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Race-Conscious Admissions and Equal Protection in Higher Education

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Race-Conscious Admissions and Equal Protection in Higher Education

In its 2023 decision in *Students for Fair Admissions v. Harvard*, the Supreme Court upended decades-old precedent allowing some use of race in higher education admissions, sometimes known as “affirmative action” programs. These programs involve what the Court at one time called the “benign” use of racial classifications—voluntary measures not required by court order or settlement and designed not to remedy past discrimination but to help racial minorities contribute diverse viewpoints within the educational environment. Over the years, use of race as a factor in admissions decisions became common in many highly selective colleges and universities, both public and private.

When federal courts have analyzed the constitutionality of “affirmative action” in higher education, they have done so under the Fourteenth Amendment’s guarantee of “equal protection.” Although the use of racial classifications under this provision is prohibited in most circumstances, race-conscious admissions policies in higher education had for many years proved a notable exception. Prior to the *Students for Fair Admissions* case, the Supreme Court had repeatedly upheld universities’ use of race as one of many factors considered in the admissions process, concluding that such policies could pass a particularly searching form of review known as *strict scrutiny*. The Court long grappled with this seeming tension—between the strictness of its scrutiny and its approval of race-conscious admissions policies—beginning with its landmark 1978 decision in *Regents of the University of California v. Bakke*. In that case, the Court concluded that diversity in higher education admissions—that is, gathering a student body with varied experiences and backgrounds—provided a compelling government interest that justified some use of race, provided it was narrowly tailored to achieve educational goals. *Bakke* and later cases rejected quota systems and other rigid preferences, calling for use of race only as a plus factor in a holistic applicant assessment. *Students for Fair Admissions* effectively ended this endeavor. The Court considered two schools’ race-conscious admissions programs and held that their diversity goals were too amorphous to be subject to meaningful judicial review. It also concluded that the admissions programs disadvantaged some students because of their race and held that the schools wrongly assumed that a student of a minority race necessarily brought a minority viewpoint to the academic community. In addition, the Court held that the admissions preferences were too broad, particularly because they included no sunset provisions or other end points to define when they could be phased out. While it barred the universities’ use of mere racial identity as an admissions advantage, the Court did point out that school officials could consider applicants’ individual histories—including any experiences with race or culture that applicants chose to describe in their applications.

Though constitutional equal protection constraints generally concern *public* universities and their obligations under the Fourteenth Amendment, federal statutory law also plays a role in ensuring equal protection in higher education. To that end, Title VI of the Civil Rights Act of 1964 prohibits recipients of federal funding—including private colleges and universities—from, at a minimum, discriminating against students and applicants in a manner that would violate the Equal Protection Clause. Federal agencies, including the Departments of Justice and Education, investigate and administratively enforce institutions’ compliance with Title VI. Accordingly, these agencies can play a role in enforcing the restrictions *Students for Fair Admissions* has placed on race-conscious action. In addition, the agencies may apply Title VI to address discriminatory policies that hinder minority student enrollment. While Congress may not alter the Supreme Court’s equal protection jurisprudence, it may consider actions affecting Title VI, including amendment and oversight.

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“Affirmative action,” while not a legal term, is sometimes used to describe a decisionmaker’s voluntary¹ consideration of race as a way of increasing the participation or representation of racial minorities. “Affirmative action” has been among the most contentious subjects in constitutional law.² In the context of higher education, the Supreme Court has repeatedly addressed one type of policy in particular: the use of race as a factor in admissions decisions, a practice employed by some highly selective public and private colleges and universities.³ For several decades, the Court approved the legality of such policies under the Fourteenth Amendment’s guarantee of “equal protection,” relying on a single theory: that the educational benefits that flow from a diverse student body uniquely justify some consideration of race when deciding how to assemble an incoming class.

To rely on that diversity rationale, however, the Court required universities to explain in concrete and precise terms what their diversity-related goals were and why they had chosen those goals in particular.⁴ A university had to show that its admissions policy achieved its diversity-related goals as precisely as possible, while ultimately “treat[ing] each applicant as an individual.”⁵

In its 2023 decision in *Students for Fair Admissions v. Harvard*, the Court effectively ended its approval of affirmative action in higher education admissions, holding that the practices at Harvard and the University of North Carolina (UNC) were unlawful. The Court concluded that UNC’s practices violated the guarantee of equal protection in the Fourteenth Amendment to the Constitution, which generally prohibits governmental racial discrimination. Additionally, while the Fourteenth Amendment’s Equal Protection Clause applies directly only to state-run educational institutions, its nondiscrimination requirements apply equally to private colleges and universities that receive federal funds under Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits recipients of federal dollars from discriminating on the basis of race.⁶ In *Students for Fair Admissions*, the Court concluded that Harvard’s affirmative action program violated this statutory provision for the same reasons that UNC’s violated the Constitution.

¹ As used in this report, a “voluntary” race-conscious measure is one adopted by an institution apart from any legal obligation to do so. 28 C.F.R. § 42.104(b)(6)(ii) (2024) (U.S. Department of Justice [DOJ] regulation outlining a voluntary form of “affirmative action” permissible under Title VI of the Civil Rights Act of 1964). The term “affirmative action” has also been used to describe court-ordered remedial measures designed to address past, state-sponsored segregation. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 22, 28 (1971) (stating that the remedy for state-enforced separation of the races is “to dismantle dual school systems” and approvingly discussing “affirmative action[s]” proper for achieving that end); *cf.* 28 C.F.R. § 42.104(b)(6)(i) (U.S. DOJ regulation providing, under Title VI of the Civil Rights Act of 1964, that “[i]n administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination”). This report addresses only voluntary affirmative action. For discussion of remedial measures, see CRS Report R45481, “Affirmative Action” and Equal Protection in Higher Education, by Christine J. Back (2019).

² ERWIN CHEREMINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 764 (5th ed. 2015) (“No topic in constitutional law is more controversial than affirmative action.”).

³ Legal definitions of race, ethnicity, or national origin have not been at issue in this context. Accordingly, this report does not address the issue.

⁴ *Fisher v. Univ. of Tex. (Fisher II)*, 579 U.S. 365, 381–82 (2016). The Court had previously remanded a challenge to the university’s affirmative action program. *Fisher v. Univ. of Tex. (Fisher I)*, 570 U.S. 297 (2013), *aff’d*, 579 U.S. 365 (2016).

⁵ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 318 (1978) (Powell, J., announcing judgment of the Court) (plurality opinion).

⁶ 42 U.S.C. § 2000d (barring racial discrimination “under any program or activity receiving Federal financial assistance”); *see also Alexander v. Sandoval*, 532 U.S. 275, 279–81 (2001) (“tak[ing] as given” that Title VI “proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment”) (second alteration in original) (quoting *Bakke*, 438 U.S. at 287).

This report describes the evolution of the Supreme Court’s voluntary affirmative action jurisprudence and the *Students for Fair Admissions* decision’s implications.⁷ The report concludes by discussing the role that Title VI plays in ensuring equal protection in higher education, including several avenues for congressional action under the Act.

Equal Protection and Racial Classifications

The Fourteenth Amendment to the Constitution provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”⁸ The constitutional guarantee of equal protection broadly prohibits the government from employing “arbitrary classification[s].”⁹ The use of racial classifications in particular has long been of special concern for the federal courts. This “heightened judicial solicitude”¹⁰ for racial categorizing has roots nearly as old as the Fourteenth Amendment itself. As the Supreme Court explained in an early decision under the Amendment, the “spirit and meaning” of the Equal Protection Clause was “that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, . . . that no discrimination shall be made against them by law because of their color.”¹¹ In the decades since, the Court has only made clearer that it regards the government’s use of racial classifications as “inherently suspect” and therefore subject to more demanding scrutiny than other classifications, which are typically reviewed only for basic rationality.¹²

There has been significant disagreement, however, over just how rigidly the courts should scrutinize a racial classification, especially when the point of the classification is to benefit racial minorities, as in affirmative action.

Strict Scrutiny and Supreme Court Affirmative Action Jurisprudence

The Court first took up the issue of race-based admissions in *Regents of the University of California v. Bakke*, challenging an affirmative action admissions program at the University of California at Davis Medical School. The school set aside 16 of 100 places in its entering class for

⁷ Portions of this report are drawn from an earlier CRS report, see Back, CRS Report R45481, *supra* note 1.

⁸ U.S. CONST. amend. XIV, § 1. Equal protection obligations also apply to the federal government. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995) (observing that under Supreme Court case law “the equal protection obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable,” so that “the standards for federal and state racial classifications [are] the same”).

⁹ See *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 597 (2008) (referring to the Court’s “traditional view of the core concern of the Equal Protection Clause as a shield against arbitrary classifications”). See also *Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (“Our cases have recognized successful equal protection claims brought by a ‘class of one,’ where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.”).

¹⁰ *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (observing that “heightened judicial solicitude is appropriate” for classifications affecting “a ‘discrete and insular minority’”) (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938)).

¹¹ *Strauder v. West Virginia*, 100 U.S. 303, 307 (1879), *abrogated by*, *Taylor v. Louisiana*, 419 U.S. 522 (1975).

¹² *Adarand*, 515 U.S. at 218 (quoting *Regents of Univ. Cal. v. Bakke*, 438 U.S. 265, 291 (1978)); *Graham*, 403 U.S. at 371–72 (observing that “the Court’s decisions have established that classifications based on . . . race are inherently suspect and subject to close judicial scrutiny”).

“disadvantaged” students, considering only minority students for these slots.¹³ A White applicant denied admission filed suit challenging the set-aside under the Equal Protection Clause as well as Title VI,¹⁴ which prohibits institutional recipients of federal funds—like the Medical School—from discriminating on the basis of race.¹⁵

A deeply divided Court produced no majority opinion. Justice Stevens, writing for four Justices, concluded that the program violated Title VI, sidestepping the constitutional question.¹⁶ Another four Justices would have reached the equal protection challenge.¹⁷ In doing so, they would have required the Medical School to point to “important governmental objectives” that justified its admissions policy’s use of “remedial” racial classifications, along with evidence that the policy’s use was “substantially related to” achieving those important objectives.¹⁸ Under that standard—a form of intermediate scrutiny¹⁹—these Justices would have upheld the policy.²⁰

Justice Powell, announcing the Court’s judgment but writing for himself, insisted that all “racial and ethnic distinctions” drawn by the government must be regarded as “inherently suspect” and subjected to “the most exacting judicial examination.”²¹ What that meant in *Bakke*, according to Justice Powell, was that the Medical School would need to prove that its use of the “special admissions” carve-out was “precisely tailored to serve a compelling governmental interest”—the standard of review now known simply as *strict scrutiny*.²² Because, in his view, the school could come forward with no such proof, Justice Powell concluded that its affirmative action policy could not survive the Court’s scrutiny under either the Fourteenth Amendment or the overlapping standards of Title VI.²³

Diversity as a Compelling Government Interest

Bakke first formulated the diversity rationale as a justification for race-conscious admissions. In his *Bakke* opinion, Justice Powell took up the issue of a compelling government interest and rejected most of the university’s arguments for other affirmative action justifications. First, he rejected a racial balancing argument—an alleged interest in having “some specified percentage” of certain racial or ethnic groups in a student body. Then, Justice Powell rejected the school’s claims that it was both “remedying . . . the effects of ‘societal discrimination’” and endeavoring to train minority doctors for “the delivery of health-care services to communities currently

¹³ *Bakke*, 438 U.S. at 274–75 (describing the operation of the “special admissions program”). Unless otherwise indicated, citations of *Bakke* are of Justice Powell’s opinion announcing the Court’s judgment.

¹⁴ The Act provides that “[n]o 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.

¹⁵ *Bakke*, 438 U.S. at 276–79.

¹⁶ This group included Chief Justice Burger along with Justices Rehnquist, Stevens, and Stewart. *See id.* at 418 (Stevens, J., concurring in part and dissenting in part).

¹⁷ This group included Justices Brennan, Blackmun, Marshall, and White. *See id.* at 324.

¹⁸ *Id.* at 359 (Brennan, J., concurring in part and dissenting in part).

¹⁹ *See* CHEMERINSKY, *supra* note 2, at 765 (characterizing this level of review as intermediate).

²⁰ *Bakke*, 438 U.S. at 325–26 (Brennan, J., concurring in part and dissenting in part).

²¹ *Id.* at 291; *see* Emily Bazelon, *Why Is Affirmative Action in Peril? One Man’s Decision*, NY TIMES MAG. (Mar. 4, 2023), <https://www.nytimes.com/2023/02/15/magazine/affirmative-action-supreme-court.html>.

²² *Bakke*, 438 U.S. at 299.

²³ *Id.* Justice Powell agreed with the four dissenting Justices that “Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” *Id.* at 287; *see also id.* at 352 (Brennan, J., concurring in part and dissenting in part) (explaining the dissenters’ view that “Title VI’s definition of racial discrimination is absolutely coextensive with the Constitution’s”).

underserved.” None of these interests, Justice Powell concluded, provided a reason substantial enough to justify turning to race-conscious measures.²⁴ In the years since, the Court has not further opined on these potential justifications.

Justice Powell was clear, however, about one interest he considered compelling enough to satisfy strict scrutiny: “a diverse student body.”²⁵ This interest included the university’s “right to select those students who will contribute the most to the ‘robust exchange of ideas.’”²⁶ Justice Powell provided little detail as to how this interest might, in practice, be used to justify race-based action. As he saw it, however, the interest had limits: pursuing diversity would not allow a university to resort to racial quotas, for example.²⁷

In 2003, the Court clarified *Bakke*’s application in *Grutter v. Bollinger*,²⁸ a case challenging the University of Michigan Law School’s admissions program. In *Grutter*, the Court endorsed Justice Powell’s diversity rationale as a compelling government interest.²⁹ It approved the Law School’s goal of admitting a class with what it called a “critical mass of underrepresented minority students”³⁰ to ensure that those students were “encourage[d] . . . to participate in the classroom” and did not “feel isolated.”³¹

In subsequent years, the Court further refined its application of strict scrutiny to affirmative action programs, including its conception of student-body diversity as a compelling interest.³² In 2016, the Court in *Fisher v. University of Texas* reaffirmed that, “because racial characteristics so seldom provide a relevant basis for disparate treatment,” “[r]ace may not be considered [by a university] unless [its] admissions process can withstand strict scrutiny.”³³ The *Fisher* Court set two new benchmarks for reviewing a university’s asserted interest in resorting to race as a factor in its admissions policy. First, the university had to articulate “concrete and precise goals” that its race-conscious policy served—goals “sufficiently measurable” under “judicial scrutiny.”³⁴ Second, the university had to provide a “‘reasoned, principled explanation’ for its decision to pursue those goals.”³⁵ In the Court’s view in *Fisher*, the University of Texas’s use of race in its admissions decisions met both benchmarks.³⁶

²⁴ *Id.* at 306–12.

²⁵ *Id.* at 312–13. *See* *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (endorsing “Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions”). No other Justice in *Bakke* joined Justice Powell’s opinion or his explanation of the diversity rationale. Indeed, the term “diversity” does not even appear in any other Justice’s opinion.

²⁶ *Bakke*, 438 U.S. at 312–13.

²⁷ *Id.* at 307 (“If [the Medical School’s] purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid.”).

²⁸ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

²⁹ *Id.* at 325.

³⁰ *Id.* at 319.

³¹ *Id.* at 318.

³² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995); *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 499 (1989) (plurality opinion).

³³ *Fisher II*, 579 U.S. 365, 376 (2016) (first and second alteration in original) (first quoting *City of Richmond*, 488 U.S. at 505, and then quoting *Fisher I*, 570 U.S. 297, 309 (2013)).

³⁴ *Id.* at 366–67.

³⁵ *Id.* at 382 (quoting *Fisher I*, 570 U.S. at 310).

³⁶ *Id.* at 382–84.

In the view of some critics, this Supreme Court jurisprudence stood out as an anomaly.³⁷ In no other context had diversity passed muster as a compelling government interest. More broadly, racial distinctions had passed strict scrutiny only when they remedied past discrimination or (at least in the limited circumstance of race-based prison violence) were needed to ensure prison security.³⁸ A school's mere invocation of a diversity goal, however, was not enough to overcome strict scrutiny.³⁹ *Bakke* and subsequent cases also considered ways in which race-conscious admissions must avoid overbroad use of race.

Narrow Tailoring

After establishing a compelling government interest, an affirmative action proponent must show that its race-based program is narrowly tailored to achieve that interest—namely, that it is neither overbroad nor underinclusive.⁴⁰ The 2003 companion cases of *Grutter v. Bollinger* and *Gratz v. Bollinger* offer clear examples: the Supreme Court upheld the University of Michigan Law School's policy in *Grutter* while striking down the university's undergraduate admissions policy in *Gratz*.⁴¹ The Court compared the Michigan policies to a plan Justice Powell had described favorably in *Bakke*: Harvard's affirmative action plan.⁴² Justice O'Connor explained for the Court in *Grutter* that “the Law School engage[d] in a highly individualized, holistic review of each applicant's file”; did not award “mechanical, predetermined diversity ‘bonuses’ based on race or ethnicity”; and, “[I]ike the Harvard plan,” accorded each applicant the same sort of flexible consideration that Justice Powell had called for in *Bakke*.⁴³ That policy contrasted, in the Court's view, with the university's undergraduate admissions policy in *Gratz*. Under the undergraduate policy, admissions officers automatically awarded “20 points, or one-fifth of the points needed to guarantee admission, to every single ‘underrepresented minority’ applicant solely because of race.”⁴⁴ The Court held the *Grutter* plan constitutional because of its holistic, flexible consideration of race and rejected the *Gratz* plan because of its rigidity.

With their contrasting results, *Gratz* and *Grutter* outlined several basic criteria by which courts could assess a university's race-conscious admissions policy. Those criteria, as the U.S. Court of Appeals for the Ninth Circuit later described them, could be characterized as “five hallmarks of a narrowly tailored affirmative action plan.”⁴⁵ First, a plan under the *Grutter* and *Gratz* rulings

³⁷ See, e.g., Brett M. Kavanaugh, *Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1917 (2017) (“The Court has recognized a basic equal protection right not to be treated differently by the government on account of your race. But there is a longstanding exception for affirmative action, at least in the realm of higher education.”).

³⁸ *Johnson v. California*, 543 U.S. 499, 512–13 (2005).

³⁹ *Fisher II*, 579 U.S. 365, 381 (2016).

⁴⁰ *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 506 (1989); see also Sanchitha Jayaram & April J. Anderson, “Narrow Tailoring” and Race-Conscious Government Action, CRS PODCAST, at 01:03 (Nov. 16, 2023), <https://www.crs.gov/audio/detail/WPD00074?source=search>.

⁴¹ *Grutter v. Bollinger*, 539 U.S. 306, 343–44 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 275–76 (2003).

⁴² See *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 316 (1978) (discussing the plan then in place at Harvard, as outlined by amicus); *Grutter*, 539 U.S. at 335; *Gratz*, 539 U.S. at 272.

⁴³ *Grutter*, 539 U.S. at 337.

⁴⁴ *Gratz*, 539 U.S. at 270.

⁴⁵ *Smith v. Univ. of Wash.*, 392 F.3d 367, 373 (9th Cir. 2004); but see Peter N. Salib & Guha Krishnamurthi, *The Goose and the Gander: How Conservative Precedents Will Save Campus Affirmative Action*, 102 TEX. L. REV. 123, 125 (2023) (describing the Court's “mysterious—arguably incoherent—restrictions on how those preferences could be structured”). Narrow tailoring requirements are not unique to education; other forms of government race-based action are similarly evaluated. CRS Report R47471, *The Constitution and Race-Conscious Government Action: Narrow Tailoring Requirements*, by April J. Anderson (2023).

needed to avoid quotas. As Justice O'Connor explained in *Grutter*, “a ‘quota’ is a program in which a certain fixed number or proportion of opportunities are ‘reserved exclusively for certain minority groups’” consequently “insulat[ing] the individual [applicant] from comparison with all other candidates for the available seats.”⁴⁶ A quota system is generally not flexible enough to be narrowly tailored.⁴⁷

Second, an admissions program under *Grutter* and *Gratz* had to involve a “highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”⁴⁸ This review allowed “the use of race as one of many ‘plus factors’ in an admissions program.”⁴⁹

Third, a school needed to give serious, good-faith consideration to race-neutral alternatives for reaching its diversity goals. After reviewing race-neutral options that the University of Michigan Law School had rejected as inappropriate, the *Grutter* Court pointed out that “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,” “[n]or does it require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.”⁵⁰ Rather, as the Court later elaborated in *Fisher*, “A university . . . bears the burden of proving a ‘nonracial approach’ would not promote its interest in the educational benefits of diversity ‘about as well and at tolerable administrative expense’” as a race-conscious approach.⁵¹

Fourth, a school had to avoid harm to third parties, where possible. In *Grutter*, Justice O'Connor stated that “a race-conscious admissions program” must “not unduly harm members of any racial group.”⁵² It should avoid harm to “innocent persons competing” for the same benefit.⁵³

Fifth, narrow tailoring required a time limit. This requirement, Justice O'Connor explained for the Court in *Grutter*, reflected a consideration that “however compelling their goals,” racial classifications “are potentially so dangerous that they may be employed no more broadly than the interest demands.”⁵⁴ Doctrinally, this requirement meant there could be no “permanent justification” for race-conscious admissions policies in higher education; sooner or later they had to end, as the university conceded in its briefing.⁵⁵ Practically, this “logical end point” could come in one of several ways. It could take the form of an explicit “durational requirement,” such as a sunset provision.⁵⁶ Alternatively, it could arrive as a result of “periodic reviews to determine whether racial preferences are still necessary to achieve student body diversity.”⁵⁷ However a university chooses to pursue that end, it has, as the *Fisher* Court explained, an “ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions

⁴⁶ *Grutter*, 539 U.S. at 334–35 (first quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 496 (1989), and then quoting *Bakke*, 438 U.S. at 317).

⁴⁷ *Fisher I*, 570 U.S. 297, 309 (2013).

⁴⁸ *Grutter*, 539 U.S. at 337.

⁴⁹ *Fisher I*, 570 U.S. at 305.

⁵⁰ *Grutter*, 539 U.S. at 339.

⁵¹ *Fisher II*, 579 U.S. 365, 377 (2016) (quoting *Fisher I*, 570 U.S. at 312).

⁵² *Grutter*, 539 U.S. at 341.

⁵³ *Id.* (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 308 (1978)).

⁵⁴ *Id.* at 342.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*; see also *Smith v. Univ. of Wash.*, 392 F.3d 367, 375 (9th Cir. 2004) (indicating that, under *Grutter*, “race-conscious admissions programs must be limited in time, such as by sunset provisions or periodic reviews to determine whether the preferences remain necessary”).

policies” and the role race plays in them, or whether it should continue to play one at all.⁵⁸ The *Grutter* Court, writing in 2003, assumed that the school would continue to explore race-neutral options and suggested that “25 years from now, the use of racial preferences will no longer be necessary.”⁵⁹

The *Students for Fair Admissions* Decision

In the 2023 case *Students for Fair Admissions v. Harvard*, the Supreme Court upended its jurisprudence regarding the constitutionality of affirmative action programs in higher education admissions.⁶⁰ The case involved separate challenges to Harvard’s and UNC’s affirmative action programs, and the Court issued one majority opinion concluding that the schools’ stated interest in diversity did not support race-based admissions.⁶¹ Chief Justice Roberts, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, concluded that the two schools’ affirmative action admissions policies, in seeking student-body diversity, lacked “sufficiently focused and measurable objectives warranting the use of race,” among other things.⁶² The ruling constrains race-based affirmative action in higher education admissions at private and public colleges and universities.

The Court in *Students for Fair Admissions* did not expressly overturn *Grutter*, but it observed that *Grutter* “expressed marked discomfort with the use of race in college admissions” and characterized racial classifications as “dangerous.”⁶³ As a result, the *Grutter* Court considered permissible race-based government action “subject to continuing oversight.”⁶⁴ Citing *Grutter*’s requirement that race-based decisions must “end” at “some point,” the Court held that both Harvard’s and UNC’s admissions policies violated equal protection.⁶⁵

Considering Measurable Objectives, Race as a Disadvantage, and Time Limits

In *Students for Fair Admissions*, the Supreme Court concluded that the schools’ admissions programs failed strict scrutiny for three primary reasons: the schools’ plans (1) lacked measurable objectives, (2) had no end date or other goal to mark a stopping point, and (3) used race to disadvantage and to stereotype students.⁶⁶

To begin with, the Court stated that it could not “license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review.”⁶⁷ The schools argued that they aimed to promote diverse viewpoints, prepare productive citizens and leaders, and foster cross-racial understanding.⁶⁸ The Supreme Court determined, however, that courts cannot measure these “elusive” and “standardless,” if “worthy,”

⁵⁸ *Fisher II*, 579 U.S. 365, 388 (2016).

⁵⁹ *Grutter*, 539 U.S. at 343.

⁶⁰ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023).

⁶¹ *Id.* at 190.

⁶² *Id.* at 230.

⁶³ *Id.* at 212 (quoting *Grutter*, 539 U.S. at 342).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 230.

⁶⁷ *Id.* at 217.

⁶⁸ *Id.* at 214–15.

goals.⁶⁹ The Court found Harvard's and UNC's diversity goals too "amorphous" and not "sufficiently measurable" to allow meaningful judicial review.⁷⁰ In the Court's view, even if courts could quantify these objectives, they could not declare them accomplished with sufficient certainty to know when affirmative action should end.⁷¹ In contrast, the majority observed that other compelling interests the Court has recognized as justifying race-based action can be reliably assessed: courts can evaluate whether the potential for racial violence so threatens prison security as to justify inmate segregation and can gauge when race-based remedies have alleviated the effects of past segregation.⁷²

The Court also found the schools' race-conscious admissions programs were not narrowly tailored. In addressing the schools' specific racial classifications, the Court also concluded that "imprecise" and "arbitrary" groupings of various ethnicities and races revealed a problem with the affirmative action plans' structure,⁷³ as the distinctions lacked "meaningful connection between the means they employ and the goals they pursue."⁷⁴ Lumping all Asians together was, in the Court's view, "plainly overbroad," while the seeming exclusion of Middle Easterners was "underinclusive."⁷⁵ A school might disregard the lack of South Asian students provided it admitted enough East Asian students, for instance. "[T]he use of these opaque racial categories undermines, instead of promotes, respondents' goals," the Court concluded.⁷⁶ This "mismatch between the means respondents employ and the goals they seek," the Court said, made it "especially hard to understand how courts are supposed to scrutinize the admissions programs that respondents use."⁷⁷

The Court also emphasized *Grutter's* requirement that race-based admissions programs be temporary. "This requirement was critical," the majority stated, "and *Grutter* emphasized it repeatedly."⁷⁸ A time limit was "the reason the Court was willing to dispense temporarily with the Constitution's unambiguous guarantee of equal protection," in the Court's view,⁷⁹ yet with respect to Harvard's and UNC's admissions plans, the Court pointed out that some twenty years after *Grutter*, the schools admitted that they had no timeline in mind for ending consideration of race.⁸⁰ Apart from avoiding any specific timeline, the Court concluded, the institutions offered no demographic "benchmark" or goal that could, if achieved, mark the end of the schools' need for affirmative action.⁸¹

The Court in *Students for Fair Admissions* did not explicitly tie its concerns about an end date with a narrow tailoring assessment. In the Court's view, the lack of a benchmark or other end point helped illustrate that "the interests [the schools] view as compelling cannot be subjected to

⁶⁹ *Id.* at 215.

⁷⁰ *Id.* at 214 (quoting *Fisher II*, 579 U.S. at 381).

⁷¹ *Id.* at 213.

⁷² *Id.* at 215.

⁷³ *Id.* at 216.

⁷⁴ *Id.* at 215.

⁷⁵ *Id.* at 216.

⁷⁶ *Id.* at 217.

⁷⁷ *Id.* See David E. Bernstein, *Why Does the Supreme Court Refer to Preferences for Hispanics/Latinos as "Racial Preferences"?* VOLOKH CONSPIRACY (Jan. 24, 2022, 5:27 PM), <https://reason.com/volokh/2022/01/24/why-does-the-supreme-court-refer-to-preferences-for-hispanics-latinos-as-racial-preferences>.

⁷⁸ *Students for Fair Admissions*, 600 U.S. at 212.

⁷⁹ *Id.*

⁸⁰ *Id.* at 224.

⁸¹ *Id.* at 221.

meaningful judicial review,” because a court could not “know when they have been reached, and when the perilous remedy of racial preferences may cease.”⁸² The parties’ use of affirmative action until racial “stereotypes have broken down” promised no identifiable end point, in the Court’s view.⁸³ The Court also condemned what it termed the plans’ “numerical commitment” to diversity, evidenced in consistent rates of minority admissions year to year.⁸⁴ The results, the Court said, resembled the “racial balancing” forbidden by precedent and portended that consideration of race would continue.⁸⁵

The Court found that the schools’ use of race violated other requirements of *Grutter* as well. For one thing, it disadvantaged some students on the basis of race.⁸⁶ While *Grutter* and *Bakke* allowed race to be used as a plus factor, but not a determining factor, for specific applicants, the Court in the *Students for Fair Admissions* case determined that the schools’ admissions programs reduced Asian and White admission rates.⁸⁷ The Court observed that since admissions are “zero-sum,” providing a benefit “to some applicants but not to others necessarily advantages the former group at the expense of the latter.”⁸⁸

The Court also held that the schools’ admissions programs violated equal protection principles barring racial stereotyping by establishing an “inherent benefit” in “race for race’s sake.”⁸⁹ Quoting *Grutter*, the Court said 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.’”⁹⁰ In the Court’s view, the schools’ admissions programs based on fostering diversity evinced such a belief, assuming students “of a particular race, because of their race, think alike.”⁹¹

Reconciling *Students for Fair Admissions* and *Grutter*

Although the Supreme Court in *Students for Fair Admissions* invalidated Harvard’s and UNC’s affirmative action admissions programs, it did not explicitly overrule *Grutter*.⁹² The Court held that the schools’ programs were unconstitutional because they did not use measurable objectives, they used race to disadvantage some students, they relied on stereotyping, and they lacked “meaningful end points.”⁹³ The Court viewed these characteristics as contravening the boundaries

⁸² *Id.* at 214.

⁸³ *Id.* at 224.

⁸⁴ *Id.* at 222.

⁸⁵ *Id.* at 223 (quoting *Fisher I*, 570 U.S. 297, 311 (2013)).

⁸⁶ *Students for Fair Admissions*, 600 U.S. at 213.

⁸⁷ *Id.* at 209, 218 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 317 (1978)).

⁸⁸ *Id.* at 218–19, 272.

⁸⁹ *Id.* at 220.

⁹⁰ *Id.* at 219 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003)).

⁹¹ *Id.* at 220–21 (quoting *Miller v. Johnson*, 515 U.S. 900, 911–12 (1995)).

⁹² See Salib & Krishnamurthi, *supra* note 45, at 124 (“Although the Court stopped short of explicitly overruling the cases that first authorized [affirmative action], scholars, concurring and dissenting Justices, and even the majority opinion itself all strongly suggest that the holding functionally accomplishes exactly that.”); Richard H. Fallon, Jr., *Selective Originalism and Judicial Role Morality*, 102 TEX. L. REV. 221, 225 (2023) (observing that the Court “effectively held that race-based admissions preferences violate the Equal Protection Clause”); Robert Barnes, *Supreme Court Rejects Race-Based Affirmative Action in College Admissions*, WASH. POST. (June 29, 2023, 8:24 PM), <https://www.washingtonpost.com/politics/2023/06/29/affirmative-action-supreme-court-ruling/> (stating that the ruling “rolls back decades of precedent”).

⁹³ *Students for Fair Admissions*, 600 U.S. at 230.

of permissible race-based decisionmaking in the Court's equal protection jurisprudence.⁹⁴ In so holding, the Court based its ruling, at least in part, on a conclusion that the schools' policies did not satisfy *Grutter*.

Although *Grutter* has not been overruled, its continuing relevance is unclear. *Students for Fair Admissions* does not give clear guidelines for any race-conscious admissions program that would meet constitutional standards going forward. It is not even clear that the program at issue in *Grutter* could satisfy the analysis in *Students for Fair Admissions*. For one thing, the Court in *Students for Fair Admissions* highlighted *Grutter*'s requirement that race-based action be temporary, observing that the Court did not “bless[] such programs indefinitely.”⁹⁵ The Court also emphasized *Grutter*'s statement that “25 years from now, the use of racial preferences will no longer be necessary.”⁹⁶ One interpretation of *Students for Fair Admissions* could be that the Court determined that *Grutter* had, under its own terms, expired. Justice Thomas would read more into the majority opinion; in a concurrence, he concluded that “*Grutter* is, for all intents and purposes, overruled.”⁹⁷

On top of leaving *Grutter*'s status in question, the Court did not explain how *Students for Fair Admissions* applies to other institutions' plans. The Court did not limit its holding to Harvard's and UNC's policies and pronounced that “universities may not” use “the regime we hold unlawful today.”⁹⁸

The Court expressly avoided addressing one specific educational context, however: military service academies. Explaining that the government had argued that race-based admissions programs further compelling government interests at the nation's military academies, the Court in *Students for Fair Admissions* stated that these institutions were not parties and that its opinion did “not address the issue, in light of the potentially distinct interests that military academies may present.”⁹⁹

Further, while the Supreme Court struck down Harvard's and UNC's race-conscious admissions preferences, it did not bar all mention of race in higher education admissions. For one thing, the Court acknowledged that nothing barred schools from “considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise,” in written submissions such as admissions essays.¹⁰⁰ The majority cautioned, however, that schools could “not simply establish through application essays or other means the regime we hold unlawful today.” Rather, consideration would have to be based on each applicant's “experiences as an individual—not on the basis of race.”¹⁰¹

⁹⁴ *Id.*

⁹⁵ *Id.* at 227.

⁹⁶ *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

⁹⁷ *Students for Fair Admissions*, 600 U.S. at 287 (Thomas, J., concurring).

⁹⁸ *Id.* at 230 (majority opinion).

⁹⁹ *Id.* at 213 n.4. At least one service academy faces a lawsuit challenging its admission practices. See *Students for Fair Admissions v. U.S. Mil. Acad.*, No. 23-CV-08262, 2024 WL 36026, at *5 (S.D.N.Y. Jan. 3), *appeal filed*, No. 24-40 (2d Cir. Jan. 4), *denying injunction pending appeal*, 144 S. Ct. 716 (U.S. Feb. 2, 2024) (Sotomayor, J., in chambers).

¹⁰⁰ *Students for Fair Admissions*, 600 U.S. at 230. One observer quoting this sentence stated that “[I]tigation is sure to continue as the sides fight about the limits of Chief Justice Roberts's life preserver line.” Kevin R. Eberle, *A Review of Significant Supreme Court Decisions of the 2022-23 Term*, S.C. LAW., Sept. 2023, at 48, 50.

¹⁰¹ *Students for Fair Admissions*, 600 U.S. at 231. Some have argued that, as a practical matter, schools may still be able to assemble a racially diverse student body by relying on student-admission essays and characteristics correlated with race. See Salib & Krishnamurthi, *supra* note 45, at 152.

Additionally, other Supreme Court precedent recognizes that remedying educational institutions' past discrimination is a compelling government interest distinct from the interest in fostering student-body diversity that the Court appeared to reject in *Students for Fair Admissions*.¹⁰² Accordingly, an institution could still take action (including, perhaps, race-conscious action) to remedy its own past racial discrimination.¹⁰³ Remedying general, societal discrimination, however, is not an adequate compelling government interest.¹⁰⁴ In the *Students for Fair Admissions* case, the schools did not claim to be remedying past discrimination. Schools in the Court's previous rulings on voluntary affirmative action programs in higher education admissions—in *Bakke*, *Grutter*, *Gratz*, and *Fisher*—also did not raise such claims. Accordingly, it is unclear whether institutions could succeed on a remedial theory.

Title VI and Higher Education

Many of the Supreme Court's affirmative action cases, including *Students for Fair Admissions*, have involved, in addition to constitutional equal protection claims, claims brought under Title VI of the Civil Rights Act of 1964.¹⁰⁵ That provision prohibits discrimination on the basis of race, color, or national origin in federally funded programs, including both public educational institutions and private institutions accepting federal funds.¹⁰⁶ The Court has read Title VI's protections to overlap with the Equal Protection Clause,¹⁰⁷ and accordingly its ruling in the *Students for Fair Admissions* case will require changes in both public and private college and university affirmative action programs that rely on race. Nationwide, only a minority of institutions—mostly highly selective institutions—use such programs. Some states have banned affirmative action in their institutions.¹⁰⁸

As schools that consider race in their admissions programs evaluate and amend their programs in response to *Students for Fair Admissions*, Title VI may play a larger role when it comes to issues of race and education. The statute is an important means of combating intentional discrimination, and it is sometimes used to challenge facially neutral policies that end up reducing minority enrollment.¹⁰⁹ Some may see this aspect of Title VI enforcement as a way to increase enrollment of underrepresented minorities.¹¹⁰

¹⁰² See *Students for Fair Admissions*, 600 U.S. at 215; *United States v. Fordice*, 505 U.S. 717, 729 (1992); Back, CRS Report R45481, *supra* note 1.

¹⁰³ See Back, CRS Report R45481, *supra* note 1, at 43.

¹⁰⁴ *Students for Fair Admissions*, 600 U.S. at 226.

¹⁰⁵ 42 U.S.C. § 2000d.

¹⁰⁶ *Id.* (“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.”) See also *id.* § 2000d-4a (defining program or activity).

¹⁰⁷ *Alexander v. Sandoval*, 532 U.S. 275, 279–81 (2001) (“tak[ing] as given” that Title VI “proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment”) (second alteration in original) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (Powell, J., announcing judgment of the Court)).

¹⁰⁸ See Eryn Hadley, *Did the Sky Really Fall? Ten Years After California's Proposition 209*, 20 *BYU J. PUB. L.* 103, 127–28 (2005); Symposium, *From Proposition 209 to Proposal 2: Examining the Effects of Anti-Affirmative Action Voter Initiatives*, 13 *MICH. J. RACE & L.* 461, 474 (2008).

¹⁰⁹ Michael D. Shear & Anemona Hartocollis, *Education Dept. Opens Civil Rights Inquiry into Harvard's Legacy Admissions*, *N.Y. TIMES* (July 25, 2023), <https://www.nytimes.com/2023/07/25/us/politics/harvard-admissions-civil-rights-inquiry.html>.

¹¹⁰ Michael G. Perez, *Fair and Facially Neutral Higher Educational Admissions Through Disparate Impact Analysis*, 9 *MICH. J. RACE & L.* 467, 481 (2004).

Agency Interpretation and Enforcement of Title VI

To enforce the protections of Title VI, the Act grants all federal funding agencies the authority to issue implementing regulations¹¹¹ and the power to enforce the regulations they issue.¹¹² In practice, much of the interpretive authority falls to the U.S. Department of Justice (DOJ)¹¹³ and, for educational programs, the U.S. Department of Education (ED).¹¹⁴ ED has issued its own set of rules to govern the federal education dollars it disburses each year, reaching many colleges and universities.¹¹⁵ ED has the authority to enforce those rules against noncompliant recipients, including through an investigation that may, upon a finding of noncompliance, result in the termination, suspension, or refusal to grant federal funds.¹¹⁶ Both DOJ and ED have established their own processes for receiving and investigating complaints of suspected Title VI violations.¹¹⁷ Aside from its investigations of complaints, ED is also required by regulation to conduct “compliance reviews” “from time to time” to assess whether “the practices of recipients . . . are complying” with Title VI.¹¹⁸

When ED finds a school in violation of Title VI or its implementing regulations, the Department may seek to cut off federal funding through an “administrative fund termination proceeding[,],” as it has in at least some cases.¹¹⁹ Since the passage of the Civil Rights Restoration Act of 1987,¹²⁰ the courts have applied Title VI liability broadly, holding that a violation can affect several

¹¹¹ 42 U.S.C. § 2000d-1. Executive Order 12,250 delegated functions that the statute had originally vested in the President to the Attorney General relating to the approval of rules, regulations, and orders of executive branch agencies that extend federal financial assistance. *See* Exec. Order No. 12,250, 28 C.F.R. pt. 41, app. A to pt. 41 (Nov. 2, 1980).

¹¹² *See* 42 U.S.C. § 2000d-1.

¹¹³ The Attorney General, pursuant to executive order, has been given broad authority to coordinate Title VI implementation and enforcement across executive branch agencies. *See* Exec. Order No. 12,250 § 1-201(a), 28 C.F.R. pt. 41, app. A to pt. 41 (Nov. 2, 1980). DOJ has accordingly produced a comprehensive manual of Title VI guidance in addition to its own set of regulations under the Act. *See* CIV. RIGHTS DIV., U.S. DEP’T OF JUST., TITLE VI LEGAL MANUAL, <https://www.justice.gov/crt/book/file/1364106/dl?inline> (last visited Apr. 5, 2024); 28 C.F.R. §§ 42.101–42.112 (DOJ regulations implementing Title VI).

¹¹⁴ *See* CRS In Focus IF12455, *Race Discrimination at School: Title VI and the Department of Education’s Office for Civil Rights*, by Jared P. Cole (2023).

¹¹⁵ *See Education and Title VI*, OFF. FOR CIV. RIGHTS, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html> (last visited Apr. 5, 2024) (identifying ED funding recipients).

¹¹⁶ 42 U.S.C. § 2000d-1 (stating that compliance “may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law”).

¹¹⁷ *See Filing a Complaint*, CIV. RIGHTS DIV., U.S. DEP’T OF JUST., <https://www.justice.gov/crt/filing-complaint> (last visited Apr. 5, 2024) (describing methods of reporting complaints to DOJ); *Education and Title VI*, *supra* note 115 (explaining ED’s enforcement of Title VI through its Office for Civil Rights and describing the complaint procedure for reporting acts of discrimination based on “race, color, or national origin”).

¹¹⁸ 34 C.F.R. § 100.7(a) (2024).

¹¹⁹ *See, e.g., Coal. for Equity & Excellence in Md. Higher Educ. v. Md. Higher Educ. Comm’n*, 977 F. Supp. 2d 507, 516–17 (D. Md. 2013) (citation omitted) (describing ED’s earlier efforts to terminate funding for Maryland’s higher education system); *see also Education and Title VI*, *supra* note 115). ED does not appear to have readily available data on how often it has initiated fund termination proceedings or in how many cases such proceedings have resulted in the termination of funds.

¹²⁰ Civil Rights Restoration Act of 1987, Pub. L. No. 100-259 § 2, 102 Stat. 28 (1988) (finding that “legislative action [wa]s necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered”). *See also* 42 U.S.C. § 2000d-4a.

funding streams.¹²¹ This interpretation means that a Title VI infringement in one program at a college or university could jeopardize funding for the institution as a whole.¹²²

Withdrawing funds may be the ultimate means of enforcing Title VI, but it is not the exclusive means.¹²³ DOJ, for its part, has also sought to achieve compliance through the federal courts, intervening in some private suits alleging Title VI violations¹²⁴ and otherwise representing executive branch agencies, such as ED, in lawsuits seeking enforcement of Title VI.¹²⁵ DOJ has also taken positions in cases challenging affirmative action admissions policies, including *Students for Fair Admissions*.¹²⁶

ED has ventured into affirmative action issues as well, opening Title VI investigations into the admissions decisions at several prominent private universities. Before the Court decided *Students for Fair Admissions*, ED investigated charges that universities discriminated against White and Asian applicants.¹²⁷ After the Court's decision, ED opened an investigation into charges that Harvard's admissions preference for family of alumni and donors violates Title VI.¹²⁸

Following the *Students for Fair Admissions* decision, ED and DOJ also released joint guidance explaining how higher education institutions can pursue diversity goals without violating the requirements of the Court's ruling and Title VI.¹²⁹ The guidance indicates that institutions may

¹²¹ See, e.g., *Sharer v. Oregon*, 581 F.3d 1176, 1178 (9th Cir. 2009) (“To honor Congress’ intent, we ‘interpret[] ‘program or activity’ broadly.”) (quoting *Haybarger v. Lawrence Cnty. Adult Prob. & Parole*, 551 F.3d 193, 200 (3d Cir. 2008)); see also TITLE VI LEGAL MANUAL, *supra* note 113, at 22–24, 27–28.

¹²² See *Ayers v. Allain*, 893 F.2d 732, 754 (5th Cir. 1990) (observing that the Civil Rights Restoration Act of 1987 made it “possible to establish institution-wide discrimination under Title VI when there is federal financing that is program specific”).

¹²³ See *Nat’l Black Police Ass’n v. Velde*, 712 F.2d 569, 575 (D.C. Cir. 1983) (explaining that “fund termination was envisioned as the primary means of enforcement under Title VI,” but that “Title VI clearly tolerates other enforcement schemes” including the “referral of cases to the Attorney General, who may bring an action against the recipient”).

¹²⁴ See generally *Alexander v. Sandoval*, 532 U.S. 275, 279–80 (2001) (discussing the ability of private individuals to sue under Section 601 of Title VI).

¹²⁵ See *Educational Opportunities Cases*, CIV. RIGHTS DIV., U.S. DEP’T OF JUST., <https://www.justice.gov/crt/educational-opportunities-cases> (last updated Apr. 4, 2023).

¹²⁶ See Statement of Interest in Opposition to Defendant’s Motion for Summary Judgment, *Students for Fair Admissions, Inc. v. Harvard Corp.*, 397 F. Supp. 3d 126 (D. Mass. 2019), (No. 14-cv-14176), ECF No. 497; Brief for the United States as Amicus Curiae Supporting Appellant and Urging Reversal, *Students for Fair Admissions, Inc. v. Harvard Corp.*, No. 19-2005 (1st Cir. Mar. 18, 2020), 2020 WL 1329780; Brief for the United States as Amicus Curiae Supporting Respondent, *Students for Fair Admissions, Inc. v. Univ. of N.C.*, 600 U.S. 181 (2022) (No. 21-707), 2022 WL 3130793; Brief for the United States as Amicus Curiae Supporting Respondent, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2022) (No. 20-1199), 2022 WL 3108833.

¹²⁷ See, e.g., Benjamin Wermund, *Trump Administration Probes Complaint That Yale Discriminates Against Asian-Americans*, POLITICO (Sept. 26, 2018, 1:50 PM), <https://www.politico.com/story/2018/09/26/trump-administration-probes-yale-discrimination-complaint-843581>; Rachel Treisman, *Justice Department Drops Race Discrimination Lawsuit Against Yale University*, NPR (Feb. 3, 2021), [https://www.npr.org/2021/02/03/963666724/justice-department-drops-race-discrimination-lawsuit-against-yale-university#:~:text=The%20U.S.%20Department%20of%20Justice,in%20its%20undergraduate%20admissions%20process; William S. Flanagan & Michael E. Xie, Justice Department Actively Investigating Harvard Admissions, HARVARD CRIMSON \(Oct. 11, 2017\), https://www.thecrimson.com/article/2017/10/11/foia-confirms-doj-investigation/](https://www.npr.org/2021/02/03/963666724/justice-department-drops-race-discrimination-lawsuit-against-yale-university#:~:text=The%20U.S.%20Department%20of%20Justice,in%20its%20undergraduate%20admissions%20process; William S. Flanagan & Michael E. Xie, Justice Department Actively Investigating Harvard Admissions, HARVARD CRIMSON (Oct. 11, 2017), https://www.thecrimson.com/article/2017/10/11/foia-confirms-doj-investigation/).

¹²⁸ Michael D. Shear & Anemona Hartocollis, *Education Dept. Opens Civil Rights Inquiry into Harvard’s Legacy Admissions*, N.Y. TIMES (July 25, 2023), <https://www.nytimes.com/2023/07/25/us/politics/harvard-admissions-civil-rights-inquiry.html>.

¹²⁹ U.S. DEP’T OF EDUC. AND DEP’T OF JUST., QUESTIONS AND ANSWERS REGARDING THE SUPREME COURT’S DECISION IN *STUDENTS FOR FAIR ADMISSIONS, INC. V. HARVARD COLLEGE AND UNIVERSITY OF NORTH CAROLINA 3* (Aug. 14, 2023) [hereinafter SFFA QUESTIONS AND ANSWERS], https://www.justice.gov/d9/2023-08/post-sffa_resource_fa_q_final_508.pdf; See also Dear Colleague Letter from Kristen Clarke, Assistant Att’y Gen., U.S. Dep’t (continued...)

still consider “any quality or characteristic of a student that bears on the institution’s admission decision, such as courage, motivation, or determination,” even if that student’s application “ties that characteristic to their lived experience with race.”¹³⁰ Accordingly, the guidance suggests that institutions review admissions procedures and “ensure they identify and reward those attributes that they most value, such as hard work, achievement, intellectual curiosity, potential, and determination.”¹³¹ Additionally, the *Students for Fair Admissions* decision concerned only admissions, the guidance points out, and institutions may “redoubl[e] efforts to recruit and retain talented students from underserved communities, including those with large numbers of students of color.”¹³² Recruitment, retention, or efforts to “grow[] the talent pool” in certain communities do not require the now-forbidden admission preferences.¹³³ Schools need not “ignore race” in outreach and recruiting activities, the guidance advises.¹³⁴ Schools might “work proactively to identify potential barriers posed by existing” admissions policies, such as those based on legacy status or donor affiliation, that “may reflect and amplify inequality, disadvantage, or bias.”¹³⁵

Some agency interpretations of Title VI could *require* that schools consider whether their policies disadvantage minority applicants, even inadvertently. While the *Students for Fair Admissions* case holds that intentional, race-based admissions policies like Harvard’s and UNC’s violate Title VI, regulations may require schools to avoid policies with an unintentional racial impact. A Title VI federal funding recipient’s actions might violate Title VI regulations if they have a disproportionate racial effect. ED and other agencies have long adopted Title VI “disparate impact” regulations that bar funding recipients from unjustified actions that have discriminatory effects based on a protected characteristic.¹³⁶ Regulations do not give private plaintiffs permission to sue. In *Alexander v. Sandoval*, the Supreme Court ruled that while private plaintiffs may sue in federal court to enforce parts of Title VI, they may do so only in claims of intentional discrimination that violates the Equal Protection Clause.¹³⁷ Because the Supreme Court has not ruled that agencies are prohibited from enforcing disparate impact regulations through the administrative process, ED can enforce its Title VI disparate impact regulations in education programs it funds.¹³⁸

of Just. & Catherine Lhamon, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. (Aug. 14, 2023) [hereinafter SFFA Dear Colleague Letter], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20230814.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=; Fact Sheet, The White House, President Biden Announces Actions to Promote Educational Opportunity and Diversity in Colleges and Universities (June 29, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/29/fact-sheet-president-biden-announces-actions-to-promote-educational-opportunity-and-diversity-in-colleges-and-universities/>; Jillian Berman, *Biden Administration to Colleges: Here’s How You Can Maintain Diversity Without Affirmative Action*, MARKETWATCH (Aug. 14, 2023), <https://www.marketwatch.com/story/biden-administration-to-colleges-heres-how-you-can-maintain-diversity-at-colleges-without-affirmative-action-1760d36b>.

¹³⁰ SFFA QUESTIONS AND ANSWERS, *supra* note 129, at 3.

¹³¹ SFFA Dear Colleague Letter, *supra* note 129, at 2.

¹³² SFFA Dear Colleague Letter, *supra* note 129, at 2; SFFA QUESTIONS AND ANSWERS, *supra* note 129, at 4.

¹³³ SFFA Dear Colleague Letter, *supra* note 129, at 2.

¹³⁴ SFFA QUESTIONS AND ANSWERS, *supra* note 129, at 4.

¹³⁵ SFFA Dear Colleague Letter, *supra* note 129, at 2.

¹³⁶ 34 C.F.R. § 100.3(b); *see also* 42 U.S.C. § 2000(k) (outlining the burden of proof in disparate impact cases under Title VII of the Civil Rights Act of 1964).

¹³⁷ *Alexander v. Sandoval*, 532 U.S. 275, 279–80 (2001); CRS Report R45665, *Civil Rights at School: Agency Enforcement of Title VI of the Civil Rights Act of 1964*, coordinated by Jared P. Cole (2019).

¹³⁸ *See* Cole, CRS Report R45665, *supra* note 137; Cole, CRS In Focus IF12455, *supra* note 114. Some have speculated that the Court may invalidate disparate impact rules. Aziz Huq, *Ending Affirmative Action May Be Just the Beginning*, POLITICO (June 29, 2023, 11:50 AM), <https://www.politico.com/news/magazine/2023/06/29/affirmative-action-ending-00104189>.

Congress and Title VI

When it comes to school admissions and race, Congress cannot change the Supreme Court’s equal protection jurisprudence governing race-based admissions but still has a significant say over Title VI and its enforcement. Congress can conduct hearings and oversight. Congress could also amend Title VI¹³⁹ so that it is no longer interpreted congruently with equal protection.¹⁴⁰ It could make the statute either (1) *more restrictive* of race-conscious actions than the Court’s current equal protection jurisprudence or (2) *expressly permissive* of race-conscious measures (such as race-conscious outreach and recruiting) that the Court has upheld or has thus far not addressed. Congress may wish to keep in mind that Title VI has a broader reach than does the *Students for Fair Admissions* decision. Not only does the statute cover higher education beyond admissions, it reaches educational programs across age groups and applies to federally funded programs outside education. Because the Supreme Court had recognized achieving diversity as a compelling government interest only in higher education admissions, the *Students for Fair Admissions* decision abrogates diversity-based affirmative action only in that context. It does not change the law in primary or secondary education or, for that matter, outside of education; in those cases, diversity-based affirmative action had never been approved to begin with.¹⁴¹

If seeking to make Title VI more restrictive, Congress could prohibit recipients of federal funds from using voluntary race-conscious measures at all—including in matters such as outreach and recruiting. On the other hand, if Congress sought to make Title VI more permissive, it could expressly encourage or require certain diversity-enhancing measures. Congress could require or encourage schools to develop plans to enhance minority recruiting or retention or to appoint diversity coordinators, Title VI coordinators, or advisory committees, for instance.¹⁴² Congress could also bar specific policies that, in its estimation, disadvantage certain groups.¹⁴³

In addition, Congress could expressly address other avenues for enforcing Title VI’s antidiscrimination mandate. This enforcement could include incorporating a private right of action to bring suit under Title VI, which now has only an implied right with no statutorily defined remedies.¹⁴⁴ Conversely, Congress could foreclose a private right of action, leaving enforcement solely in the hands of agencies. Congress could also amend Title VI to provide for

¹³⁹ 42 U.S.C. § 2000d.

¹⁴⁰ In a concurrence, Justice Gorsuch opined that Title VI is more restrictive than the Equal Protection Clause and would not allow race-based distinctions even if they pass strict scrutiny. *Students for Fair Admissions*, 600 U.S. at 181, 288 (2023) (Gorsuch, J., concurring).

¹⁴¹ Even though *Students for Fair Admissions* is not controlling outside of higher education admissions, courts have cited it in striking other forms of race-based action. For example, a district court in Tennessee cited the decision’s emphasis on an end date as justification for enjoining certain federal contracting preferences. *Ultima Servs. Corp. v. USDA*, No. 20-CV-00041, 2023 WL 4633481, at *15 (E.D. Tenn. July 19, 2023). A district court in Texas quoted the decision in holding that the Minority Business Development Agency may not limit its services to minority business owners. *Nuziard v. Minority Bus. Dev. Agency*, No. 23-CV-00278, 2024 WL 965299, at *36 (N.D. Tex. Mar. 5, 2024).

¹⁴² See Aatish Bhatia & Emily Badger, *Can You Create a Diverse College Class Without Affirmative Action?*, N.Y. TIMES (Mar. 9, 2024), <https://www.nytimes.com/interactive/2024/03/09/upshot/affirmative-action-alternatives.html> (suggesting schools may enhance racial diversity by “building relationships with high school counselors, traveling to college fairs, and perhaps developing dual-enrollment courses that introduce high school students to college work”).

¹⁴³ See Lindsay Wise & Jennifer Calfas, *Capitol Hill Targets Legacy Preferences for College Admissions*, WALL ST. J., (Nov. 7, 2023, 5:00 AM), <https://www.wsj.com/us-news/education/capitol-hill-targets-legacy-preferences-for-college-admissions-f827125f>.

¹⁴⁴ See, e.g., *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (“Although Title VI does not mention a private right of action, our prior decisions have found an *implied* right of action.”). See also *id.* at 187–90 (observing that “Title VI mentions no remedies—indeed, it fails to mention even a private right of action” and applying contract doctrine to conclude that remedies under Title VI include compensatory damages and injunctive relief, but not punitive damages).

disparate impact liability—that is, a Title VI violation based on a funding recipient’s use of certain policies or practices that a litigant shows disproportionately and negatively impact members of a protected class. Such liability already exists under Title VII of the Civil Rights Act of 1964, covering employment discrimination.¹⁴⁵ A provision addressing disparate impact liability would resolve a significant and ongoing debate on the issue.¹⁴⁶ Such an addition could also be one way of clarifying whether, as the Court has held in its affirmative action jurisprudence, Congress intends for Title VI to be read coextensively with the Equal Protection Clause.¹⁴⁷ Congress could also make changes that do not affect Title VI’s enforcement directly; it could require funding recipients to collect and report data on minority recruiting, retention, admissions, or other criteria.

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¹⁴⁵ 42 U.S.C. § 2000e-2(k) (outlining the burden of proof in disparate impact cases under Title VII of the Civil Rights Act of 1964).

¹⁴⁶ During the Obama Administration, for example, ED’s Office for Civil Rights issued a series of guidance documents premised on a disparate impact theory under Title VI to evaluate whether school districts were inappropriately disciplining minority students. The Trump Administration proposed rescinding that guidance, however, arguing in a report that the guidance’s disparate impact theory rested on a “dubious” reading of Title VI, “at best.” See U.S. DEP’T OF EDUC. ET AL., FINAL REPORT OF THE FEDERAL COMMISSION ON SCHOOL SAFETY 67–72 (2018), <https://www2.ed.gov/documents/school-safety/school-safety-report.pdf> (discussing the earlier disparate impact guidance and the Commission’s reasons for urging their withdrawal). The Biden administration again employed disparate impact theories in enforcement. Naaz Modan, *Ed Dept Revives Systemic Racial Discrimination Reviews of School Districts*, K-12 DIVE (May 1, 2023), <https://www.k12dive.com/news/Biden-Cardona-revive-disparate-impact-OCR-Department-of-Education/648543/>.

¹⁴⁷ Because the Court has understood equal protection to forbid only acts of intentional discrimination, and not those solely with a “racially disproportionate impact,” *Washington v. Davis*, 426 U.S. 229, 239 (1976), a statutory disparate impact standard would necessarily broaden Title VI’s protections beyond that constitutional minimum.