

Justice Sotomayor, in a comprehensive and persuasive dissenting opinion, refuted the majority's criticisms of the goals and racial

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13 *SFFA*, 600 U.S. at 214–16. For example, he criticized grouping Asians in one category as overbroad. *Id.* at 216. He also faulted the goals of the challenged plans, asserting that such goals as training future leaders and preparing students to function in a diverse working environment are "not sufficiently coherent for purposes of strict scrutiny." *Id.* at 214. He also saw no means of measuring the attainment of the plans' stated goals. *Id.* at 215–16.

14 *Id.* at 216–17.

15 *Id.* at 221.

16 For example, plans might refine racial classifications to avoid both over- and under-inclusiveness. Similarly, affirmative action plans might establish concrete goals and hire industrial psychologists to assess empirically whether the affirmative action plans are achieving their goals. Finally, plans might provide for their termination once they have attained stated goals. Given ambitious stated goals, attainment might take a number of years.

17 *SFFA*, 600 U.S. at 201 (quoting U.S. CONST. amend. XIV, § 1).

18 *Id.* at 206.

19 *Id.* at 218–19.

20 *Id.*

21 *Id.* at 219.

categories applied by Harvard and UNC.[22] She argued that, in the current climate of lingering racial inequality, valid affirmative action plans do not need a determinable end point.[23] Most importantly, she stressed that the very purpose of the Equal Protection Clause is to set a constitutional foundation for achieving racial equality.[24] Noting that *Plessy* condoned racism in public education, Justice Sotomayor emphasized the importance of *Brown* in dismantling institutionalized racism in public schools.[25] She pointed out that affirmative action in higher education continues the work begun in *Brown*.[26] Although Justice Sotomayor believed that affirmative action had made progress in reversing the legacy of racism, she argued that the premature abandonment of affirmative action would set back the cause of racial equality.[27]

After analyzing the *SFFA* decision in Part I, the remainder of this Article discusses the aftermath of that decision and its potential effects on DEI initiatives. Part II explores the possible consequences of the decision in the public sector. In doing so, it discusses the two leading Supreme Court cases in this area: *Wygant v. Jackson Board of Education*[28] and *City of Richmond v. J.A. Croson Co.*[29] *Wygant* dealt with the Jackson school board's policy granting preferences to minority teachers,[30] and *Croson* dealt with the City of Richmond's race-conscious affirmative action plan for subcontracting city construction projects.[31] Both cases held that, under the Equal Protection Clause, race-conscious affirmative action must meet the two-prong analysis of

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22 *Id.* at 367–68 (Sotomayor, J., dissenting).

23 *Id.* at 369–707. Justice Sotomayor argued that *Grutter*'s expectation that affirmative action would end in twenty-five years was merely aspirational. She therefore concluded that that valid affirmative action plans need no end point. *Id.* It would seem, however, that the aspiration that affirmative action will no longer be needed in twenty-five years differs from the requirement that affirmative action plans have end points. To meet the requirement of narrow tailoring, a plan might state that it will end when the plan has achieved its stated diversity goals.

24 *Id.* at 318–26 (pointing out that after the abolition of slavery in the United States so-called Black Codes and newly enacted criminal laws sought to continue the subjugation of formerly enslaved people).

25 *Id.* at 326–27.

26 *Id.* at 300 (Sotomayor, J., dissenting).

27 *Id.* at 377–79 (fearing that the majority's decision will be "destructive" to equality in education and society in general).

28 Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

29 City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

30 *Wygant*, 476 U.S. at 273.

31 *Croson*, 488 U.S. at 470.

strict scrutiny.[32] Such affirmative action plans must (1) promote a compelling state interest and (2) be narrowly tailored to avoid impinging on the rights of those not in the protected class in question.[33] To establish the first prong—a compelling state interest—a public entity adopting such a plan must have either engaged in racial discrimination or passively condoned it.[34] After analyzing the requirements of the Equal Protection Clause for government affirmative action, Part II then examines the likelihood that *SFFA*'s interpretation of the Equal Protection Clause will constrain public affirmative action plans. Opponents of affirmative action have initiated a lawsuit challenging the constitutionality of the race-conscious admissions program of the United States Military Academy at West Point.[35] Part II analyzes the arguments raised in this Equal Protection case and the district court's decision denying the plaintiffs' motion for a preliminary injunction.

Part III examines affirmative action under Title VII and § 1981. *United Steelworkers of America v. Weber*[36] and *Johnson v. Transportation Agency*[37] prescribe the requirements of affirmative action in employment. Under these two cases, such plans (1) must address a "manifest racial imbalance in traditionally segregated employment categories,"[38] (2) may not trammel the rights of unprotected workers, and (3) must have an end point.[39] Part III goes on to discuss the implications of *SFFA* for Title VII and section 1981. This Part then explores how *SFFA* has emboldened the opponents to affirmative action to attempt to eliminate DEI programs from the private sector.

The Article concludes by highlighting some of the benefits of DEI. The Conclusion points out that DEI initiatives are proactive, rather than reactive like civil rights litigation. Moreover, DEI strategies have wider ranging effects than litigation. Unlike litigation, DEI seeks to increase

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32 *Wygant*, 476 U.S. at 272; *Croson*, 488 U.S. at 493.

33 *Wygant*, 476 U.S. at 272; *Croson*, 488 U.S. at 493.

34 *Croson*, 488 U.S. at 492; *Wygant*, 476 U.S. at 274.

35 Verified Complaint, Students for Fair Admission v. U.S. Milit. Acad., No. 23CV08262, 2023 WL 6144467 (S.D.N.Y. Sept. 19, 2023) (alleging a violation of the Equal Protection Clause); *see also* Students for Fair Admissions v. U.S. Naval Acad., No. 23-2699, 2023 WL 8806668, at *3 (D. Md. Dec. 20, 2023) (alleging a violation of the Equal Protection Clause similar to the violation alleged against West Point).

36 United Steelworkers v. Weber, 443 U.S. 193 (1979).

37 Johnson v. Transp. Agency, 480 U.S. 616 (1987).

38 *Weber*, 443 U.S. at 197; *Johnson*, 480 U.S. at 625.

39 *Weber*, 443 U.S. at 208; *Johnson*, 480 U.S. at 625.

the participation of Black people in all phases of education, business, and employment. Finally, because DEI initiatives are voluntary, they are emblematic of the ethos of equality: the commitment of a wide swath of the public and private sectors to eliminate the most stubborn elements of racial bias. Thus, DEI initiatives create a climate for positive change. This dynamism has spurred a growing number of businesses to embrace DEI.

SFFA has eliminated affirmative action in higher education. After their success in the *SFFA* case, the opponents of DEI have stepped up their attacks in both the public and private sectors. One can only hope that those under pressure to run away from DEI will not desert a cause worth fighting for.[40]

I
THE *STUDENTS FOR FAIR ADMISSIONS* DECISION

In *SFFA*, the Supreme Court decided the fate of its decades-long acceptance of racial diversity as a compelling state interest in institutions of higher learning.[41] Critical of the admissions policies of Harvard and UNC, the Court reversed the position it had taken in *Bakke*, *Grutter*, and *Fisher* and held that racial diversity is not a compelling state interest under the Equal Protection Clause of the Fourteenth Amendment.[42]

A. Chief Justice Roberts's Majority Opinion

1. The Admissions Procedures at Harvard and UNC

The first step in Harvard's multistep admissions process required "readers" to screen applicants for their achievements "in six categories: academic, extracurricular, athletic, school support, personal, and

[40] A cautionary note is necessary. In the opinion of the author, some prominent universities, unlike the University of Oregon, have corrupted the ideals of diversity, equity, and inclusion. These institutions of higher learning, which espouse the values of DEI, have condoned antisemitism. A flimsy excuse for this corruption is often a misguided argument for free speech. Free speech on university campuses does not imply freedom to threaten or intimidate. Universities are ethically bound to ensure safe and welcoming environments for all students. DEI should not be an instrument of equity and inclusion for some but not others. Universities, which bear the responsibility for the welfare of all their students, may not, in good conscience, pick and choose which groups will benefit from an education free of intimidation.

[41] *SFFA*, 600 U.S. at 231.

[42] *See infra* Section I.A.

overall."[43] Race was one factor that might permissibly affect an applicant's "overall" score.[44] Subcommittees then evaluated applicants from various geographical areas.[45] Race was also a permissible factor at the subcommittee level.[46] Subcommittees then made recommendations to the full forty-member admissions committee, which sought to avoid a dramatic decline in minority admission compared to the previous entering class.[47] Support of a majority of the full committee resulted in an applicant's approval, subject to a final winnowing process, which again might permissibly take race into consideration.[48]

UNC used a two-step process, beginning with a reader who was required to take race into account.[49] The readers' recommendations then went to a review committee, which made final admissions decisions.[50] Race was a permissible consideration for the review committee.[51]

2. A Rebuke of Past Racism

Tracing the history of the Fourteenth Amendment, Chief Justice Roberts lamented the country's prolonged failure to vindicate the promise of the Equal Protection Clause.[52] He rebuked the Court for its decision in *Plessy v. Ferguson*, which permitted the separate-but-equal doctrine "to deface much of America."[53] *Brown v. Board of Education* overruled "the inherent folly of that approach" and recognized that "[s]eparate cannot be equal."[54] This reversal of the law, Justice Roberts observed, led to numerous Supreme Court decisions

43 *SFFA*, 600 U.S. at 194.

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.* at 194–95.

48 *Id.* at 195.

49 *Id.*

50 *Id.* at 196.

51 *Id.* at 196–97.

52 *Id.* at 202–03. As a preliminary matter, UNC argued that SFFA lacked standing to sue because it was not a bona fide membership organization at the time of its formation. *Id.* at 200. Chief Justice Roberts explained that an organization has standing if either it was injured itself or if it represents members who were injured. *Id.* at 199. He rejected UNC's standing argument because SFFA had identified members who were injured, a fact that was determinative of standing. *Id.* at 201.

53 *Id.* at 203. He acknowledged that *Plessy* condoned the norm of segregation that prevailed throughout many parts of the nation after the Civil War. *Id.* at 202–03.

54 *Id.*

rejecting segregated parks, modes of transportation, neighborhoods, and businesses.[55]

3. Colorblindness

Despite recognizing the country's history of racial injustice, Chief Justice Roberts sounded a recurrent theme: the Equal Protection Clause is colorblind.[56] Subject to the most rigorous examination, stated the Chief Justice, distinctions based on race are suspect, regardless of benign motives. He asserted that the Equal Protection Clause does not tolerate any racial distinctions unless supported by the "daunting" strict scrutiny standard.[57] He noted that, excluding *Grutter* and its progeny, the Court had recognized only two state interests sufficiently compelling to support race-based government action: to remediate specific instances of past discrimination and to protect people's physical safety.[58] By reviewing the constraints of strict scrutiny, Chief Justice Roberts set the stage for his rejection of diversity as a compelling state interest.

4. The Bakke *and* Grutter *Decisions*

Chief Justice Roberts then turned to *Bakke*, which, in a splintered decision, did not crystalize a majority viewpoint.[59] Nevertheless, Justice Powell's position came to stand for the analysis of the Court.[60] Justice Powell recognized "the educational benefits that flow from a diverse student body"[61] as a compelling state interest. That interest, he emphasized, did not invest academia with unfettered latitude to engage

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55 *Id.* at 205–06. *See, e.g.*, Gayle v. Browder, 352 U.S. 903 (1956) (invalidating law that required racially segregated busing).

56 *SFFA*, 600 U.S. at 206 (positing that "[e]liminating racial discrimination means eliminating all of it," without regard to race).

57 *Id.* at 206.

58 *Id.* at 207.

59 *Id.* at 208.

60 *Id.* No other Justice, the Chief Justice noted, joined in Justice Powell's opinion. *Id.* at 210. Four Justices approved of affirmative action to remedy past societal discrimination. Four other Justices would have declared diversity constitutionally impermissible because the Equal Protection Clause is colorblind. *Id.*

61 *Id.* at 208–09. The Chief Justice pointed out that *Bakke* resulted in six opinions, none garnering a majority of the Court. Four Justices would have allowed race-based affirmative action to remedy past discrimination, not only at the institution in question but also in society in general. *Id.* at 210. Four others would have rejected diversity as a compelling state interest because, they argued, the use of diversity violated the constitutional principle of colorblindness. *Id.* The Chief Justice noted, however, that Justice Powell's opinion has come to embody the constitutional analysis of the case. *Id.* at 208.

in race-based discrimination.[62] Race could operate in the admissions process only as a "plus" factor.[63] The Constitution forbade the use of quotas and any admissions decision based solely on an applicant's race.[64]

The Chief Justice noted that the *Grutter* Court expressed reservations about permitting diversity to continue in perpetuity as a compelling state interest in college admissions.[65] The *Grutter* Court was concerned that the implementation of diversity would devolve into stereotyping and be used unfairly as a means to discriminate against nonminority applicants.[66] Therefore, *Grutter* held that race-conscious admissions programs must end.[67] "We expect," stated the *Grutter* majority, "that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[68]

5. The Constitutional Infirmities of the Harvard and UNC Admissions Programs

The Chief Justice identified several reasons that the admissions programs of both Harvard and UNC were unconstitutional. First, he noted that both institutions used admissions standards that were too amorphous to permit meaningful judicial review.[69] For example, Harvard articulated goals such as "training future leaders," "better educating students through diversity," and "producing new knowledge stemming from diverse outlooks," and one of UNC's goals was promoting "cross-racial understanding."[70] The Chief Justice believed it impossible to measure progress on these goals and found them elusive of a determinable end point.[71]

Second, the Chief Justice faulted Harvard and UNC for not demonstrating how their programs would achieve their diversity

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62 *Id.* at 209.

63 *Id.*

64 *Id.*

65 *Id.* at 211.

66 *Id.* at 211–12 (quoting Grutter v. Bollinger, 539 U.S. 306, 343 (2003)).

67 *Id.*

68 *Id.* at 213.

69 *Id.* at 214 (quoting Students for Fair Admissions v. Univ. of N.C., 567 F. Supp. 3d 580 at 656).

70 *Id.* Other goals of the UNC admissions program were "promoting the robust exchange of ideas," "broadening and refining understanding," and "fostering innovation and problem-solving." *Id.* (quoting 567 F. Supp. 3d at 656).

71 *Id.*

goals.[72] He pointed out that some of the racial categories such as "Asian" were overbroad, lumping different populations together.[73] Other categories such as "Hispanic," he argued, were arbitrary, a shortcoming which might result in one "Hispanic" nationality gaining disproportionate admissions at the expense of others.[74] Basing admissions on such imprecise categories, he reasoned, might therefore ultimately hinder achieving diversity of the student body.[75]

Third and most importantly, the Chief Justice criticized the challenged admissions programs for using race as a "negative."[76] As an example, he cited an 11.1% decline in Asian Americans admitted to Harvard.[77] The Chief Justice explained, "A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter."[78]

It is important to note at this point that, unlike Chief Justice Roberts's other criticisms of the Harvard and UNC admissions programs, this zero-sum argument appears uncorrectable. The zero-sum argument implies that colleges and universities may not use race, even as a "plus" factor. Taking the Chief Justice's analysis at face value, one must conclude that diversity-based affirmative action is never constitutionally permissible.

Fourth, the Chief Justice found objectionable the universities' presumption that members of any race tend to think alike.[79] This presumption, he maintained, perpetuates stereotyping.[80]

Finally, the Chief Justice observed that the challenged diversity programs had no end point.[81] Harvard and UNC asserted that their diversity programs would end when they achieved "meaningful representation and meaningful diversity."[82] To implement these

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72 *Id.* at 216.

73 *Id.*

74 *Id.* at 217.

75 *Id.*

76 *Id.* at 218.

77 *Id.*

78 *Id.* at 218–19.

79 *Id.* at 219.

80 *Id.* at 220. Chief Justice Roberts cautioned that "universities may not operate their admissions programs on the 'belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.'" *Id.* at 219 (quoting Grutter v. Bollinger, 539 U.S. 306, 333 (2003)).

81 *Id.* at 221.

82 *Id.* (citing Transcript of Oral Argument at 167, Students for Fair Admission v. Univ. of N.C., 567 F. Supp. 3d 580 (2021) (No. 21-2263)).

diversity goals, Harvard and UNC endeavored to avoid a decline in minority admissions from one year to the next.[83] This process, observed the Chief Justice, ensured that race would always be an admissions factor.[84] Harvard and UNC also argued that their programs will end when students no longer need affirmative action to obtain the educational benefits of diversity.[85] The Chief Justice found this proposed end point unsatisfactory because such educational benefits are not measurable.[86] The Chief Justice then rejected Harvard and UNC's assertion that their programs passed constitutional muster even without an end point, stating that *Grutter* required that such programs articulate when they will terminate.[87] Finally, the Chief Justice pointed out that Harvard and UNC admitted that their programs had no sunset date.[88]

6. A Narrow Loophole

Despite invalidating Harvard and UNC's diversity programs, the Chief Justice suggested alternative approaches that might achieve diversity while avoiding impermissible race-conscious policies.[89] He found it constitutionally permissible for a college or university to consider an "applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[90] Yet he cautioned not to use this approach as a pretext for racial preferences, emphasizing that a "student must be treated based on his or her experiences as an individual—not on the basis of race."[91]

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83 *Id.* at 221–23.

84 *Id.* at 224. Harvard and UNC also argued that, under *Grutter*'s twenty-five-year permissive period for universities to engage in race-based affirmative action, five years remained in the clock. The Chief Justice deemphasized the twenty-five-year limit, and observed, in any event, that neither Harvard nor UNC believe that their affirmative action programs will end after five more years. *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.* at 230–31.

90 *Id.*

91 *Id.* If used as a pretext for discrimination, preferential treatment of minority students might invite disparate treatment lawsuits, which are based on intentional discrimination. *See* Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (referring to intentional discrimination as "disparate treatment"); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973) (establishing a three-step framework under Title VII to root out pretexts for unlawful discrimination).

This distinction between individualized treatment and race-based preferences stands on a razor's edge. Colleges and universities seeking to follow the Chief Justice's race-neutral approach may find that they have invited a disparate treatment lawsuit for intentional discrimination. This Article examines this issue in Section III.C.4.a.

B. Justice Gorsuch's Concurring Opinion

Three Justices, Thomas,[92] Kavanaugh,[93] and Gorsuch, wrote concurring opinions. Justice Gorsuch's opinion, in which Justice Thomas joined, may be the most significant.[94] Justice Gorsuch compared Title VII of the 1964 Civil Rights Act—the title prohibiting workplace discrimination—to Title VI, which was at issue in the *SFFA* case.[95] He stated that "everything said here about the meaning of Title VI tracks this Court's precedent in *Bostock* interpreting identical material language in Title VII."[96] This comparison suggests that Justices Gorsuch and Thomas might support a Title VII challenge to affirmative action.[97]

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92 Justice Thomas wrote a concurring opinion. *SFFA*, 600 U.S. 181, 231 (Thomas, J., concurring). He criticized the "'antisubordination' view of the Fourteenth Amendment: that the Amendment forbids only laws that hurt, but not help, blacks." *Id.* at 246. He also questioned how racial diversity, rather than diversity based on other characteristics, uniquely advances educational goals. *Id.* at 253–54. Pointing out the "zero-sum nature of college admissions," he argued that favoring the admission of Black students inevitably reduces the admission numbers of Asian Americans, whose history is marred by systemic discrimination. *Id.* at 272–73.

93 *Id.* at 311 (Kavanaugh, J., concurring). Justice Kavanaugh interpreted *Grutter*'s twenty-five-year expectation that affirmative action in colleges and universities might end within twenty-five years after the decision as a firm end point rather than an aspiration. *Id.* at 317.

94 *Id.* at 287 (Gorsuch, J., concurring).

95 *Id.* at 290.

96 *Id.* at 301–02. *See* Bostock v. Clayton Cty., 590 U.S. 644, 655 (2020) (quoting Title VII's prohibition of employment discrimination based on race, color, national origin, sex and religion). Justice Gorsuch highlighted the similarity of the language of Title VII and Title VI, which prohibits recipients of federal funds from engaging in discrimination based on race, color or national origin. *See* 42 U.S.C. § 2000d et seq.

97 *See* Am. All. for Equal Rights v. Fearless Fund Mgmt., LLC, 2023 WL 6295121, at *7 (N.D. Ga. Sept. 27, 2023) (expressing uncertainty as to how *SFFA* will affect the continued viability of Johnson v. Transp. Agency, 480 U.S. 616 (1987), which permitted affirmative action under Title VII and implicitly under § 1981).

C. Justice Sotomayor's Dissenting Opinion

1. The History of Racial Oppression

In her dissent, Justice Sotomayor traced the history of the racial oppression of Black people.[98] She asserted that the Southern states denied Black people access to education to perpetuate the invective of inferiority and thereby to perpetuate slavery.[99] After the Thirteenth Amendment abolished slavery, the Southern states adopted a system of laws, known as the "Black Codes," burdening Black people with onerous legal disabilities.[100] These states also cynically enacted new criminal laws to subject convicted Black persons to forced labor.[101]

To rectify the failure of the Thirteenth Amendment to establish racial equality, Congress adopted the Fourteenth Amendment.[102] Justice Sotomayor emphasized that Congress rejected proposals that would have rendered the Equal Protection Clause colorblind.[103] Congress, for example, did not adopt a proposal that would have forbade distinctions based on "race or color."[104] Justice Sotomayor further argued that the Civil Rights Act of 1866, like the Equal Protection Clause, was not colorblind.[105] By providing that "every race and color" is entitled to the rights accorded "white citizens," that law sought to prohibit laws that oppressed Black people.[106] Given this historical background, Justice Sotomayor concluded that, rather than supporting racial colorblindness, Congress encouraged policies seeking to place Black Americans on the same footing as their white counterparts.[107] It is "inconceivable," she concluded, "that race-conscious college admissions are unconstitutional."[108]

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98 *SFFA*, 600 U.S. at 319 (Sotomayor, J., dissenting).

99 *Id.*

100 *Id.* at 320.

101 *Id.* at 321.

102 *Id.* at 322.

103 *Id.*

104 *Id.* (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1287 (1866)).

105 *Id.* at 325; *see* Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

106 *SFFA*, 600 U.S. at 325 (Sotomayor, J., dissenting) (quoting Act of Apr. 9, 1866, 14 Stat. 27). Justice Sotomayor bolstered her argument that the Equal Protection Clause is not colorblind by noting that when Congress adopted the Fourteenth Amendment it simultaneously enacted race-conscious statutes. *Id.* at 322. One example is the Freedmen's Bureau Act, which provided benefits to emancipated Black Americans. *Id.*

107 *Id.* at 325.

108 *Id.* at 326.

Justice Sotomayor noted that the post–Civil War aspiration to establish racial equality encountered unrelenting resistance, sometimes imposed by the Supreme Court itself.[109] She labeled *Plessy v. Ferguson* a "shameful decision" and praised the *Brown* Court for recognizing that "[s]eparate educational facilities are inherently unequal" and therefore violate the Equal Protection Clause.[110]

Subsequent Supreme Court decisions confirmed *Brown*'s recognition that the Fourteenth Amendment guaranteed "equality of [educational] opportunity," not "a formalistic rule of race-blindness."[111] Justice Sotomayor cited *Green v. School Board of New Kent City*, in which the Court rejected as unconstitutional a plan that allowed students to choose which school to attend.[112] She quoted the *Green* Court, which explained that such plans were too passive to eliminate "well-entrenched dual systems" of racial segregation.[113] Based on *Brown* and its progeny, Justice Sotomayor criticized the *SFFA* majority for reverting to the discredited argument that the Equal Protection Clause is colorblind.[114]

2. Diversity as a Compelling State Interest

Justice Sotomayor proceeded to the *Bakke* Court's plurality decision, which recognized diversity as a compelling state interest sufficient to support affirmative action in institutions of higher learning.[115] Diversity, the *Bakke* plurality explained, could be one factor among many in the college admissions process.[116] Justice Sotomayor cited *Grutter v. Bollinger* and *Fisher v. University of Texas*, both of which affirmed the constitutionality of diversity as a goal of college admissions if the race factor is narrowly tailored.[117] She observed that these "diversity" decisions followed from *Brown*'s

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109 *Id.*

110 *Id.* at 326–27 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954)).

111 *Id.* at 328.

112 *Id.* Justice Sotomayor also cited *North Carolina Board of Education v. Swann*, 402 U.S. 43, 45–46 (1971) (holding a North Carolina statute that prohibited considering race in school busing unconstitutional because racial colorblindness clashes with *Brown*'s promise of equality in education). *Id.* at 328–29.

113 *Id.* at 328 (quoting Green v. Cnty. Sch. Bd. of New Kent Cnty., 391 U.S. 430, 437 (1968)).

114 *Id.* at 330.

115 *Id.* at 331.

116 *Id.*

117 *Id.*

aspiration for racial equality in public education.[118] Diversity in the classroom, she argued, debunks racial stereotypes, raises public confidence in institutions of higher learning, and enables minority graduates to rise to leadership positions.[119]

Contrary to the majority's implicit assumption, Justice Sotomayor emphasized that racial inequality persists[120] and that the lingering effects of past segregation of public schools still require remedial action.[121] Minority students, she noted, are more likely to attend schools with less challenging curricula, less qualified teachers, and lower standardized scores than their white counterparts.[122] This legacy of discrimination frustrates minorities' employment opportunities, income levels, access to healthcare, and homeownership.[123]

Justice Sotomayor also criticized the majority for ignoring the principle of *stare decisis*, effectively overruling *Bakke*, *Grutter*, and *Fisher*, and creating turmoil by invalidating admissions programs of colleges around the country.[124]

3. Analysis of the Harvard and UNC Admissions Programs

Justice Sotomayor went on to analyze the Harvard and UNC admissions programs for their compliance with the Equal Protection Clause.[125] She focused on whether these programs were narrowly tailored, concluding that they were the least restrictive means available to achieve the institutions' valid diversity interests.[126] Citing *Fisher*, she noted that a program is narrowly tailored unless a race-neutral alternative achieves the institution's diversity goals at a tolerable expense.[127] She showed that SFFA had not proposed any valid

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118 *Id.* at 332. Justice Sotomayor also lauded affirmative action because it improves cross-cultural understanding, enhances students' skill sets needed in a global marketplace, and creates opportunities for a broader talent pool. *Id.*

119 *Id.* Justice Sotomayor added that academic freedom under the First Amendment also supports a college's right to use diversity in its admissions process. *Id.* Academic freedom leads to cross-cultural acceptance and the robust exchange of a multiplicity of ideas. *Id.* at 333.

120 *Id.* at 333–34.

121 *Id.* at 334. Justice Sotomayor asserted that about half of Black and Latinx students currently attend schools that have highly racially homogenous enrollment. *Id.*

122 *Id.* at 335.

123 *Id.* at 337.

124 *Id.* at 342–43.

125 *Id.* at 343.

126 *Id.*

127 *Id.* at 344.

alternative to the district court.[128] SFFA had suggested, for example, that Harvard and UNC adopt programs that focus admissions on income levels rather than race and legacy preferences.[129] Justice Sotomayor rejected this proposal because it would cause the admissions of Black applicants to plummet by about 32%.[130]

Applying *Bakke*, *Grutter*, and *Fisher*, Justice Sotomayor observed that race may operate as a "plus factor" in a holistic review process.[131] Thus, she asserted that race may make a difference in admitting a particular applicant provided that race is not "decisive for virtually every minimally qualified underrepresented minority applicant."[132] She also pointed out that Harvard employed a multitiered admissions process, including consideration by several committees of an applicant's "grades, test scores, recommendation letters, and personal essays."[133] The applicant's race, and other factors including geographical location and socioeconomic status, entered the calculus only as plus factors.[134] Justice Sotomayor argued that invalidating Harvard's admissions program would reduce Black admissions from 14% to 6% and Hispanic admissions from 14% to 9%.[135] Dismantling the admissions programs sustained in *Grutter* and *Fisher* would have resulted in even greater levels of retrenchment of minority admissions.[136] Because the impact of Harvard and UNC's admissions programs had less impact on admissions than did the admissions programs at issue in *Grutter* and *Fisher*, Justice Sotomayor concluded

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128 *Id.* at 344–45 (quoting Students for Fair Admissions, Inc. v. Univ. of N.C., 37 F. Supp. 3d 580, 687). Justice Sotomayor stressed that the district court, after hearing expert testimony at trial, found that none of SFFA's alternatives met the criteria for proving that the programs of Harvard and UNC were not narrowly tailored. *Id.* at 344. For example, some of SFFA's proposal made the faulty assumption that all available top students would apply to Harvard and UNC, that those schools would admit all those applicants, and that all of those admitted would enroll. *Id.* at 345.

Another unworkable proposed alternative would require use of a complicated admissions index that would require colleges to "access . . . real-time data for all high school students." *Id.* (quoting Students for Fair Admissions, Inc., 37 F. Supp. 3d at 647).

129 *Id.* at 346.

130 *Id.*

131 *Id.* at 347.

132 *Id.* (quoting Gratz v. Bollinger, 539 U.S. 244, 272 (2003)) (admonishing that, in a valid affirmative action program, race may not be the determinative for all minimally qualified applicants).

133 *Id.*

134 *Id.* Harvard characterized "plus factors" as "tips." *Id.* at 348.

135 *Id.*

136 *Id.* at 348–49.

that the programs of Harvard and UNC were constitutionally permissible.[137]

Existing Supreme Court precedent prohibits admissions programs from using race to achieve a specified percentage[138] of minority applicants.[139] Justice Sotomayor found that Harvard's admissions programs did not violate this prohibition.[140] She reasoned that the consistency of the racial mix in entering classes, rather than reflecting a quota as the majority contended, merely reflected continuity.[141]

Justice Sotomayor pointed out that *Grutter* and *Fisher* rejected virtually all the majority's arguments, including the admissions programs' purported imprecision and overbreadth of racial categories, reliance on stereotypes, and lack of end points.[142] Thus, she concluded that the majority opinion is a stealth overruling of those Supreme Court precedents.[143] She argued that positions rejected in previous decisions were not acceptable grounds to overrule those decisions.[144] This is especially so, she urged, if the decision to disregard controlling precedent rests merely on the "policy preferences" of some of the justices.[145] Justice Sotomayor feared that by imposing their personal views, rather than established constitutional principles, the *SFFA* majority had damaged the public's confidence in the Court's legitimacy.[146]

Addressing the majority's criticism that the Harvard College and UNC admissions programs are too imprecise to withstand constitutional scrutiny, Justice Sotomayor recited a long list of remarkably imprecise state interests, all of which the Court had deemed compelling.[147] The list included the interest in protecting (1) court decorum, (2) the integrity of the Medal of Honor, and (3) the physical

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137 *Id.*

138 *Id.* at 350.

139 *Id.* at 351.

140 *Id.*

141 *Id.* at 351.

142 *Id.* at 352.

143 *Id.*

144 *Id.*

145 *Id.* at 353. Justice Sotomayor noted that a "Mexican appearance" may constitutionally be one factor among many to stop someone at the southern border of the United States. *Id.* at 354 (quoting United States v. Birgnoni-Ponce, 422 U.S. 873, 84–87 (1975)). Yet, the *SFFA* majority held that ethnicity may not be a factor to enhance educational outcomes fostered by racial diversity. *Id.* at 354–55. Justice Sotomayor found this contradiction constitutionally indefensible. *Id.*

146 *Id.* at 353.

147 *Id.* at 358.

and mental wellbeing of children.[148] None of these compelling state interests, Justice Sotomayor argued, is more amenable to precise measurement than the positive impact that diversity brings to education.[149]

Justice Sotomayor also took issue with the majority's claim that the Harvard College and UNC admissions programs unfairly disadvantage some racial groups.[150] She pointed out that athletes, legacy applicants, relatives of donors, and children of faculty receive preferential treatment in the admissions process.[151] Although these groups account for only 5% of the applicant pool, they result in about 30% of students admitted.[152]

The majority argued that the Harvard and UNC admissions programs engaged in stereotyping by assuming that people of different ethnicities have viewpoints that differ from people of other ethnicities.[153] To the contrary, Justice Sotomayor asserted that a lack of racial diversity in the classroom contributes to stereotyping.[154]

Justice Sotomayor also tackled the majority's argument that the admissions programs of Harvard College and UNC were not narrowly tailored because progress on the programs' goals such as producing leaders and preparing graduates to work in a diverse global marketplace are unmeasurable.[155] She noted that the majority provided no guidance as to what level of precision comports with the Constitution[156] and accused the majority of duplicity, charging that it simply opposes affirmative action in any form.[157]

In response to the majority's contention that the Harvard and UNC affirmative action programs use "imprecise," "opaque," and "arbitrary"

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148 *Id.*

149 *Id.* Justice Sotomayor criticized the majority for exempting military academies from its ruling that diversity is not a compelling state interest. *Id.* at 355. She believed that the very national security concerns that diversity implies in military academies apply equally to all universities. *Id.*

150 *Id.* at 359.

151 *Id.* at 359–60.

152 *Id.* at 360.

153 *Id.* at 220.

154 *Id.* at 360.

155 *Id.*

156 *Id.*

157 *Id.* She argues that the majority contradicts itself by insisting that too much precision in an affirmative action admissions program results in unacceptable quotas while too little precision result in unmeasurable goals. *Id.* at 367. Her argument, however, conflates the requirements of a constitutionally acceptable admissions program with the measurability of the program's goals.

racial categories,[158] Justice Sotomayor observed that Harvard College and UNC used racial categories that closely resembled those used by the U.S. Census Bureau.[159] She also noted that students dispelled any imprecision in conveying their racial heritage by providing additional detail in their personal statements.[160]

Justice Sotomayor addressed the majority's argument that neither the Harvard College nor the UNC program had a specific end point.[161] She argued that *Grutter*'s expectation that diversity-based affirmative action would end in twenty-five years was merely aspirational.[162] She scoffed at the fiction that "racial inequality has a predictable cutoff date."[163]

As noted, the majority created a loophole allowing institutions of higher learning to consider the personal experiences of applicants and that those experiences may relate to race.[164] Justice Sotomayor found this concession inadequate to provide a fair consideration of race as a factor supporting college admissions.[165]

4. A Rebuttal of Justice Thomas's Arguments

Justice Sotomayor turned to Justice Thomas's dissenting opinion, rebutting his arguments point by point. Countering the argument that Black and Latinx beneficiaries of affirmative action graduate ill-prepared to compete with their white counterparts, she referred to a wealth of empirical data that has debunked his argument.[166] With a touch of irony, she noted that three justices on the Supreme Court

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158 *Id.* at 216–17.

159 *Id.* at 367.

160 *Id.* at 368. In addition, Justice Sotomayor pointed out that nothing in the record suggested that students objected to these categories. *Id.*

161 *Id.*

162 *Id.* at 369.

163 *Id.* at 370. Justice Sotomayor pointed out that the *Grutter* Court admonished Columbia University to monitor and reflect upon the progress that its affirmative action program made in achieving racial equality. *Id.* at 369. This admonition, she argued, showed the flexibility in *Grutter*'s timeline for the cessation of diversity-based affirmative action plans in academia. *Id.* Harvard and UNC are complying with the Court's requirement of constant review and reassessment of the progress of their admissions programs. *Id.* This argument, however, cuts both ways. The Court's admonition might well have signaled the flexibility which Justice Sotomayor suggests but it may just as plausibly suggest how Columbia might accelerate the achievement of its admission goals with a twenty-five-year end date.

164 *Id.* at 362–63.

165 *Id.* at 363.

166 *Id.* at 371.

graduated from law schools with race-conscious admissions programs.[167]

Justice Thomas argued that affirmative action stigmatizes its beneficiaries "with a badge of inferiority."[168] Justice Sotomayor controverted this argument, again referring to empirical data.[169] She proceeded to address Justice Thomas's argument that affirmative action, through clubs and other on-campus activities, leads to de facto segregation.[170] She asserted that, far from being harmful, affinity-based activities enhance minority students' visibility on campus and decrease their sense of isolation.[171]

Justice Thomas also claimed that the Harvard College admissions program discriminated against Asian American applicants.[172] Justice Sotomayor countered that (1) the trial court found no evidence of discrimination against Asian applicants and that (2) the admission of Asian Americans has increased at Harvard College and other universities since they implemented affirmative action programs.[173] Finally, Justice Sotomayor rebutted Justice Thomas's argument that only elites support affirmative action.[174] Every student who testified at trial, she noted, favored race-conscious admissions programs.[175]

5. A Warning

Justice Sotomayor warned that the absence of college affirmative action will harm not only minorities but also every segment of society.[176] She focused on the military's need for a diverse talent pool and argued that the lack of diversity in U.S. combatants engaged in the Vietnam War undermined the credibility of our armed forces.[177] She argued that doctors, teachers, lawyers, scientists, and business leaders with diverse backgrounds better serve minority communities and bring a broad range of perspectives to their work that ultimately benefits

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167 *Id.* at 372.

168 *Id.* (quoting Thomas, J., *id.* at 270).

169 *Id.* at 372–73 (citing A. Onwuachi-Willig et al., *Cracking the Egg: Which Comes First Stigma or Affirmative Action*, 96 CALIF. L. REV. 1299, 1323 (2008) (concluding that racial stigma results from racial stereotypes rather than affirmative action)).

170 *Id.* at 373.

171 *Id.*

172 *Id.* at 273 (Thomas, J., concurring).

173 *Id.* at 375 (Sotomayor, J., dissenting).

174 *Id.* at 376.

175 *Id.*

176 *Id.* at 379.

177 *Id.* at 379–80.

society.[178] By terminating college affirmative action, the majority cut off the pipeline of talented people of color.[179]

The balance of this Article explores the current law governing affirmative action in the public and private sectors and how *SFFA* may affect that law. The Article also examines how *SFFA* has already frustrated DEI policies in the private sector and how *SFFA* may thwart such initiatives in the future.

II
AFFIRMATIVE ACTION IN THE PUBLIC SECTOR UNDER THE EQUAL PROTECTION CLAUSE

Affirmative action in the public sector is subject to the requirements of the Equal Protection Clause. *SFFA* affects affirmative action in four areas of the public sector: education, employment, contracting, and the military. This Part discusses these areas and examines *SFFA*'s possible impact on them.

A. The Effect of SFFA *on Public School Education*

The most direct impact of *SFFA* may be felt in public schools. After *SFFA*, reliance on diversity to justify affirmative action plans is dubious. School boards wishing to achieve higher percentages of minority students would therefore be well advised to shift their policies away from racial diversity to nonracial policies such as family income.

In *Boston Parent Coalition for Academic Excellence Corp. v. The School Committee for Boston*, the First Circuit confronted the issue of whether an admissions policy based partly on family income was constitutionally permissible.[180] The School Committee determined that Black and Latinx persons were underrepresented in the student bodies

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178 *Id.* at 381.

179 *Id.* at 383. Justice Jackson wrote a dissenting opinion in which she stressed that "[o]ur country has never been colorblind." *Id.* at 385 (Jackson, J., dissenting). She stressed that "government policies affirmatively operated . . . to dole out preferences to those who, if nothing else, were not Black." *Id.* at 392. She cited areas of disadvantage for Black Americans in wealth, income, housing, education, the professions, and healthcare. *Id.* at 392–96. Because of these inequities, she argued that the prohibition of affirmative action will perpetuate the pervasive racism that has and continues to afflict people of color. *Id.* at 404. Justice Jackson faulted the majority for prolonging and worsening racism in America. *Id.* at 408.

180 Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. for Bos., 89 F.4th 46, 51 (1st Cir. 2023), *appeal docketed*, No. 23-1137 (U.S. Apr. 19, 2024).

of three selective Boston public schools.[181] In response to these disproportions, the School Committee adopted a plan providing that 80% of students admitted to the three schools would be selected from zip codes with the lowest family incomes.[182] Among applicants living in those low-income areas, those with the highest grade point averages would be selected for admission in descending order.[183]

The plaintiffs alleged that the facially neutral use of family income violated the Equal Protection Clause (1) because it had a disparate impact on white and Asian applicants, and (2) because the School Committee adopted it with the intent to discriminate against white and Asian applicants.[184] The First Circuit applied the disparate impact theory announced in *Griggs v. Duke Power Co.*[185] The court held correctly that the plaintiff did not establish a disparate impact violation because the selection criterion—family income—diminished the underrepresentation of Black and Latinx students.[186] A disparate impact violation occurs when a policy or practice increases minority underrepresentation compared to the local population.[187]

The First Circuit also discussed the "loophole" that Chief Justice Roberts created in *SFFA*.[188] The court pointed out that Chief Justice Roberts specifically carved out income-based criteria as providing a possible justification for affirmative action.[189] Conceding that *SFFA* cautioned against using this justification as a pretext for seeking racial diversity, the First Circuit discerned no such pretextual motive.[190] Although school officials might adopt an income-based plan to increase

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181 *Id.* at 51. In 2020–21 school year, the student bodies of the three schools were as follows: White 39%, Asian 21%, Latinx 21%, Black 14%, and "[M]ixed [R]ace" 5%. *Id.* at 52. By contrast, the corresponding percentages of the citywide school-age population in Boston were as follows: White 16%, Asian 7%, Latinx 36%, Black 35%, "[M]ixed [R]ace" 5%. *Id.*

182 *Id.* at 53. Although the plan was discontinued during pendency of the lawsuit, five students denied admission while the plan was in effect pressed the case forward. *Id.* at 54.

183 *Id.* at 53. The remaining 20% of admitted students were simply chosen based on the highest grade point averages. *Id.*

184 *Id.* at 56; *see* Washington v. Davis, 426 U.S. 229, 242–45 (1976) (holding that an Equal Protection claim arises when a practice has a disparate impact on a racial group and the state actor that implemented the practice had the intent to discriminate).

185 *Id.* at 57–58 (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

186 *Id.* at 58.

187 *Id.* at 57.

188 *Id.* at 60. The *SFFA* Court stated: "[N]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." *SFFA*, 600 U.S. 181, 230.

189 *Bos. Parents Coal. for Acad. Excellence Corp.*, 89 F.4th at 60.

190 *Id.*

minority admissions, the First Circuit declared that such a motive is acceptable as long as it is not a "subterfuge."[191]

The First Circuit's reliance on the *SFFA* loophole seems tenuous. A fuzzy line separates a legitimate motive to increase minority enrollments from an impermissible subterfuge. Chief Justice Roberts emphasized that admissions decisions must rest on a student's unique ability, courage, or determination.[192] "[T]he student," explained the Chief Justice, "must be treated based on his or her experiences as an individual—not on the basis of race."[193] The admissions process of the School Committee did not undertake any such individualized evaluation.

B. Wygant v. Board of Education*:* *The Constitutional Test for Public Employment*

In *Wygant v. Board of Education*, the Supreme Court established the Equal Protection standard for race-conscious programs in public employment.[194] The Jackson Board of Education and teachers' union adopted an affirmative action provision in their collective bargaining agreement,[195] which prohibited laying off minority teachers if the result would reduce the percentage of minority teachers in the school district.[196] When the school board, following this provision, laid off nonminority teachers, those teachers commenced a lawsuit against the school board and the union, alleging a violation of the Equal Protection Clause.[197]

The Supreme Court invoked a two-prong test to determine the constitutionality of this race-conscious policy.[198] The Court held (1) that a compelling state interest must support the policy, and (2) that the policy must be narrowly tailored to minimize the harm imposed on employees who are not beneficiaries of the policy.[199] Addressing the first prong, the Court stated that societal discrimination alone does not create a compelling state interest.[200] To justify a race-based policy, the

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191 *Id.* at 61.

192 *See SFFA*, 600 U.S. at 231.

193 *Id.*

194 Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

195 *Id.* at 271.

196 *Id.* at 270–71.

197 *Id.* at 272.

198 *Id.* at 274.

199 *Id.*

200 *Id.*

governmental entity that adopted the policy must prove by a "strong basis in evidence" that it, rather than society in general, engaged in discrimination.[201] The school board made no such showing.[202] Instead it argued that the policy created minority role models for its students.[203] The Court rejected this rationale for two reasons. First, the role model theory is not tied to past discrimination.[204] Second, a plan based on the creation of role models has no discernible end point.[205]

The Court also held that the challenged policy was not narrowly tailored within the meaning of the Equal Protection Clause.[206] Layoffs visit a significant burden on employees who rely on their paychecks to support themselves and their families.[207] Hiring decisions, on the other hand, do not interfere to the same degree as layoffs with a person's ability to earn a living.[208] The Court suggested that a plan adopting preferential hiring, as opposed to preferential layoffs, might better comply with the narrow-tailoring requirement of the Equal Protection Clause.[209]

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201 *Id.* at 277.

202 *Id.* at 278. Justice Marshall argued in his dissenting opinion that the record before the district court was incomplete, and, because of incomplete factual development, he would have remanded the case. *Id.* at 296 (Marshall, J., dissenting). Nevertheless, he went on to take issue with the plurality. *Id.* He stressed that he did not believe strict scrutiny should apply to race-conscious affirmative action and proposed instead that the Equal Protection Clause required "important government objectives" and that the race-related measure is "substantially related to achievement of those objectives." *Id.* at 301–02 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 360 (1978) (Brennan, White, Marshall & Blackmun, JJ., concurring in part)). He also argued that the fully developed facts of the case met even the strict scrutiny standard. *Id.* at 303. He pointed out that facts disclosed to the Supreme Court, though not in the record, indicated that Jackson had operated a segregated school system and that Black teachers were underrepresented on its faculty. *Id.* Under threat of litigation and in an atmosphere of violence and unrest, the school board and union reached an agreement to desegregate the school system and hire more Black teachers. *Id.* at 306. The provision to avoid a reduction in the percentage of Black teachers was necessary to maintain the gains in faculty representation of Black teachers in the school system. *Id.* Justice Marshall also argued that the harm to the laid-off white teachers was within the bounds of constitutional permissibility. Although he acknowledged that losing one's job is burdensome, he pointed out that both Black and white teachers were subject to layoffs in proportion to their representation on the faculty. *Id.* at 309.

203 *Id.* at 275.

204 *Id.*

205 *Id.*

206 *Id.* at 282–83.

207 *Id.*

208 *Id.*

209 *Id.*

C. The Significance of Wygant

Wygant articulated the two requirements of a constitutionally valid race-conscious affirmative action plan: The governmental entity must prove that it engaged in past discrimination, and its plan must be narrowly tailored to minimize the burden imposed on nonprotected persons. To minimize that burden, the plan must have a discernible end point.

The requirements of an affirmative action plan under Title VII set the architecture for affirmative action under the Equal Protection Clause. Though not identical, the two standards are highly analogous. As more fully shown in Part III, a valid affirmative action plan under Title VII need not meet the rigors of strict scrutiny. Rather, an employer must show that its affirmative action plan addresses a manifest imbalance in traditionally segregated job categories. Such a showing need not rise to the level of a violation of Title VII; the employer must merely prove underrepresentation of a protected class. Much like the narrow-tailoring requirement of the Equal Protection Clause, Title VII requires minimizing the burden on unprotected persons and articulating an end point for the plan.

Before discussing affirmative action under Title VII, however, this Article examines more fully the requirements of the Equal Protection Clause for affirmative action plans affecting public contracting and the implications of *SFFA* on such plans.

D. Richmond v. J.A. Croson Co.*: The Constitutional Test for Contract Set-Asides*

City of Richmond v. J.A. Croson Co. applied the Equal Protection Clause to an affirmative action plan involving government contracting.[210] In April 1983 Richmond adopted the Minority Business Utilization Plan (Plan), which required prime contractors awarded city construction projects to subcontract at least 30% of the dollar value of the contract to Minority Business Enterprises (MBEs).[211] Interested in

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210 City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

211 *Id.* at 477–78. To be eligible to bid for subcontracts, a business needed to be at least 51% minority owned and controlled. *Id.* at 478. Those eligible were Black, Latinx, Asian, Native American, Native Alaskan. *Id.* The Plan did not include a geographical limit on eligibility. *Id.* Justice Stevens found the eligibility requirements unacceptable under the standard adopted in *Wygant* and *Croson* because businesses never victimized by discrimination in the Richmond area and never even operating in the area were potential beneficiaries of the Plan. *Id.* at 515 (Stevens, J., concurring in part and concurring in the judgment).

bidding for a construction project to install a new plumbing system in the Richmond city jail, J.A. Croson Co. (Croson) unsuccessfully sought local MBEs to supply fixtures for the project.[212] At the time for awarding the prime contract, Croson was the only bidder.[213] Still unable to find a suitable minority subcontractor, Croson, in accordance with the Plan's waiver provision, sought a waiver from the 30% MBE requirement.[214] While the waiver application was pending, Continental, an MBE, bid for the subcontract to provide the fixtures for the project.[215] Continental's bid was 7% higher than the market price for the fixtures and would have raised Croson's costs for the project by $7,663.[216] To accommodate Continental's bid and meet the MBE requirement, Croson requested that Richmond grant it a price increase.[217] Richmond denied both Croson's request for a waiver and for a price increase and sought new bids for the construction project.[218] Croson, in turn, sued the city for violating the Equal Protection Clause.[219]

Justice O'Connor, writing for a plurality of the Court, found the Richmond Plan constitutionally infirm.[220] Following the reasoning of *Wygant*,[221] she stated that the Plan was defective because it addressed past discrimination in the construction industry in general but provided

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212 *Id.* at 479–82 (opinion of the Court).

213 *Id.* at 482.

214 *Id.* at 478–49. The Plan provided: "No partial or complete waiver of the foregoing [30% set-aside] requirement shall be granted by the city other than in exceptional circumstances. To justify a waiver, it must be shown that every feasible attempt has been made to comply, and it must be demonstrated that sufficient, relevant, qualified Minority Business Enterprises . . . are unavailable or unwilling to participate in the contract to enable meeting the 30% MBE goal." *Id.* at 478–79.

215 *Id.* at 482–83.

216 *Id.* at 483.

217 *Id.*

218 *Id.*

219 *Id.*

220 *Id.* at 493.

221 *See also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). In *Adarand*, a federal government program granted a 10% bonus to prime federal contractors for hiring minority subcontractors. *Id.* at 204, 208. Adarand challenged this program under the Fifth Amendment's guarantee of equal protection of the laws. *Id.* The Supreme Court applied the same strict scrutiny test used in *Wygant* and *Croson* and remanded the case to the Tenth Circuit for further consideration. *Id.* at 235. In Fullilove v. Klutznick, 448 U.S. 448, 491–92 (1980), a plurality of the Supreme Court upheld a 10% set aside of federal public works contracts for minority-owned businesses. Chief Justice Burger, though not specifically adopting the strict scrutiny standard, stated that "[a]ny preference based on racial or ethnic criteria most necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." *Id.*

no basis to conclude that Richmond itself had discriminated against minorities in the construction industry.[222] Justice O'Connor found the Plan objectionable because such a broad rationale for affirmative action had no logical end point.[223] The Equal Protection Clause, she stated, does not tolerate the open-ended denial of rights to any race.[224] Richmond argued that 50% of the local population was Black, yet only 0.67% of local construction contracts went to MBEs.[225] Justice O'Connor found this statistical comparison meaningless because it did not take into account the percentage of qualified MBEs.[226] She then expanded the bounds of permissible affirmative action established in *Wygant*. Even if Richmond had not engaged in past discrimination, if it had been a "passive participant" in local industry discrimination, such participation might justify affirmative action under the Equal Protection Clause.[227] No evidence, however, suggested the city's complicity in discriminatory conduct.[228] Justice O'Connor therefore rejected the city's argument that a compelling state interest supported the Plan.[229]

Justice O'Connor also found that Richmond's plan was not narrowly tailored.[230] She pointed out the difficulty in analyzing whether a plan was narrowly tailored to address a public actor's past discrimination when no evidence in the case suggested any such wrongdoing.[231] Nevertheless, she noted that Richmond might have narrowly tailored its approach by providing race-neutral financial aid programs to local businesses.[232] Another alternative might have been to provide training,

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222 *Croson*, 488 U.S. at 498. Justice Stevens disagreed with the plurality's premise that to justify an affirmative action plan, a governmental entity must have engaged in past discrimination. *Id.* at 511 (Stevens, J., concurring in part and concurring in judgment). He agreed, however, that under *Wygant* and *Croson* the Plan was constitutionally unacceptable. *Id.* at 511–12. The Plan, he observed, was not limited to victims of local discrimination. *Id.* at 515. Nor did the Plan distinguish between those white contractors who had engaged in discrimination and those who had not. *Id.* at 515–16.

223 *Id.* at 493 (plurality opinion).

224 *Id.*

225 *Id.* at 499.

226 *Id.* at 500.

227 *Id.*

228 *Id.* at 492 (opinion of J. O'Connor).

229 *Id.* at 505 (opinion of the Court).

230 *Id.* at 507.

231 *Id.* Justice O'Connor also criticized Richmond's plan for being overinclusive. *Id.* Among the classes that the plan favored were Spanish-speaking, Asian, Native American, and Native Alaskan people. *Id.* Justice O'Connor stressed that Richmond offered absolutely no evidence of discrimination against any of these groups. *Id.*

232 *Id.*

on a race-neutral basis, to people interested in entering the construction trade.[233] Such alternatives, she noted, might have benefited minority firms without denying the rights of others.[234]

E. The Implications of SFFA *for* Wygant *and* Croson

The question arises as to what, if any, impact the *SFFA* case may have on affirmative action in the public sector. The *SFFA* decision measured the constitutionality of the Harvard College and UNC admissions programs against the strict scrutiny standard used in *Wygant* and *Croson*.[235] *SFFA* may therefore threaten the continued vitality of *Wygant* and *Croson*. Emphasizing perhaps the most salient objection to affirmative action, the Court expressed intolerance for any plan or program that disadvantages any racial group.[236] This objection goes to the very heart of any affirmative action program. Chief Justice Roberts reasoned that "[a] benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter."[237] The potential impact of Justice Roberts's observation is far-reaching and potentially alarming to proponents of affirmative action. Any affirmative action plan, whether in education, employment, or government contracts, ultimately disadvantages the unprotected group. Boosting the protected group is the very purpose of affirmative action. Thus, taken to its logical conclusion, *SFFA* might render any race-conscious plan unconstitutional. The Court may therefore have signaled its intent to limit *Wygant* and *Croson* or even resort to a stealth overruling of those cases as the *SFFA* decision did to *Bakke*, *Grutter*, and *Fisher*.

It is also possible that the Court will not go so far. *Wygant* and *Croson* rest on a more demanding constitutional test than *Bakke* and *Grutter*. Whereas *Bakke* and *Grutter* accepted diversity as a compelling state interest in education, *Wygant* and *Croson* required proof that the government unit advancing a race-conscious affirmative action plan had engaged in or had been complicit in discrimination.[238] Because *Wygant* and *Croson* placed a heavy burden on government entities

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233 *Id.* at 510 (plurality opinion).

234 *Id.*

235 *SFFA*, 600 U.S. 181, 332 (2023).

236 *Id.* at 218–19.

237 *Id.*

238 *Croson*, 488 U.S. at 492, 498; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).

seeking to engage in affirmative action, the Court might hesitate before declaring all such plans constitutionally impermissible.

Another reason that the Supreme Court may choose not to tamper with the strict scrutiny standard of *Wygant* and *Croson* is that this standard does not tend to lead to problems with narrow tailoring. In *SFFA*, Chief Justice Roberts identified several reasons that the Harvard College and UNC admissions programs failed to meet the narrow-tailoring requirement. He criticized these programs because they used vague racial classifications that were sometimes overinclusive and other times underinclusive.[239] Another of Chief Justice Roberts's criticisms was Harvard College and UNC's failure to show how racial diversity advanced their goals more than other approaches such as religious diversity.[240] These criticisms do not apply to public employment or government contracting because neither *Wygant* nor *Croson* recognized racial diversity as a compelling state interest that might justify affirmative action. Both cases required that the government actor initiating affirmative action had either engaged in past discrimination or was complicit in discrimination.[241] Justice Roberts also criticized the Harvard and UNC admissions programs for having unmeasurable goals.[242] It is a simple matter for affirmative action plans under *Wygant* and *Croson* to meet this criticism. For example, an affirmative action plan in a public school district might, as its goal, target parity between the percentage of qualified Black teachers in the local labor pool and the percentage of Black teachers that the school district employs.[243]

SFFA also found the Harvard and UNC admissions programs unacceptable under the Equal Protection Clause because the programs had no determinable end point.[244] Although *Wygant* and *Croson* also require a determinable end point, *SFFA* poses no meaningful obstacle to affirmative action plans under public employment or government contracting. Affirmative action plans under *Wygant* and *Croson* may provide that they will terminate when the number of Black public school teachers, police officers, firefighters, or subcontractors reaches parity with the qualified local labor market.

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239 *SFFA*, 600 U.S. at 214–18.

240 *Id.* at 253–54.

241 *Croson*, 488 U.S. at 492, 498; *Wygant*, 476 U.S. at 274.

242 *SFFA*, 600 U.S. at 214.

243 *Wygant*, 476 U.S. at 275.

244 *SFFA*, 600 U.S. at 225.

Wygant and *Croson* dealt with the permissibility of affirmative action in the public sector and required as a precondition to the validity of such plans that the government entity in question had either engaged in past discrimination or had condoned local discrimination.[245] However, neither *Wygant* nor *Croson* addressed whether diversity in public employment may provide a compelling state interest sufficient to meet the requirements of the Equal Protection Clause. The next Section addresses this issue.

*F. Pre-*SFFA *Equal Protection Employment Cases: Diversity as a Basis for Affirmative Action*

Few cases support diversity as a compelling state interest in public employment.[246] *Petit v. City of Chicago* is such a case.[247] *Petit* concerned an examination for the promotion of Chicago police officers to the rank of sergeant.[248] The scores on the examination were standardized for race and ethnicity.[249] Nonminority police officers brought suit, alleging that by adjusting the scores on the examination, the Chicago Police Department violated the Equal Protection Clause.[250] Citing *Grutter*, the Seventh Circuit held that the state interest in diversity in the Chicago Police Department was even more compelling than the state interest in diversity in education.[251] The court observed that metropolitan police departments serve ethnic communities that may be distrustful of police officers.[252] Distrust translates into uncooperativeness, which may impede law

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245 *Croson*, 488 U.S. at 492; *Wygant*, 476 U.S. at 274.

246 Alexander v. City of Milwaukee, 474 F.3d 437, 445 (7th Cir. 2007) (holding that diversity in an urban police department is a compelling state interest but finding that the defendants failed to show a specific plan with an articulated policy, goals, parameters, or means of assessing how race should influence promotion decisions); Petit v. City of Chicago, 352 F.3d 1111, 1114 (7th Cir. 2003) (holding that diversity is a compelling state interest for the police department); Reynolds v. City of Chicago, 296 F.3d 524, 529–31 (7th Cir. 2002) (upholding an affirmative action plan allowing the out-of-rank promotions of Black, Latinx, and women applicants to increase the effectiveness of the police force); Dietz v. Baker, 523 F. Supp. 2d 407, 418–19 (D. Del. 2007) (holding that, depending on a sufficient factual showing, diversity might be a compelling state interest for police department promotions to inspector).

247 *Petit*, 352 F.3d at 1114.

248 *Id.* at 1112.

249 *Id.*

250 *Id.*

251 *Id.* at 1114.

252 *Id.* at 1115.

enforcement.[253] However, when minority officers have leadership roles in police departments, community distrust abates, cooperation increases, and law enforcement benefits.[254]

Reaching a contrary result, the Third Circuit in *Lomack v. City of Newark* held that diversity is not a compelling state interest in fire companies.[255] Relying on an accountant's report finding that many Newark fire companies were predominated by a single race, the Newark Fire Department, seven years after issuance of the report, adopted an affirmative action plan to desegregate these fire companies.[256] Thirty-four firefighters and two unions brought a lawsuit, alleging that the plan violated the Equal Protection Clause.[257]

Newark argued that *Grutter* justified its use of affirmative action to achieve diversity in its fire companies.[258] It contended that integrated fire companies promoted tolerance and camaraderie among firefighters with diverse backgrounds.[259] The Court rejected Newark's arguments, stating that *Grutter* held that educational benefits are a compelling state interest in law school, but not in a fire department.[260] The mission of a school, the court noted, is to educate students, to cultivate citizenship, and to prepare students for careers and leadership roles.[261] A diverse student body, the *Grutter* Court found, supports that mission.[262] The

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253 *Id.*

254 *Id.* The Seventh Circuit also found that the standardization of scores was narrowly tailored to overcome significant flaws in the examination, and was a one-time measure, which satisfied the requirement that affirmative action be temporary. *Id.* at 1117–18.

255 Lomack v. City of Newark, 463 F.3d 303, 309 (3d Cir. 2006).

256 *Id.* at 306. The impetus for the accountant's report was a 1977 Consent Decree that ordered Newark to hire more Black and Hispanic firefighters, although the decree did not find that Newark had engaged in intentional discrimination. *Id.* at 305.

257 *Id.* at 307.

258 *Id.* at 309. Newark also argued that it had engaged in past discrimination and that past discrimination justified its plan to integrate the fire companies. *Id.* at 308. The court rejected this argument noting that Newark conceded that it had not intentionally discriminated. *Id.* at 307–08. Newark argued that it unintentionally engaged in de facto segregation consistent with *Brown v. Board of Education*, 347 U.S. 483 (1954); the court held that de facto segregation is not a constitutional basis for affirmative action in the public workplace. *Id.* at 308. The final argument raised by Newark was that a Consent Decree, issued in 1977, required an affirmative action plan to desegregate the fire companies. *Id.* at 311. The Third Circuit interpreted the Consent Decree merely as establishing benchmarks for hiring and promoting minority firefighters. *Id.*

259 *Id.* at 309.

260 *Id.*

261 *Id.* at 309–10.

262 *Id.* at 310.

Third Circuit pointed out that the mission of a fire department is not to educate but rather is to fight fires.[263]

Lomack and *Petit* are reconcilable because the effectiveness of police departments, unlike fire departments, depends heavily on community support. As noted, however, few cases have recognized diversity as a compelling state interest in public employment. Moreover, as discussed below, the question arises whether outlier decisions such as *Petit* survive *SFFA*.

G. The Implications of SFFA *on Diversity as a Compelling State Interest in Public Employment*

The *Petit* decision rested substantially on *Grutter*, which found that diversity, in higher education, is a compelling state interest.[264] By reversing position in *SFFA* and holding that diversity is no longer a compelling state interest in higher education, the Supreme Court has cast doubt on the possibility that any lower federal court will cite diversity as justification for affirmative action in public employment or any other context. One might argue that the urgency of effective policing is an interest more compelling than the interest of diversity in institutions of higher learning. In *Petit*, the Seventh Circuit declared that "there is an even more compelling need for diversity in a large metropolitan police force charged with protecting a racially and ethnically divided major American city."[265] In the post–George Floyd era in which distrust of the police often runs high in minority communities, one may reasonably conclude that the *Petit* court was right and that diversity remains a compelling state interest even after *SFFA*. However, one may argue just as persuasively that *Petit*'s diversity argument does not survive *SFFA*. In *SFFA*, Justice Roberts pointed out that any boost because of race will negatively affect someone not in the protected class.[266] Regardless of the context, that zero-sum argument applies to any affirmative action plan. It is therefore arguable that, after *SFFA*, diversity may rarely be a compelling state interest under the Equal Protection Clause. The military may provide such a rare case. As shown below, diversity in the military may survive as a compelling state interest, even after *SFFA*.

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263 *Id.*

264 Petit v. City of Chicago, 352 F.3d 1111, 1114 (7th Cir. 2003).

265 *Id.*; *accord* Alexander v. City of Milwaukee, 474 F.3d 437, 445 (7th Cir. 2007).

266 *SFFA*, 600 U.S. 181, 218–19 (2023).

H. Diversity in the Military

In September 2023 Students for Fair Admissions sued the United States Military Academy at West Point in the Southern District of New York for instituting a race-based affirmative action policy.[267] This policy sets benchmarks for the number of Black, Hispanic, and Asian candidates for admission in each incoming class.[268] SFFA alleged that West Point, in an effort to match the percentage of Black officers with the percentage of Black enlisted personnel, set the benchmark for Black admissions at over 14%.[269] This benchmark, the complaint argued, overrepresented the percentage of Black people in the U.S. population, which is 13.1%. The complaint went on to allege that race is sometimes a determinative factor in the admissions process denying deserving applicants admission because of their race.[270] The academy's practice of racial balancing, the complaint asserted, will continue indefinitely because the composition of enlisted army personnel dictates the extent of racial balancing at the academy.[271] Finally, the complaint denied West Point's rationales for its policy that its racial balancing increases unit cohesion[272] and inspires trust in society that the military is racially

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267 Verified Complaint, Students for Fair Admissions v. U.S. Mil. Acad., No. 23CV08262, (S.D.N.Y. Sept. 19, 2023) 2023 WL 6144467. SFFA also brought a virtually identical lawsuit against the U.S. Naval Academy. *See* Students for Fair Admissions v. U.S. Naval Acad., No. 23-2699, 2023 WL 8806668, at *3 (D. Md. Dec. 20, 2023) (alleging a violation of the Equal Protection Clause). In that case, SFFA sought a preliminary injunction to stop the Naval Academy from using a race-conscious admissions program. *Id.* at *6–7. Stressing that the *SFFA* decision recognized that the military academies have unique concerns, the court found that the Naval Academy's race-conscious admissions program serves the military's compelling state interest in national security. *Id.* at *11. The court also distinguished this case from *SFFA*, finding that attainment of the goals of the Naval Academy's admissions program were measurable. *Id.* at *13. The court also concluded that the admissions program was narrowly tailored because it considered each applicant's individual experience, and because it has tried alternative approaches such as marketing to underrepresented demographics. *14–15. Accordingly, the court denied SFFA's motion for a preliminary injunction. *Id.* at *15.

268 Verified Complaint, *supra* note 267, ¶ 28.

269 *Id.* ¶ 30. The complaint alleges that West Point has not yet reached its objective of parity between the percentage of enlisted personnel and officers who are Black, noting that white people currently account for 53% of enlisted personnel and 73% of the officer corps. *Id.* ¶ 40.

270 *Id.* ¶ 35.

271 *Id.* ¶ 41.

272 *Id.* ¶¶ 46–47. The complaint alleges that racial tensions in the army have been "virtually nonexistent" since the Vietnam War. *Id.* ¶ 47. The complaint asserts that West Point has proffered no support for the proposition that a racially diverse officer corps engenders "cross-cultural understanding" between enlisted men and officers, or that a

unbiased.[273] SFFA argued that under the *SFFA* decision West Point's affirmative action admissions policy violates the Equal Protection Clause, and that SFFA is entitled to a preliminary injunction, blocking West Point from continuing its race-conscious admissions program.[274]

West Point responded that a diverse officer corps is a compelling state interest grounded in national security.[275] West Point also contended that, unlike the Harvard and UNC programs, its affirmative action goals are statistically measurable.[276] It also asserted that its policy, which seeks parity between the racial mix of the officer corps and enlisted ranks, is narrowly tailored.[277] In addition, West Point noted that its policy imposes no quotas.[278] Because of the urgency of

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diverse officer corps facilitates "sociocultural competencies essential to multicultural leadership." *Id.* ¶¶ 51–52. Nor does West Point support its assertion, SFFA alleges, that diversity enhances effectiveness in accomplishing military missions. *Id.* ¶ 53. Finally, the complaint alleges that West Point has failed to support its claim that a diverse officer corps enhances interactions with international allies. *Id.* ¶ 54.

273 *Id.* ¶¶ 55–56. The complaint challenges West Point's assertions that the public will lose trust in a military that is not racially balanced, and that the loss of trust will cause enlistments to decline. *Id.* ¶ 57. To rebut these assertions, the complaint alleges that, given West Point's current policy of racial balancing, the army faces a recruitment crisis. *Id.* The complaint alleges that the cause of the recruitment crisis is West Point's abandonment of a merit-based admissions policy. *Id.* ¶ 58.

274 To obtain a preliminary injunction, the SFFA must prove (1) likelihood of success on the merits, (2) the likelihood that it will suffer irreparable harm absent a preliminary injunction, (3) the equities tip in its favor, and (4) a preliminary injunction is in the public interest. *See, e.g.*, Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

275 Defs.' Mem. of L. in Opp'n to Pl.'s Mot. for a Prelim. Inj. at 21, Students for Fair Admissions v. U.S. Mil. Acad., No. 7:23CV08262 (S.D.N.Y. Nov. 22, 2023) ECF No. 47. West Point asserted that racial tensions have always plagued the armed forces. *Id.* at 22. Citing racial strife and violence in 1968, West Point argued that racial and ethnic diversity in the officer corps is essential to "combat effectiveness, and unit cohesion; the recruitment and retention of officers and enlisted personnel alike; and the domestic and international legitimacy of the U.S. Army as an institution." *Id.* at 24, 28. West Point cited the results of an empirical study conducted by the Department of Defense, Office of People Analytics in 2022, which found that when service personnel ranked the condition of racial diversity "healthy" they assessed the military state of readiness at a better level than when they ranked the condition of racial diversity "unhealthy." *Id.* at 32. Finally, West Point cited another empirical study concluding that a diverse and inclusive military leads to "battlefield success." *Id.* at 33.

276 *Id.* at 53; *see also id.* at 41–42 (stating that, unlike Harvard and UNC's goals, West Point's goals are measurable simply by counting the number of violent eruptions spawned by racial tensions and by acquiring feedback from service personnel assessing unit cohesion).

277 *Id.* at 52; *see also id.* at 47 (stressing that West Point's admissions policy is holistic and individualized to take into account all the qualities of each applicant and that race is only one factor among many that are considered in the admissions process).

278 *Id.* at 50.

the state interest in a robust military, West Point argued that its policy should be exempt from the requirement of having an end point.[279]

The district court denied SFFA's motion for a preliminary injunction.[280] In reaching its decision, the court stressed Chief Justice Roberts's acknowledgement that the interests of the military are unique.[281] The district court criticized SFFA for filing a factually "imprecise" complaint that was based on a "patchwork of information."[282] In opposition to the motion for a preliminary injunction, West Point submitted six factual declarations, which the court found persuasive.[283] In particular, the court credited West Point's factual assertions that a diverse officer corps (1) is critical to mission readiness, (2) expands the range of innovative problem solving, (3) aids in recruitment and retention, and (4) supports domestic and international trust in the United States military.[284] To bolster its acceptance of the military's assertions, the court again referred to Chief Justice Roberts's carve out for military academies.[285] Thus, the district court concluded that such academies deserve greater deference in Equal Protection cases than public or private universities.[286] Based on all these reasons,[287] the district court found that SFFA failed to show a likelihood of success on the merits.[288]

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279 *Id.* at 59; *see also id.* at 58 (asserting that West Point does not intend to use its race-conscious admissions policy indefinitely).

280 Students for Fair Admissions v. U.S. Mil. Acad., No. 23-CV-08262, 2024 WL 36026, at *14 (S.D.N.Y. Jan. 3, 2024).

281 *Id.* at *10. Chief Justice Roberts cautioned against extending the holding of *SFFA* to the military academies as follows: "The United States as *amicus curiae* contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct issues that military academies may present." *SFFA*, 600 U.S. 181, 213 n.4.

282 *U.S. Mil. Acad.*, 2024 WL 36026, at *10.

283 *Id.* The court emphasized that West Point used a multitiered holistic admission process, which allowed for the consideration of race only at certain distinct stages. *Id.* at *5.

284 *Id.* The court noted that SFFA controverted these assertions for the first time in its reply papers. *Id.* at *11.

285 *Id.*

286 *Id.*

287 *Id.* at *11–12.

288 *Id.* at *12. The district court also found that SFFA failed to prove irreparable harm. *Id.* SFFA raised two arguments to support this element of a preliminary injunction. *Id.* First, it argued that the mere allegation of a constitutional violation established irreparable harm. *Id.* The court disagreed because SFFA had failed to show a probability of success on the merits. *Id.* Second, SFFA argued that the denial of admission to deserving applicants

III
AFFIRMATIVE ACTION UNDER TITLE VII AND § 1981

The Supreme Court has long recognized that Title VII and § 1981 permit affirmative action plans in both the public and private sectors.[289] In *United Steelworkers v. Weber*, the Supreme Court upheld the validity of an affirmative action plan in private employment.[290] Eight years after *Weber*, the Supreme Court in *Johnson v. Transportation Agency* refined *Weber* and extended its holding to public employment.[291] This Part analyzes these two Supreme Court cases and then discusses the implications of *SFFA* for affirmative action under Title VII and § 1981. This Part also shows how *SFFA* has already disrupted DEI programs in the business arena.

A. United Steelworkers v. Weber*:* *Recognition of Affirmative Action Under Title VII*

In 1974, Kaiser Aluminum and Chemical Corp. (Kaiser) and the United Steelworkers entered into a collective bargaining agreement that adopted a race-conscious affirmative action plan.[292] That plan reserved 50% of future openings in an in-plant craft-training program for Black applicants until the percentage of Black craft workers at Kaiser reached 39%, which was the percentage of Black people in Kaiser's local labor force.[293] When Kaiser and the union adopted this affirmative action plan, Kaiser's cadre of craft workers was almost

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constituted irreparable harm. *Id.* Again, the court disagreed, noting that plaintiff-applicants who had been denied admission could reapply if SFFA won the case. *Id.* Finally, the court found that the equities tipped in favor of West Point because a temporary injunction would disrupt the admissions process, which was already underway, and would require West Point to rescind letters of acceptance that it had issued to candidates. *Id.* at *13. SFFA applied to the Supreme Court for a writ of injunction. The Supreme Court denied the application because the record was underdeveloped and noted that, by denying the application, the Court was not expressing a view on the merits. Students for Fair Admissions, Inc. v. U.S. Mil. Acad., 144 S. Ct. 716 (2024) (denying application for writ of injunction).

289 *See infra* Sections III.A and B (discussing *Johnson* and *Weber*).

290 United Steelworkers v. Weber, 443 U.S. 193 (1979); *see* Rudebusch v. Hughes, 313 F.3d 506, 520–21 (9th Cir. 2002) (following *Johnson* in Title VII case challenging affirmative action plan).

291 Johnson v. Transp. Agency, 480 U.S. 616 (1987); *cf.* Walton v. Medtronic USA, Inc., No. 22-CV-50, 2023 WL 3144320 (D. Minn. April 28, 2023) at *1 (granting plaintiff's motion to amend complaint where plaintiff alleged that defendant's goals of having women occupying 40% of its leadership positions and Black people occupying 20% of those positions explained why he was discharged from his employment).

292 *Weber*, 443 U.S. at 197–98.

293 *Id.* at 197–99. The plan applied to fifteen Kaiser plants. *Id.* at 198.

entirely white.[294] Each of the fifteen Kaiser plants following this affirmative action plan set goals to meet the plan's requirements.[295]

White workers denied admission into the craft-training program sued Kaiser and the union because the affirmative action plan resulted in preferences for Black applicants.[296] The plaintiffs argued that the affirmative action plan violated Title VII, which prohibits "discriminat[ion] . . . because of . . . race."[297] The argument that Title VII is colorblind mirrors the majority's principal point in *SFFA*. To support the colorblindness argument, the *Weber* plaintiffs also relied on *McDonald v. Santa Fe Transportation Company*, which held that Title VII protects both white and Black people.[298]

Although acknowledging the plausibility of plaintiffs' arguments, the Court rejected them.[299] Much as Justice Sotomayor argued in her dissenting opinion in *SFFA*, the *Weber* majority grounded its analysis on legislative history and historical context.[300] Writing for the majority, Justice Brennan pointed out that Black workers had long been denied skilled and semiskilled jobs.[301] To address this worsening problem, Congress implicitly supported affirmative action.[302] This implicit support, Justice Brennan observed, appeared in the House Report accompanying the 1964 Civil Rights Act.[303] The House Report stated that the Act "will create an atmosphere conducive to voluntary

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294 *Id.* at 198. Before 1974, only 1.83% of the skilled craft workers at Kaiser's Gramercy plant were Black. *Id.* This low number qualified as a manifest imbalance given that Black people comprised 39% of the local labor force. *Id.* at 199.

295 *Id.* at 197–99.

296 *Id.* at 199.

297 *Id.* at 201 (quoting 42 U.S.C. § 2000e-2(a)(1)). Chief Justice Burger followed the literalist approach to Title VI's prohibition of race discrimination. *Id.* at 216 (Burger, J., dissenting). Although he agreed with the policy supporting affirmative action, he felt constrained to reject the lawfulness of affirmative action, charging that the majority had "amend[ed]" the statute to achieve what the statute forbids. *Id.* Voicing an even stronger criticism of the majority than had Chief Justice Burger, Justice Rehnquist accused the majority of an Orwellian manipulation of language. *Id.* at 219–20 (Rehnquist, J., dissenting). He cited *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1973), which concluded that Title VII forbids racial discrimination in the workplace "for any group, minority or majority," and criticized the majority for ignoring *Griggs*, other Supreme Court precedent, legislative history, and the language of the statute. *Id.* at 220–21. He found Kaiser's affirmative action plan particularly offensive because it established a 50% quota for Black trainees. *Id.* at 254. Perhaps in hyperbolic language, he characterized a quota as "a creator of castes." *Id.*

298 *Weber*, 443 U.S. at 200–01.

299 *Id.* at 201.

300 *Id.*

301 *Id.* at 201–02.

302 *Id.* at 204.

303 *Id.*

or local resolution of other forms of discrimination."[304] Justice Brennan stressed that this endorsement of voluntary antidiscrimination initiatives showed Congress's support for affirmative action in the private sector.[305] He also noted that, before the passage of the Act, critics argued that the Act might be construed to permit or even require employers with racial imbalances to institute racial preferences.[306] In response to this criticism, Congress added § 703(j) to the Act.[307] Although that section provides that the Act does not *require* the use of racial preferences, it is silent on the permissibility of such preferences.[308] Justice Brennan concluded that § 703(j) therefore left the door open to voluntary affirmative action.[309]

To underscore the importance of voluntary affirmative action under Title VII, Justice Brennan wrote: "It would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish patterns of racial segregation and hierarchy."[310]

Still, Justice Brennan recognized that Title VII placed limits on voluntary affirmative action plans.[311] A valid plan under Title VII must address a manifest imbalance in traditionally segregated job categories.[312] Although Justice Brennan did not define this rather opaque requirement, the virtual exclusion of Black workers from craft jobs at Kaiser clearly met it.[313] In addition, a plan may not trammel the

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304 *Id.* (quoting H.R. REP. NO. 88-914, pt. 1, at 18 (1963)). As further support for the permissibility of affirmative action, Justice Brennan cited *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). *Id.* The *Albemarle* Court stated that Congress intended Title VII to catalyze "employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." *Id.* (quoting United States v. N.L. Indus., Inc., 479 F.2d 354 (8th Cir. 1973)).

305 *Id.*

306 *Id.* at 205.

307 *Id.*

308 *Id.*

309 *Id.* Justice Brennan noted that, as a condition for their support of Title VII, legislators insisted that "management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible. H.R. REP. NO. 88-914, pt. 2, at 29 (1963). Consistent with preserving management prerogatives, Title VII permitted employers to adopt voluntary affirmative action plans. *Weber*, 443 U.S. at 207.

310 *Id.* at 204.

311 *Id.* at 208.

312 *Id.*

313 *Id.*

rights of those who are not in the plan's protected class.[314] Justice Brennan saw no substantial impact on the rights of any of Kaiser's workers because none were discharged or barred from advancement.[315] He also emphasized that the plan was temporary, because it would terminate when the underrepresentation of Black workers in Kaiser's craft jobs approximated the percentage of Black people in the local workforce.[316]

Weber established the requirements of a valid affirmative action plan under Title VII. As noted, one of those requirements—a manifest imbalance in traditionally segregated job categories—was left largely undefined. In addition to affirming *Weber*, the *Johnson* decision explained, however imprecisely, the meaning of the manifest imbalance requirement.[317]

B. Johnson v. Transportation Agency*: The Refinement of* Weber

In 1987, the Transportation Agency of Santa Clara County, California (Agency) adopted an affirmative action plan to boost the number of promotions of minority and female workers.[318] The Agency announced an opening for the Skilled Craft job of road dispatcher.[319] Twelve Agency employees applied for the promotion, including Paul Johnson and Diane Joyce.[320] Johnson had been working for the Agency for twelve years, Joyce for nine.[321] Both had some experience as a road dispatcher.[322] The Agency deemed nine of the twelve applicants

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314 *Id.*

315 *Id.*

316 *Id.*

317 *See infra* notes 332–37 and accompanying text (discussing *Johnson's* explanation of the manifest imbalance test.).

318 Johnson v. Transp. Agency, 480 U.S. 616, 619 (1987).

319 *Id.* at 623.

320 *Id.*

321 *Id.* The work experiences of Joyce and Johnson were similar. Joyce began working for the Agency in 1970. *Id.* Initially, she served as an account clerk. *Id.* She applied for an opening for road dispatcher in 1974, but she was ineligible for that job because she had not worked in road maintenance. *Id.* In 1975, she transferred from senior account clerk to road maintenance worker. *Id.* "During her four years in that position, she occasionally worked out of class as a road dispatcher." *Id.* Johnson began working for the Agency in 1967 as a road yard clerk. *Id.* He also applied for the opening in 1974 for a road dispatcher, but the Agency found him ineligible because he lacked experience in road maintenance. *Id.* In 1977, the Agency transferred Johnson to the position of road maintenance worker. *Id.* Like Joyce, Johnson occasionally worked out of class as a road dispatcher. *Id.*

322 *Id.*

qualified for the promotion.[323] A two-person board interviewed and rated the nine qualified applicants.[324] The highest score that any applicant earned on the interview was 80.[325] Johnson tied for the second highest score with a 75, and Joyce came in fourth with a score of 73.[326] Three Agency supervisors then conducted a second interview of the nine qualified applicants and recommended Johnson for the promotion.[327]

Joyce believed that the panel of supervisors was biased against her because she had had on-the-job clashes with two panel members, one describing her as a "rebel-rousing, skirt-wearing person."[328] Joyce expressed her concerns to the Agency's Affirmative Action Coordinator who, in turn, recommended to the Agency Director, James Graebner, that Joyce get the promotion.[329] Graebner followed this recommendation and awarded the promotion to Joyce.[330]

Johnson commenced a lawsuit against the Agency, alleging that, by awarding the promotion to Joyce, the Agency had violated Title VII.[331] Perhaps the most important issue in *Johnson* was whether the Agency's female workforce had "a manifest imbalance . . . in traditionally segregated job categories."[332] The Court found that women were underrepresented in many of the Agency's job categories and emphasized that women occupied none of its 238 Skilled Craft

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323 *Id.*

324 *Id.*

325 *Id.*

326 *Id.* at 624.

327 *Id.*

328 *Id.* at 677 n.5. Joyce testified that one of the members on the second panel was her supervisor when she was assigned to road maintenance work. *Id.* When she began working on this job, the Agency did not issue her overalls, though it had done so for male workers assigned to the same duty. *Id.* While performing this physical work, her pants were ruined. *Id.* When she complained to her supervisor, he was unresponsive. *Id.* After three more occasions when her pants were ruined in the course of her work, she filed a grievance and received four pairs of overalls the next day. *Id.* As a separate matter, Joyce informed the Agency employee responsible for arranging the second interview that she would not be available on a certain day because she had enrolled for a disaster preparedness class. *Id.* Nevertheless, the second interview was set for a time that conflicted with the class. *Id.*

329 *Id.* at 624.

330 *Id.* at 624–25.

331 *Id.* at 625. Consistent with *Wygant*, which placed the burden of persuasion on the plaintiff raising an Equal Protection challenge to an affirmative action plan, the *Johnson* Court placed the burden of persuasion on the plaintiff raising a Title VII challenge. *Id.* at 631.

332 *Id.* at 631 (quoting United Steelworkers v. Weber, 443 U.S. 193, 197 (1979)).

jobs.[333] Adopting the stance of Justice O'Connor in her concurring opinion in *Weber*, the Court instructed that a manifest imbalance need not be sufficient to support a Title VII violation.[334] The *Johnson* Court also adopted a less stringent standard for affirmative action under Title VII compared to the demanding Equal Protection standard, which requires past discrimination or complicity in local industry discrimination.[335] "[W]e do not," the Court stated, "regard as identical the constraints of Title VII and the Federal Constitution on voluntary affirmative action plans."[336] The Court's rationale for this relatively low threshold was that requiring a violation in Title VII cases to meet the standard of *Wygant* and *Croson* would create a disincentive for employers to adopt affirmative action plans and might therefore frustrate the national policy favoring affirmative action.[337]

The Court found the Agency's affirmative action plan consistent with the other requirements of Title VII.[338] The plan had the long-term goal of matching the percentage of its women employees to the percentage of women in the area labor pool.[339] Implementation of the

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333 *Id.* at 634–36.

334 *Id.* at 632. Justice O'Connor criticized the manifest imbalance standard because she felt that it was unreasonably vague. *Id.* at 652 (O'Connor, J., concurring). She also suggested that a statistical imbalance sufficient to support a prima facie pattern or practice violation be required to sustain in any affirmative action plan in public employment, whether brought under the Equal Protection Clause or Title VII. *Id.* at 653.

335 *Id.* at 632 (majority opinion); *see* Joel L. Selig, *Affirmative Action in Employment After* Croson *and* Martin*: The Legacy Remains Intact*, 63 TEMP. L. REV. 1, 10 (1990) (comparing the standards that justify affirmative action under *Wygant*, *Croson*, *Weber*, and *Johnson*).

336 *Johnson*, 480 U.S. at 619.

337 *Id.* at 633. Justice White disagreed with such a lax definition of "traditionally segregated job[]" categories. *Id.* at 657 (White, J., dissenting). He understood *Weber* to define that term to mean the "intentional and systematic exclusion of blacks by the employer and the union from certain job categories." *Id.* Because he believed that the *Johnson* majority reinterpreted "a traditionally segregated job[]" category to means a relatively minor manifest imbalance, he called for the overruling of *Weber* and dissented from *Johnson*. *Id.*

338 *Id.* at 641 (majority opinion). Justice Scalia dissented, faulting the plan for benchmarking the Agency's labor force with the total labor market, rather than the qualified labor market. *Id.* at 659–60 (Scalia, J., dissenting). He argued that women do not seek certain jobs and insisted that the Agency had not discriminated, asserting that the absence of female hires in labor-intensive jobs reflected the lack of qualified female applicants for those jobs. *Id.* at 668. Justice Scalia faulted the majority for engaging in social engineering and abandoning the injunction of Title VII, which is to eliminate workplace discrimination. *Id.* The unfortunate result of the majority's ruling, he lamented, would be that less qualified people get jobs in preference to those who are more qualified. *Id.* at 675. His overarching point, which was analogous to Chief Justice Roberts's Equal Protection argument in *SFFA*, was that the very language of Title VII is colorblind and genderblind. *Id.* at 677.

339 *Id.* at 634.

plan was flexible, relying on the subsequent collection of data to guide the Agency in adjusting short-term goals to accommodate the number of available women with the training and experience needed for particular jobs.[340] The plan did not unnecessarily trammel the rights of male employees because it did not bar men from advancement.[341] It had no set asides or quotas, and Graebner, the ultimate decisionmaker, took a multifactor approach to decision-making.[342] Johnson had no grounds to complain of unfair treatment since he had no settled right to the promotion, retained his job, and was eligible to apply for future promotions.[343] Finally, the plan was temporary, expressly seeking to attain, rather than maintain, a workforce reflecting the available labor market.[344]

C. The Implications of SFFA *for Affirmative Action Under Title VII*

Although one may argue that *SFFA* casts doubt on the viability of affirmative action under Title VII, the resolution of this issue is far from clear. The next Section of this Article explores the arguments on both sides of this issue.

1. Manifest Imbalance Standard as a Justification for Affirmative Action

The *Johnson* Court's announcement that affirmative action plans under Title VII face a reduced standard compared to affirmative action plans under the Equal Protection Clause raises the possibility that diversity may support affirmative action under Title VII.

Justice Stevens took this position in his concurring opinion in *Johnson*.[345] Rejecting the view that Title VII is "colorblind," he argued that, because Congress enacted Title VII to benefit minorities, rationales other than a manifest imbalance, including diversity, may support Title VII affirmative action plans.[346] He reasoned that, before

340 *Id.*

341 *Id.* at 638.

342 *Id.*

343 *Id.*

344 *Id.* at 639.

345 *Id.* at 647 (Stevens, J., concurring).

346 *Id.* at 644, 647. Justice Stevens argued for a permissive standard for affirmative action. *Id.* at 647. He argued that "[p]ublic and private employers might choose to implement affirmative action for many reasons other than to purge their own past sins of discrimination." *Id.* He endorsed two alternative justifications for affirmative action: diversity and the reduction of community discord over the underrepresentation of minority workers. *Id.*

the enactment of Title VII, an employer was free to adopt race-conscious affirmative action.[347] It defied common sense to interpret a statute designed to benefit minorities as an instrument to constrain voluntary efforts to aid them.[348]

Justice Stevens's concurring opinion did not express the view of the Court's majority. Lower courts might interpret *SFFA* to undermine Justice Stevens's permissive approach, and the Supreme Court as currently constituted might well limit or even overrule *Weber* and *Johnson* and hold that Title VII bans affirmative action. This possibility arises because of the very nature of affirmative action, whether in education or employment. In banning diversity-based affirmative action in higher education, Chief Justice Roberts concluded that the Equal Protection Clause is "colorblind" and does not tolerate favoring one race over another.[349] Even when used as one factor among many, affirmative action, reasoned the Chief Justice, ultimately penalizes students who are not in the protected class.[350] The same argument might apply to affirmative action under Title VII: When an affirmative action plan results in the hire or promotion of a person in a protected class, an unprotected person is disadvantaged because that person, absent affirmative action, would have received that benefit. Such was the case when Johnson and Joyce competed for the road dispatcher job.

However, another consideration suggests that the Supreme Court might not limit or overrule *Weber* and *Johnson*. The manifest imbalance standard is based on a measurable statistical disparity between the percentage of an employer's minority workers and the relevant labor pool. Chief Justice Roberts argued that the benefits of diversity are hard to measure and sometimes speculative.[351] Because manifest imbalance is measurable, the Court may be inclined to let *Weber* and *Johnson* stand.

If the Court chooses not to review an affirmative action Title VII case, the task of applying *SFFA* to Title VII would then fall to the lower federal courts. Because *SFFA* does not address Title VII, it seems highly likely that these courts would leave intact the manifest imbalance standard as a justification for Title VII affirmative action. To do otherwise would be to engage in bald speculation about whether

347 *Id.* at 645.

348 *Id.*

349 *SFFA*, 600 U.S. 181, 206.

350 *Id.* at 218–19.

351 *Id.* at 214.

the Supreme Court might abolish affirmative action under Title VII. That would be a giant step for lower courts to take.

The tenability of diversity as a justification for affirmative action under Title VII is another matter. The Supreme Court has never addressed this issue directly, and, as discussed below, lower federal courts have not held that an employer's desire to attain a diverse workforce supports affirmative action plans under Title VII.[352]

2. Diversity as a Justification for Affirmative Action Under Title VII

Taxman v. Board of Education is the leading case that rejected diversity as a permissible justification for Title VII affirmative action plans.[353] In 1975, the Board of Education of Piscataway, New Jersey, adopted an affirmative action plan affecting its employment decisions.[354] The plan did not have any remedial purpose.[355] The percentage of minority teachers in the Piscataway workforce exceeded the percentage in the local labor pool.[356] The purpose of the plan was to provide students with equal educational opportunities and to attract minority candidates for open positions.[357] It provided that if a minority and nonminority candidate appeared equally qualified, the minority candidate would receive preferential consideration.[358]

In May 1989 the Superintendent of Schools recommended a one-teacher reduction in the business department of Piscataway High School.[359] Existing state law dictated that the board lay off the teacher with the least seniority.[360] Sharon Taxman, who was white, or Debra Williams, who was Black, had equal seniority, so one of them faced discharge.[361] Applying the affirmative action plan, the board laid off

352 *See infra* Section III.C.2.

353 Taxman v. Bd. of Educ., 91 F.3d 1547, 1567 (3d Cir. 1996).

354 *Id.* at 1550.

355 *Id.*

356 *Id.*

357 *Id.* When Theodore H. Kruse, the school board president, testified at a deposition, he explained the purpose of the affirmative action plan as follow: "Basically, I think because I had been aware that the student body and the community which is our responsibility, the schools of the community, is really quite diverse and there—I have a general feeling during my tenure on the board that it was valuable for the students to see in the various employment roles a wide range of background[s] . . . ." *Id.* at 1551.

358 *Id.* at 1551.

359 *Id.*

360 *Id.*

361 *Id.*

Taxman.[362] Taxman sued the board for employment discrimination under Title VII.[363]

A majority of the Third Circuit found that the school board's affirmative action plan failed to meet any of the requirements of *Johnson*.[364] The plan did not address a manifest imbalance of minority teachers in the Piscataway school district's teacher workforce.[365] Devoid of any stated goals or standards, the plan trammeled the rights of those not in the protected class.[366] Unlike Johnson, who retained his job and the eligibility to apply for new job openings, the Piscataway school board discharged Taxman.[367] Finally, the Piscataway plan did not provide for its termination.[368]

The Third Circuit also considered whether diversity, absent a remedial purpose, justifies a Title VII affirmative action plan. Reviewing the text and legislative history of Title VII, the Third Circuit found that the statute has two purposes: to end discrimination against those in protected classes, and to end the underrepresentation of minorities in the nation's workforce.[369] The Third Circuit reasoned that promoting diversity does not address either of Title VII's dual goals.[370] Therefore, it rejected diversity as a valid basis for an affirmative action plan.[371]

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362 *Id.*

363 *Id.* at 1552.

364 *Id.* at 1564.

365 *Id.* at 1563.

366 *Id.* at 1564.

367 *Id.*

368 *Id.* at 1552, 1564.

369 *Id.* at 1557. To support its belief that Congress limited affirmative action as a remedial remedy, the Third Circuit quoted a statement of Senator Tom Clark to the Senate: "The rate of [Black] unemployment has gone up consistently as compared with white unemployment for the past 15 years. This is a social malaise and a social situation, which we should not tolerate. This is one of the principal reasons that the bill should pass." *Id.* (quoting 110 CONG. REC. 7220 (1964) (statement of Sen. Clark)).

370 *Id.* at 1558.

371 *Id.* at 1559; *see also* Iadimarco v. Runyon, 190 F.3d 151, 164 (3d Cir. 1999) (noting that although "[a]n employer has every right to be concerned with the diversity of its workforce," diversity is not a proper basis to promote employees); Mangold v. Peco Energy, No. 19-5912, 2021 WL 6072818, at *16 (E.D. Pa. Dec. 23, 2021) (stating that diversity initiatives are both "lawful" and "laudable" if they do not affect an individual's employment status). *But cf.* Shea v. Kerry, 796 F.3d 42, 57 (D.C. Cir. 2015) (commenting that affirmative action plans require "an adequate factual predicate . . . *such as* a 'manifest imbalance' in a 'traditionally segregated job categor[y].'" *Id.* at 57 (emphasis added).

Chief Judge Sloviter disagreed with the majority's analysis.[372] She argued that the majority interpreted the purposes of Title VII too restrictively.[373] The statute's broad purpose, she urged, is to eliminate not only the vestiges of past discrimination but also the potential for future discrimination.[374] To facilitate the achievement of these purposes, *Weber* and *Johnson* established the manifest imbalance standard, which is merely a sufficient basis for Title VII affirmative action rather than the necessary basis.[375] To support her reading of *Weber*, she quoted the majority opinion, which stated, "We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line."[376] Citing *Bakke*, Justice Sloviter concluded that the educational benefits flowing from a diverse workforce justify diversity as a valid basis for Title VII affirmative action.[377]

3. The Implication of SFFA *for Diversity as a Justification for Affirmative Action under Title VII*

By effectively overruling *Bakke*, *Grutter*, and *Fisher*, *SFFA* undercuts Judge Sloviter's argument that diversity justifies affirmative action in the workplace. It may be true, as some argue, that a diverse workforce spurs a broadening of perspectives that may benefit teamwork, problem-solving, and the appeal of a company's goods or services to diverse communities.[378] Nevertheless, with the exception

372 *Taxman*, 91 F.3d at 1567 (Sloviter, J., dissenting).

373 *Id.* at 1571; *see* Kenneth R. Davis, *Wheel of Fortune: A Critique of the "Manifest Imbalance" Requirement for Race-Conscious Affirmative Action under Title VII*, 43 GA. L. REV. 993, 1015 (2009) (arguing that the standards established in *Weber* and *Johnson* for voluntary affirmative action are unduly restrictive and deter employers from adopting affirmative action plans that might benefit minorities that have been subjected to past discrimination).

374 *Taxman*, 91 F.3d at 1571 (Sloviter J., dissenting).

375 *Id.* at 1570.

376 *Id.* (quoting United Steelworkers of America v. Weber, 443 U.S. 193, 208 (1979)). Similarly, in *Johnson*, Justice Stevens in his concurring opinion urged that "the [majority] opinion does not establish the permissible outer limits of voluntary [affirmative action] programs." *Id.* (Stevens, J., concurring) (quoting Johnson v. Transp. Agency, 480 U.S. 616, 642).

377 *Id.* at 1574 (Sloviter, J., dissenting).

378 *See, e.g.*, Ritu Rana, *Effective Communication in a Diverse Workplace*, 2 INT'L J. ENHANCED RSCH. MANAGERIAL & COMPUT. APPLICATIONS 1 (Feb. 2013) (asserting that diversity benefits business by enhancing productivity, improving problem solving, attracting

of policing, courts have been unwilling to recognize the benefits of a diverse workforce.[379] Thus, if diversity no longer justifies affirmative action in education, one may question whether diversity justifies affirmative action in employment.

On the other hand, Title VII is not subject to the strict scrutiny standard of the Fourteenth Amendment. This difference might support diversity as a justification for affirmative action under Title VII. A valid affirmative action plan under the Equal Protection Clause requires past or present discrimination by the state actor adopting affirmative action or its complicity in local discrimination.[380] *Weber* and *Johnson* have adopted the less stringent manifest imbalance standard for affirmative action under Title VII.[381] Title VII's adoption of the relatively permissive manifest imbalance standard might open the door to the permissive view that diversity is an alternative justification for Title VII affirmative action.

The next Section of this Article discusses how opponents of affirmative action have used *SFFA* to challenge DEI programs, and how courts have responded to those challenges. As shown below, these efforts have encountered a mixed record of success.

a. The Judicial View of SFFA*'s Implications*

American Alliance for Equal Rights v. Fearless Fund Management is a recent case that sheds light on how lower federal courts may interpret *SFFA*.[382] Fearless Foundation (Foundation), an organization dedicated to supporting women of color, sponsored a contest, which awarded grants to businesses owned by Black women.[383] The American Alliance for Equal Rights (Alliance), in an action brought under § 1981 of the Civil Rights Act of 1866,[384] sought to enjoin the

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and retaining talent, building team synergy, appealing to a diverse customer base, and reducing litigation costs).

379 *See, e.g.*, Jared M. Mellott, *The Diversity Rationale for Affirmative Action in Employment After* Grutter*: The Case for Containment*, 48 WM. & MARY L. REV. 1091, 1114 (2006) (opposing the expansion of the diversity rationale for affirmative action into the employment arena because, even in the context of policing, the security rationale is too "amorphous").

380 *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 492 (1989).

381 *See* United Steelworkers v. Weber, 443 U.S. 193, 208 (1979).

382 Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC, No. 1:23-CV-3424-TWT, 2023 WL 6295121 (N.D. Ga. Sept. 27, 2023).

383 *Id.* at *1.

384 42 U.S.C. § 1981.

contest because it excluded all but Black women from participating.[385] Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens."[386] The Foundation argued that the contest was a valid affirmative action plan and therefore did not violate § 1981.[387] Noting that affirmative action under § 1981 follows the law enunciated in *Johnson v. Transportation Agency*,[388] the district court based its analysis on that case.[389] The district court stated: "The extent to which *SFFA* overruled the affirmative action plan defense to § 1981 under *Johnson*, if at all, is unclear."[390] Influenced by *Weber*'s full-throated endorsement of affirmative action under Title VII, the district court questioned whether it should construe *SFFA* to nullify the viability of affirmative action plans under Title VII or § 1981.[391]

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385 *Am. All. for Equal Rts.*, 2023 WL 6295121, at *2. Section 1981 provides several advantages compared to Title VII. Title VII has limits on recoverable compensatory and punitive damages, 42 U.S.C. § 1981(b)(3), whereas § 1981 has no damage limits, 42 U.S.C. § 1981(b)(4). *See* Johnson v. Ry. Express Agency, 421 U.S. 454, 460 (1975) (discussing remedies available under § 1981). Title VII requires a party to file a complaint with the EEOC before commencing a federal court action. 42 U.S.C. 2000e-5(a)-(e). Section 1981 does not require a plaintiff to file a complaint with an administrative agency. Only employers with fifteen or more employees are subject to suit under Title VII. 42 U.S.C. § 2000e(b). Section 1981 has no such minimum requirement. *See generally* Danielle Tarantolo, *From Employment to Contract: Section 1981 and Antidiscrimination Law for the Independent Contractor*, 116 YALE L.J. 170, 191 (2006).

386 *Am. All. for Eq. Rts.*, 2023 WL 6295121, at *2.

387 *Id.* The Foundation also argued that the First Amendment freedom of speech protected the contest. *Id.* at *5. The court found a likelihood that the Foundation would prevail on this point and therefore denied Alliance's motion for a preliminary injunction. *Id.* at *6–7.

388 Johnson v. Transp. Agency, 480 U.S. 616 (1987); *see* Sharkey v. Dixie Elec. Membership Corp., 262 F. App'x 598, 603–05 (5th Cir. 2008) (applying *Weber* and *Johnson* affirmative action requirements to employment case brought under § 1981); Doe v. Kamehameha Schs., 470 F.3d 827, 839 (9th Cir. 2006) (en banc) (confirming that the Title VII standard for affirmative action applies to § 1981 affirmative action plans, *id.* at 838, and modifying that standard when applied of private schools, *id.* at 842–85); Setser v. Novack Inv. Co., 657 F.2d 962 (8th Cir. 1981) (en banc), *vacating in part*, 638 F.2d 1137 (8th Cir. 1981) (holding that affirmative action is permissible under § 1981 and that the standards for such plans follow the law applicable under Title VII).

389 *Am. All. for Equal Rts.*, 2023 WL 6295121, at *7.

390 *Id.*

391 *Id.* The district court quoted the *Weber* Court, which stated: "It would be ironic indeed if the law triggered by a Nation's concern over centuries of racial injustice . . . constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy." *Id.* (quoting United Steelworkers v. Weber, 443 U.S. 193, 204 (1979)).

Despite the district court's reluctance to conclude that *SFFA* implicitly overruled *Weber* and *Johnson*, it held that the Foundation's contest did not come within the protective ambit of those cases.[392] The court pointed out that courts had always applied *Weber* and *Johnson* to programs specifically designated as affirmative action plans, not to contests.[393]

The impact of *SFFA* reaches beyond lower court judicial decisions. Firms offering DEI programs have succumbed to legal challenges by choosing to abandon their programs rather than face the daunting prospect of litigation.

b. The Morrison & Foerster and Perkins Coie Actions

After *SFFA*'s disavowal of affirmative action in higher education, organizations opposed to race- and sex-conscious programs have been relentless in their efforts to extend *SFFA* to DEI initiatives of businesses.[394] One notable example is the American Alliance for Equal Rights (AAER), an organization aligned with Students for Fair Admissions.[395] To advance its agenda, AAER commenced actions challenging the DEI programs of two prominent international law firms, Morrison & Foerster (Morrison) and Perkins Coie (Perkins).[396]

Commenced on August 22, 2023, AAER challenged Morrison's fellowship program.[397] This program reserved lucrative fellowships for designated groups of first-year law students, including Black students, and excluded students who were not members of the designated groups.[398] The firm invited fellowship recipients to return as summer

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392 *Id.*

393 *Id.* Second, operating under the questionable assumption that after *SFFA* § 1981 affirmative action plans must be narrowly tailored to meet the requirements of strict scrutiny, the court doubted that the Foundation could meet this standard. *Id.* This part of the Court's analysis seems tenuous at best. The court did not explain how *SFFA* implies that strict scrutiny applies to affirmative action plans under Title VII or § 1981. *Weber* and *Johnson* did not apply strict scrutiny to Title VII affirmative action plans. *See supra* notes 33–37 and accompanying text (discussing the relatively lax standard for valid affirmative action plans under Title VII).

394 *See infra* notes 395–408 and accompanying text.

395 *See* Taylor Telford, *Law Firm Opens Fellowship to All Students After Lawsuit*, WASH. POST (Sept. 6, 2023, 2:20 PM), http://www.washingtonpost.com/business/2023/09/06/morrison-foerster-diversity-lawsuit-white-applicants/.

396 *See id.*

397 Complaint at ¶ 2, Am. All. for Equal Rts. v. Morrison & Foerster LLP, No. 23-CV-23189 (S.D. Fla. Aug. 22, 2023).

398 *Id.* ¶ 2. Only Black, Latinx, Native American, Native Alaskan, and LGBTQ+ individuals were eligible for these fellowships. *Id.* This program offered eligible first year law students summer fellowships, including a $25,000 stipend and $250,000 salary. *Id.* ¶ 17.

associates after their second year of law school, and recipients of fellowships comprised the primary pool of law school graduates that Morrison ultimately hired as full-time associates.[399] Alleging that the fellowship program was racially discriminatory and therefore violated § 1981,[400] the complaint sought to enjoin the program.[401] The parties settled the case, which was discontinued on October 11, 2023.[402] In that settlement, Morrison agreed to open the fellowship program to all applicants.[403]

In a separate lawsuit, AAER sued Perkins under § 1981 for operating a "diversity fellowship" program nearly identical to Morrison's program.[404] Like the Morrison lawsuit, AAER discontinued this case when Perkins agreed to open its fellowship program to all applicants.[405] In the wake of these lawsuits, Edward Blum, president of AAER, accused many law firms of operating "racially discriminatory" programs.[406] "It is to be hoped," he commented, "that these firms proactively open their programs to all law students before they are sued in federal court."[407]

c. A Rash of Actions Against Corporate America

Hoisted on the back of the *SFFA* decision, the anti-DEI movement cannot be overestimated. America First Legal, an organization determined to thwart corporate DEI efforts, has filed complaints with the Equal Employment Opportunity Commission challenging the diversity programs of numerous companies.[408]

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399 *Id.* ¶ 20.

400 *Id.* ¶ 39.

401 *Id.* Prayer for Relief ¶ C.

402 Am. All. for Equal Rts. v. Morrison & Foerster LLP, No. 23-cv-23189 (S.D. Fla. Aug. 22, 2023).

403 Telford, *supra* note 395.

404 Am. All. for Equal Rts. v. Perkins Coie LLP, No. 23-cv-01877 (N.D. Tex. Aug. 22, 2023).

405 *See* Tatyana Monnay, *Perkins Coie DEI Suit Ended by Anti-Affirmative Action Group*, BLOOMBERG L. (Oct. 11, 2023, 10:53 AM), http://news.bloomberglaw.com/business-and-practice/perkins-coie-dei-suit-dropped-by-anti-affirmative-action-group/.

406 *Id.*

407 *Id.*

408 The list of companies includes Yum! Brands, Twilio, Starbucks, Morgan Stanley, McDonald's, Lyft, Kontoor Brands, Hershey, Anheuser-Busch, Dick's Sporting Goods, BlackRock, Mars, Nordstrom, Alaska Airlines, PricewaterhouseCoopers, Unilever, Kellogg's, Salesforce, Major League Baseball, Activision, NASCAR, American Airlines, Southwest Airlines, United Airlines, and Macy's. *Woke Corporations*, AM. FIRST LEGAL, https://aflegal.org/woke-corporations/ (last visited Nov. 24, 2023).

4. The Tenuous Loophole

As noted in Part I, Chief Justice Roberts created a pathway for universities to consider race on an individualized basis in the admissions process.[409] He allowed that a university may consider an "applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[410] But he warned universities not to use this approach as a pretext for racial preferences, emphasizing that a "student must be treated based on his or her experiences as an individual—not on the basis of race."[411]

In the context of employment, one might argue that DEI strategies short of concrete affirmative action plans may avoid reasonable legal challenge, even if *SFFA*'s ban on affirmative action expands into the arenas of employment and government contracts. Examples of DEI initiatives are outreach in underserved communities and training and mentoring programs for incumbent employees.[412] If such initiatives do not set goals for hiring, promoting, and retaining employees, they may avoid of the rocky terrain of challenges under Title VII and § 1981. Nevertheless, opponents of DEI may attempt to use Title VII principles to frustrate all attempts to foster diversity.

a. Disparate Treatment Challenges

First, opponents of DEI may argue that such programs violate Chief Justice Robert's warning that purportedly race-neutral programs may not operate as pretexts for discrimination. Intentional discrimination is

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409 *SFFA*, 600 U.S. 181, 225.

410 *Id.* at 230.

411 *Id.* at 231.

412 *See, e.g.*, David G. Yee, *Promoting Diversity as Professionalism*, S.C. L. REV. 885, 894 (2022) (supporting mentoring as an effective means to enhance DEI); Stephen M. Rich, *What Diversity Contributes to Equal Opportunity*, 89 S. CAL. L. REV. 1011, 1062 (2016) (listing non–affirmative action DEI strategies such as diverse work teams, same sex- or race-mentors, and sex-or race-based affinity groups); Deborah L. Rhode, *Foreword: Diversity in the Legal Profession: A Comparative Perspective*, 83 FORDHAM L. REV. 2241, 2245 (2015) (promoting outreach in recruiting as an effective means of enhancing DEI); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 470 (2001) (commenting that training and mentoring are crucial to success and advancement in law firms); Rana, *supra* note 378 and accompanying text (noting the manifold benefits of DEI initiatives to business, including enhancing productivity, improving problem solving, attracting and retaining talent, building team synergy, appealing to a diverse customer base, and reducing litigation costs); Janice Gassam Asare, *The Key to Diversity and Inclusion Is Mentorship*, FORBES (Sept. 26, 2019, 10:17 PM), https://www.forbes.com/sites/janicegassam/2019/09/26/the-key-to-diversity-and-inclusion-is-mentorship/ (noting the benefits of mentoring programs that focus on diversity).

called disparate treatment.[413] To establish a disparate treatment violation, a party must merely prove that race or sex was a motivating factor for an employment action such as the decision to hire, promote, or discharge.[414] Even if an employer characterizes an initiative as race- and sex-neutral, opponents may look for evidence of bias.

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413 *See, e.g.*, Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (referring to intentional discrimination as "disparate treatment").

414 42 U.S.C. § 2000e-2(m) provides: "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989) (announcing in a plurality opinion that an employment practice violates Title VII if invidious discrimination was a motivating or contributing factor rather than a but-for cause); *see* Charles A. Sullivan, *Making Too Much of Too Little?: Why "Motivating Factor" Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. 357, 385 (2020) (interpreting the "motivating factor" test correctly to mean that "bias need not affect the decision at all to be a motivating factor.") There is another framework for establishing intentional discrimination. In McDonnell Douglas v. Green, 411 U.S. 792 (1973), the Supreme Court announced a three-step framework, which provides an alternative to the motivating factor test. At step one, the plaintiff must prove a prima facie case, which consists of four elements: (1) membership in a protected class, (2) that he or she applied for and was qualified for the position in question, (3) that he or she was rejected for the job, and (4) that, after the rejection, the job remained open. *Id.* at 802. At step two, the burden of production shifts to the defendant who must merely articulate a nondiscriminatory reason for the challenged adverse employment action. *Id.* at 802–03. At step three, the plaintiff has the burden to persuade the finder of fact that the defendant's step-two reason was a pretext for discrimination and, by meeting that burden the plaintiff is entitled to judgment. *Id.* at 804. In St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993), the Supreme Court diluted the holding of *McDonnell Douglas* by declaring that, even if the plaintiff disproves the defendant's step-two reason, the jury is permitted but not compelled to find for the plaintiff. *See* Kenneth R. Davis, *The "Severe and Pervers-ive" Standard of Hostile Work Environment Law: Behold the Motivating Factor Test*, 72 RUTGERS L. REV. 401, 409 n. 47 (2020) (discussing how *Hicks* eviscerated *McDonald Douglas*). There is another issue particular to *McDonnell Douglas* reverse discrimination cases. Some courts require the plaintiff to prove, as the first element of a prima facie case, "background circumstances" indicating the defendant's inclination to discriminate against white people. *See, e.g.*, Pio v. Benteler Automotive Corp., No. 21-1231, 2022 WL 351772, at *6 (6th Cir. Feb. 7, 2022) (holding that where a white person alleges reverse discrimination, the plaintiff must establish facts that "support the suspicion that the defendant is that unusual employer who discriminates against the majority"); Bless v. Cook Cnty. Sheriff's Off., 9 F.4th 565, 574 (7th Cir. 2021) (holding that in a case of reverse discrimination a plaintiff must prove "background circumstances" showing that something "fishy" suggests an inclination to discriminate against white people). *But see* Iadimarco v. Runyon, 190 F.3d 151, 161–62 (3d Cir. 1999) (finding the "background circumstances" test "irremediably vague," and requiring a white plaintiff merely to prove evidence "to support the reasonable probability of discrimination").

b. Disparate Impact Challenges

Even more troublesome to proponents of DEI is the possibility of a disparate impact lawsuit.[415] As announced in *Griggs v. Duke Power Co.*, disparate impact means that a facially neutral employment practice adversely affects a protected class.[416] Outreach in underserved communities may result in a statistical underrepresentation of white people hired. Recruiting in low-income areas, whether for students or employees, will not violate Title VII if the number of minority enrollees or employees hired does not exceed the qualified percentage in the local population.[417] However, even a relatively small disproportion meets the requirements of a disparate impact claim.[418]

To avoid a disparate impact claim, one might argue that, even if recruiting favored a protected class, hiring decisions ultimately depended on factors such as an interview and experience, and that admissions decisions ultimately depended on several factors, including an interview and grade point average. Unfortunately, these arguments would likely fail.[419] In *Connecticut v. Teal*, the Supreme Court rejected the so-called bottom-line defense.[420] This defense asserted that in a multitiered selection process only the ultimate result, rather than the results at earlier stages, determines a disparate impact violation.[421] Citing § 2000e-2(a), the *Teal* Court reasoned that Title VII provides a remedy for "individuals" harmed by discrimination and concluded that individuals excluded at any stage in a multitiered selection process are entitled to recourse.[422] If at all possible, each tier must be analyzed

415 *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

416 *Id.* at 431 (noting that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.").

417 Bos. Parents Coal. for Acad. Excellence Corp. v. Sch. Comm. for Bos., 89 F.4th 46, 51 (1st Cir. 2023), *appeal docketed* (U.S. Apr. 19, 2024) (rejecting claim of disparate impact under the Equal Protection Clause).

418 *See* Ricci v. DeStefano, 557 U.S. 557, 586 (2009). This rule provides a minimal standard for establishing a prima facie disparate impact claim. *Id.* An employment practice violates this rule if the selection rate of members of a protected class is 80% or less of the selection rate of those not in the protected class. *Id.* The *Ricci* court noted that the EEOC proposed the 80% rule, which is merely a rule of thumb. *Id.*

419 *See* Connecticut v. Teal, 457 U.S. 440, 448 (1982).

420 *Id.*

421 *Id.* at 442.

422 *Id.* at 448; *see also* Section 2000e-2(a)(2), which forbids limitations and classifications that would "deprive any individual of employment opportunities." 42 U.S.C. § 2000e-2(a)(2).

separately for disparate impact.[423] Section 2000e-(k)(1)(B)(i) of the 1991 Civil Rights Act codified *Teal*.[424] Accordingly, disparate impact at any stage of an employment or educational selection process is unlawful.

Business necessity is the principal defense to a disparate impact claim.[425] To establish this defense, a defendant must prove that a challenged business practice is related to job performance.[426] Courts generally require a statistical study to prove such a relationship.[427] Employers facing a disparate impact claim based on DEI efforts would therefore need to make a statistical showing that their DEI initiatives enhance such metrics as worker performance, productivity, sales, or good will among customers. Numerous scholars support DEI efforts in business and argue that such efforts result in benefits, including the attraction and retention of an extensive talent pool, the expansion of a company's customer base, and a reduction in litigation.[428] Although some empirical evidence questions the efficacy of DEI initiatives, a substantial body of research supports the premise that a business enjoys tangible financial benefits by fostering a diverse workforce.[429]

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423 *Connecticut*, 457 U.S. at 448. Justice Powell dissented. *Id.* at 456 (Powell, J., dissenting). He observed that disparate treatment, that is, intentional discrimination, is concerned with individual rights, whereas disparate impact is concerned with group right. *Id.* at 458. Thus, he argued that the majority's decision conflated the two types of discrimination. *Id.* at 459.

424 Section 2000e-2(k)(1)(B)(i) provides: "With respect to demonstrating that a particular employment practice causes a disparate impact . . . , the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B)(i).

425 *Id.*

426 *See, e.g.*, *Connecticut*, 457 U.S. at 446 (stating that the business necessity defense requires the employer to show that the challenged employment practice relates to job performance).

427 *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 429–35 (1975) (requiring strong statistical proof to support a business necessity defense).

428 *See supra* note 412 and accompanying text (citing scholars who support DEI initiatives).

429 *See, e.g.*, Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 28, 30–31, 42–43 (2022) (discussing empirical research finding that DEI efforts may have widespread company benefits, including increased profitability and an enhanced reputation, which brings financial gains, but acknowledging empirical evidence challenging these results); Alex Edmans et al., *Diversity, Equity, and Inclusion* (Eur. Corp. Governance Ins., Working Paper No. 913/2023, 2023), http://ssrn.com/abstract=4426488; Anna Powers, *A Study Finds That Diverse Companies Produce 19% More Revenues*, FORBES (June 27,

5. The Future

It appears that more challenges to DEI initiatives loom in the not-too-distant future. These challenges may allege disparate treatment and disparate impact violations of Title VII and § 1981. How courts grapple with these challenges to DEI workplace strategies may determine the future of governmental and corporate efforts to achieve diversity, equity, and inclusion of minorities, women, LGBTQ+ persons, and others who have been denied equal opportunity.

CONCLUSION

The law provides multiple remedies for racial discrimination. The Equal Protection Clause of the Fourteenth Amendment prevents state actors from discriminating because of race.[430] Title VII prohibits both public and private actors from engaging in employment discrimination against individuals in protected classes.[431] Section 1981 provides yet another remedy for discrimination in the making and enforcement of contracts.[432] These safeguards are critical to the attainment of racial justice. But these remedies are not enough.[433]

DEI initiatives may achieve more for racial equality than the constitutional and statutory remedies. DEI is not reactive. Other remedies come into play only after unlawful discrimination has occurred. The courts become the battleground for cases that force the expenditure of time and money and take an emotional toll on those who have already endured discriminatory conduct. DEI initiatives are proactive.[434] They provide a boost to minorities seeking a better

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2018, 10:15 PM), https://www.forbes.com/sites/annapowers/2018/06/27/a-study-finds-that-diverse-companies-produce-19-more-revenue/ (citing study conducted by Boston Consulting Group of 1,700 companies showing that diverse workforce resulted in a 19% increase in revenues).

430 U.S. CONST. amend. XIV, § 1.

431 42 U.S.C. § 2000e-(2)(a).

432 42 U.S.C. § 1981(a).

433 *See, e.g.*, David Hinojosa & Genevieve Bonadies Torres, *The Absurd Reach of a "Colorblind" Constitution*, 72 AM. L. REV. 1775, 1781 (2023) (arguing that civil rights statutes that provide litigation rights are insufficient to address lingering racial bias).

434 *See* Lina Cheng Yee Lye, *The Wrong Debate*, 13 BERKELEY WOMEN'S L.J. 13, 14 (1998) (asserting that everyone is society benefits from affirmative action because it promotes a just society); Penda D. Hain, *Justice Blackmun and Racial Justice*, 104 YALE L.J. 7, 15 (1994) (noting that one prominent approach to DEI is that race-conscious measures are appropriate to address societal discrimination, irrespective of the discriminatory action of individual wrongdoers).

education or a better job. DEI initiatives are not a means of conflict resolution. They are a means of conflict avoidance.[435]

Unlike lawsuits that address specific instances of wrongdoing, DEI initiatives have an endless capacity to help Black people who seek better lives.[436] In the private sector, there is no limit on how many firms may adopt DEI strategies, and such policies have become prevalent.[437]

DEI initiatives are voluntary, and, because they are not judicially mandated, they are uniquely suited to combat discrimination.[438] They demonstrate the good faith desire of both public and private actors to

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435 Justice Blackmun made this point in his concurring opinion in United Steelworkers v. Weber, 443 U.S. 193, 211 (1979) (Blackmun, J., concurring). He recognized that "[p]referential hiring along the lines of the Kaiser program is a reasonable response for the employer, whether or not a court, on these facts, could order the same step as a remedy." *Id.* He continued, "The company is able to avoid identifying victims of past discrimination, and so avoids claims for backpay that would inevitably follow a response limited to such victims. If past victims should be benefited by the program, however, the company mitigates its liability to those persons." *Id.*

436 *See* Mitchell F. Crusto, *A Plea for Affirmative Action*, 136 HARV. L. REV. F. 205, 218 (2023) (pointing out the contributions that beneficiaries of affirmative action have made to society); Deborah N. Archer, *Collective or Individual Benefits?: Measuring the Educational Benefits of Race-Conscious Admission Programs*, 57 HOW. L.J. 557, 559 (2014) (arguing that apart of race-conscious affirmative action's individual benefits, affirmative action brings about societal benefits); Joshua M. Levine, *Stigma's Opening:* Grutter*'s Diversity Interest(s) and the New Calculus for Affirmative Action in Higher Education*, 94 CAL. L. REV. 457, 470 (2006) (praising *Grutter* for taking a broad view of affirmative action in higher education, including not only the educational benefits of affirmative action but also societal benefits in preparing minority students for future leadership roles, teaching minority students the value of good citizenship, and breaking down racial stereotypes).

437 Bryce T. Daniels, *Disparate Impact: A Failed Remedy for Discrimination*, 53 CREIGHTON L. REV. 313, 327 (2020) (asserting that affirmative action is "prevalent throughout society."); Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1, 83 (2011) (noting that "[e]stimates regarding the prevalence of affirmative action and diversity policies among private sector employers vary, but the consensus is that such policies are widespread and have been for decades.").

438 *See* Johnson v. Transp. Agency, 480 U.S. 616, 630 (1989) (stressing that "voluntary employer action can play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination in the workplace, and Title VII should not be read to thwart such efforts." (citing United Steelworkers of America v. Weber, 443 U.S. 193, 204 (1979)); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 290 (1986) (O'Connor, J., concurring in part and concurring in judgment) (urging the Court to consider "the value of voluntary efforts to further the objectives of the law" when it determines the validity of affirmative action plans) (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 364 (1978) (Brennan, J., concurring in judgment in part and dissenting in part))); *see also* Barbara J. Fick, *The Case for Maintaining and Encouraging the Use of Voluntary Affirmative Action in Private Sector Employment*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 159, 160 (1997) (commenting that Congress intended Title VII to encourage private-sector efforts against discrimination in the workplace).

end the enduring obstacles that minorities continue to face.[439] Regrettably, society has not yet met the goal of removing those obstacles. Justice Sotomayor was correct when she observed in her dissent in *SFFA* that "[r]acial inequality runs deep to this very day."[440]

Given these benefits of DEI initiatives, the Supreme Court in *SFFA* has opted to take a literalist approach to the Equal Protection Clause. In doing so, the *SFFA* Court disregarded this country's history of racial injustice, the background events leading to the Equal Protection Clause, and Congress's intent in adopting that clause. Turning a blind eye to overwhelming evidence that the Equal Protection Clause envisions special consideration for the rights of Black people, the *SFFA* Court declared that the Equal Protection Clause is colorblind.

The harm of this ruling will unfold over the coming months and years. Chief Justice Roberts criticized race-conscious affirmative action for inevitably discriminating against someone not in the protected class.[441] If one takes this criticism to its logical conclusion, all affirmative action under the Equal Protection Clause, Title VII, and § 1981 may be in jeopardy. Attacks against racial preferences may extend even to seemingly benign strategies, such as outreach in recruitment and mentoring and training programs that until *SFFA* had appeared beyond the reach of reasonable challenge. Some firms under legal threat have already backed down.[442] One can only hope that in the future the advocates of DEI, whether in the public or private sector, stand tough.

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439 *See* Alex M. Johnson, *The Underrepresentation of Minorities in the Legal Profession: A Critical Race Theorist's Perspective*, 95 MICH. L. REV. 1005, 1058 (1997) (positing that one important aspect of affirmative action is to communicate a widespread concern to convey the sincere message of "fair opportunity" and "mutual respect").

440 *SFFA*, 600 U.S. 181, 337 (Sotomayor, J., dissenting).

441 *Id.* at 294.

442 *See supra* notes 393–404 and accompanying text (discussing the *Morrison Foerster* and *Perkins Coie* cases).