DIVERSITY HIRING IN THE WORKPLACE: THE IMPLICATIONS OF *STUDENTS FOR FAIR ADMISSIONS* ON TITLE VII

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I. INTRODUCTION

The legality of affirmative action in the higher education context was addressed by the Supreme Court in its 2022 term.[1] This Article will consider what impact the Supreme Court decision overturning affirmative action in the university context may have on affirmative action in the workplace.[2]

Scholars like Harvard's Professor Noah Feldman have considered this question.[3] In an article released the day of the Supreme Court's oral argument for *SFFA*, Professor Feldman argued that the Court's ruling will not only bring about major changes in higher education also for private corporations.[4] He raised concerns that if the Court overturned prior precedent permitting diversity as a rationale for considering race in university admissions, corporations may well be concerned that such a rationale should also not be applied in the employment context.[5] Professor Feldman also maintained that, given the similarity in language between Title VI and Title VII, "an employer who uses affirmative action to seek diversity along the lines of any category protected by Title VII workplace anti-discrimination law[—]which include[s] race, sex, religion and national origin[—]will be running the risk of being held liable for unlawful discrimination."[6] This Article will consider Professor Feldman's concerns in greater detail.

Part I provides background on the legislative history and statutory language of both Title VI and Title VII.[7] It outlines the similarities in the language and history of the statutes in order to explain why scholars like Feldman would conclude that the Supreme Court's *SFFA* decision must necessarily impact the workplace and companies' Diversity, Equity, and Inclusion (DEI) initiatives.[8]

Part II turns to the *SFFA* legal standard to consider how *SFFA* and its analysis of the Equal Protection Clause and Title VI potentially changes the legal standard for Title VII.[9] It outlines the affirmative action programs employed by both the University of North Carolina and Harvard University. It then looks at the majority opinion as well as Justice Neil Gorsuch's

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1. *See generally* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023) (holding that race-based college admission programs violate the 14th Amendment's Equal Protection Clause).

2. *See infra* Parts II–IV (discussing the newly-created *Students for Fair Admissions* (*SFFA*) legal standard and its potential effects on affirmative action initiatives in the private sector).

3. Noah Feldman, *The Supreme Court Will Make It Harder to Hire a Diverse Team*, BLOOMBERG (Oct. 31, 2022, 5:00 AM), https://www.bloomberg.com/opinion/articles/2022-10-31/what-the-supreme-court-s-diversity-ruling-means-for-employers?sref=8SU5LPWa.

4. *Id.*

5. *Id.*

6. *Id.*

7. *See infra* Part I (providing background on and distinguishing Title VI and Title VII).

8. *See infra* Part I (comparing Titles VI and VII's language and history).

9. *See infra* Part II (discussing the history of *SFFA*'s legal standard and how its analysis potentially changes Title VII's legal standard).

concurrence.[10]

Part III reviews the pre-*SFFA* legal standard both regarding Title VI and Title VII affirmative action and DEI programs.[11] In doing so, it demonstrates that courts—the Supreme Court and lower courts—have interpreted Title VI and Title VII differently, with Title VI connecting to the Equal Protection Clause,[12] while Title VII does not.[13] Further, Part III looks to administrative guidance from the Equal Employment Opportunity Commission (EEOC) that similarly elucidates permissible Title VII DEI initiatives, which, it argues, must be remedial in nature and not for purposes of diversifying the workforce, unlike the now impermissible Title VI affirmative action programs.[14] As such, Part III argues that *SFFA*'s Equal Protection-based ruling should not affect permissible workplace diversity initiatives.[15]

Finally, Part IV more pointedly asks what, if anything, this new legal standard post-*SFFA* means for companies and their DEI initiatives.[16] It once more concludes that, notwithstanding similarity in the language in Title VI of the Civil Rights Act—which applies in the university context—and Title VII of the Civil Rights Act—which applies in the employment context—further distinctions in these Titles, as well as divergence in the case law and administrative guidance outlined in Part III, make it unlikely that the Supreme Court's affirmative action ruling in *SFFA* will directly impact case law and regulatory actions regarding DEI initiatives in the employment context.[17] That said, Part IV argues that the Supreme Court's *SFFA* ruling could nevertheless have a chilling effect on such practices by corporations, particularly in the short-term aftermath of the decision.[18] Further, it argues that, given the Supreme Court's opposition to any racial classification, the legal standard for Title VII DEI initiatives may change in the near future as disgruntled employees bring challenges to these initiatives.[19] In particular, it

10. *See infra* Section II.B–C (outlining affirmative action programs employed by both the University of North Carolina and Harvard University and analyzing both *SFFA*'s majority opinion and Justice Gorsuch's concurring opinion).

11. *See infra* Part III (reviewing the pre-*SFFA* legal standard in light of Titles VI and VII affirmative action programs).

12. U.S. CONST. amend. XIV, § 1 ("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.").

13. *See infra* Part III (demonstrating how federal courts have interpreted Title VI as connecting with the Equal Protection Clause while Title VII does not).

14. *See infra* Sections III.B.3, III.C (discussing administrative guidelines that allude to permissible Title VII DEI initiatives and arguing that these initiatives must be remedial in nature according to Title VII).

15. *See infra* Section III.C (arguing that *SFFA*'s ruling does not implicate permissible workplace diversity initiatives according to Title VII's constitutional interpretations).

16. *See infra* Part IV (analyzing *SFFA*'s impact on workplace DEI initiatives).

17. *See infra* Part IV (arguing that SFFA's interpretation of Title VI differs substantially from courts' interpretations of Title VII).

18. *See infra* Part IV (discussing potential effects of *SFFA* outside of higher education).

19. *See infra* Part IV (analyzing potential effects of *SFFA* given the Supreme Court's general trends).

draws attention to a recent case ruled on by the Court in *Muldrow v. City of St. Louis*, which, since decided in favor of the petitioner, may open the floodgates to suits challenging DEI initiatives and workplace affirmative action in hiring.[20]

II. BACKGROUND

In the wake of the death of George Floyd, the unarmed black man killed by police in Minneapolis, a number of Silicon Valley companies, including Facebook and Google, announced new programs to address racism.[21] Facebook and Google[22] set goals of hiring 30% more people of color in leadership positions by 2025.[23] Google also announced that it would strive to be more inclusive in other scenarios besides hiring, such as eliminating any office security procedures that may lead to racial profiling.[24] In the struggle to achieve racial equality,[25] affirmative action programs in the workplace can serve as a targeted remedy.[26] It offers private organizations, like Google, Facebook, and others, the power to address past inequities.[27]

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20. *See infra* Section IV.B (discussing the implications of a recent Supreme Court case ruling).

21. Elizabeth Dwoskin & Nitasha Tiku, *A Recruiter Joined Facebook to Help It Meet Its Diversity Targets. He Says Its Hiring Practices Hurt People of Color*., WASH. POST (Apr. 6, 2021, 6:00 AM), https://perma.cc/X83A-K5XJ.

22. *Id.* At the time of the announcement in 2020, approximately 96% of Google's U.S. leaders were white or Asian, and 73% of its global leaders were men. Paresh Dave, *Google Sets 2025 Leadership Diversity Goal, Ends 'Tailgater' ID Checks*, REUTERS (June 17, 2020, 3:11 PM), https://perma.cc/7D9S-ND7S.

23. *Id.* Though not a focus of this Article, there have been numerous studies about the benefits of more diversity in workplaces. Cristian L. Dezso & David Gaddis Ross, *Does Female Representation in Top Management Improve Firm Performance? A Panel Data Investigation*, 33 STRATEGIC MGNT. J. 1072 (2012) (finding that on average, "female representation in top management leads to an increase of $42 million in firm value"); Orlando C. Richard & Susan Kirby, *The Impact of Racial and Gender Diversity in Management on Financial Performance: How Participative Strategy Making Features Can Unleash a Diversity Advantage*, 24 THE INT'L J. OF HUM. RES. MGMT. 13, 2571, 2580 (2013) (finding that increases in racial diversity were clearly related to enhanced financial performance); Anthony Lising Antonio et al., *Research Report: Effects of Racial Diversity on Complex Thinking in College Students*, PSYCH. SCI. 507, 507–09 (2004) (studying the effects of racial diversity in groups and discovering that when a black person presented a dissenting perspective to a group of white people, the perspective was perceived as more novel and led to broader thinking and consideration of alternatives than when a white person introduced *that same dissenting perspective*).

24. Jon Porter, *Facebook's Latest Diversity Report Shows It's Inching Towards Its Goals*, VERGE (July 15, 2020, 11:39 AM), https://perma.cc/8AQV-ZGZV.

25. *Id.* Despite these articulated priorities, tech companies' annual diversity reports show only incremental progress in increasing the ratio of black and Latino employees, as well as high attrition rates among black women. Recent accounts of racial bias and inequities in pay and promotion abound among black women at Google, Pinterest, and Amazon. Dwoskin & Tiku, *supra* note 21.

26. Dwoskin & Tiku, *supra* note 21.

27. *Id.* In fact, the first mention of affirmative action was in the workplace context. *See* Exec. Order No. 10,925, 26 FR 1977 (1961). President John F. Kennedy's Executive Order 10925 required government contractors to "take affirmative action to ensure that applicants are employed, and that employees are [fairly] treated during employment, without regard to their race, creed, color, or national origin." *Id.* This Article will not address government contractors at length, but I will note here that various executive orders

Affirmative action, of course, is not reserved only for workplaces. Higher education institutions have strived for many years to make classrooms better reflect the makeup of the U.S. population.[28] In 1997, the Association of American Universities famously defended the practice of affirmative action in admissions decisions:

> A very substantial portion of our curriculum is enhanced by the discourse made possible by the heterogeneous backgrounds of our students. Equally, a significant part of education in our institutions takes place outside the classroom, in extracurricular activities where students learn how to work together, as well as to compete; how to exercise leadership, as well as to build consensus. If our institutional capacity to bring together a genuinely diverse group of students is removed—or severely reduced—then the quality and texture of the education we provide will be significantly diminished.[29]

Workplace diversity and diversity in higher education are inextricably linked.[30] To achieve diversity in the private sector, particularly in leadership positions, businesses need a pipeline of diverse applicants educated at institutions of higher learning.[31]

The link between the workplace and institutions of learning was reflected in the Civil Rights Act of 1964, which contained two crucial provisions to eliminate discrimination in the workplace and in education.[32] Following President John F. Kennedy's assassination, President Lyndon B. Johnson urged Congress to honor President Kennedy's memory by passing a civil rights bill aimed at ending racial discrimination.[33] In an address to a joint session of Congress in 1964, President Johnson stated, "We have talked long enough in this country about equal rights. We have talked for one hundred years or more. It is time now to write the next chapter—and to write it in the books of law."[34] Congress heeded his call and passed the Civil Rights Act on July 2 of that year.[35] Consisting of eleven titles, the Civil Rights Act sought to end discrimination based on one's identity or status in the United States.[36] The judiciary has generally established that the Civil Rights Act and its titles

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do impose affirmative action obligations on government contractors that differ from the rules for private employers. 41 C.F.R. § 60-2.

28. Association of American Universities, *On the Importance of Diversity in University Admissions*, N.Y. TIMES (Apr. 14, 1997), https://perma.cc/VXZ7-4XSH.

29. *Id.*

30. *Id.*

31. *Id.*

32. Civil Rights Act, 42 U.S.C. §§ 1981–2000h-6 (1964).

33. *See* Address of the President of the United States, H.R. Doc. No. 178 (1963) (Statement of President Lyndon B. Johnson).

34. *Id.*

35. 42 U.S.C. § 2000.

36. *Id.*

are Constitutional under Congress's Commerce Clause power.[37] This Article will focus on two titles in particular, Title VI and Title VII, which address educational and workplace diversity, respectively.[38]

A. Title VI

Title VI of the Civil Rights Act of 1964 is a federal law that prohibits discrimination on the basis of race, color, or national origin in all programs or activities receiving federal funding.[39] Section 601 of Title VI provides: "No person in the United States shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."[40]

As beneficiaries of federal funding, most colleges and universities are covered by Title VI.[41] Persons alleging discrimination under Title VI based on race, color, or national origin by recipients of federal funds may file administrative complaints with federal departments or agencies.[42] "Recipient" means, for the purposes of the Civil Rights Act:

> Any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.[43]

B. Title VII

Title VII prohibits discrimination on the basis of race, color, religion, sex, or national origin by covered employers, which includes private-sector employers with fifteen or more employees, state and local government employers with fifteen or more employees, and the federal government as an

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37. *See, e.g.*, Boynton v. Virginia, 364 U.S. 454 (1960) (reasoning that "[t]he Interstate Commerce Act, . . . uses language of the broadest type to bar discriminations of all kinds"); Henderson v. United States, 339 U.S. 816 (1950) (holding that a company practice to exclude non-white passengers from dining cars was unconstitutional and violative of the Interstate Commerce Act); Mitchell v. United States, 313 U.S. 80 (1941) (similarly finding a company's routine practice of excluding non-white passengers to violate the Interstate Commerce Act and the Fourteenth Amendment); Morgan v. Virginia, 328 U.S. 373 (1946) (considering race-based segregation to unlawfully burden interstate commerce).

38. *See infra* Section I.A–B (addressing Titles VI and VII, respectively).

39. 42 U.S.C. § 2000d.

40. *Id.*

41. *Id.* § 2000e.

42. *Id.*

43. 34 C.F.R. § 104.3.

employer.[44] It also applies to unions and employment agencies.[45] Title VII in its original form under the Civil Rights Act includes two sections, 703(a)[46] and 703(d),[47] which are explicitly relevant to employment practices.[48] These sections read as follows:

> Section 703(a) Employer Practices:
> It shall be an unlawful practice for an employer—
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status . . . .
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> Section 703(d) Training Programs:
> It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.[49]

As is evident, Title VI and Title VII are very similar in their focus on discrimination on the basis of protected characteristics, though Title VII includes sex and religion while Title VI does not.[50] That said, the titles differ in other respects and diverged through amendments added to Title VII in 1991.[51]

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44. 42 U.S.C. § 2000e.
45. *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, EEOC, https://perma.cc/LRU4-A9QU (last visited Feb. 26, 2025).
46. 42 U.S.C.A § 2000e-2(a) (West 1964).
47. *Id.* § 2000e-2(d).
48. *Id.* § 2000e-2(a)–(d).
49. *Id.*
50. *See id.* (noting the differences in the language of the statutes).
51. *See infra* Section I.C (discussing the distinctions between Title VI and Title VII).

C. Statutory Distinctions Between Title VI and Title VII

There are several key distinctions between Title VI and Title VII, notwithstanding their similar language with respect to protected classes.[52] These distinctions include additional statutory language and approaches embedded in Title VII from the time of its passage in 1964, as well as a divergence between Title VI and Title VII after the 1991 Civil Rights Act Amendments.[53]

Congress included a provision in Title VII that is not contained in Title VI and that directly implicates affirmative action in the employment context.[54] Section 703(j) explicitly states that nothing incorporated into the Act places an affirmative duty on employers and labor unions to give minority groups preferential treatment in order to remedy existing racial imbalances in employment.[55] In essence, scholars have argued, "this means that employers and labor unions have no duty to maintain racial quotas."[56] Importantly, the Court has found that the use of "require" rather than the phrase "require or permit" in § 703(j) fortifies the conclusion that Congress did not intend to limit business freedom so as to prohibit all voluntary, race-conscious affirmative action.[57]

In 1991, Title VI and Title VII further diverged. In 1991, Congress passed the Civil Rights Act of 1991,[58] a U.S. labor law that responded to various Supreme Court decisions that limited the rights of employees who had sued their employers for discrimination.[59] Section 703 is the core

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52. *See generally infra* note 58 and accompanying text (highlighting the differences between Title VI and Title VII).

53. *See infra* note 58 and accompanying text (continuing to note distinctions and divergence after the 1991 amendment).

54. *See* 42 U.S.C. § 2000e-2(j).

55. *Id.* ("Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.").

56. Robert J. Affeldt, *Title VII in the Federal Courts—Private or Public Law*, 14 VILL. L. REV. 664, 671 (1969).

57. *See* United Steelworkers v. Weber, 443 U.S. 193, 207 (1979).

58. Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1071 (1991).

59. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (making it easier under Federal Rule of Civil Procedure 56 to shift the burden to the non-moving party—the plaintiff in this case—to produce evidence in support of discrimination); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) (holding that the trial court must take all factual inferences in the non-movant's favor); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 597 (1986) (raising the standard for surviving a summary judgment motion to require unambiguous evidence of illegal activity); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 230–33 (1989) (discussing justification to shift burden).

antidiscrimination section of Title VII.[60] There is a key provision of the Civil Rights Act of 1991 that is relevant to this Article: § 703(m).[61]

Under § 703(m),[62] Title VII does not require a plaintiff to show that discrimination was the but-for, or determinative, cause of the adverse employment action for liability, but rather requires that the plaintiff show that one of the protected characteristics was a "motivating factor" for "any employment practice, even though other factors also motivated the practice."[63] Its language reads: "Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[64]

With § 703(m)'s passage, Congress "left it in the hands of a jury to determine whether an adverse employment action taken against [an employee] was in some discernible way motivated by that employee's race."[65] Now, if the plaintiff can convince a jury that an unlawful motivating factor was at least partially present in the decision-making process that led to the adverse employment decision, the employee will be entitled to judgment in his or her favor and to at least some relief.[66] By including § 703(m) in Title VII, Congress arguably took a different approach to protected statuses in the decision-making process, and provided an avenue for remediation by plaintiffs not found in Title VI.[67] To establish a prima facie case of employment discrimination, a plaintiff must have enough evidence to show that he was discriminated against by his employer for a prohibited reason.[68] If the employer is able to provide evidence of a legitimate, non-discriminatory motive, then the employee can challenge the employer's evidence by showing that the employer's arguments are just a pretext for discrimination.[69] Thus, under the language of § 703(m), if the employee can demonstrate that race was a motivating factor for the employment practice, even though other factors were present, the employee will prevail in the lawsuit.[70] Interestingly, virtually no affirmative action cases in an

60. *See generally* 42 U.S.C. § 2000e-2 (discussing discrimination as an unlawful practice).

61. *See id.* § 2000e-2(m).

62. *Id.* ("[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

63. *Id.*

64. *Id.*

65. Jeffrey A. Van Detta, *The Strange Career of Title VII's § 703(m): An Essay on the Unfulfilled Promise of the Civil Rights Act of 1991*, 89 ST. JOHN'S L. REV. 883, 888 (2015).

66. Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003).

67. *See id.* at 94 (noting the passage of the 1991 Civil Rights Act was in response to a series of Supreme Court decisions "interpreting the Civil Rights Act of 1866 and 1964").

68. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

69. *Id.* at 804–05.

70. *Desert Palace*, 539 U.S. at 101.

employment context have been brought under § 703(m), and thus there is no precedent for how race would be treated as a motivating factor.[71]

III. THE STUDENTS FOR FAIR ADMISSIONS DECISION

Between 2003 and 2016, the Supreme Court did not hear challenges to university affirmative action programs.[72] Then in 2022, the Court heard two related cases challenging affirmative action: on October 31, 2022, the Court heard oral argument in *Students for Fair Admissions v. President and Fellows of Harvard College*[73] and *Students for Fair Admissions v. University of North Carolina.*[74] In both cases, the petitioner was Students for Fair Admissions (SFFA), an organization founded and headed by Edward Blum, a conservative legal strategist[75] who has been behind many of the recent Supreme Court cases around race and democracy.[76] SFFA represented over 20,000 students and parents, many of whom were Asian/Pacific American, who "believe that racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional."[77] On June 29, 2023, the Court handed down a single ruling for both challenges.[78]

This Section will provide background on the universities' affirmative action programs before turning to the two most salient writings by the Court—the majority opinion authored by Chief Justice John Roberts and the concurrence of Justice Gorsuch.[79] I argue that the Chief Justice circumscribes

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71. As discussed in later sections, the absence of case law on this topic as it relates to DEI programs implies that § 703(m) is not inconsistent with EEOC guidance and other Title VII rulings that permit remedial DEI programs in workplaces. *See infra* Section III.B (discussing the aforementioned inconsistencies).

72. In 2016, the Court decided another Equal Protection challenge to university affirmative action, this time over the University of Texas's policy of accepting students in the top 10% of each high school's graduating class, regardless of race. Fisher v. Univ. of Tex., 579 U.S. 365, 395 (2016). This facially race-neutral law in practice "equalize[d] competition between students who live[d] in relatively affluent areas with superior schools and students in poorer areas . . . [tending] to benefit African-American and Hispanic students, who are often trapped in inferior public schools." *Id.* (internal citation omitted).

73. Students for Fair Admissions v. President and Fellows of Harvard Coll., 600 U.S. 181 (2022) (No. 20-1199).

74. Students for Fair Admissions v. Univ. of N.C., 142 S. Ct. 896 (2022) (No 21-707).

75. Anemona Hartocollis, *He Took on the Voting Rights Act and Won. Now He's Taking on Harvard*, N.Y. TIMES (Nov. 19, 2017), https://perma.cc/EPA4-NBGK.

76. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 956 (1996) (concerning racial gerrymandering that increased minority congressional representation); Nw. Austin Mun. Utility Dist. No. 1 v. Holder, 557 U.S. 193, 212 (2009) (regarding § 5 of the Voting Rights Act of 1965 and its requirement that proposed electoral-law changes in certain states be approved by the federal government); *Fisher*, 579 U.S. at 369 (challenging University of Texas's undergraduate admissions policy); Shelby Cnty. v. Holder, 570 U.S. 529, 529 (2013) (regarding the constitutionality of two provisions of the Voting Rights Act of 1965); Evenwel v. Abbott, 578 U.S. 54, 54 (2016) (asking whether the Equal Protection Clause of the Fourteenth Amendment requires that districting take into account the total population—not just the number of people eligible to vote).

77. STUDENTS FOR FAIR ADMISSIONS, https://perma.cc/3VCZ-YU7Y (last visited Feb. 26, 2025).

78. Students for Fair Admissions, 600 U.S. at 181.

79. *Id.*

his holding to the Equal Protection Clause, therefore avoiding any explicit carryover to Title VII.[80] Justice Gorsuch's concurrence further emphasizes that the majority's holding does not implicate Title VII workplace jurisprudence.[81] These points are explored in more detail in later sections of this Article.[82]

A. The Cases

In *Students for Fair Admissions v. University of North Carolina*, SFFA argued that the University of North Carolina (UNC) unfairly used race to give preference to underrepresented minority applicants to the detriment of white and Asian-American applicants.[83] SFFA argued, as a public institution, UNC is subject to both Title VI and the Equal Protection Clause explicitly as a state-run institution, thus clearly putting it under the purview of the Fourteenth Amendment.[84] Both Title VI and the Equal Protection Clause, the organization argued, should be read as invalidating affirmative action as UNC had adopted it.[85] As such, "*Grutter* is wrong in every way—historically, legally, factually, practically, and morally."[86]

Students for Fair Admissions v. Harvard presented somewhat different considerations.[87] Overall, the question remained whether Harvard's affirmative action program—and by extension other university affirmative action programs like it—were permissible.[88] As a private institution, Harvard is not subject to the Equal Protection Clause under the plain language of that constitutional provision.[89] However, it is clearly subject to Title VI as an organization that receives federal funds.[90] However, as demonstrated throughout this Article, the Court has read the two standards as parallel, thus blurring the private-public distinction.[91] That said, the basis on which the Court invalidated affirmative action in education could implicate the legal

80. *Id.* at 213.

81. *Id.* at 287.

82. *See infra* Section II.C (discussing the majority approach and Justice Gorsuch's concurrence).

83. *Students for Fair Admissions*, 600 U.S. at 298–99.

84. Brief Amicus Curiae of Pac. Legal Found., Ctr. for Equal Opportunity et al. in Support of Petitioner at 5, Students for Fair Admissions, Inc. v. Univ. of N.C., 142 S. Ct. 896 (2022) (No. 21-707) ("The University of North Carolina is a public institution that receives federal funds. But in making race a factor in its admissions decisions, the [u]niversity runs afoul of both Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. The protections of Title VI and the Equal Protection Clause are coextensive, and ought to forbid racial discrimination of any kind.")

85. *Id.*

86. Reply Brief for Petitioner at 7, *Univ. of N.C.*, 142 S. Ct. 896 (No. 21-707).

87. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 980 F.3d 157, 166–87 (1st Cir. 2020).

88. *Id.*

89. *See id.*

90. *Id.* at 185–87.

91. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 308 (2023) (Gorsuch, J., concurring).

reasoning for distinguishing the cases from the Title VII context.[92]

B. Harvard and University of North Carolina's Affirmative Action Programs

Harvard and UNC employed a selective admissions process to fill their student body each year.[93] Both schools have developed a unique process for deciding who would compose the undergraduate class.[94]

Harvard's process worked as follows. A first reader read each application and assigned it a score in "six categories: academic, extracurricular, athletic, school support, personal, and overall."[95] The point system ranged from "1" to "6" with "1" being the highest.[96] After this, Harvard gathered its admissions subcommittees—responsible for making recommendations to the full admissions committee—that consider applicants based on geography.[97] The subcommittees were permitted to and often did take an applicant's race into account when considering whether to push an applicant onto the next round.[98]

Next, a committee of forty members met to consider the regional subcommittees' recommendations.[99] Early in this meeting, the committee discussed the race breakdown of the culled pool of applicants that they were considering in order to ensure that Harvard did "not hav[e] a dramatic drop-off" in minority admissions.[100] When an applicant received a majority of the full committee's vote, he or she was accepted for tentative admission.[101] Once all applicants were voted on, the committee once again discussed the racial breakdown of the class.[102]

Finally, and perhaps most controversially, Harvard created what it called "lop," during which the list of students voted on in the committee was further "winnowed."[103] Those applicants placed on the "lop list" were vulnerable to not garnering admissions.[104] The lop list itself:

> [C]ontain[ed] only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. . . . Once the lop process [was] complete, Harvard's admitted class [was] set. In the Harvard

92. *Id.*
93. *Id.* at 190–97 (majority opinion).
94. *Id.*
95. *Id.* at 194.
96. *Id.*
97. *Id.* (internal citation omitted).
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 195.
102. *Id.*
103. *Id.*
104. *Id.*

> admissions process, 'race [was] a determinative tip for' a significant percentage of 'all admitted African American and Hispanic applicants.'[105]

UNC's admissions process considered race as a factor even earlier than did Harvard.[106] At its initial review stage, forty admissions officers reviewed the approximately 43,500 applications received.[107] In this first stage, "[r]eaders [were] required to consider '[r]ace and ethnicity . . . as one factor' in their review."[108] As with Harvard, other factors included academic performance, standardized tests, essay quality, and personal factors.[109] The record showed that "underrepresented minority students were 'more likely to score [highly] on their personal ratings than their white and Asian American peers,' but were more likely to be 'rated lower by UNC readers'" on the other factors.[110] After the initial readers' recommendations were finalized, they went to a committee, which ultimately approved or rejected the admission recommendation made by the first reader.[111] UNC instructed that "[i]n making those decisions, the [review] committee may consider the applicant's race."[112]

C. The Opinions

The *SFFA* majority and concurrences offered two different routes to prohibit affirmative action in higher education: one constitutional and the other statutory.[113] In all, the Court released six opinions that totaled 257 printed pages.[114] Chief Justice Roberts's Constitution-based majority opinion garnered five other signatories: Justices Gorsuch, Clarence Thomas, Samuel Alito, Brett Kavanaugh, and Amy Coney Barrett.[115] Justice Thomas, Justice Gorsuch, and Justice Kavanaugh all wrote concurring opinions, while Justices Ketanji Brown Jackson and Sonia Sotomayor wrote in dissent, with

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105. *Id.*

106. *Id.*

107. *Id.* (citing Students for Fair Admissions, Inc. v. Univ. of N.C., 567 F. Supp. 3d 580, 597 (M.D.N.C. 2021), *rev'd sub nom. Students for Fair Admissions*, 600 U.S. 181).

108. *Id.* (citing *Univ. v. N.C.*, 567 F. Supp. at 597) (alterations in original).

109. *Id.* at 195–96.

110. *Id.* at 196 (internal citation omitted).

111. *Id.*

112. *Id.* at 196–97 (internal citation omitted).

113. Generally, most Supreme Court experts believe that the Court will overrule *Grutter* and thus prohibit affirmative action programs in higher education. *See, e.g.*, Daniel Strain & Nicholas Goda, *Is Affirmative Action in College Admissions on Its Way Out? Expert Weighs In*, CU BOULDER TODAY (Nov. 10, 2022), https://perma.cc/5G2Q-BSLK; Nina Totenberg, *The Supreme Court Hears Affirmative Action Case*, NPR (Oct. 31, 2022), https://perma.cc/6YN7-YKTB (discussing how the Court could overrule *Grutter*).

114. *See generally Students for Fair Admissions*, 600 U.S. at 181 (explaining affirmative action's place in education).

115. *See id.* at 190.

Justice Elena Kagan signing on to both dissents.[116] Below, this Section focuses on two writings, the majority opinion and Justice Gorsuch's concurrence, as they are the most relevant to this Article's Title VII focus.

1. Majority Opinion: The Constitutional Approach That Does Not Implicate Title VII

The Court's majority opinion prohibits affirmative action in higher education using the Equal Protection Clause.[117] As the following Sections explain, by limiting its reasoning to the Fourteenth Amendment, the Court circumscribes its ruling to only affirmative action in the education context and not in the employment context.[118] Further, the majority opinion finds that prohibiting educational admissions-based affirmative action under the Fourteenth Amendment encompasses private as well as public institutions.[119] It does so by citing *Gratz v. Bollinger*: "We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI."[120] Chief Justice Roberts notes that "[a]lthough Justice Gorsuch questions that proposition, no party asks us to reconsider it. We accordingly evaluate Harvard's admissions program under the standards of the Equal Protection Clause itself."[121]

After a quick overview of Harvard and UNC's admissions systems and the Court's jurisdiction, the opinion turns to a sweeping history of the Equal Protection Clause at a high level that signals a reset of its previous interpretations.[122] It goes through the Fourteenth Amendment's ratification,[123] finding that its legislative history demanded that the Constitution "should not permit any distinctions of law based on race or color."[124] The majority finds that the Court's own precedent "embrace[s] the transcendent aims of the Equal Protection Clause," [125] citing *Brown v. Board*

116. *See id.* at 231–87 (Thomas, J., concurring); *id.* at 287–310 (Gorsuch, J., concurring); *id.* at 311–17 (Kavanaugh, J., concurring); *id.* at 318–84 (Sotomayor, J., dissenting); *id.* at 384–411 (Jackson, J., dissenting).

117. *Id.* at 204.

118. *See infra* Sections II.C.1–2 (discussing the institutional limitation of the Court's ruling to an educational context).

119. *Students for Fair Admissions*, 600 U.S. at 253–54.

120. Gratz v. Bollinger, 539 U. S. 244, 276 n.23 (2003).

121. *Students for Fair Admissions*, 600 U.S. at 198 n.2.

122. *Id.* at 200.

123. *Id.*

124. *Id.* at 202 (citing Supp. Brief for United States at 41, Brown v. Bd. of Educ., 347 U.S. 483 (1954), 1953 WL 78291, at 41).

125. *Id.*

of Education,[126] *Gayle v. Browder*,[127] and *Mayor & City Council of Baltimore v. Dawson*.[128] These cases "vindicate[d] the Constitution's pledge of racial equality."[129]

The opinion then explores the case law of affirmative action from *Bakke*[130]—which permitted an affirmative action program that "flatly contravened a core 'principle imbedded in the constitutional and moral understanding of the times': the prohibition against 'racial discrimination'"[131]—through the more recent cases, including *Grutter* and *Fisher*.[132] From these precedents, the Chief Justice and the opinion's signatories found three basic principles: "[1] University programs must comply with strict scrutiny, [2] they may never use race as a stereotype or negative, and—at some point—[3] they must end."[133] Given that, as the Court found, the respondents' admissions systems fail on all three counts, they must be invalidated under the Fourteenth Amendment.[134]

The Court expands upon each of the three principles, explaining how UNC and Harvard's affirmative action programs violate the standards set forth by precedent.[135] First, under a strict scrutiny assessment, an affirmative action program must be narrowly tailored in order to satisfy a compelling interest.[136] The majority finds that the goals of the schools[137] in their affirmative action programs are "not sufficiently coherent for purposes of strict scrutiny."[138] How, for example, can a court determine if the "future leaders" that Harvard said affirmative action helped have been adequately trained?[139] Even more, the Court found that the schools' admissions programs did not connect their goals of the program to the means that they employed.[140]

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126. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (requiring schools to admit students on a racially nondiscriminatory basis).

127. *Gayle v. Browder*, 352 U.S. 903 (1956) (summarily affirming a decision invalidating state and local laws that required segregation in busing).

128. *Mayor & City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955) (striking down laws that permitted racial segregation in public beaches and bathhouses).

129. *Students for Fair Admissions*, 600 U.S. at 205.

130. *Id*. at 208–10 (internal citation omitted).

131. *Id.* at 210.

132. *Id.* at 211–13 (internal citation omitted).

133. *Id.* at 213.

134. *Id.* at 214.

135. *Id.*

136. *Id.*

137. *Id.* ("Harvard identifies the following educational benefits that it is pursuing: (1) 'training future leaders in the public and private sectors'; (2) preparing graduates to 'adapt to an increasingly pluralistic society'; (3) 'better educating its students through diversity'; and (4) 'producing new knowledge stemming from diverse outlooks.' UNC points to similar benefits, namely, '(1) promoting the robust exchange of ideas; (2) broadening and refining understanding; (3) fostering innovation and problem-solving; (4) preparing engaged and productive citizens and leaders; [and] (5) enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes.'").

138. *Id.* at 186.

139. *See id.*

140. *Id.* at 215.

According to the Court, "[i]t is far from evident . . . how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue."[141]

Next, the Court found that the race-based admissions systems unconstitutionally used race as a negative and as a stereotype.[142] The policies of UNC and Harvard "overall result[ed] in fewer Asian Americans and white students being admitted."[143] And, further, "by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, [the schools'] programs tolerate[d] the very thing that *Grutter* foreswore: stereotyping."[144] By assuming that a black student could bring a perspective that a white student could not, the schools were assuming that racial identity alone revealed something about an individual's character or experience.[145] Race itself, however, cannot say something "about who you are."[146] As the Court said, "[t]he entire point of the Equal Protection Clause is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well."[147]

Finally, the Court found that, in violation of *Grutter*, the admissions processes of the two schools lacked a "'logical end point.'"[148] The schools gave the Court no numerical benchmark or precise number or percentage at which the race-based admissions programs ended.[149] However, the importance of a logical endpoint was "not just a matter of repetition."[150] "It was the reason the Court [in *Grutter*] was willing to dispense temporarily with the Constitution's unambiguous guarantee of equal protection."[151] As such, the entire history of the Court's affirmative action jurisprudence has been a deviation from the promise of the Equal Protection Clause because it was understood that it had a remedial purpose and an endpoint—2028, according to Justice O'Connor's *Grutter* opinion.[152] All parties involved, according to the Court, seemed to agree that there was no end in sight.[153] This is true especially given that the system is not sufficient to continue dispensing

141. *Id.* at 216.
142. *Id.* at 218.
143. *Id.*
144. *Id.* at 220.
145. *Id.*
146. *Id.*
147. *Id.* (emphasis in original).
148. *Id.* (citing Grutter v. Bollinger, 539 U.S. 306, 326 (2003)).
149. *Id.*
150. *Id.* at 212.
151. *Id.*
152. *Grutter*, 539 U.S. at 343.
153. *Students for Fair Admissions*, 600 U.S. at 225 ("Here, however, Harvard concedes that its race-based admissions program has no end point. . . . And it acknowledges that the way it thinks about the use of race in its admissions process 'is the same now as it was' nearly 50 years ago.") (internal citation omitted).

with the Constitution's Equal Protection guarantee.[154]

The Court noted, though perhaps less relevant in the workplace context, that "nothing in [its] opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."[155] That said, a student must still be treated based on the experience of his race, and not on the basis of race itself.[156]

2. Justice Gorsuch's Concurrence: The Statutory Approach That Does Implicate Title VII

In at least one amicus brief, the America First Legal Foundation urged the Supreme Court to rule that Title VI prohibits any consideration of race as a matter of statutory construction.[157] This argument espouses the view that Title VI in its clear language disallows considerations of protected status.[158] Thus, affirmative action, by considering protected statuses, should be prohibited textually.[159] During oral argument, Justice Gorsuch explored this prospect that the Court could decide the two cases without weighing in on any constitutional issues.[160] Although the Court previously held that the legal test under Title VI coincides with the test under the Fourteenth Amendment, Justice Gorsuch noted that the language of the two provisions is different.[161] And Title VI is "plain and clear" in its text in barring discrimination based on race.[162]

Ultimately, Justice Gorsuch, along with his cosigner, Justice Thomas, encouraged the Court to take this statutory approach.[163] He argued that the Equal Protection Clause operates on states and does not regulate the conduct of private parties, such as employers in private workplaces.[164] As such, "Title VI reaches entities and organizations that the Equal Protection Clause does not."[165] He chastised the majority for only course correcting in its reading of the Equal Protection Clause.[166] Instead, he called on courts to course correct

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154. *Id.*

155. *Id.* at 230.

156. *Id.* at 231.

157. Brief for Am. First Legal as Amicus Curiae Supporting Neither Party, *Students for Fair Admissions*, 600 U.S. 181 (No. 20-1199).

158. *Id.*

159. *Id.*

160. *See* Transcript of Oral Argument at 163, Students for Fair Admissions v. Univ. of N.C., 142 S. Ct. 896 (2022) (No. 21-707) (consolidated after oral argument with *Students for Fair Admissions v. President & Fellows of Harvard College*).

161. *Id.*

162. *Id.*

163. *Students for Fair Admissions*, 600 U.S. at 308 (Gorsuch, J., concurring).

164. *Id.*

165. *Id.*

166. *Id.* at 310.

in their treatment of Title VI.[167] "For years, [the courts] have read a solo opinion in *Bakke* like a statute while reading Title VI as a mere suggestion."[168] "A proper respect for the law demands the opposite."[169] "Title VI bears independent force beyond the Equal Protection Clause."[170]

In focusing on his statutory interpretation of Title VI, Justice Gorsuch "emphasize[d] that Title VI of the Civil Rights Act of 1964"[171] does not tolerate affirmative action.[172] As he argued, "both schools routinely discriminate on the basis of race when choosing new students—exactly what [Title VI] forbids."[173] He went through a textualist reading of Title VI, first defining "discriminate" and then defining "on the ground of."[174] Using a contemporaneous dictionary, Justice Gorsuch defined "discriminate" as "to trea[t] that individual worse than others who are similarly situated."[175] However, under the Court's jurisprudence, Title VI "prohibits only intentional discrimination."[176] And, he defined "on the ground of" to mean "because of", which, in the judicial world, invokes but-for causation.[177] Therefore, Justice Gorsuch concluded, "Title IV prohibits a recipient of federal funds from intentionally treating one person worse than another similarly situated person because of his race, color, or national origin."[178]

Justice Gorsuch then invoked Title VII, arguing that the "Court has long recognized, too, that when Congress uses the same terms in the same statute, we should presume they 'have the same meaning.'"[179] As such, Justice Gorsuch argued, "'Both Title VI and Title VII' codify a categorical rule of 'individual equality, without regard to race.'"[180] Thus, Justice Gorsuch's concurrence implied that, following the Court's jurisprudence—including his own writing in *Bostock*—[181] under Title VII, it is similarly "never permissible 'to say 'yes' to one person . . . but to say 'no' to another person' even in part 'because of the color of his skin.'"[182]

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167. *Id.*
168. *Id.*
169. *Id.*
170. *Id*.
171. *Id.* at 287.
172. *Id.* at 288.
173. *Id.*
174. *Id.* at 288–89.
175. *Id.* at 288 (quoting Bostock v. Clayton Cnty., Ga., 590 U.S. 644, 657 (2020)).
176. *Id.* (quoting Alexander v. Sandoval, 532 U.S. 275, 280 (2001)).
177. *Id.* at 289 (quoting WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 640 (College ed. 1960)).
178. *Id.* at 288.
179. *Id.* (quoting IBP, Inc. v. Alvarez, 546 U.S. 21, 24 (2005)).
180. *Id.* (quoting Regents of Univ. of Cal. v. Bakke, 428 U.S. 265, 416 n.19 (1978)).
181. *Id.* at 302 ("Do the dissenters think *Bostock* wrongly decided? Or do they read the same words in neighboring provisions of the same statute—enacted at the same time by the same Congress—to mean different things?").
182. *Id.* at 310 (quoting *Bakke*, 428 U.S. at 418).

IV. PRE-STUDENTS FOR FAIR ADMISSIONS PRECEDENT

After the passage of the Civil Rights Act of 1964, but before the *SFFA* cases, the Supreme Court had been called upon to determine whether considering race and other forms of diversity in applicants—both at the higher education level and the employment level—violated the language and spirit of the Act.[183] In the context of higher education, the Court—as it did in the *SFFA* majority—also considered not only Title VI but also whether affirmative action is permissible under the Constitution's Equal Protection Clause.[184] The Equal Protection Clause provides that:

> 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 any person within its jurisdiction the equal protection of the laws.[185]

This Section will discuss Supreme Court and lower court precedent in the Title VI and Title VII context prior to *SFFA* to further elucidate the differences between the two statutes.[186] Ultimately, through the case law, this Section shows the distinction in precedent between Title VII and Title VI and that the precedential connection between Title VI and the Equal Protection Clause makes it unlikely that the Court's majority opinion in *SFFA* impacts Title VII jurisprudence.[187]

A. Affirmative Action Cases Under Title VI

Before *SFFA*, Supreme Court precedent established that universities could use a protected characteristic, such as race, as a factor in the admissions process if the use passes the "strict scrutiny" standard, meaning the institution was required to have a "compelling governmental interest" and the process was "narrowly tailored" to meet this interest.[188] By permitting a diversity-based interest in Title VI cases, the Supreme Court differentiated Title VI claims from Title VII, which, as I will show, does not allow diversity as a justification for workplace affirmative action.[189]

Regents of the University of California v. Bakke[190] was the most well-known Supreme Court case on affirmative action in university

183. *See infra* Section III.A (detailing affirmative action cases before *SFFA*).

184. *See infra* Section III.A (discussing how the Court has analyzed prior affirmative action cases).

185. U.S. CONST. amend. XIV. Thus, the Equal Protection Clause requires each State to provide equal protection under the law to persons within its jurisdiction. *See id.*

186. *See infra* Section III.A (discussing other affirmative action cases before *SFFA*).

187. *See infra* Section III.A (detailing affirmative action cases under Title VI).

188. Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

189. *Id.* at 344.

190. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

admissions before *SFFA*.[191] The plaintiff, Allan Bakke, was a white male who applied to UC Davis Medical School twice, once in 1973 and again in 1974.[192] He was rejected for admission both times.[193] He received interviews in both instances and was, by all accounts, a strong candidate.[194] "In both years, applicants were admitted under [a] special program with grade point averages, MCAT scores, and benchmark scores significantly lower than Bakke's."[195] The special admissions program at UC Davis operated with a separate admissions committee.[196] Candidates were asked whether they were economically and/or educationally disadvantaged or whether they were a member of a minority group.[197] Those who were eligible to be considered by the special committee did not have to meet the 2.5 GPA cutoff that the regular applicants were required to satisfy.[198] Ultimately, the special committee presented its top choices to the general admissions committee.[199] The number of spots reserved for applicants through the special committee was sixteen out of the 100 total spots.[200] *Bakke* challenged the public medical school's use of the special committee under Title VI and the Equal Protection Clause of the Fourteenth Amendment.[201] The Supreme Court ultimately held that universities are allowed to consider race as a factor, but a quota system is impermissible.[202]

Perhaps most relevant to this Article, the Supreme Court found that a diversity rationale was a compelling government interest and that certain means of achieving that interest could be upheld as narrowly tailored under the Equal Protection Clause and Title VI.[203] Justice Lewis F. Powell's decisive vote in *Bakke* in large part relied on Harvard University's brief extolling the importance of diversity in the higher education system.[204] In its brief, Harvard defended a diversity rationale for affirmative action:

> In practice, this new definition of diversity [from geographic to racial] has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants

191. Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 208 (2023).
192. *Bakke*, 438 U.S. at 266.
193. *Id.*
194. *Id.* at 276.
195. *Id.* at 277.
196. *Id.*
197. *Id.* at 274. Minority group members included "Blacks," "Chicanos," "Asians," and "American Indians." *Id.*
198. *Id.* at 275.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at 318–20.
203. *Id.* at 320.
204. Adam Chilton et al., *Assessing Affirmative Action's Diversity Rationale*, 122 COLUM. L. REV. 331, 342 (2022).

> who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a Black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.[205]

The attainment of a diverse student body, the majority held in *Bakke*, was enough to justify certain forms of affirmative action that were narrowly tailored to achieve that goal.[206]

After the *Bakke* decision in 1978, the Supreme Court did not hear another challenge to race-based affirmative action programs in school admissions until 2003.[207] That year, the Supreme Court heard and ruled on two cases—*Gratz v. Bollinger* and *Grutter v. Bollinger*—that laid out the blueprint for race-conscious admission that was widely used by universities until July 2023.[208] Both suits were brought by white applicants to the University of Michigan—like UC Davis, a public university—who were denied admission.[209] In *Gratz*, Jennifer Gratz and Patrick Hamacher sued over a points-based admissions system used by the university.[210] At the time, the University of Michigan granted admission to any applicant who scored more than 100 points on a 150-point scale.[211] Members of underrepresented minorities were each granted twenty points, and as a result, "virtually every" qualified applicant from these minority groups was admitted.[212] In *Grutter*, the University of Michigan Law School, demonstrating its commitment to diversity, focused its admissions both on the academic ability of applicants but also on a "flexible assessment of applicants' talents, experiences, and potential 'to contribute to the learning of those around them.'"[213] Diversity was considered a "plus" in the law school's holistic approach.[214]

The Court ultimately found the point system in *Gratz* unconstitutional under the Equal Protection Clause and a violation of Title VI.[215] Race had not

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205. *Bakke*, 438 U.S. at 322–23 (app.). Justice Powell quoted an even longer excerpt from the amicus brief in his opinion; it has been edited here for length.

206. *Id.* at 320.

207. *See generally* Gratz v. Bollinger, 539 U.S. 244 (2003) (deciding on the University of Michigan's use of racial preferences in undergraduate admissions); Grutter v. Bollinger, 539 U.S. 306 (2003) (considering the University of Michigan Law School's use of race as a factor in student admissions).

208. *See Gratz*, 539 U.S. at 270–71; *Grutter*, 539 U.S. at 326–27.

209. *See Gratz*, 539 U.S. at 251; *Grutter*, 539 U.S. at 312–16.

210. *Gratz*, 539 U.S. at 250.

211. *Id.* at 255.

212. *Id.* at 254.

213. *Grutter*, 539 U.S. at 315.

214. *Id.*

215. *Gratz*, 539 U.S. at 275–76.

been considered on an individualized basis, nor was the consideration of race narrowly tailored to achieve the University of Michigan's compelling interest in diversity.[216]

In *Grutter*, on the other hand, the Court found that the Equal Protection Clause and Title VI[217] do not prohibit the narrowly tailored use of race in admissions decisions to further the school's compelling interest in obtaining educational benefits that flow from diversity.[218] A school's interest in admitting a "critical mass"[219] of underrepresented minority students does not count as a quota.[220] In what is now perhaps the most famous language of *Grutter*, the Court explicitly highlighted that race-conscious programs should not exist permanently.[221] Writing for the majority, Justice Sandra Day O'Connor expressed the expectation that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[222] This dicta opened the door for the Supreme Court to take up the issue of affirmative action in schools once more, though the 2022 cases are a few years shy of the twenty-five-year prediction, and progress has arguably not met Justice O'Connor's timeline.[223]

In sum, though permissible affirmative action within the higher education context was previously limited to only certain activities, such as giving a "plus" to diverse applicants in a holistic admissions approach, the Court historically permitted diversity to be a sufficient government interest in the education context.[224] Again, as demonstrated in the following sections, diversity is not a permissible rationale in Title VII workplace DEI jurisprudence.[225]

Perhaps even more importantly, post-*SFFA*, the Court's precedent read the Equal Protection Clause standard and Title VI's standard to be identical in the affirmative action context.[226] Later, this Article will show that Title VII has never been read coterminously with the Equal Protection Clause.[227] In *Bakke*, for example, Justice Powell held that "Title VI . . . proscribe[s] only

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216. *Id.*

217. *Grutter*, 539 U.S. at 341. Here, the Court found that as Title VI proscribes only those racial classifications that would violate the Equal Protection Clause, the petitioner's statutory claims must fail when their Equal Protection Clause claims fail. *Id.*

218. *Id.* at 343.

219. *Id.* at 340.

220. *See id.*

221. *Id.* at 343.

222. *Id.*

223. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 213 (2023).

224. *See, e.g.*, *Grutter*, 539 U.S. at 340 (holding that diversity can be a compelling government interest in the education context).

225. *See* discussion *infra* Section III.B (describing diversity in the context of Title VII workplace DEI jurisprudence).

226. *See* Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 389–91 (1982).

227. *See* discussion *infra* Section III.B.1 (discussing the relationship between Title VII and the Equal Protection Clause).

those racial classifications that would violate the Equal Protection Clause,"[228] while in *Grutter*, the Court held that "the prohibition against discrimination in [Title VI] is co-extensive with the Equal Protection Clause."[229] As demonstrated below, the Court has not made a similar connection between Title VII and the Equal Protection Clause, which further evidences this Article's assertion that the Court's 2023 holding on Title VI affirmative action should not directly impact the practice in the employment context.[230]

B. Court Precedent on Title VII DEI Initiatives

The Supreme Court and lower courts, both before and after the Civil Rights Act of 1991, have adopted a three-part test for DEI plans to diversify the workplace in the employment context: a valid plan (1) must address a manifest imbalance in segregated job categories where minorities have been traditionally underrepresented; (2) must not unnecessarily trammel the rights of nonminority workers; and it (3) must be temporary because a plan loses its justification once it has eliminated a manifest imbalance.[231] Again, *SFFA*'s majority opinion, circumscribed to the Equal Protection Clause and diversity-based affirmative action, did not alter this backward-looking and bounded three-part test in Title VII.[232]

1. The Supreme Court's Title VII Affirmative Action Jurisprudence

In the first Supreme Court case squarely addressing affirmative action in hiring under Title VII, the Court held that Title VII's prohibition under §§ 703(a) and (d) of racial discrimination does not disallow all private, voluntary, race-conscious affirmative action plans.[233] The 1974 case, *United States Steelworkers v. Weber*, involved the United Steelworkers of America and Kaiser Aluminum and Chemical Corporation.[234] The two entered into a collective-bargaining agreement in which 50% of employee openings were reserved for black employees.[235] The respondents argued that Congress

228. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 287 (1978) (majority opinion).

229. *Grutter*, 539 U.S. at 343 (citing *Gen. Bldg. Contractors Ass'n*, 458 U. S. at 389–91); *see also* William Baude & Daniel Epps, *Relentless Personal Attacks*, DIVIDED ARGUMENT (Nov. 14, 2022), https://www.dividedargument.com/episodes/relentless-personal-attacks ("And then in Bakke, the first affirmative action cases, the Supreme Court said, 'Well, it's all the same,' the Title IV and Equal Protection Clause.").

230. *See* discussion *supra* Section II.B (discussing the relationship between Title VI and the Equal Protection Clause); *see also* discussion *infra* Section III.B.1 (discussing the lack of a similar relationship between Title VII and the Equal Protection Clause).

231. *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 635–40 (utilizing the three-part test).

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

233. United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979).

234. *Id.* at 197.

235. *Id.*

intended Title VII to prohibit all race-conscious affirmative action plans, even those benefiting historically underrepresented groups.[236] Their argument, the Court said, "rest[ed] upon a literal interpretation of §§ 703(a) and (d) of the Act."[237] Those sections prohibit "discrimina[tion] . . . because of . . . race" in hiring and in the selection of apprentices for training programs.[238] As such, the respondents argued, Kaiser's agreement with the United States Steelworkers (USWA) union violated the language of Title VII by discriminating against white employees solely because they are white.[239] The respondent did not introduce an Equal Protection argument, as neither Kaiser nor USWA were state actors.[240]

This argument did not convince the Court, though it admitted that it was "not without force."[241] The Court ultimately found that the Kaiser-USWA plan was an affirmative action plan voluntarily adopted by parties to eliminate what it called "traditional patterns of racial segregation."[242] As such, though the plan violated the literal text of Title VII, it did not violate the spirit of the law.[243] After examining the legislative history and historical context of Title VII, the Court concluded that "an interpretation of the sections that forbade all race-conscious affirmative action would 'bring about an end completely at variance with the purpose of the statute and must be rejected."[244] Though it was undeniable that the affirmative action plan in *Weber* did involve racial discrimination, the Court ultimately found that this kind of racial discrimination was not prohibited by Title VII.[245]

Since *Weber*, the Supreme Court has only considered one other affirmative action plan in employment under Title VII.[246] Eight years after *Weber*, the Court heard *Johnson v. Transportation Agency*.[247] As in *Weber*, this case concerned a remedial affirmative action plan.[248] The defendant in *Johnson*, a county transportation agency, adopted a voluntary affirmative action plan providing that, in making promotions to positions within traditionally segregated job classifications, the race or sex of the applicant was a factor to be considered.[249] Through its own research, the agency had found that while women made up 36.4% of the area labor market, they

236. *Id.*
237. *Id.*
238. 42 U.S.C. § 2000e-2(a), (d).
239. *Weber*, 443 U.S. at 199–200.
240. *Id.* at 201.
241. *Id.*
242. *Id.*
243. *See id.*
244. *Id.* at 202 (internal citation omitted).
245. *Id.*
246. *See* Johnson v. Transp. Agency, 400 U.S. 616, 619 (1987).
247. *Id.*
248. *Id.*
249. *Id.*

constituted only 22.4% of its employees.[250] In addition, women held fewer than 10% of such job categories as officials, administrators, professionals and technicians, and as to the position involved in this case—skilled craft workers—none of the 238 jobs was held by a woman.[251] The agency stated that its objective was "a statistically measurable yearly improvement in hiring, training and promotion of minorities and women throughout the agency in all major job classifications where they are underrepresented."[252] Over the longer term, it hoped "to attain a work force whose composition reflected the proportion of minorities and women in the area labor force."[253]

The majority in *Johnson* affirmed the employer's practice, finding that the plan was addressed to prefer groups that were "significantly underrepresented" in the area of employment.[254] I will briefly note, though it holds no precedential weight, that Justice John Paul Stevens expressed an interest in expanding permissible affirmative action programs.[255] In his concurring opinion, Justice Stevens expressed that Title VII should allow employers the "managerial discretion" to adopt voluntary affirmative action programs "that might seem sensible from a business or a social point of view."[256] He suggested that employers might have permissible purposes for "forward-looking" affirmative action that would "improv[e] their services to [B]lack constituencies, avert[] racial tension over the allocation of jobs in a community, or increas[e] the diversity of a work force."[257] As such, Justice Stevens advocated for making Title VII jurisprudence resemble Title VI jurisprudence, in which the Court would permit a diversity rationale for affirmative action in the employment context as well.[258] However, Justice Stevens did not convince his colleagues on the Court, and thus Title VII affirmative action remains more circumscribed because of the requirement that affirmative action programs be proven to be a justifiable remedy.[259]

2. Lower Courts After Weber*,* Johnson*, and the Civil Rights Act of 1991*

Lower courts have, for the most part, faithfully executed the Supreme Court's three-part test[260] both before and after the passage of the Civil Rights

250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* at 621–22.
254. *Id.* at 620–21.
255. *Id.* at 645–46 (Stevens, J., concurring).
256. *Id.* at 645.
257. *Id.* at 647 (quoting Kathleen M. Sullivan, Comment, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 96 (1986)).
258. *Id.* at 643–44.
259. *Id.* at 641–42 (majority opinion).
260. United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979) (finding that the plan in question was not prohibited by Title VII). Again, a valid plan (1) must address a manifest imbalance in segregated job categories where minorities have been traditionally underrepresented, (2) must not unnecessarily

Act of 1991, demonstrating that the amendments to the text, particularly § 703(m)'s motivating factor test, have little bearing on courts assessments of affirmative action programs thus far.[261]

The Third Circuit Court of Appeals decided two major cases on Title VII and affirmative action after 1991.[262] The first case, *Taxman v. Board of Education*[263] decided in 1996, involved the Piscataway Board of Education.[264] The Board made race a factor in selecting which of two equally qualified employees to lay off.[265] The superintendent of the school district recommended to the Board an affirmative action plan in order to determine which teacher to retain and which to let go.[266] He ultimately argued that "because he believed Ms. Williams [a black teacher] and Ms. Taxman were tied in seniority, were equally qualified, and because Ms. Williams was the only Black teacher in the Business Education Department," the Board should retain Williams.[267] The Board followed that recommendation, believing that "by retaining Mrs. Williams[,] it was sending a very clear message that [the Board felt] that [its] staff should be culturally diverse."[268] Ultimately, the Third Circuit, hearing this case en banc, held that because the door is not open to non-remedial justifications, the Board violated Title VII's antidiscrimination standard.[269]

The Third Circuit evaluated diversity-based affirmative action under the second prong of *Weber*, which ascertained whether the affirmative action program "unnecessarily trammels" the interests of non-minorities.[270] The court noted that, unlike remedial affirmative action, diversity-based affirmative action is not connected to a limited goal and thus violates Title VII's purpose.[271] Such a policy had the strong possibility of being "an established fixture of unlimited duration."[272] The court concluded that, even if diversity were a permissible discriminatory purpose under Title VII, the diversity-based affirmative action program in *Taxman* unnecessarily trammeled the interests of others.[273]

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trammel the rights of nonminority workers, and (3) must be temporary because a plan loses its justification once it has eliminated a manifest imbalance. *Id.* at 208–09.

261. *See* Detta, *supra* note 65.

262. *See* Taxman v. Bd. of Educ., 91 F.3d 1547 (3d Cir. 1996); Shurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486 (3d Cir. 1999).

263. *Taxman*, 91 F.3d 1547.

264. *Id.* at 1550.

265. *Id.* at 1549.

266. *Id.* at 1551.

267. *Id.*

268. *Id.* at 1552.

269. *Id.* at 1558.

270. *Id.* at 1564.

271. *Id.* at 1556.

272. *Id.* at 1564.

273. *Id.* at 1565.

Interestingly, two of the court's four dissenters argued that education presents "unique concerns," and thus, the court should align this Title VII case more closely to the Court's holding in *Bakke* and other Title VI cases.[274] In dissent, Judge Anthony Scirica stated that he did "not believe Title VII prevents a school district, in the exercise of its professional judgment, from preferring one equally qualified teacher over another for a valid educational purpose."[275] Ultimately, this interpretation did not persuade a majority of the court.[276] Even so, Judge Scirica's dissent highlights the clear divergence between Title VI and Title VII's affirmative action standards.[277]

Three years later, the Third Circuit heard another Title VII affirmative action case, again finding the employer's plan deficient under a remedial standard of Title VII.[278] In *Schurr v. Resorts International Hotel*,[279] a New Jersey statute, the Casino Control Act, required every casino licensee to take affirmative steps "to ensure that women, minorities[,] and persons with disabilities are recruited and employed at all levels of the operation's work force and treated during employment without regard to their gender, minority status, or disability."[280] The New Jersey guidelines set a goal of 25% minorities as technicians at casinos.[281] Believing he was following guidelines, the casino's Director of Show Operations and Stage Manager hired a black male, Boykin, instead of the plaintiff, Schurr, for a technician position.[282] He did so despite believing that each of the applicants was "equally qualified."[283]

Relying again on *Weber*, the court found that "the affirmative action plan offered to rebut Schurr's prima facie case lacks the remedial purpose required by controlling precedent."[284] The resort's affirmative action plan and the New Jersey regulations "were not based on any finding of historical or then-current discrimination in the casino industry or in the technician job category; the plan was not put in place as a result of any manifest imbalance or in response to a finding that any relevant job category was or ever had been affected by segregation."[285]

In a case with somewhat similar reasoning to *Taxman*, the Eleventh Circuit found that an employer's justification for hiring a minority applicant

274. *Id.* at 1576 (Scirica, J., dissenting).
275. *Id.*
276. *Id.* at 1567 (majority opinion).
277. *Id.* at 1576–77 (Scirica, J., dissenting).
278. Schurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486 (3d. Cir. 1999).
279. *Id.*
280. *Id.* at 488–89 (citing N.J.A.C. 19:53-4.3(a)).
281. *Id.* at 490.
282. *Id.*
283. *Id.*
284. *Id.* at 497.
285. *Id.* at 497–98.

could not be based on the race of the "client."[286] In *Ferrill v. Parker Group*,[287] the employer, TPG, tried to employ a legitimate business necessity defense in order to justify its affirmative action hiring.[288] TPG hired Ferrill, a black woman, in order to race-match "get-out-the-vote calls."[289] TPG presumed that Ferrill's assignment to call black voters was an effective way to reach such voters.[290] After the election, Ferrill was immediately laid off.[291] The relevant court holding is twofold: (1) the bona fide occupational qualification and business necessity defenses are not available to a defendant who is accused of intentional discrimination on the basis of race,[292] and (2) Title VII's affirmative action exception cannot be used for "race–matched" practices.[293]

In a more recent case, the Fifth Circuit took up the question of affirmative action in hiring in *Sharkey v. Dixie Electric Membership Corp*.[294] In that case, the employer, DEMCO, adopted an affirmative action plan and various tests, including a "Test of Adult Basic Education" and basic "Aptitude Test Batteries."[295] "[O]nly candidates who receive[d] 'high' or 'medium' scores [were] considered for interviews based upon their qualifications" with no consideration of race.[296] The interview process was the first time that the employer learned of the applicant's race.[297] Sharkey alleged that he did not get the job because the "position was held by a black person, and was held open for a black person simply because of race."[298]

The Fifth Circuit found that this was not true.[299] Rather, DEMCO presented evidence that "its application and hiring process were nondiscriminatory."[300] DEMCO considered white and minority applicants and ultimately hired a black applicant because of his experience and test scores.[301] Though DEMCO did have a goal of hiring two black employees by the year's end, such a goal "did not necessarily mean that DEMCO would hire two African-Americans to fill vacant positions," rather, Human Resources promised to "hire the two most qualified people that [they could]

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286. Ferrill v. Parker Grp., Inc., 168 F.3d 468, 477 (11th Cir. 1999).
287. *Id.* at 471–73.
288. *Id.*
289. *Id.* at 471.
290. *Id.* at 474.
291. *Id.* at 471.
292. *Id.* at 474 (citing Dothard v. Rawlinson, 433 U.S. 321 (1977); Miller v. Tex. State Bd. of Barber Exam'rs, 615 F.2d 650, 652 (5th Cir. 1980); Swint v. Pullman-Standard, 624 F.2d 525, 535 (5th Cir. 1980)).
293. *Id.* at 471.
294. Sharkey v. Dixie Elec. Membership Corp., 262 F. App'x. 598, 598–602 (5th Cir. 2008).
295. *Id.* at 599.
296. *Id.*
297. *See id.*
298. *Id.* at 605 (quoting Brief for Appellant at 19, *Sharkey*, 262 F. App'x. 598 (No. 06–31199)).
299. *Id.* at 607–08.
300. *Id.* at 606–08.
301. *Id.* at 606.

find."[302] As such, the appellate court found that year-to-year hiring goals was not a Title VII violation, as it was not an absolute bar to the advancement of white people or unnecessarily trammeling white applicants' interests.[303] DEMCO had demonstrated that the number of minority workers that it employed was significantly fewer than the percentage of available minority applicants with the requisite skills in the recruitment area.[304]

Thus, as the case law indicates, lower courts have studiously applied Supreme Court precedent when assessing workplace affirmative action programs.[305] The introduction of § 703(m)'s motivating factor test in 1991 has not altered jurisprudence on affirmative action in the Title VII context.[306] Since § 703(m) cases are virtually non-existent in the affirmative action context, considering race as a remedial interest appears to not be a prohibited "motivating factor" under § 703(m).[307] And the case law relating to affirmative action under Title VII is arguably more circumscribed and tailored than that under Title VI.[308] Employers, for example, cannot show preference for one diverse applicant over another non-diverse applicant under a diversity rationale.[309] Rather, the employer must establish that remedial steps are justified.[310] In addition, as previously noted, the case law does not connect Title VII and the Equal Protection Clause as it does for Title VI, nor does it establish parallel standards between the two as it does in the Title VI context.[311]

3. Title VII Administrative Guidance

Justice Harry Blackmun's concurrence in *Weber* in 1979 highlighted an acute concern among members of the Court that the interest in encouraging employers to adopt voluntary affirmative action plans may lead to uncertainty among private employers for what exactly is a permissible practice and what leaves them open to litigation for reverse discrimination claims.[312] The EEOC responded to this uncertainty by adopting guidelines later in 1979 to provide employers with clarity as to what form of affirmative action is appropriate

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302. *Id.*

303. *Id.* at 606–07.

304. *Id.* at 600.

305. *See supra* Section III.B.1 (discussing the Supreme Court's affirmative action jurisprudence and precedent).

306. *See supra* Section III.B.2 (covering the Civil Rights Act of 1991 and its implications).

307. *See supra* Section III.B.2 (discussing § 703(m) having little bearing on courts' assessments of affirmative action).

308. *See supra* Section III.B.1 (discussing affirmative action caselaw).

309. *See supra* Section III.B.2 (discussing employers' implications for hiring practices).

310. *See supra* Section III.B.2 (discussing precedent that establishes remedial steps).

311. Baude & Epps, *supra* note 229 ("Dan: It's going to come because presumably, they're going to say Title VI just follows Equal Protection case law. Does Title VII follow equals [sic] protection case law? Will: No. Dan: Yeah. It seems like it's one more jump.").

312. United Steelworkers of Am. v. Weber, 443 U.S. 193, 209–16 (1979) (Blackmun, J., concurring).

under Title VII.[313] These guidelines, though issued prior to the Civil Rights Act of 1991, remain the standard today, once again demonstrating that § 703(m)'s motivating factor test and other amendments have not impacted permissible Title VII affirmative action programs.[314]

In their most general terms, the EEOC guidelines permit reasonable action that will provide a defense to future disparate impact cases against private employers by providing employment opportunities for members of groups that have been historically excluded.[315] As aligned with case law, reasonable bases for a voluntary affirmative action program are threefold: (1) a company has or tends to have an adverse effect on employment opportunities of members of previously excluded groups, (2) a company leaves uncorrected the effects of prior discrimination, or (3) as a result of disparate treatment, the company or person within it making the analysis has a reasonable basis for concluding that affirmative action is appropriate.[316] Arguably the best practice to demonstrate that any of the three discriminatory practices exists within a workplace relies on statistics.[317] If available, the EEOC recommends a calculation of target minorities working at the company in contrast to the labor pool with the right skills for the available positions.[318]

The EEOC guidelines specify various actions that an organization can take once the organization has determined that it has a reasonable basis for adopting an affirmative action program.[319] These permissible affirmative action steps often include corrective actions like educational and outreach efforts aimed at recruiting more employees from underrepresented populations, revamping selection instruments or procedures which have not yet been validated in order to reduce exclusionary effects, or establishing a system for regularly monitoring the effectiveness of an affirmative action program.[320] Perhaps most important for employers, § 713(b)(1) of Title VII provides a defense to liability under Title VII to an employer who acts "in good faith, in conformity with, and in reliance on any written interpretation or opinion of the [EEOC] . . ."[321]

I briefly note that affirmative action guidelines differ for non-construction government contractors.[322] There, each contractor must follow the Office of Federal Contract Compliance Programs (OFCCP) regulations, which mandate that these contractors develop and maintain a

313. 29 C.F.R. § 1608.
314. *Id.*
315. *Id.* § 1608.4(c).
316. *Id.* § 1608.4(b).
317. *See* 41 Fed. Reg. 38, 814 (Sept. 13, 1976).
318. *Id.*
319. It relies on plans and programs that are described in the EEOC Coordinating Council's "Policy Statement" on "Affirmative Action Programs for State and Local Government Agencies." *Id.*
320. *Id.*
321. 42 U.S.C. § 2000e-12(b)(1) (1976).
322. *See* 41 C.F.R. § 60-2.1(b) (2025).

written affirmative action program if they have fifty or more employees and have a significant enough contract with the government.[323] Notably, the nature of this mandatory affirmative action also differs slightly for government contractors than for non-government contractors.[324]

C. Wrapping Up

Again, this Section summarizes Title VI precedent and Title VII jurisprudence and administrative guidance in order to elucidate the differences between the judiciary's interpretation of these two nearly identical statutes.[325] Title VI has been read—both historically and in *SFFA* itself—in conjunction with the Equal Protection Clause.[326] This is true because, as Chief Justice Roberts noted, "discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI."[327] Conversely, Title VII has never been read as aligned with the Fourteenth Amendment, and, even more, it has always been subject to a different, remedial standard.[328] Employers have never been permitted to justify hiring an underrepresented applicant by using a diversity rationale similar to that employed by university affirmative action programs.[329] Rather, per *Weber* and the EEOC guidelines, a valid workplace affirmative action plan (1) must address a manifest imbalance in segregated job categories where minorities have been traditionally underrepresented, (2) must not unnecessarily trammel the rights of nonminority workers, and (3) must be temporary because a plan loses its justification once it has eliminated a manifest imbalance.[330]

V. THE IMPLICATIONS OF *STUDENTS FOR FAIR ADMISSIONS* FOR PRIVATE EMPLOYERS UNDER TITLE VII

Given the distinctions between Title VI and Title VII statutory language, as well as divergent treatment under the case law and administrative policy, the question is what, if any, impact will the Court's decisions in the related *SFFA* cases have on affirmative action in the employment context?[331]

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323. *See id.*

324. *Id.* §§ 60-2.16–17.

325. *See supra* Section III.A–B (noting how the Court has previously viewed Titles VI and VII).

326. *See supra* Section III.A (listing diversity as a compelling government interest).

327. Gratz v. Bollinger, 539 U.S. 244, 276 n.23 (2003).

328. *See supra* Section III.B (contrasting Titles VI and VII).

329. *See, e.g.*, United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1997) (explaining workplace plan requirements).

330. *See id.*

331. *See supra* Section I.C (analyzing statutory interpretations over time).

Without formally overturning *Weber*, affirmative action plans like those resembling the agreement between Kaiser and USWA would still fall "on the permissible side of the line" of legality.[332] Arguably, so long as the affirmative action plans are still, as in *Weber*, "designed to break down old patterns of racial segregation and hierarchy . . . [that are] structured to 'open employment opportunities for [African Americans] in occupations which have been traditionally closed to them,'"[333] the Supreme Court precedent permits those remedial plans to remain in place.[334]

More specifically—as demonstrated above—though the text of Title VI and Title VII are nearly identical, the statutory differences as a result of the Civil Rights Act of 1991 and different development of the case law implies that any change in Title VI case law from *SFFA* would not impact Title VII jurisprudence.[335] Title VII is arguably more developed with clear administrative guidance and its strict interpretation of legal affirmative action practices solely for remedial, and not diversity, purposes.[336]

Given that the Supreme Court invalidated affirmative action in the higher education context on constitutional grounds, such a break from precedent should not implicate private sector employment decisions.[337] Affirmative action discrimination challenges in private sector employment have never been associated with the Equal Protection Clause, as have challenges to affirmative action even in private education.[338] As such, a successful constitutional challenge to affirmative action in the higher education context should not invalidate the practice in the private employment context.[339]

If, however, lower courts consider Justice Gorsuch's concurrence to be persuasive precedent, the Title VI statutory language may appear to cause the greatest challenge to Title VII affirmative action, given the clear similarities in the language of the statutes.[340] Even so, as this paper demonstrates, in light of the diverging case law and administrative guidance, that too should not automatically change permissible affirmative action practices under Title VII.[341] That said, *SFFA* may have indirect impacts on diversity hiring through a less diverse pipeline—and direct impacts by emboldening affirmative

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332. *Weber*, 443 U.S. at 208.

333. *Id.* (quoting 110 Cong. Rec. 6548 (1964) (remarks of Sen. Humphrey)). *See generally* Fullilove v. Klutznick, 448 U.S. 448 (1980) (holding that the U.S. Congress can constitutionally use its spending power to remediate past discrimination).

334. *Weber*, 443 U.S. at 208.

335. *See supra* Parts I–II (noting the history of and differences between Titles VI and VII).

336. *See supra* Section I.B (giving background into Title VII).

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

338. *See* Baude and Epps, *supra* note 229.

339. Again, this Article does not address public employment, which may have a different result.

340. *See Students for Fair Admissions*, 600 U.S. at 290 (Gorsuch, J., concurring).

341. *See supra* Section II.B–C (distinguishing the opinions in *SFFA*).

action critics to bring direct challenges to Title VII.[342]

A. Impact on the Hiring Pipeline

Currently, under EEOC Compliance Manual Section 15, employers are permitted to adopt strategies to expand the applicant pool of qualified black applicants if the employer notices that "African Americans are not applying for jobs in the numbers that would be expected given their availability in the labor force . . . ."[343] One strategy employers can adopt is "recruiting at schools with high African American enrollment."[344] One can imagine that without affirmative action in higher education, the number of minority workers in the labor force with the required credentials may decrease materially.[345]

Relatedly, prior to the *SFFA* decision, employers could rely on colleges to recruit and educate a diverse group of students.[346] Upon graduation, these students would enter the job market.[347] Employers could benefit from the affirmative action in higher education in two ways. First, employers could feel confident that students of color were better prepared and had the credentials to be successful employees in the workplace.[348] And, second, employers did not need to rely on the EEOC guidelines in order to get a diverse workforce, as the employers themselves did not need to engage directly in affirmative action.[349] The school's affirmative action programs arguably also benefitted the employer.[350]

Take, for example, McKinsey & Company. McKinsey currently recruits from higher education institutions like Harvard.[351] One can imagine that targeting specific prestigious schools that engage in affirmative action when selecting a student body better ensures that McKinsey's recruitment efforts at those schools will result in a diverse consultant class.[352] Now, if

342. *See Students for Fair Admissions*, 600 U.S. at 290 (Gorsuch, J., concurring) (noting similarities between Titles VI and VII).

343. *Section 15 Race and Color Discrimination, Section C: Diversity and Affirmative Action*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Apr. 19, 2006), https://perma.cc/THQ3-M2T6.

344. *Id.*

345. *See id.*

346. *See* Feldman, *supra* note 3 (explaining the Supreme Court's *SFFA* decision).

347. *Id.*

348. *Id.*

349. *See id.* Again, the reasonable bases for a voluntary affirmative action program are as follows: (1) a company has or tends to have an adverse effect on employment opportunities of members of previously excluded groups, (2) a company leaves uncorrected the effects of prior discrimination, or (3) as a result of disparate treatment, the company or person within it making the analysis has a reasonable basis for concluding that affirmative action is appropriate. *See id.*

350. *Id.*

351. The McKinsey website has a page dedicated entirely to recruiting Harvard University undergraduates to the firm. *Harvard University Undergraduate Program*, MCKINSEY & CO., https://perma.cc/H9TV-3T2B (last visited Feb. 27, 2025). Part of the webpage includes a "Campus Calendar" advertising recruiting events on Harvard's campus. *Id.*

352. *See, e.g.*, *id.* (providing one example of prestigious schools engaged in affirmative action).

Harvard can no longer select its student body with race as a consideration, McKinsey—and other employers who target those schools—will need to reconsider their recruitment processes if they value a diverse workplace, as the number of diverse students educated at Harvard and other elite institutions may decrease.[353]

B. Current and Future Challenges to DEI Initiatives

Though Title VII technically remains unchanged even after *SFFA*, workplace DEI programs and *Weber* already face challenges and will continue to face more challenges from anti-affirmative action proponents in the future.[354] In fact, thirteen republican Attorneys General have already issued a warning to Fortune 100 companies post *SFFA*, reminding CEOs that they have an "obligation[] as an employer under federal and state law to refrain from discriminating on the basis of race, whether under the label of 'diversity, equity, and inclusion' or otherwise."[355] In the warning, they cited *SFFA*, arguing that the Court's opinion also "recognized that federal civil-rights statutes prohibit[] *private* entities from engaging in race discrimination."[356]

Despite calls for the end of DEI initiatives, judges have rejected shareholder derivate suits on behalf of companies seeking injunctive relief against company diversity initiatives.[357] In *National Center for Public Policy Research v. Schultz*, a conservative think tank brought suit against Starbucks, alleging that its DEI initiatives violated Title VII as well as § 1981 and state anti-discrimination laws.[358] In a written order handed down on September 11, 2023, Chief Judge Stanley A. Bastian of the Eastern District of Washington found that based on the business judgment rule, courts generally disfavor interfering with "reasonable and legal decisions made by the board of directors of public corporations."[359]

That said, the *SFFA* decision overturning affirmative action may lead to a chilling effect,[360] at least for a time, regarding DEI practices in the

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353. Of course, this presumes that these "prestigious" universities that previously engaged in affirmative action do, in fact, better train students for the workforce. *See id.*

354. Letter from Kris W. Kobach, Kansas Att'y Gen., to Fortune 100 CEOs (July 13, 2023), https://perma.cc/5EGU-GYE4.

355. *Id.*

356. *Id*.

357. *See* Nat'l Ctr. for Pub. Pol'y Rsch. v. Schultz, No. 2:22-CV-00267-SAB, 2023 WL 5945958, at *3 (E.D. Wash. Sept. 11, 2023).

358. *See id.* at *1–2.

359. *See id.* at *3.

360. *See id.* Or, in the alternative, if employers are in fact violating Title VII by using impermissible justifications for hiring, such as diversity, then perhaps *SFFA* is, in fact, emboldening employers to follow the law as written. *See* Feldman, *supra* note 3 (explaining the Supreme Court's *SFFA* decision).

workplace.[361] Although a ban on affirmative action in higher education under an *SFFA* decision should not legally implicate DEI under Title VII and, per Judge Bastian's order, does not implicate DEI initiatives, it remains very likely that there will be an overhang of confusion concerning the legality of affirmative action in the employment context.[362] For example, Edward Blum and his group American Alliance for Equal Rights filed a lawsuit against Morrison Foerster, a multinational law firm headquartered in San Francisco.[363] The suit asserted that the firm's diversity fellowship offered to first-year law students "who are members of historically underrepresented groups in the legal industry" was unlawful.[364] In response, Morrison Foerster changed the eligibility criteria for its DEI fellowship, removing any reference to historical underrepresentation.[365]

C. Muldrow v. City of St. Louis*: A Chance to Open the Floodgates to Title VII Reverse Discrimination Litigation Against Workplace DEI Initiatives*

Perhaps most importantly to the future of Title VII DEI challenges, the Supreme Court issued a ruling in April 2024 in a case that could open the door to Title VII reverse discrimination claims and thus challenges to DEI initiatives and, to a lesser extent, workplace affirmative action.[366] The case, *Muldrow v. City of St. Louis*,[367] at first glance appears unrelated to DEI initiatives and affirmative action in hiring.[368] For nearly a decade, Jatonya Muldrow worked at the St. Louis Police Department.[369] She was suddenly and unexpectedly transferred to another unit to work as a patrol officer and was replaced by a male officer.[370] Muldrow argued that the transfer was because she was a woman.[371] Though the transfer altered her responsibilities, her salary and rank were unchanged.[372]

The question before the Court then was whether she suffered an adverse employment action sufficient to establish a claim under Title VII.[373] The

361. *See* Feldman, *supra* note 3 (theorizing that attorneys may advise companies to refrain from mentioning race following the *SFFA* decision).

362. *See Schultz*, 2023 WL 5945958, at *3.

363. *See* Complaint, Am. Alliance for Equal Rights v. Morrison & Foerster, No. 1:23-cv-23189 (S.D. Fla. Aug. 22, 2023).

364. *Keith Wetmore Fellowship for Excellence, Diversity, and Inclusion*, MORRISON FOERSTER, mofo.com/culture/diversity/recruitment-development (last visited Feb. 12, 2025); *see also* Tatyana Monnay, *Morrison Foerster Changes DEI Fellowship Criteria amid Lawsuit*, BLOOMBERG L. (Sept. 6, 2023), https://perma.cc/T87V-3SK9 (providing another example of unlawful DEI practices).

365. *Id.*

366. Muldrow v. City of St. Louis, 601 U.S. 346, 350 (2024).

367. *Id.*

368. *Id.* at 350–52.

369. Brief for Petitioner at *4, *Muldrow*, 601 U.S. 346 (No. 22-193), 2023 WL 5644865.

370. *Muldrow*, 601 U.S. at 350.

371. *Id.* at 351.

372. *Id.*

373. *Id.* at 350.

Court took this case in part to resolve a circuit split.[374] The Eighth Circuit found that "an employee's reassignment, absent proof of harm resulting from that reassignment, is insufficient to constitute an adverse employment action"[375] under Title VII.[376] The D.C. and Sixth Circuits, however, reached different conclusions in cases with similar facts.[377] In those cases, those circuits found that the plain text of Title VII does not require any showing of harm beyond the discriminatory act itself.[378] The Supreme Court in a 9-0 decision[379] aligned with the D.C. and Sixth Circuits, finding that "[i]t does not matter, as the courts below thought . . . that her rank and pay remained the same, or that she still could advance to other jobs. Title VII prohibits making a transfer, based on sex, with the consequences Muldrow described."[380]

Opponents of DEI initiatives were invested in the outcome of *Muldrow*, as the broad ruling that employees need not show an adverse action could open the door to reverse discrimination challenges to workplace DEI initiatives.[381] In oral argument, Justice Thomas raised the prospect of the outcome of this case impacting programs aimed at increasing the presence of underrepresented groups:

> Can you have discrimination that is perceived by someone who is, say, . . . law enforcement and [precinct leaders say] we need in this particular precinct more black or Hispanic officers, and so you are moved or transferred because of race? . . . [W]on't that run headlong into the focus on diversifying the workforce in certain situations?[382]

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374. *See id.*

375. Muldrow v. City of St. Louis, 30 F.4th 680, 688 (8th Cir. 2022). Multiple other courts have held that discriminatory lateral job transfers fall beyond § 2000e-2(a)(1)'s scope. *See, e.g.*, Boone v. Goldin, 178 F.3d 253, 256–57 (4th Cir. 1999); O'Neal v. City of Chicago, 392 F.3d 909, 912–14 (7th Cir. 2004); Sanchez v. Denver Pub. Sch., 164 F.3d 527, 532 (10th Cir. 1998); Webb-Edwards v. Orange Cnty. Sheriff's Office, 525 F.3d 1013, 1032–33 (11th Cir. 2008), *cert. denied*, 555 U.S. 1100 (2009) (explaining the perspective of other courts on lateral job transfers).

376. *See Muldrow*, 30 F.4th at 680–89.

377. Chambers v. District of Columbia, 35 F.4th 870, 874 (D.C. Cir. 2022).

378. *Id.* at 874–75. The D.C. Circuit, sitting en banc, overturned its prior precedent and held that "the straightforward meaning" of § 2000e-2(a)(1) "emphatic[ally]" prohibits any discriminatory grant or denial of a "job transfer," even if it does not result in reduced salary or benefits or worse working conditions. *Id.* In Threat v. City of Cleveland, Chief Judge Sutton explained for the court that circuit precedent construing Title VII to cover only "materially adverse employment actions" should be understood as no more than shorthand for the statutory text and a de minimis, Article III injury requirement. Threat v. City of Cleveland, 6 F.4th 672, 678 (6th Cir. 2021).

379. *Muldrow*, 601 U.S. 346. Note, the decision was unanimous in its judgment but Justices Thomas, Alito, and Kavanaugh wrote concurrences.

380. *Id.* at 359 (citation omitted).

381. *See id.* The Court could choose to keep its ruling narrow and hold that just lateral transfers are justiciable under Title VII, thus not implicating other employment decisions.

382. Transcript of Oral Argument at 45–46, Muldrow v. City of St. Louis, 601 U.S. 346 (No. 22-193).

Justice Thomas's question, therefore, asked if any differentiation based on protected characteristics could be discriminatory.[383] Justice Barrett similarly questioned the effect on DEI initiatives, asking, "[I]f the employer wants to increase diversity in the workplace and so promotes, say, some black employees and they get better jobs, then that's discrimination?"[384] Ultimately, now that the Court has ruled in favor of Muldrow and held that Title VII does not require plaintiffs to show that they suffered an adverse employment action in order to raise a claim of workplace discrimination, the Court may have opened the floodgates to challenges to DEI initiatives under Title VII without requiring a connection to the Equal Protection Clause.[385]

The question most relevant to this Article, however, is not about DEI initiatives for current employees—which would almost certainly be impacted by the ruling for the plaintiff—but instead about hiring initiatives that favor people based on a protected characteristic.[386] EEOC commissioner, Andrea Lucas, authored an op-ed in Reuters expressing her concerns about the possible impact of *Muldrow* even before the Court issued its opinion.[387] In it, she listed ways that a more expansive reading of Title VII could impact the workplace:

> [F]rom providing race-restricted access to mentoring, sponsorship, or training programs; to selecting interviewees partially due to diverse candidate slate policies; to tying executive or employee compensation to the company achieving certain demographic targets; to offering race-restricted diversity internship programs or accelerated interview processes, sometimes paired with euphemistic diversity 'scholarships' that effectively provide more compensation for 'diverse' summer interns.[388]

In another interview given to the Washington Post, Lucas expanded:

> Those kinds of initiatives already pose significant legal and practical risks given the current state of the law . . . . [b]ut a decision in *Muldrow* by the Supreme Court to apply a more expansive reading of the 'terms, conditions and privileges' provision of Title VII certainly could clarify and heighten the risks posed by those kinds of programs.[389]

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383. *Id.*

384. *Id.* at 17.

385. *Muldrow*, 601 U.S. at 346.

386. *See supra* Part VII (discussing the hiring initiatives in regard to DEI).

387. Andrea R. Lucas, *With Supreme Court Affirmative Action Ruling, It's Time for Companies to Take a Hard Look at Their Corporate Diversity Programs*, REUTERS (June 29, 2023, 3:35 PM), https://www.reuters.com/legal/legalindustry/with-supreme-court-affirmative-action-ruling-its-time-companies-take-hard-look-2023-06-29/.

388. *Id.*

389. Julian Mark, *Supreme Court Case Could Spark Rush of Reverse-Discrimination Claims*, WASH. POST (Dec. 5, 2023) https://www.washingtonpost.com/business/2023/12/05/supreme-court-diversity-equity-inclusion-muldrow/ (internal quotations omitted).

Some of these hiring policies lie on the legal side of Title VII now and will be in question given that the Court has ruled for Muldrow.[390] Or, at the very least, more people may have standing to sue if they so choose.[391] Thus, even those candidates who are ultimately hired may consider challenging the process.[392]

Perhaps, for example, in this post-*Muldrow* world, programs like Consortium for Graduate Study in Management[393] (Consortium) may be challenged even by those nondiverse applicants who ultimately get hired.[394] Consortium is a program that connects diverse students from the top fifteen to twenty business schools in the country with Fortune 500 companies.[395] Through the program, diverse business school students often receive internship offers and eventually job offers, sometimes even before beginning business school.[396] *Muldrow* may provide a path for nondiverse business school students to challenge this hiring process, even if they too are ultimately hired.[397] A candidate may sue a company for dividing applicants based on protected statuses.[398]

Challenges to discretionary bonuses like the ones Lucas mentioned, including those for diverse summer interns and for managers who achieve demographic targets, may also impact the make-up of the workplace.[399] Historically, courts have not considered the loss of a discretionary bonus to be a justiciable adverse employment action under Title VII.[400] One can imagine in this post-*Muldrow* world that an executive who oversees a division that does not achieve demographic targets and thus does not receive discretionary compensation may argue that the policy violates Title VII.[401] Or a summer intern who applies for a diversity scholarship and is not selected to receive one could similarly sue under Title VII.[402] Since the Court ruled

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390. *See generally* Muldrow v. City of St. Louis, 601 U.S. 346 (2024) (describing the consequences of discriminatory hiring practices).

391. *Id.*

392. *See supra* Section VII.A (discussing the impact this decision could have on the hiring pipeline).

393. *Bringing Diverse Perspectives to American Businesses*, CONSORTIUM, https://perma.cc/F84X-STLL (last visited Feb. 27, 2025).

394. *See infra* note 404 and accompanying text (addressing the impact this decision may have on challenges to discriminatory hiring practices).

395. *Bringing Diverse Perspectives to American Businesses*, *supra* note 393.

396. *Id.*

397. Muldrow v. City of St. Louis, 601 U.S. 346, 357 (2024).

398. *Id.*

399. *See generally*, Palermo v. Clinton, 437 F. App'x 508, 511 (7th Cir. 2011) (discussing discretionary bonuses in relation to an adverse employment action).

400. *See, e.g.*, *id.* ("For a discrimination claim, the loss of a discretionary bonus is not an adverse employment action because it does not change the terms or conditions of employment. The denial of one discretionary bonus (Palermo admitted he received bonuses all other years, both before and after 2007) is also not sufficient to dissuade a reasonable employee from engaging in protected activity and therefore cannot support his retaliation claim." (internal citations omitted)).

401. *See supra* Section VII.C (discussing the *Muldrow* decision and what the future may hold).

402. *See infra* note 416 and accompanying text (suggesting that summer interns applying for positions or scholarships could sue if not selected).

for Muldrow, these potential future suits could impact minority hiring in the future and ultimately could lead to a less diverse workplace.[403]

Finally, and perhaps less directly, the ruling for Muldrow may complicate recruiting diverse applicants in majority nondiverse workplaces as employers can no longer tout their affinity groups and support given to diverse employees.[404]

VI. CONCLUSION

The future of affirmative action in the higher education context is now settled.[405] Universities, as declared by the Supreme Court in *SFFA*, can no longer consider race as a factor in admission decisions.[406] This Article has argued that despite the prohibition in the higher education context, employers hoping to remedy past inequalities through affirmative action or DEI programs, for the most part, need not be concerned, at least under the logic of *SFFA*.[407] Given the divergence in case law and administrative guidance regarding Title VI and Title VII, this Article has argued that employers can continue to employ affirmative action practices based on remedial rather than diversity interests.[408]

That said, concerns regarding the future of affirmative action in the workplace context have some validity.[409] The ban on affirmative action under *SFFA* in the short term may have some—perhaps limited—impact on the employment context, though not directly.[410] In order to serve remedial interests, employers of course require applicants who are trained and able to do the jobs they seek.[411] If fewer students from underrepresented groups attend institutions of higher education, employers may struggle to find a diverse set of applicants who are able to satisfy job requirements.[412] Moreover, with the widespread lack of understanding around the divergence between Title VI and Title VII, employers may be unaware that their remedial

403. *See supra* Section VII.C (explaining what the future could hold in light of the *Muldrow* decision).

404. Perhaps one or two firms will become majority minority havens for diverse employees, while other firms will fall behind in diverse recruiting. *See* Muldrow v. City of St. Louis, 601 U.S. 346, 355 (2024).

405. *See supra* Part I (providing the summary of this Article and solutions provided herein).

406. Again, this is with the notable exception of admissions essays in which students can discuss how race has impacted them. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

407. *Id.*

408. *See supra* Part I (reviewing Titles VI and VII and distinguishing their statutory framework).

409. *See supra* Part IV (explaining the impact that recent affirmative action will have on employment).

410. *See supra* Section IV.A (reviewing the hiring practices generally applied and what might change in the future).

411. *See supra* Section IV.B (discussing the challenges to hiring practices and the concerns surrounding future hiring).

412. *See supra* Section I.C (explaining the distinctions between Titles VI and VII).

affirmative action policies will remain unaffected post-*SFFA*.[413] As such, the *SFFA* decision may have a chilling effect on Title VII affirmative action.[414] And, even more, proponents of DEI initiatives must continue to watch the Supreme Court's jurisprudence on Title VII itself, particularly in the *Muldrow* case.[415] The decision in favor of Muldrow could strengthen claims of reverse discrimination by future plaintiffs who could argue that simply being excluded due to a protected characteristic, without any other adverse employment action, would merit a Title VII challenge.[416]

413. *See supra* Section I.C (explaining the distinctions between Titles VI and VII).

414. *See supra* Part IV (analyzing the impact of *Students for Fair Admissions* on hiring practices).

415. *See supra* Section IV.C (reviewing the *Muldrow* case and what it could mean for the future of affirmative action).

416. *See supra* Section IV.C (applying the decision in *Muldrow* to the current state of affirmative action and where the caselaw is leading its future).