STUDENTS FOR FAIR ADMISSIONS V. PRESIDENT AND FELLOWS OF HARVARD COLLEGE: A PARADIGM SHIFT IN UNIVERSITY ADMISSIONS POLICIES OR MUCH ADO ABOUT NOTHING?

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ABSTRACT

It has been 35 years since I began my academic career, the bulk of which was devoted to studying the impact of federal regulation on workplace practices. As my career has come to its inevitable finale, it seemed only fitting that my last manuscript should be dedicated to one of my first interests, affirmative action. As of this writing, affirmative action has been a fixture in America for 58 years. [1] Coincidentally, this summer the Supreme Court will rule on a case that has the potential of radically changing affirmative action in university admissions. [2] It may even alter the nature of affirmative action beyond its academic application.

To enhance the reader's understanding of the issues at hand, my co-authors and I will provide a brief history of the Civil Rights Act of 1964 with particular attention devoted to its Title VI. In this discussion, the two major viewpoints on the meaning of equal opportunity are examined, individual versus collective perspectives. Also, the impact that two Supreme Court decisions *Regents of University of California v. Bakke*[3] and *Grutter v. Bolinger*,[4] have had on affirmative action policies and programs are analyzed. Note that *Grutter* culminated in the proposition that the Equal Protection Clause of the Fourteenth Amendment did not prohibit a university's *narrowly tailored* use of race in admissions decisions. It had further concluded that diversity serves a compelling interest in obtaining educational benefits that flow from a diverse student body. This is the current state of the law as it relates to admissions in higher education, and what is being challenged.

The authors then present the arguments against the status quo as offered in *Students for Fair Admissions v. President and Fellows of Harvard College*,[5] the case which is currently before the Supreme Court. The authors then predict three possible outcomes of *Students for Fair Admissions*, and the impact that each plausible outcome would have on affirmative action policies in admissions, as well as in general.

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[1] Exec. Order No 11246; 30 Fed.Reg. 12319, 12935, (1965).
[2] Students for Fair Admissions v. Harvard College, 980 F.2d 157 (1st Cir. 2020).
[3] 438 U.S. 265 (1978).
[4] 539 U.S. 306 (2003).
[5] *Supra,* note 2.

I. INTRODUCTION

Affirmative action programs as they relate to college admissions is the sole focus of this paper. Special attention is given to the use of student body diversity as a means permitting the preferential admission of students because of their membership in underutilized groups. This has become particularly noteworthy due the emphasis in recent years on university programs focused on diversity, inclusion, and equity.

Note that as of the date of this writing, preferential treatment on the basis of race or ethnicity in employment, even at academic institutions of higher learning, is not an issue in this paper. Hiring is a matter for Title VII of the Civil Rights Act of 1964, nor does it recognize diversity as a justification for preferential treatment.[6]

II. THE HISTORY OF EQUAL OPPORTUNITY

The legislative pinnacle in the struggle for equal treatment is clearly Civil Rights Act of 1964. This federal statute is the most comprehensive ever to regulate employee–employer relations and educational opportunities. This legislation was enacted to ensure that the covered entities did not take any individual's race, color, religion, sex, or national origin into account when making a decision. As previously stated, Title VII is that portion of the Civil Rights Act of 1964 that governs discrimination in employment decisions. Title VI, the focus of this paper, governs unlawful discrimination in education.

It is stated in Title VI that "[n]o person in the United States shall, on the grounds 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."[7] The operative phrase is "no person" which implies an individual rather than a group right is being conveyed by the statute.

A. Individual Versus Collective Perspectives of Equal Opportunity

Since the beginning of the civil rights movement, the term *equal opportunity* has never meant the same construct to all of its advocates. Even as Congress debated the new civil rights law, three distinct factions formed: those who opposed the legislation, those who wanted it to protect individual rights, and those who desired it to protect group (i.e., collective) rights.[8] To avoid confusion, the authors will refer to group rights perspective as the collective rights perspective, as the latter term is currently in vogue.[9] The first group is of little consequence as those who opposed the Civil Rights Act were defeated and have largely faded to a footnote in

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[6] Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 354 (D.C. Cir. 1998); Taxman v. Board of Education of Piscataway, 91 F.3d 1547, 1561 (3rd Cir. 1996); Alexander v. Estepp, 95 F.3d 312, 315 (4th Cir. 1996).

[7] 42 USC § 2000(d) (2022).

[8] HERMAN BELZ, EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION (1992); STEVEN F. LAWSON, CHARLES M. PAYNE, DEBATING THE CIVIL RIGHTS MOVEMENT, 1945-1968 (2006).

[9] Bruno Amable, *Morals and Politics in the Ideology of Neo-Liberalism*. 9 SOCIO-ECONOMIC REVIEW 3-30 (2011); Sabrins E. Vaught, Angelina E. Castagno, *"I Don't Think I'm a Racist": Critical Race Theory, Teacher Attitudes, and Structural Racism*, in CRITICAL RACE THEORY IN EDUCATION 114-136 (Laurence Parker, David Gillborn, eds., 2020); Niki Iman Saleh, *Title VI and Affirmative Action: The Danger of 'Color-Blind' Admissions for Immigrant Students of Color*, 31 AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY & THE LAW (https://jgspl.org/title-vi-and-affirmative-action-the-danger-of-color-blind-admissions-for-immigrant-students-of-color/).

history. However, the other two factions, which represent two very distinct views of what equal opportunity should be, are still very much with us to this current time. Many of the apparent contradictions which still persist in affirmative action case law and regulations trace their origins to these two polarized views. Since government regulation and judicial interpretation is the result of a political process, understanding these two competing political motivations may explain how and why we have arrived at this juncture.

The perspective that the authors call the *Individual Rights Approach* to equal opportunity, intended the new civil rights statute to safeguard individuals against the deprivation of educational opportunities based on membership in a particular group. The underlying proposition of the individual rights party was that it had been morally wrong to deny an individual the access to educational opportunities merely because he or she was the member of a particular group for which the decision maker harbored a bias. The damage suffered was by the affected individual. For example, an otherwise qualified individual, was denied consideration for admission in a particular university or program. It was this individual who needed protection, not one who was not qualified for admission. Therefore, new law and the protection that it afforded, should be prospective in nature,[10] that is to say, looking toward the future. The premise is basically that the past cannot be undone, however any further discrimination can be circumvented. Title VI purpose is to outlaw discrimination based on race, color, religion, sex, and national origin from a particular point in time forward. It is prospective in nature.[11]

Under this individual rights view of equal opportunity, college administrators would make all admissions decisions in a color-blind manner. The ultimate end was to guarantee that all applicants receive the same treatment.

The opposing view was sometimes referred to as the group rights approach to equal opportunity, in contemporary times this view is increasingly referred to has the *collective rights approach* and was the approach embraced by the collective rights faction in Congress during the debate on the language of the Civil Rights Act of 1964.[12]

Where the individual rights faction was prospective, the collective rights faction was retrospective. The underlying proposition of the collective rights faction was that certain groups had been historically wronged and that it was the government's responsibility to make them whole, to make up for past discrimination. This view was, therefore, remedial in nature. It attempted to compensate groups for past injuries.

Instead of being color-blind, the collective rights faction advocated employment practices that were class conscious, giving protection and a helping hand to historically oppressed classes.[13] Under this collectivist philosophy of EEO, the ultimate end is to create a workplace that guarantees equal results (proportional outcomes) among the different gender and ethnic groups in society.

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[10] BELZ, *supra* note 8 at 29.

[11] ROBERT K. ROBINSON, GERALYN M. FRANKLIN, EMPLOYMENT REGULATION IN THE WORKPLACE: BASIC COMPLIANCE FOR MANAGERS (2015).

[12] TODD S. PURDUM, AN IDEA WHOSE TIME HAS COME: TWO PRESIDENTS, TWO PARTIES, AND THE BATTLE FOR THE CIVIL RIGHTS ACT OF 1964 117-124 (2014); CHARLES W. WHALEN, BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985); ELIZABETH ANDERSON, THE IMPERATIVE OF INTEGRATION (2010).

[13] BELZ, *supra* note 8 at 29.

Initially, the individual rights faction would prevail in Congress by getting its view enacted in the statute. We know this to be so because the language of Title VII of the Civil Rights Act of 1964 is replete with the phrases "any individual" and "such individuals."[14]

This success of the individual rights faction is also demonstrated by the language of Title VI, which explicitly states that "No *person* in the United States shall, on the grounds of *race, color, or national* origin [emphasis added by the authors], be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Note that the operative word is *person* and not *group*. However, the collective rights faction would advance their vision of equal opportunity in later innovations from the executive and judicial branches, particularly in the form of affirmative action.[15]

The group rights perspective would emerge in later innovations proffered by the executive and judicial branches, in such forms as affirmative action and disparate impact.

III. THE ADVENT OF AFFIRMATIVE ACTION

The term "affirmative action" can be traced to the earlier Executive Order 10925.[16] In this order, President John F. Kennedy urged federal contractors to take "affirmative action" to ensure individuals, during employment, were treated without regard to their race, color, religion, sex, or national origin.[17]

President Kennedy's successor, President Lydon B. Johnson, would later initiate Executive Order 11246, under which each federal contractors, subcontractors, recipients of federal grant and aid money, and depositories of federal funds were required to file an annual compliance report with the contracting federal agency or secretary of labor.[18] This executive order imposed the requirement for affected entities to monitor and report applications and selection outcomes. These compliance reports required covered employers to further provide information on practices, policies, programs, and employment statistics. By focusing attention on numeric outcomes of hiring decisions, this would eventually lead to race-conscious employment practices. Over time, these requirements would evolve into more elaborate reporting formats such as the EEO-1 through EEO-6 reports, and the very sophisticated formalized affirmative action programs delineated in *Revised Order No. 4*.[19] *Revised Order No. 4* contains the Office of Federal Contract Compliance Program's guidance for constructing programs that would meet its standards of review.

A. Wygant and Strict Scrutiny

Beginning in 1971, the Supreme Court embarked on a series of decisions that interpreted the Fourteenth Amendment in a manner that would allow the Equal Protection Clause to permit

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[14] 42 U.S.C. § 2000e-2(a) (2022).

[15] Robert K. Robinson, Franklin, Geralyn M., & Karen Epermanis, *The Supreme Court rulings in Grutter v. Bollinger and Gratz v. Bollinger: The brave new world of affirmative action in the 21st century*. 36 PUBLIC PERSONNEL MANAGEMENT 33-49 (2007); BARBARA R. BERGMANN, IN DEFENSE OF AFFIRMATIVE ACTION (1996); RICHARD D. KAHLENBERG, THE REMEDY: RACE, CLASS AND AFFIRMATIVE ACTION (1997); SHIRLEY BETTER, INSTITUTIONAL RACISM: A PRIMER ON THEORY AND STRATEGIES FOR SOCIAL CHANGE (2007).

[16] 3 C.F.R. 448 (1959–1963).

[17] *Id.*

[18] *Supra* note 1.

[19] 41 C.F.R. § 60–2 *et seq.* (2022).

limited preferential treatment under specific circumstances—rejecting the notion that Congress must always act in a *color-blind fashion*. [20]

Under the Equal Protection Clause, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[21] From its inception, the Fourteenth Amendment's Equal Protection Clause clearly forbade states and their respective subunits from creating any law, regulation, or policy that treated a citizen differently because of race. The dilemma that this created for preferential treatment under an affirmative action plan is apparent.

First, only state and local governments and their agencies can violate the Equal Protection Clause. Private sector employers are not covered under the Fourteenth Amendment. Because the concept that making distinctions among citizens based on their ancestry is contradictory in a society that claims equality under the laws, the courts have been willing to permit government-initiated affirmative action only under extreme circumstances. In recent years, federal courts have become even stricter in their analysis of those circumstances. This is important to know because public universities are governed by both the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.

Under the principle of strict scrutiny, any preferences pursued by a state or local government must pass a two-part test. The landmark case establishing this two-part test is the 1986 Supreme Court decision, *Wygant v. Jackson Board of Education*.[22] *Wygant* establishes the standard by which affirmative action plans are permissible under the Equal Protection Clause in the same manner that *Steelworkers v. Weber*[23] sets the standard under Title VII.

The first part of the strict scrutiny test is to establish that there exists a compelling government interest to be served by the affirmative action plan's use of preferential treatment.[24] Only when this criterion is satisfied, will the courts then examine the affirmative action plan to ascertain if it is sufficiently narrowly tailored to accomplish that compelling government interest. To meet this standard, the affirmative action plan must be justified. The state or local government must have a strong basis in evidence that its classification of citizens along racial, ethnic, or gender lines is absolutely necessary. For governments and their agencies, this is an even more difficult burden because, as previously presented, the expressed purpose of the Equal Protection Clause of the Fourteenth Amendment is to prohibit government decision making from using such irrelevant factors as a person's race.[25]

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[20] Swan v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 18–21 (1971); McDaniel v. Barresi, 402 U.S. 39, 41 (1971); Franks v. Bowman Transportation, Co., 424 U.S. 747, 763 (1976); Bakke, 438 U.S. at 378–379.

[21] U.S. Const. amend. XIV, § 1.

[22] 476 U.S. 267 (1986).

[23] 443 U.S. 193 (1979).

[24] Palmore v. Sidoti, 466 U.S. 429, 432 (1984).

[25] City of Richmond v. Croson, 488 U.S. 469, 495 (1989); see also, Loving v. Virginia, 388 U.S. 1, 11 (1967); Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

1. Compelling Government Interest

Until *Grutter v. Bollinger*, the only government interest that is sufficiently compelling to justify preferential treatment of one group of citizens over another is the need to eliminate the present effects of the government entity's past discrimination.[26] In establishing this justification, the state or local government has two issues to prove. First, it must clearly identify present effects that can be traced to some previously discriminatory practices.

Next, it must show that it actually implemented the discriminatory policy or practice. Statistical imbalances (often referred to as underutilization) in given programs or categories are used as evidence of the present effects.[27] However, imbalances, in and of themselves, are not sufficient to justify the preferential treatment. There must be a direct link between the previous discriminatory practices and the current imbalance.

It should be noted that initially, until *Grutter,* diversity was not accepted as sufficient to establish a *compelling government interest*. Federal circuit courts explicitly declared that diversity did not establish a compelling interest that would justify preferences.[28] In one case, a circuit court indirectly overturned diversity justifications by holding that decisions based on retaining minorities strictly because of underrepresentation would not withstand a constitutional challenge.[29] The most interesting case of the time, *Taxman v. Board of Education of Piscataway*,[30] not only held that a goal of maintaining racial diversity could violate the Equal Protection Clause, but it could also violate Title VII. In this decision, the Court of Appeals for the Third Circuit was emphatic that it could not accept the premise that a "nonremedial diversity goal is a permissible basis for affirmative action under Title VII."[31] The goal of maintaining a racially diverse workforce, in the absence of any remedial justification, would unnecessarily trammel the interests of employees who were members of nonpreferred racial groups, and it would equally fail to be a temporary measure by maintaining a racial balance.[32]

2. Narrowly Tailored Programs

Once the government agency or department has justified its use of affirmative action through the demonstration that the program serves a compelling government interest, the program must then clear the second hurdle: show that it is narrowly tailored to achieve its ends. In other words, is the preferential treatment designed in such a way as to minimize the harm to innocent third parties? There appears to be an emerging consensus that in determining whether a plan is sufficiently narrowly tailored, the courts should consider five key factors:[33]

- The efficacy of alternative race-neutral practices
- The planned duration of the policy
- The relationship between the numerical goal and the percentage of preferred group members in the relevant population or relevant workforce
- The flexibility of the policy, including waivers if the goal cannot be met
- The burden that the program places on innocent third parties

[26] Bakke, 438 U.S. at 307; Wygant, 476 U.S. at 274; Croson, 488 U.S. at 486.
[27] 41 C.F.R. § 60–2.23 (2022).

B. Affirmative Action and Higher Education

In *Regents of the University of California v. Bakke*, the Supreme Court held that, "In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."[34]

This was a very real obstacle to overcome as rights created by the first section of the "Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights."[35] The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.[36] At the initial stage of the debate, an equally qualified, in some instances a better qualified Black applicant was denied equal education opportunity. By the time of *Bakke* in 1978, it was a white applicant with equal or better qualifications who claimed educational opportunities were being denied him because of his race.[37] When Bakke was denied admission to the medical school, it was noted that Black applicants with lower MCT scores were admitted. The Medical School of the University of California at Davis claimed this occurred to enhance the diversity of their professional program, though it was "only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body."[38]

In the end, the *Bakke* Court ordered that Bakke be admitted into the medical school, the universities and that the special admissions program be terminated because it was not the least intrusive means of integrating the medical profession and increasing minority doctors.[39] It did not bar the university from taking race into account as a factor in its future admissions decisions.[40] Race may be a contributing factor, but not the determining factor in such decision making, a so-called, a factor within a factor.[41]

C. Diversity and Grutter

In a 5-to-1 decision, *Grutter v. Bolinger*,[42] the Supreme Court made an exception to *Wygant's* strict scrutiny test by declaring that a diverse student body could serve as a compelling government interest.[43] However, this precedent is restricted only to university admissions. In doing

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[28] Hunter v. The Regents of the University of California, 190 F.3d 1061, 1074 (9th Cir. 1999); Wessmann v. Gittens, 160 F.3d 790, 800 (1st Cir. 1998) (the concept of "diversity" implemented by BLS does not justify a race-based classification); Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344, 354 (D.C. Cir. 1998); Hopwood v. State of Texas, 78 F.3d 932, 944–945 (5th Cir. 1996).
[29] Cunico v. Pueblo School Dist. No. 60, 917 F.2d 431, 439 (10th Cir. 1990).
[30] 91 F.3d 1547.
[31] *Id.* at 1561.
[32] *Id.*
[33] U.S. v. Paradise, 480 U.S. 149, 171 (1987) (plurality opinion).
[34] *Supra* note 3 at 287.
[35]Shelley v. Kraemer, 334 U. S. 1, 22 (1948). *Accord,* Missouri ex rel. Gaines v. Canada, 305 U. S. 337, 351 (1938); McCabe v. Atchison, T. & S.F. R. Co., 235 U. S. 151, 235 U. S. 161-162 (1914).
[36] 438 U. S. at 290.
[37] *Id.* at 277.
[38] *Id*. at 314.
[39] *Id.* at 266.
[40] *Id.* at 267.
[41] Fisher v. University of Texas at Austin, 136 S.Ct. 2198, 2207 (2016).
[42] 539 U.S. 306 (2003).
[43] *Id.* at 328–329.

so, *Grutter* appears to have abandoned both the Equal Protection Clause and Title VI's prohibition on race-conscious admissions. Not surprisingly, university administrations have taken advantage of the latitude afforded them by *Grutter* to engage in the very activity which Title VI appeared to forbid. Again, it is important to note that diversity currently does not justify preferential treatment for employment and contract awards.

It is further worth noting that the acceptance of such race conscious justifications, potentially appear to undermine *Brown v. Topeka Board of Education's*[44] rejection of the use of race. The *Brown* court held that the Fourteenth Amendment prevents states from according different treatment to American children on the basis of their color or race.[45] A point further reiterated in *Parents Involved in Community Schools v. Seattle School District No. 1*.[46]

In *Grutter*, the University of Michigan's law school sought to enroll a "'critical mass' of minority students" through its holistic admissions process.[47] The Supreme Court held that an interest in "critical mass" was "not simply 'to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin'; such a specific number 'would amount to outright racial balancing which is patently unconstitutional.'"[48] Rather, the concept [critical mass]"is defined by reference to the educational benefits that diversity is designed to produce."[49] Enumerated among those benefits purported in *Grutter* were cross-racial understanding, breaking down stereotypes, improved classroom discussions, the promotion of learning outcomes, student preparation for postgraduate life, and the cultivation of strong leaders.[50]

IV. STUDENTS FOR FAIR ADMISSIONS V. HARVARD COLLEGE

The principal issue in *SFFA v. Harvard* is that Harvard college is unlawfully penalizing Asian American students by engaging in race balancing admissions policies (attempting proportional representation) which emphasize race over workable race neutral alternatives.[51] In essence, the plaintiffs are asking the Supreme Court to overturn the 2003 decision, *Grutter v. Bollinger*,[52] by eliminating race as a factor in college admissions.[53]

Using a multiple regression, statistical evidence provided by SFFA indicates that Harvard's admissions process discriminates against Asian-American applicants in at least three criteria: First, Asian-American applicants score significantly stronger in academic performance than any other racial group. Second, Asian-Americans also perform very well in non-academic categories and have higher extracurricular scores than all other racial groups. Third, Asian-American applicants also receive higher overall scores from alumni interviewers than the other racial groups.[54]

Asian-American applicants also receive strong scores from teachers and guidance counselors. Though these were insignificantly lower than those of white applicants, they were

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[44] 347 U.S. 483 (1954).
[45] 347 U.S. 483, 495 (1954).
[46] 551 U.S. 701, 747 (2007).
[47] 539 U.S. at 329.
[48] Grutter at 329–30 (quoting Regents of Univ. of Cal. v. Bakke , 438 U.S. 265, 307 (1978) (opinion of Powell, J.)).
[49] *Id.* at 330
[50] *Id.*
[51] Students for Fair Admissions v. President and Fellows of Harvard College, Oyez, https://www.oyez.org/cases/2022/20-1199 (last visited Feb 2, 2023).
[52] 539 U.S. 306 (2003).
[53] 397 F.Supp. 3d 126 (D. Mass. 2019) *affirmed,* 980 F.3d 157 (1st Cir. 2020).
[54] Plaintiff's Motion for Summary Judgement (Cas 1:14-cv-14176-ADB (06/15/2018) at 7.

higher than those of African American and Hispanic applicants in the aggregate. In sum, SFFA found that "Asian-American applicants as a whole are stronger on many objective measures than any other racial/ethnic group including test scores, academic achievement, and extracurricular activities."

A. Lower Court Rulings in SFFA v. Harvard

In November 2014 Students for Fair Admissions filed suit against Harvard college alleging that its race-conscious admission policies violated Title VI[55] by excluding qualified Asian American applicants from consideration because of their race.[56] Let it be noted that as a private college, Harvard is not a state actor under that Equal protection Clause of Amendment XIV, however, the University of North Carolina is.

B. Students for Fair Admissions, Inc. v. University of North Carolina[57]

Though there was no substantial evidence that the University of North Carolina's (hereafter, UNC) Admissions Office used the phrase "critical mass" regularly, there is significant evidence that it defined, discussed, and measured the concept behind the phrase. This is borne out by UNC's reference to the educational benefits that diversity is designed to produce. The Admissions Office stated that successful admission to UNC was based upon eight criteria : Academic program, academic performance, standardized testing. Extracurricular activity, special talent, essay background, and personal criteria. Each of the criterion are described below:[58]

> • Academic program criteria : rigor, breadth, and pattern of courses taken, all viewed within the context of the entire applicant pool, and the student's high school and any previously attended post-secondary institutions.
> • Academic performance criteria : grade point average, rank in class, individual grades, trends in grades, and patterns in grades, all viewed within the contexts of the entire applicant pool and the student's high school and any previously attended post-secondary institutions.
> • Standardized testing criteria : results from the SAT or ACT, and available SAT Subject, Advanced Placement, and International Baccalaureate exams, as well as occasional results from state-mandated end-of-course exams, all viewed in light of the documented strengths and limitations of these tests, for all first year and sophomore transfer candidates.
> • Extracurricular activity criteria : engagement outside the classroom; persistence of commitment; demonstrated capacity for leadership; contributions to family, school, and community; work history; unique or unusual interests.
> • Special talent criteria : in music, drama, athletics, and in writing.
> • Essay criteria : idea, organization, voice, vocabulary, sentence structure and

[55] 42 U.S.C. § 2000d *et seq.*
[56] 397 F.Supp. 3d 126 (D. Mass. 2019)
[57] 567 F.Supp. 3d 580, (M.D.N.C. 2021).
[58] Trial Findings of Fact and Conclusions of Law (Cas 1:14-cv-00954-LCB-JLW (10/18/2021) at 28-29.

grammar; evidence of self-knowledge and reflection; insightfulness; unique or unusual perspectives.
• Background criteria : relative advantage or disadvantage, as indicated by family income level, education history of family members, impact of parents/guardians in the home, or formal education environment; experience of growing up in rural or center-city locations; status as child or stepchild of Carolina alumni.
• Personal criteria : curiosity; kindness; creativity; honesty and integrity; motivation; character; impact on community; exceptional achievement in-or-out of the classroom; history of overcoming obstacles or setbacks; openness to new cultures and new or opposing ideas; talent for building bridges across divisions in school or community or among individuals from different backgrounds.

Statistical analysis again demonstrated that Asian-American students were at a disadvantage in the selection process.

The University of North Carolina contended that this policy was consistent with Supreme Court's decision in *Grutter v. Bollinger*, in that the "race or ethnicity of any student may—or may not —receive a 'plus' in the evaluation process depending on the individual circumstances revealed in the student's application." Additionally, while a hypothetical race-based "plus" may be significant in a particular individual's case, resulting in the admission of that student, it is not automatically awarded. Also, the "plus" is considered in terms of numeric points or as the defining feature of an application. Even in instances when a "plus" is awarded, it does not automatically result in an offer of admission, as the admissions process is not based on formulas or preset scoring requirements.[59]

That is to say the final admission decision appears, at least to the authors, to be subjective. In fact, Judge Loretta Biggs would hold that "non-statistical evidence does not demonstrate discrimination."[60]

C. Supreme Court Grants Certiorari

On February 25, 2021, The Supreme Court agreed to hear arguments in its 2022-2023 term.[61] *SFFA v. Harvard* was consolidated with *SFFA v. University of North Carolina and* would hear oral arguments on October 31, 2022.[62]

On July 22, 2022*, SFFA v. University of North Carolina* was no longer consolidated with *SFFA. v. Harvard*, as the Supreme Court chose to separate the two cases. This was likely due to the University of North Carolina being an entity under the Equal Protection Clause of the Fourteenth Amendment and Title VI, and Harvard being under Title VI only. A decision is expected in June 2023.[63]

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[59] 567 F.Supp. 3d at 600.
[60] *Id.* at 659-660.
[61] SFFA v. Harvard *cert. granted*, 142 S. Ct. 895 (2022).
[62] *Id.*
[63] College Board, *U.S. Supreme Court Ruling on Race in Admissions: Prepare Now for the 2023 Ruling,* COLLEGE BOARD (https://professionals.collegeboard.org/2023-scotus-race-admissions)(last visited Feb 2, 2023).

V. POSSIBLE OUTCOMES AND CONSEQUENCES

The outcome of *SFFA v. Harvard* will not just affect university admissions but is likely to impact all race conscious decisions in such areas as employment, contract awards, and grant awards.

A. Status Quo

The Supreme Court affirms the decisions of the lower courts. *Grutter* remains intact. Nothing changes as far as the federal judiciary is concerned. One possible consequence which may result from the publicity that the decision may garner, state legislatures may initiate action on their own to limit racial/ethnic preferences within their jurisdictions. Currently, there are eight states that have already banned affirmative action in employment, contract awards, and university admissions.[64] Interestingly, the State of Michigan passed an amendment to their constitution, Proposition 2,[65] in response to the *Grutter v. Bollinger* decision. Though immediately challenged by pro-affirmative action activists, the constitutional amendment was upheld by the Supreme Court of the United States.[66] It should be noted that though states may enact statutes or pass [state] constitutional amendments prohibiting racial preferences, these measures have no effect on federally mandated affirmative action programs.[67]

B. Grutter is Overturned

In the event that *Grutter* was overturned, this would not be as draconian as the media is likely to make it seem. It merely changes university affirmative action programs back to their pre-*Grutter* days. That is to say, that preferential admissions programs will return to the strict scrutiny under *Bakke*. For admissions officers, this means more effort must be devoted to establishing a *compelling government interest*. This may not be an insurmountable task as many academic studies and journal articles support the contention that diversity produces great educational benefits and outcomes.[68] Though many such studies are from academic disciplines that may benefit from such findings.[69]

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[64] Arizona, Florida, Idaho, Michigan, Nebraska, New Hampshire, Oklahoma, and Washington.
[65] Mich. Const. Art. I, §26.
[66] Schuette v. Coalition to Defend Affirmative Action, 572. U.S. 291 (2014).
[67] Robert Robinson, Dave Nichols, John Goodman, *The 2007 Revisions to the Employer Information Report and Their Potential Impact on Equal Employment Opportunity and Affirmative Action Compliance.* HR ADVISOR: LEGAL & PRACTICAL GUIDANCE, 24-29. (2008).
[68] Siddhartha P. Tiwarim, *Knowledge and Understanding of Diversity*, 30 TECHIUM SOCIAL SCIENCE JOURNAL 159-163 (2022); Channing J. Mathews, Myles Durkee, Elan C. Hope, *Critical Action and Ethnic–Racial Identity: Tools of Racial Resistance at the College Transition*, 32 JOURNAL OF RESEARCH ON ADOLESCENCE 1083-1097 (2022); Teniell L. Trolian, Eugene T. Parker, *Shaping Students' Attitudes Toward Diversity: Do Faculty Practices and Interactions with Students Matter*? 63 RESEARCH IN HIGHER EDUCATION 849-870 (2022).
[69] K. C. Culver, Rosemary Perez, Josephe A. Kitchen, Darnell G. Cole, *Fostering Equitable Engagement: A Mixed-Methods Exploration of the Engagement of Racially Diverse Students in a Comprehensive College Transition Program*. JOURNAL OF DIVERSITY IN HIGHER EDUCATION Advance online publication (https://doi.org/10.1037/dhe0000408 (2022); Chandra V. Reyna, *Pursuing Racial Justice on Predominantly White Campuses: Divergent Institutional Responses to Racially Palatable and Racially Conscious Students* in SYSTEMIC RACISM IN AMERICA: SOCIOLOGICAL THEORY, EDUCATION INEQUALITY, AND SOCIAL CHANGE

Grutter allowed admission staffs and officials to focus their energies on establishing that their preferential admissions programs were *narrowly tailored*. They only had to focus on the second part of strict scrutiny because the first part, *compelling government interest*, diversity of the student body, was taken for granted. If *Grutter* is overruled, universities may still have preferential admissions, they will just have to devote more effort and resources to demonstrating their justification for developing them.

C. Affirmative Action is Abolished

If the Court decides that the Constitution clearly forbids the preference of members of one group/class over another on the basis of race or ethnic origin, then such discrimination is clearly unlawful.[70] This would have the effect of eliminating the affirmative action in higher education admissions. It is likely that such a prohibition on affirmative action in higher education would also establish precedent for the abolition of affirmative action in hiring as well as contract and grant awards.

If such becomes the case, it will likely resolve the issue at the very forefront of the equal opportunity debate; is equal opportunity's nature individual or collective? If preferences, by their very nature become unconstitutional, then the individual rights faction clearly prevails as no individual could be denied access to educational opportunities merely because he or she was the member of a particular group.

The impact on higher education is projected to be a decline in black and Hispanic enrollments.[71] Most of this would result by the de facto raising of admissions standards for the underutilized groups through the elimination of preferences.[72]

The question remains, would such a decision mean that the collective vision of equal opportunity is eliminated forever? No, no more than it was the defeat of the collectivist vision when the individual rights faction triumphed in the enactment of the Civil Rights Act of 1964. The collective rights faction may react by yet packing the Supreme Court in order to overturn *SFFA v. Harvard*. The proponents of affirmative action could, conceivably, champion a constitutional amendment, though the court-packing option would be the easier to achieve.

141- 161 (Rashawn Ray, Hoda Mahmoudi, eds., 2022); Samuel D. Museus, Kiana Shiroma, *Understanding the Relationship between Culturally Engaging Campus Environments and College Students' Academic Motivation*, 12 EDUCATION SCIENCES 785 (https://www.mdpi.com/2227-7102/12/11/785) (2022).

[70] Loving, *supra* note 24 at 11-12; McLaughlin v. Florida, 379 U. S. 184, 198 (Stewart concurring) (1964); Brown, *supra* note 43 at 490.

[71] Huacong Liu, *How do Affirmative Action Bans Affect the Racial Composition for Postsecondary Students in Public Institutions?* 36 EDUCATION POLICY 1348-1372 (2020); V. Thandi Sule, Rachelle Winkle-Wagner, Dina Maramba, Abigail Sachs, *When Higher Education is Framed as a Privilege: Anti-Blackness and Affirmative Action during Tumultuous Times*, 45 THE REVIEW OF HIGHER EDUCATION 415-449 (2022); Crusto, Mitchell F., *A Plea for Affirmative Action* (September 12, 2022). Harvard Law Review Forum (Forthcoming 2023), Loyola University New Orleans College of Law Research Paper Forthcoming, (https://ssrn.com/abstract=).

[72] Xiaodan Hu, Kubra Say, Jeanette Baker, Brennan Carr, *The Influence of Affirmative Action Bans on Institutional Retention*, THE JOURNAL OF COLLEGE STUDENT RETENTION: RESEARCH, THEORY & PRACTICE 1-26 (DOI: 10.1177/15210251221108460) (2022); Dan P. Ly, Utibe R. Essien, Andrew R. Olenski, Anupam B. Jena, *Affirmative Action Bans and Enrollment of Students From Underrepresented Racial and Ethnic Groups in U.S. Public Medical Schools,* ANNALS OF INTERNAL MEDICINE (https://www.acpjournals.org/doi/10.7326/M21-4312) (June 2022). Grant Blume, Mark Long, *Changes in Levels of Affirmative Action in College Admissions in Response to Statewide Bans and Judicial Rulings*, 36 EDUCATION AND POLICY ANALYSIS 228-252 (2014).