The Fallout of SFFA v. Harvard and the Future of Affirmative Action

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The Fallout of *SFFA v. Harvard*

and the Future of Affirmative Action

Submitted to

Professor Charles Kesler

by

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Abstract

When the Supreme Court ruled race-conscious admissions to be unconstitutional in *SFFA v. Harvard*, it sent the higher education world into shock. About 200 universities across the nation who featured admissions systems selective enough to where a student’s race impacted their admission probability were forced to restructure their admissions. As media outlets reports on the decision dominated the headlines, the man responsible for the Students for Fair Admissions’ victory, Edward Blum, quietly shifted his attention to his next target, the business world. Blum, a professional plaintiff with the goal of ridding America of race-conscious policies, understands better than anyone that his success in establishing new precedent in education-related affirmative action policy significantly boosts the odds of a subsequent success in the business world. Unsurprisingly, prior to the *SFFA* ruling, Blum created the Alliance for Fair Board Recruitment and filed lawsuits against several corporate boards.

This thesis predicts the future structure, if any, of antidiscrimination law in hiring practices. It first looks to the past to establish a trend in Supreme Court decisions through dissecting the rulings in *SFFA v. Harvard* and other major affirmative action cases. The thesis then explores Blum’s past successes, his philosophy, and his future aspirations. Next, it evaluates the impact affirmative action has on economic outcomes, liberty, and discrimination today through arguments from the likes of Richard Epstein and Stacy Hawkins. Lastly, after examining arguments on the justifications backing antidiscrimination laws, the thesis concludes by offering a prediction for the future of race-conscious hiring practices.
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Chapter One: Introduction & History

This past summer, the higher education world nervously awaited the Supreme Court’s looming decision on race conscious admissions. The Court heard the arguments for the *Students for Fair Admissions vs Harvard*; and universities across the nation and prospective applicants alike sat on the edge of their seats as their intricate yet seemingly just admissions process lay on the chopping block. The system which took decades to develop and aimed to foster the most diverse and efficient learning environment possible, appeared to be on the way out. Eventually, the Supreme Court found that race conscious admissions were unconstitutional because they no longer treated race as only a positive, as certain groups’ admission rates were negatively affected. Universities’ ability to capitalize on a multitude of student backgrounds to enable the creation of well rounded, impartial, and unprejudiced graduates came to a halt. Or did it? The decision seemed to pose significant challenges to not only prospective minority students, but also to universities who were forced to find a novel and more arduous method of structuring a diverse student body. Leading up to and following the decision the media, university officials, and those following the case foresaw the potential shockwaves sent throughout the higher education world. Universities followed and feared the decision for months, the media ran countless headlines displaying their dissent, and protestors took to the streets. The world understood the significance of the case. However, as the losers of the case voiced their outrage, the victors silently transitioned their focus onto their next target. Affirmative action disputes in the Court exist in two fields, education and business. The current interpretation on affirmative action in one field heavily influences the other. When a landmark alteration to one field occurs, one in the other field is likely to follow. Well aware of this, Edward Blum, the activist behind the Students for Fair Admissions (SFFA), simultaneously founded the Alliance for Fair Board Recruitment.
(AFFBR). While the SFFA aims to generate significant change in the college admissions process, the AFFBR centers their efforts on the business world. They hope to do away with race and sex-based quotas for public companies resulting in bias and certain advantages in the hiring process. Edward Blum’s success in restructuring college admissions not only boosts his personal confidence in his ability to win another constitutional challenge, but also significantly increases the likelihood of winning a near identical challenge against the corporate world. Blum’s imminent cases against corporate hiring brings us to the research question of this paper: How will the decision in SFFA v. Harvard affect the future of affirmative action for corporations?

To answer this question, I will first provide the appropriate and necessary context of Affirmative Action’s history in the Supreme Court. I will describe the history of Affirmative Action cases in the Supreme Court relating to education concluding with an extensive breakdown of the SFFA v. Harvard case. I will then explore Affirmative Action cases relating to business practices including racial set asides and classifications. I will use the takeaways from both the education and business affirmative action cases to establish the Court’s current interpretation on affirmative action’s constitutionality, discover a trend, and predict where it is headed. Next, I will introduce Edward Blum and discuss his past successes and failures as well as his future goals. Further, I will cover the Alliance for Fair Board Recruitment, and their current lawsuits. Subsequently, I will present varying arguments supporting and critiquing antidiscrimination law’s role in American society. Finally, I will conclude by assembling all the

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evidence, trends, and arguments into a detailed prediction of the functionality and role affirmative action will play in the business world.

However, before diving into Affirmative Action’s storied history in the Supreme Court, the basic concepts behind the history ought to be covered. The questions of why the history is important, and what is actually happening to our laws when the Supreme Court makes a ruling on Affirmative Action ought to precede a discussion of the cases.

The origin of Affirmative Action dates to the Reconstruction era of the United States, directly following the Civil War. In a largely failed effort to ensure that minorities and specifically African Americans were not discriminated against after the freeing of the slaves, the North offered the South reentry into the union on a set of certain conditions. Most importantly, the ratification of the 13th, 14th, and 15th amendments was the key condition for reentry. The amendments in short: abolished slavery, guaranteed citizenship to former slaves, and guaranteed the right to vote to former slaves respectively. The amendments were initially a smashing success. Thanks in part to Union soldiers ensuring the enforcement of these policies, Black people integrated into society well with several holding significant public service positions. This time period soon earned the name, Reconstruction. However, on top of former confederates reseizing their power, the controversial results of the election of 1876 unofficially ended the Reconstruction era in the South. Through a “back-room” political deal, the Democrats offered Republican Rutherford B. Hayes the Presidency in exchange for an abandonment of Reconstruction policies and withdrawal of Union troops from the South.\(^2\) Unfortunately, the next several decades were marked by rampant racism, both formally and informally. The purpose of

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the Amendments was deviously circumvented through technicalities or outright ignorance such as segregation, literacy tests before voting, and false imprisonment resulting in prison labor. Moreover, loopholes created by the courts, among other egregious policies enforced by States such as “‘Black Codes’” and “‘Jim Crow Laws’” ensured the continued discrimination against African Americans. Although nearly all progress was lost, the practically irreversible ratifications of the 13th, 14th, and 15th amendments were major steps in the right direction.

Despite the failure to embark on the journey towards a just society, these crucial amendments would eventually play a pivotal role in ensuring equal rights for all. Fast forward almost a century later from the ratification of 14th Amendment in 1868, Jim Crow Laws, desegregation, and crippling racism ran rampant across the nation. Centuries of oppression finally sparked a powerful civil rights movement spearheaded by icons such as Martin Luther King Jr., Rosa Parks, Malcolm X, and others. President Lyndon B Johnson and those in power finally responded to the outcries from the marginalized and were able to pass the Civil Rights Act of 1964. Stemming from the passage of the civil rights act, the government began encouraging and operating programs favoring minorities in attempts to undo the effects of centuries of crippling discrimination. These policies aimed to increase the financially livelihood of Black people through boosting their presence in higher education and in higher paying jobs. Of course, there is so much beyond just this concise briefing on race in American laws and the path towards affirmative action, but these are the unmissable essential points on the timeline.

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Ultimately there are many chapters left to be written about America’s journey to create an equal society, free of discrimination, but these events are crucially important because the 14th Amendment and the Civil Rights act are the two laws which frequently justify antidiscrimination policies. Simply describing the laws is not sufficient because the purpose and motivation behind them is what the Supreme Court attempts to consider when arriving at a decision. A phrase, sentence, or bill cannot entirely encapsulate the impetus and rationale behind affirmative action. Although an impossible task, Affirmative Action aims to remedy centuries of brutal discrimination by affording the marginalized proper avenues to achieve the equal opportunity they deserve through quotas and set asides. Understanding the history of the discrimination, and the path to equality allows for better educated decisions.

That all being said, as this paper will later discuss, GOP-appointees on the bench such as justices Anthony Kennedy and Sandra Day O’Connor often argue that Affirmative Action ought to be balanced with the bigger picture in mind. The goal of creating an equal society cannot be overshadowed by the terrible mistakes and grievances of the past. Discrimination from the past ought not to be remedied through a method which regresses one group: progress must be made together. The more Liberal side of the debate argues that understanding the terrible mistakes and grievances of the past allows us to best remedy the situation. With the hypothesis and justification behind Affirmative Action in mind, approaching the precise phrasing and nuances of the most influential and relevant affirmative action articles and laws is now appropriate.

Throughout the following cases justices and Court decisions will frequently make reference to the Fourteenth Amendment and the Civil Rights Act. The Fourteenth Amendment states that “all persons born or naturalized in the United States” are citizens, and that the whole number of each person ought to be apportioned to the electoral count. However, the most
significant element of the amendment stems from two rather ambiguous phrases towards the latter half of the bill. The amendment states that no State shall “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.” The first phrase here is referenced to as the Due Process Clause, and the Equal Protection Clause for the second one. Originally the purpose of the Amendment was to create a pathway to citizenship for all former slaves and to combat the possibility of another 3/5 clause-esque decision. However, the Equal Protection Clause effectively hijacked the significance of the Amendment. Although slightly ambiguous, justices and policymakers alike largely understand the Equal Protection Clause to signify a forbiddance of discrimination. Presently in affirmative action cases, the Fourteenth Amendment is almost entirely referenced solely for the Equal Protection Clause and occasionally the due process clause as in Brown v. Board, II.

Jumping forward nearly a century from the ratification of the 14th Amendment, President Lyndon B. Johnson helped to pass the Civil Rights Act of 1964. Although not written into the Constitution as the supreme law of the land, the Civil Rights Act of 1964 still plays a momentous role in promoting affirmative action. The act often referred to as simply the Civil Rights Act boasted eleven different titles or sections. Many of the titles deal directly with race within different pathways of life including voting, public facilities, public education, federally assisted programs, and employment. Out of the eleven titles, Titles II, VI, and VII are the three which are frequently debated and cited in important antidiscrimination law cases. Title II states that

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“all persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, and privileges, advantages, and accommodations of any place of public accommodation… without discrimination or segregation on the grounds of race, color, religion, or national origin.”8 The title continues by defining a public accommodation as any hotel, lodging establishment, restaurant, soda fountain, theater, or stadium, but excludes “private club[s].”9 Title II provides a clear and unclouded route to abolishing discrimination in public spaces. The title does not play a major role in affirmative action cases regarding education or employment but is worth noting for its direct barring of discrimination. Interestingly, the title was almost immediately challenged, and in the *Heart of Atlanta Motel, Inc. v. United States* case, the Supreme Court found that Congress held the power to pass Article II through the Commerce Clause. In other words, Congress constitutionally could ban discrimination in the public forum because discrimination affected interstate commerce by discouraging outsiders from traveling to a location with discriminatory practices.10 Moving forward, Title VI and VII are where the bulk of the impact, and more importantly the bulk of the disagreement regarding the Civil Rights Act resides. Many of the business-related affirmative action cases will make mention of either one or both of these Titles. In Title VI, the overall purpose is to assure “nondiscrimination in federally assisted programs.” The bill states that no person shall be “excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance” on the grounds of race.11 The large majority of these programs or activities appear in the form of a “grant, loan, or contract” given towards a project or program. The Court

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8“Civil Rights Act (1964).”
9 “Civil Rights Act (1964).”
frequently cites this section in cases that deal with racial set asides. Lastly, Title VII guarantees “equal employment opportunity” without discrimination on the grounds of “race, color, religion, sex or national origin.” Notably, the bill refrains from offering equal employment, only equal employment opportunity. In other words, through boosting minorities’ job prospects by offering set asides and quotas all people regardless of their discriminable qualities will hold an equal chance at earning a job, however they will not all be guaranteed or given the job. Further, although largely irrelevant to affirmative action, it is important to note that Title VII is the only section to crucially include sex as one of the factors that ought not to be discriminated against. The inclusion of the word “sex” not only holds a controversial back story, but also played a key role in securing significant wins in the battle for gender equality.

Lastly, before beginning with the case history, I will present a helpful analogy. Imagine a ladder represents affirmative action in general. On the ladder, the left rail is affirmative action in academia and the right rail is affirmative action’s role in business. Together the two rails are joined by the steps which are the Court’s interpretations of the 14th Amendment and the Civil Rights Act. In other words, besides executive orders, affirmative action only exists as whatever the current interpretations of the 14th Amendment and Civil Rights Act are. The Court determines how high the ladder rises, or if there is a ladder at all through their rulings.
Chapter Two: Affirmative Action Cases in Education

The beginning of affirmative action’s history in the Supreme Court dates to the 19th century. The two landmark cases headlining the issue are *Plessy v. Ferguson* (1896) and *Brown v. Board of Education* (1954). Although now dated spectacles of the past, the two cases hold tremendous importance to the nation’s history. *Plessy* originated in the State of Louisiana when their legislature implemented the Separate Car Act of 1890 which forced Black and White people to sit in separate rail cars. In 1892, Homer Plessy, who was seven eighths Caucasian but technically Black under Louisiana law, agreed to participate in a test to challenge the Act where he would sit in the Whites only section of the car. The railroad company also agreed to participate in the test because they found that the Act imposed additional costs by forcing them to purchase additional cars. On the day of the test, Plessy was told to vacate the whites only car but refused and was arrested. Plessy then sued the State of Louisiana arguing that the Separate Car Act violated the Thirteenth and Fourteenth Amendments. In 1896 the Supreme Court held that the state law was indeed constitutional, finding Homer Plessy in the wrong. The majority opinion upheld state-imposed racial segregation justifying it by arguing that separate treatment did not imply inferiority. Ultimately, *Plessy* is remembered for coining the infamous, “separate but equal” doctrine, claiming that the segregation did not violate the Equal Protection Clause.

For the next half century, legal segregation popularized and expanded under the precedent set by *Plessy*. However, by the 1950s a string of lawsuits against school districts who denied students admittance on the basis of race made it to the Supreme Court. Cases from Kansas, South Carolina, Virginia, Delaware, and Washington DC were consolidated into one case named *Brown v. Board of Education of Topeka* (or simply *Brown v. Board*). In a famous unanimous

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decision, the Court ruled that the separate but equal doctrine for education is inherently unequal. Chief Justice Earl Warren delivered the precedent altering opinion arguing that “segregation of public education based on race instilled a sense of inferiority that had a hugely detrimental effect on the education and personal growth of African American children.” With the decision significantly altering the layout of American society, Warren elected to use language that was more accessible to non-lawyers and the common man because Warren felt it was necessary for “all Americans to understand its logic.” The Equal Protection Clause originally did not serve the purpose of abolishing discrimination for the first several decades of its existence, in actuality it enabled it through Plessy. However, Brown v. Board represented a significant step towards the clause serving as a champion combating discrimination. Unfortunately, Chief Justice Warren regrettably concluded the ruling by demanding that states end segregation with “all deliberate speed.” The ambiguous phrase allowed for many states to avoid desegregating for several years. While ultimately successful, the path to integrating public schools proved to be a rocky one with harsh public racism and resistance frequently halting integration. In one incident in 1957 now known as the “Little Rock Nine,” nine teenage Black children enrolled at Little Rock’s Central High School, but on the first day of classes the Arkansas governor controversially ordered the national guard to block the students’ entry. Not until several weeks later were the teenagers able to regularly attend school when President Eisenhower ordered US Army troops to

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14Ibid
the scene.\textsuperscript{16} Although slightly tangential to modern affirmative action considerations, \textit{Plessy} and \textit{Brown} are critical in understanding the history of the Equal Protection Clause.

The precedent more closely relating to \textit{SFFA v. Harvard} dates to 1978 in \textit{Regents of University of California v. Bakke}. The decision ruled that affirmative action was constitutional, but the school’s individual quota systems mandating a certain number of students from a certain racial group to be admitted was unconstitutional. In \textit{Bakke} the Court ruled that race could be used when considering an application but it must only be a plus, and it must be one of many factors considered.\textsuperscript{17} \textit{Bakke} more broadly symbolizes the Court’s strong backbone as it was the first case where they struck down affirmative action legislation. Up until \textit{Bakke}, and for many cases following, the Court continued to uphold all constitutional challenges to affirmative action, but showed that quota systems specifically were too obvious and significant of a boost to minorities. Another crucial takeaway from \textit{Bakke}, is that being “the Court’s first major affirmative action case,” it “made diversity the cornerstone of the Supreme Court’s affirmative action jurisprudence and, in turn, of the nation’s very identity.”\textsuperscript{18} In other words, \textit{Bakke} cemented diversity as a desirable goal for universities, businesses, and the government to pursue. The popularization of this goal resulting held major influence over all subsequent affirmative action cases, as the promotion of diversity became an implied desire. This desire was codified in \textit{Bakke}’s opinion when “Justice Lewis F. Powell, Jr. proclaimed that public university affirmative action programs, like all racial classifications, must satisfy ‘strict scrutiny’” under the Equal Protection Clause.


Protection Clause.\textsuperscript{19} A law can pass the strict scrutiny standard by being “narrowly tailored” and “least restrictive” in its efforts to meet a “compelling government interest.”\textsuperscript{20} Although seemingly difficult to meet the so-called “strict scrutiny,” the Court made it so one of the mandated “compelling government interests” that is required in order to use racial classifications is racial diversity. Through labeling racial diversity as a “compelling government interest,” universities can broadly practice race-conscious admission policies in the name of diversity.

The cases setting the modern precedent for race-conscious admissions are \textit{Grutter v. Bollinger} (2003) and its sister case \textit{Gratz v. Bollinger} (2003). Both cases were lawsuits against the University of Michigan’s admissions system. \textit{Gratz} found that the university’s point-based admissions system was unconstitutional because the significant head start it gave to minorities did not consider race on an individualized basis. \textit{Grutter} on the other hand upheld the basic concept backing affirmative action. The Court ruled that admissions officers could consider race as long as it was “narrowly tailored” and used in an individualized way which only saw race used as a plus.\textsuperscript{21} Although only considering race as a plus is an inherently confusing concept because seemingly boosting one group’s admission’s probabilities would naturally harm another’s, the Court defended the practice as constitutional at the time. Interestingly enough, in her opinion in \textit{Grutter}, Justice Sandra Day O’Connor famously predicted that “25 years from now,” the “use of racial preferences will no longer be necessary” in the admissions process.\textsuperscript{22}

While \textit{Grutter} remains as the established modern precedent, one other significant race-conscious

\textsuperscript{19}Ibid
\textsuperscript{22}Ibid
admissions case reached the Supreme Court between 2003 and the present. After being denied admission to the University of Texas in 2008, a white woman sued over the university’s race-conscious admissions policy in what was “widely seen as an attempt to overturn” Grutter. The Supreme Court first heard the case in 2013 where it sent it back to a lower court, then heard the case again in 2016. These two cases became known as Fisher I and II. Ultimately, the Court ruled in favor of the university in Fisher v. University of Texas by a vote count of 7-1, with only Ruth Bader Ginsburg dissenting. The majority found that the use of racial classifications is constitutional if “workable race-neutral alternatives do not suffice.”

Looking forward to SFFA v. Harvard, although seemingly unlikely for the Court to reverse its ruling only 7 years later, the altered makeup of the Court with four new justices in Gorsuch, Kavanaugh, Coney Barrett, and Jackson and six republican nominees provided for potential inconsistency. Further, with just 5 years remaining on O’Connor’s pressuring prediction for the feasibility of race-conscious admissions, justices may feel forced to alter the standing precedent as soon as possible. The Court cannot predict the timing of when the next landmark affirmative action case may present itself. If they fail to overturn Grutter 20 years after the 25-year prediction timeline, they may not get another chance to do so until 30 years after Grutter. In other words, some justices on the Court may rather alter affirmative action’s structuring too early rather than too late. Further, the nature of America’s political climate constantly demands the Court to rethink its rulings to meet societal standards. Not so infrequently does the Court overturn their previous decisions. Specifically for affirmative action, the Courts past predictions coupled with a more conservative bench predicts a likely shakeup for

\[23\] Ibid
the future, now the question is whether the shakeup be in SFFA v. Harvard or the next landmark decision.

Sure enough, on the morning of June 29th, 2023, the Supreme Court ruled in a 6-3 vote to side with the SFFA over Harvard. A shakeup indeed. The decision deemed that the consideration of race and race alone in the college admissions process violates the Equal Protection Clause, and hence is unconstitutional. The majority opinion authored by Chief Justice John Roberts stated that the “race-based admissions systems… fails to comply with the twin commands of the Equal Protection Clause that race may never be used as a ‘negative’ and that it may not operate as a stereotype.” The case emerged as the newest in an over four-decade long series of landmark rulings regarding affirmative action. While its implications only immediately applied to higher education, the decision rocked nearly every sphere of American politics. Whereas nearly all previous legislation passed in Congress, Executive Orders carried out by the President, and decisions voted on by the Supreme Court besides Bakke bolstered Affirmative Action’s strength and presence in academia, SFFA v. Harvard was the first to show signs of a regression.

The case dates back to 2014 when the Students for Fair Admissions (SFFA), spearheaded by activist Edward Blum, sued Harvard alleging that their admissions policies discriminated against Asian American applicants.24 The SFFA concurrently sued the University of North Carolina in a very similar lawsuit, but the two cases were consolidated into one. Blum and the SFFA claimed that Harvard’s race-conscious admissions policies resulted in a violation of Title VI of the Civil Rights Act of 1964.25 The SFFA, the plaintiff in the case, argued that when

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Harvard applies their “holistic” approach (or race conscious approach) to evaluating potential students, Asian American students are negatively affected. Cameron T. Norris, the lawyer presenting the plaintiff’s oral argument in the Supreme Court, argued that the precedent established in *Grutter v. Bollinger* only allows for race to be used in a “narrow tailored way” and only in a manner that would be a “plus” to applicants, however Harvard uses it as a minus for Asians. Further, Norris argued that according to their objective qualifications, Asians should be getting into Harvard more than whites, but they do not because Harvard gives Asians a “significantly lower personal rating,” ranking them as “less likable, confident, and kind, even though the alumni who actually meet them disagree.” The SFFA frequently paralleled Harvard’s present-day treatment of Asians to their notorious efforts in thwarting the Jewish population at their school in the 30s.\(^{26}\) Interestingly enough, the founder of the SFFA, Edward Blum, pointed out in an interview that from 2014 back to 1998 the admissions rate for Asian American students at Harvard had flatlined at about 18 percent. However, after the initial lawsuit was filed in 2014, the admissions rate steadily increased up to 30 percent by 2023. While certainly not an admittance of guilt or wrongdoing, Harvard preemptively restructuring their admissions to more closely meet a decision in favor of the SFFA may further point to the potential need for change.\(^{27}\) Norris found that race conscious admissions go a step too far in the modern era and implored the justices to deliver a new ruling protecting groups harmed by affirmative action. Although adamantly against the negatives race conscious admissions establishes, Norris did not support an outright race consideration ban. He stipulates that race and race alone ought not to be considered

\(^{26}\)Ibid

in an application, and that it ought never to be used as a negative. The route Norris and the SFFA devised to accomplish this goal is by eliminating the ‘check-a-box’ to identify your race prompt in the common application. He contended that for schools to read that a person is “Hispanic or Black or Asian” and blindly “credit that” is unconstitutional. However, a school could credit something “unique and individual in what they wrote” regarding their identity. Norris finds that applicants should absolutely be credited for overcoming challenges or obstacles in their life stemming from their race. He emphasizes the indubitably impactful role race plays in individuals’ identities and lives, but that these very crucial and worthy experiences ought to be articulated in an essay on the application and not by just checking a box.28 Altogether, in the argument phase of their hearing, the SFFA aimed to remove the precedent set in *Grutter*, eliminate the negative affects race possesses in the admissions process, and to remove race alone as a component of the holistic admissions process.

Beyond these concrete deliverables the plaintiff wished for the Supreme Court to rule on, the plaintiff also suggested an alternate route to achieving a “robust, dynamic” diverse community through an approach they called “simulation D.” The simulation Norris presented revolved around a diverse socioeconomic background, he revealed that under their hypothetical application review method the percentage of economically advantaged students would go from 82% to 51%.29 Norris admits the methodology is certainly in the beginning stages and still needs improvement, but highlights how moving into the future socioeconomic status ought to play a more pivotal role in securing diversity on campuses across the country. The SFFA found that if race conscious admissions are found unconstitutional, socioeconomic status may potentially play

29 Ibid
as a comparable substitute for race.\textsuperscript{30} However, the SFFA stipulates that their role in the case is not to create a replacement variable for race in order to sustain a diversified campus, but that simply they are proving that race conscious admissions are harmful and violate the Equal Protection Clause.

The argument stemming from the other side of the bench was more easily summarized. Harvard relied on past precedent from \textit{Grutter} and \textit{Fisher} as well as the benefits of diversity in an academic setting to back race-conscious admission policies. Harvard obviously openly admitted that they account for race as a factor in applications, but choose to double down on their application process by arguing that it does not result in discrimination. Their team of lawyers broke this down by revealing their exact admissions process. Out of the school’s now 60,000 average yearly applicants, Harvard finds 25\% of them are fully qualified and would succeed if admitted. However, the school only has space to accommodate 3-4\% of applicants, not 25\%. The lawyers explained in their testimony that Harvard is forced to then take the fully qualified 15,000 and cut this number down to about 1900 students. Throughout the process the school may significantly alter the demographics of the group, where the fully qualified group may feature a much higher percentage of Asians compared to the admitted group. Harvard argues that while it may appear that Asians are punished in this process, they aim to create both a populace which represents America’s demographics, as well as a populace that best fosters a diverse and stimulating learning environment. They find that the race-conscious admissions process is crucial in creating the most “robust, dynamic” community possible where students can best learn from

each other.\textsuperscript{31} Harvard finds that being conscious of an applicant’s race does not violate the Equal Protection Clause because race is one of many factors used in crafting their student body.

After hearing both sides' arguments, the Supreme Court ruled in a 6-3 decision that the consideration of race in the college admissions process violates the Equal Protection Clause. The majority opinion authored by Chief Justice John Roberts stated that the “race-based admissions systems… fails to comply with the twin commands of the Equal Protection Clause that race may never be used as a ‘negative’ and that it may not operate as a stereotype.” The Court argued that while previous cases deciding in favor of race-based admissions by the Court allowed for race to be used in a positive manner to affirmatively boost prospective students’ applications, presently race is now used as a negative for some groups. Applicants still may discuss in essays the impact race holds on their identity, but colleges may not consider race and race alone. The Court “observed that Harvard’s policy of considering applicants’ race . . . overall results in fewer Asian American and white students being admitted.” While Harvard contends that the action of boosting one’s application based on his or her race does not inherently imply a negative towards another individual outside of that race group, the majority opinion scrutinizes this logic. Roberts argues that extending this logic would mean giving “preferences to applicants with high grades and test scores, ‘does not mean it is a ‘negative’ to be a student with lower grades and lower test scores.’” Unlike the decision in \textit{Grutter}, he finds that inherently rewarding one individual for receiving a boost in any category punishes someone who does receive a boost. Further, Roberts relies on excerpts from previous decisions in \textit{Gong Lum v. Rice} and in \textit{Miller v. Johnson} to support the removal of race conscious admissions. He quotes that “‘one of the principal reasons

race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.’

Put simply, Roberts argues that using race results in unjust stereotyping of individuals, and that race-conscious admissions results in the “offensive and demeaning” practice of pairing one’s characteristics with the color of your skin. Lastly, Robert’s argues that universities’ “admissions programs also lack a ‘logical end point’” as mandated in Grutter.

Despite a clear forbiddance of race conscious admissions, Chief Justice John Roberts’ majority decision fails to establish a direct overturn of precedent set in Grutter. There are three key reasons why Robert’s does not desire to formally overturn set precedent: 1) he believes this decision falls in line with Grutter due to O’Connor’s majority decision stating that their solution was a temporary one meant only to last 25 years, 2) the decision still allows for race to be mentioned in essay questions, and 3) he fears another wave of historic backlash similar to the decision in Dobbs. The Court recognizes the rarity of overturning set precedent and is aware of the harsh impact it triggers. The nation’s divisive reaction to the recent overturning of Roe v. Wade (in which the decision fell strictly along party lines) concerned all justices on the Court. The SFFA v. Harvard decision once again split directly on party lines, and the failure to reach a unanimous decision on the two landmark cases of the past decade heightened attacks.

The Court’s biggest fear is that they are perceived as a political body, indistinct from the chaos and pettiness of the two other branches. After Dobbs, critics began claiming exactly this. Continued

controversial decisions subtract from the reverence the Supreme Court commands. While unlikely for the nation to outright lose faith in the Supreme Court, a plethora of reversals of landmark decisions, and continued division among the same justices may substantially harm the Court’s reputation.

Justice Clarence Thomas joined the majority opinion, but also shared a concurring opinion. Instead of beginning his opinion by citing specific intricacies of Harvard’s admissions process which are unjust, Thomas elects to tell a story. He explains the storied history of the Court’s record on race. He notes they made mistakes at times such as in *Plessy* but they “corrected course in *Brown*.” He shares that his approach to *SFFA v. Harvard* directly correlates to the path the Court took in *Brown*. Thomas finds that similar to *Plessy*, the Court made a crucial error in *Grutter* and that *SFFA v. Harvard* plays as the perfect opportunity to once again correct course. Thomas’s sentiment reveals how the Supreme Court is very much a living organism. Despite attempts to remain apolitical, the Court nevertheless changes with the times, a phenomenon Thomas is enthusiastic to admit. Further, Thomas shares how he dissented in the original *Grutter* case and has since “repeatedly stated that [the case] was wrongly decided and should be overruled,” and that now is the time. Although the makeup of the Court at the time of *Grutter* interpreted the Constitution differently, the new makeup allows for a correction.

Justice Gorsuch wrote a separate concurring opinion emphasizing that not only does the Equal Protection Clause not tolerate race-based admissions, but that Title VI of the Civil Rights Act of 1964 also does not permit the practice. Justice Kavanaugh also offered a separate concurring opinion where he further explained why the Court’s decision is “consistent with and

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36 Ibid, 50
follows from the Court’s equal protection precedents, including the Court’s precedents on race-based affirmative action in higher education.”

Although a damming decision to rule in favor of the challengers, the SFFA, in reality the decision was far less impactful than it could have been. Roberts’ majority opinion only mandated a removal of the check the box formatted question on race, leaving the door open for discussions on race in other parts of the application. The reasoning behind this is because Roberts’ opinion banned race conscious admissions meaning that university are not allowed to know or ask for only the race of the student. However, the decision did not ban universities from knowing how race has impacted the student’s life or their journey regarding their race. Jesse Merriam, a lawyer and professor of Government at Patrick Henry College argues that the decision simply made affirmative action operate more kindly and gently, but its ultimate impact was unaltered. Further, Merriam finds that O’Connor’s 25-year expiration date from the Grutter decision has been completely ignored. He argues that unless the entire “Grutter framework” is abolished, affirmative action will continue to be a cornerstone of admission systems. As Justice Roberts explains, this is because universities strongly emphasize the importance of diversity and its advantageous effects on education. As long as diversity is prioritized, race will matter because it is “necessary for diversity,” and because race matters, affirmative action will persist. Further, Merriam establishes that the Court is presently unwilling to seriously dismantle the emphasis on diversity because they refuse to “trace the origin and trajectory of our diversity discourse,” and they fail to “engage how affirmative action, in tandem with the civil rights revolution, has

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39 Ibid
supplanted our constitutional order.”  He argues that the Court can make any ruling they want, but if they choose to ignore these two issues, “affirmative action is likely here to stay.”

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40 Ibid
41 Ibid
Chapter Three: Affirmative Action Cases in Business

At this point SFFA v. Harvard and the cases preceding it are clearly laid out, providing a sufficient platform to begin discussing the future of affirmative action in schools. However, this paper discusses race in employment and business, not education. The SFFA decision provides as the most relevant and influential affirmative action case because of its recency, but its relevance to the business world yields gaps in its influence. In other words, the SFFA decision is important, but cannot be viewed as the only influencer over the future of affirmative action in hiring because it only deals with education. While affirmative action in schools is beyond crucial to both understand and predict affirmative action’s role in hiring and candidate selection, the long string of business-related affirmative action cases possesses even greater relevance. Further, the door to potential affirmative action in schools and higher education cases is certainly not closed, but the next landmark case regarding affirmative action likely will stem from the business or corporate world due to the recency of the SFFA decision. Finally, education related affirmative action cases provide a perfect segue into business related cases because the decisions all pertain to either the Fourteenth Amendment or the Civil Rights Act of 1964. Whether in an educational or business setting, an affirmative action case demands an interpretation of one of, if not both of these crucial elements of American law. Rarely, if ever can the Equal Protection clause, or Civil Rights Act be applied in inconsistent or contrasting ways in the two separate fields.

Moving forward, the following selected business-related affirmative action cases all deal with a government ordinance which provides racial set asides or quotas. The key difference between business related cases is that instead of a third-party organization such as a university being the one to grant advantages or practice favoritism, federal, state, or local governments directly appropriate certain advantages to the disadvantaged. There are cases which reach the
Supreme Court that deal with individual companies’ hiring practices, but these cases often fail to set nationwide precedent. Circling back to racial set asides, they are often seen in the form of the government explicitly providing or reserving contracts for minorities or the disadvantaged. This most commonly looks like an ordinance requiring or favoring the hiring of a minority or disadvantaged individual. Racial quotas in a non-educational setting are most often seen when a business or the government requires a certain number of its employees or contractors to be a minority or disadvantaged. The government began these programs in the aforementioned Reconstruction Era while attempting to integrate former slaves into society. To carry out these policies, Congress relied upon the Civil Rights Act of 1866 and then later the 14th Amendment which both prohibited discrimination on the basis of race. After the unfortunate termination of the Reconstruction era it was not until Lyndon B Johnson, the Great Society, and the Civil Rights Act of 1964, where these policies gained traction again. Much unlike the racist white southerners of the 1870s, the motivation behind modern-day challengers’ attempts to do away with quotas or set asides is that they believe it creates unfair advantages for those who receive benefits from the programs, which hence creates an unequal playing field for all. Many of the plaintiffs in the following cases are individuals or companies who missed out on job opportunities or promotions because of government actions.

After Johnson’s Civil Rights Act of 1964, racial set asides became especially popular. By the 1970s, most government contracts featured a clause mandating that a certain percentage of business be reserved for disadvantaged individuals. Unsurprisingly, challenges and lawsuits

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against these programs also became especially popular in the second half of the twentieth century, with six affirmative action cases making it to the Supreme Court in the 1970s alone. The most influential of these cases was *Fullilove v. Klutznick*. The case arose after H. Earl Fullilove and other contractors filed suit in disagreement with a 1977 act of Congress which required that at least 10 percent of federal funds granted for local public works programs be directed towards businesses owned by minorities. Philip Klutznick, the Secretary of Commerce at the time, stood to defend the act before the Court. The question the Court faced was whether or not the provision of the statute for minority business enterprises violated the Equal Protection Clause of the Fourteenth Amendment. The Court in a 6-3 decision found that the minority set-aside program was indeed constitutional. Further, the Court argued that Congress could have justified their program through both the Spending Power and the Commerce Clause as well, and that “Congress did not have to act ‘in a wholly ‘color-blind’ fashion.’” The Court’s decision reveals a strong sense of support for remedial actions for past injustices, and a yearning for a nationwide push to level society. On top of this, their decision to denote that Congress not only was backed by the Equal Protection Clause but also in two other facets of the Constitution emanates a sense of power. The Court slyly implies a threat towards any potential challengers to similar cases by bragging that they can justify a set aside program through not one, not two, but three avenues. *Fullilove* emanates a rhetoric of strong support towards programs motivated by remedial and reparative efforts.

However, just a decade later, the first landmark case where a challenger successfully thwarted an existing government program arose. In 1983, the city of Richmond, Virginia enacted

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the Minority Business Utilization Plan. The plan required “general contractors who worked for the city to subcontract at least 30 percent of the dollar value of each contract to one or more Minority Business Enterprises.” A Minority Business Enterprise or (MBE) was defined as a business which was at least 51 percent owned by African Americans, Hispanics, Asians, or Native Americans. The alleged justification for the plan was to serve as a remedy for past economic discrimination within the city, a form of reparations, but at the hearing where the plan was adopted, the city provided no evidence for such discrimination. Ultimately the plan “prevented the J.A. Croson Company from receiving a contract, since it was the only non-MBE to bid on it.” The Croson company then sued the city declaring that the plan was unconstitutional under the Fourteenth Amendment. In early 1989, the Supreme Court delivered their decision on the case. In a six to three decision, the Court found that “generalized assertions’ of past racial discrimination could not justify ‘rigid’ racial quotas” for subcontracts and business deals. Sandra Day O’Connor justified her majority decision with a few select criteria. First, she found that state and local governments ought to only provide remedies for discrimination within their own jurisdiction, and that “redressing nationwide discrimination” ought to be reserved to Congress. Second, the Court found that offering remedies within the construction industry is not justified because there is little evidence showing past discrimination in this precise area. Third, the Court found that the favoritism towards all minorities, not only African Americans, reveals that the plan was not narrowly tailored enough. Extending the plan beyond the race who were previously enslaved in the area over a century ago shows that perhaps

the goal of the plan is not pay reparations, but instead something along the lines of reshaping society to their liking. O’Connor also powerfully concluded that “the dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs.” She claims that to justify Richmond’s plan through a supposed goal of creating an equal society actually works against that very goal. O’Connor argues that to consider the inequitable Richmond plan in the same regard as the rest of society’s invaluable progress diminishes, corrupts, and contaminates the righteous and real work society does. Further, in revealing her broader attitude towards racial set-asides, she also provides a framework and precedent for future reparations and racial set-aside cases. The precedent she cements is that time has progressed too far for broad and untailored remedies to be justified. Hence, not only will plans similar to Richmond’s become more and more unjustifiable and obsolete, but as time progresses, future plans will have to be even more narrowly tailored. Justifiable racial set asides ought to favor specifically those who were undoubtedly harmed by past wrongdoings. All in all, the Croson case establishes that the Supreme Court views the Fourteenth Amendment not as a tool for society to use to boost up a certain group of people, but instead as a defense mechanism from putting one class down. O’Connor and the Court see the Equal Protection Clause as an open gateway providing equal opportunity for all to pursue their own happiness, not as a leveler or mechanism which delivers happiness to a certain population.

The next significant racial set aside case which further constricted the bounds of favored treatment towards minorities is Adarand Constructors, Inc v. Peña. The case, which was decided in June of 1995, overturned two previously decided cases in Fullilove v. Klutznick and Metro

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Broadcasting, Inc. v. FCC. The dispute arose in 1989 between a highway contractor company Adarand Constructors, Inc, and the Secretary of Transportation, Peña.\(^\text{51}\) The US Department of Transportation awarded a highway contract to Mountain Gravel and Construction Company in Colorado, and Mountain Gravel subsequently asked for bids for a subcontract for the guardrails. Adarand submitted the lowest bid, however it was not awarded the contract because Gonzales Construction company’s higher bid was accepted. Mountain Gravel elected to take Gonzales’ bid because they had been certified as a small business “controlled by ‘socially and economically disadvantaged individuals.’” This move allowed for Mountain Gravel to receive an “additional payment” from the government making their higher bid more lucrative.\(^\text{52}\) Adarand’s grievance with the decision was that they themselves were a minority owned business but had not been certified by the Small Business Administration. They leaned on the fact that “federal law requires that a subcontracting clause similar to the one used here must appear in most federal agency contracts’ and that “[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business].”\(^\text{53}\) This excerpt eventually became the question at hand for the Supreme Court: should the presumption of disadvantage be solely based on the race of a person, or ought there need to be a verification of certain disadvantages in order to qualify for favored treatment? The Court found in a 5-4 decision that “all racial classifications… must pass strict scrutiny review.” They found that treating race as an automatic sign of disadvantage is not


\(^{53}\)Ibid
narrowly tailored and ought not to garner favored treatment.\textsuperscript{54} Sandra Day O’Connor’s majority opinion implied that minority status no longer inherently grants a disadvantaged status. Tying this into her famous concluding line in \textit{Grutter} where she predicted that “25 years from now,” the “use of racial preferences will no longer be necessary,” a clear pattern in her beliefs emerges.\textsuperscript{55} O’Connor and the conservative appointees of the Supreme Court believe in and recognize the importance of affirmative action, yet they possess an end goal. O’Connor’s sentiment reveals that she hopes for a day where society no longer needs affirmative action, and no one minority group is at an inherent disadvantage. She views affirmative action as a temporary path guiding America out of its troubled path and towards a promising future.

Ultimately, the primary holding was that strict scrutiny is the appropriate standard of review for all government actions based on race, not just those that disproportionately benefit whites but also affirmative action programs that benefit minority groups.\textsuperscript{56} This decision more broadly signifies the Court’s gradual regression of affirmative action programs and leniency. Whereas earlier cases such as \textit{Fullilove v. Klutznick} backed a more liberal set-aside program favoring minorities in a broadly tailored way, the Court now left the door open to a distant but potential crackdown on economic favoritism towards any minority.

The final and most recent case in the line of business-related affirmative action disputes stems from the New Haven, Connecticut Fire Department. In 2003, 118 firefighters participated in examinations to qualify for promotions. Examinations for promotion in the department were not only difficult and scarce, but they also directly controlled who would be promoted within the next two years and in what order. Many firefighters studied for months in advance, “at

\textsuperscript{54}Adarand Constructors, Inc. v. Peña.” Oyez.
\textsuperscript{56}Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995)
considerable personal and financial cost.”57 The results of a particular round of examinations revealed that Caucasian firefighters had outperformed minority candidates. The outcome of the test soon led to a public debate that turned controversial and divisive. The debate revolved around whether or not the results of the tests ought to be legitimized and for the ensuing promotions to proceed. Some claimed that the results revealed a bias in the nature of the tests ultimately favoring Whites. Others argued that the tests were fair. Both sides threatened discrimination lawsuits against the city pending the decision. Ultimately Mayor DeStefano and the city decided on throwing out the examinations without revealing which specific individuals passed the test. Foreseen uproar ensued, and Frank Ricci, a firefighter in the department filed suit against DeStefano and the city. Despite his “‘several learning disabilities’ including dyslexia” forcing him to study 8-13 hours a day, Ricci argued in court (without knowing his own personal test results) that “‘the people who passed should be promoted.’”58 Others on the side of the city described the test questions as unfair and irrelevant to New Haven structure. The Supreme Court was tasked with answering whether it was constitutional to “reject results from an otherwise valid civil service exam when the results unintentionally prevent the promotion of minority candidates.”59 In 2009, they ultimately decided in a 5-4 decision that Mayor DeStefano acted unconstitutionally by violating Title VII of the Civil Rights Act.60 Title VII explicitly prohibits employment discrimination based on race, color, religion, sex, and national origin.61 The Court failed to establish a broader ruling deeming this behavior as unconstitutional across the board.

58 Ibid
60 Ibid
because each case would be fact dependent upon the nature and results of the exams. However, the Court found that before an employer can intentionally discriminate against one group for the purpose of avoiding a “‘disparate impact’ on a protected trait the employer must have a ‘strong basis in evidence’ that it will be subject to ‘disparate impact liability’ if it fails to take the discriminatory action.”  

62 Put more simply, for an employer to discriminate against a non-protected group for the purpose of avoiding discriminating against a protected group, it must have near irrefutable evidence that the business will be liable for harming a protected group. In this specific case, the Court found that a protected group did suffer, but that the city would not be liable for it because the test they administered was “job-related, consistent with business necessity, and there was no evidence that an equally-valid, less-discriminatory alternative was available.”  

63 This specific example reveals how just because the result of a just approach may be unintentionally discriminatory, it does not make the approach unjust. Altogether, Ricci’s most significant takeaway is the continued tightening of the scope and reach of affirmative action in society. The Court further solidified and continued upon their plan of slowly picking off different intricacies and nuances of affirmative action until the elimination of the entire thing. The case marks the most recent, but certainly not final instance of a restriction of the protection and favoritism of minority groups in enterprise and commerce.

Concluding the Business Cases:

Although this string of cases serves as an extensive list of business-related affirmative action cases in the Supreme Court, it is important to note that besides Fullilove, I chose to only cover the cases that the Court found violated the Constitution. I emanated a storyline where

63Ibid
affirmative action is seemingly bound to imminent failure, and the Court consistently strikes it down at any opportunity it can, yet this is not always the case. A significant number of cases exist where affirmative action came under fire, but the Court defended it. The cases that failed to overturn precedent certainly offer valuable insight into the history of affirmative action, but are less relevant to this paper because they only continue the status quo instead of establishing new rulings and precedent. These cases include United Steelworkers of America v. Weber, Local 28 of the Sheet Metal Workers' International Association v. Equal Employment Opportunity Commission, United States v. Paradise, and Metro Broadcasting, Inc. v. FCC. Another reason why these cases are less relevant is that many of them are now null and void as subsequent cases ultimately overturned them. Moving forward, a peculiar yet crucial element of the cases I covered is that almost every vote fell among ideological lines. A 6-3, 6-3, 5-4, and another 5-4 decision in Fullilove, Croson, Adarand, and DeStefano reveals the controversy surrounding the topic. A continuation of this trajectory of overturning affirmative action likely relies on the conservative school of thought remaining the dominant one on the bench. Democrat nominees’ voting records reveal liberal wishes to maintain the influence of affirmative action. A flip on the Court to a liberal majority may not only see a halt in the termination of affirmative action programs, but possibly a re-bolstering in certain programs through an overturning of precedent in cases such as Croson. Altogether, unless the make-up of the Court undergoes a historic transformation, the future of affirmative action seems to be in real jeopardy.

After an understanding of how different eras of the Supreme Court have interpreted the various affirmative action laws and bills has been established, a more colorful analysis of these bills ought to be discussed. When first reading these bills, they may fraudulently appear to be overtly straightforward. Take for example Title VI and VII of the Civil Rights Act. The section
states that there ought to be no discrimination in federally assisted programs and equal employment opportunity. Upon initial glance it seems as if all the government ought to do is to allow for equal access to these programs, but that is exactly where affirmative action becomes extremely clouded. Suddenly allowing for equal access turns into creating racial set asides, quotas, categorizing what is a minority business enterprise, and so much more. This is where the Court has had to step in to interpret the laws, and over time the interpretations change. Ultimately, the laws that back affirmative action almost morph into a living organism which host an evolving interpretation over time. In the late 20th century, the Court made certain their interpretations of the Equal Protection Clause and the Civil Rights Act, yet the bills stand differently today. For better or for worse, the very bills which once enabled the existence of affirmative action are the ones which possess the power to tear it all down. Many justices view affirmative action to be operating in a way contrary to its stated goals and intentions, causing a reverse discrimination effect. Those sceptical of affirmative action envision the potential for evolving interpretations and capitalize on it. Finally, as time continues on, the interpretation of whether a policy is “narrowly tailored” enough will only continue to tighten and tighten resulting in a smaller scope and impact for antidiscrimination laws.

Although affirmative action cases in the Supreme Court indubitably hold the greatest influence over the functionality and constitutionality of affirmative action, one more important case ought to be discussed. As previously discussed, Bakke established in 1978 that tied in with affirmative action policies was the pursuit of diversity. Justice Powell established that diversity was a stated, desirable, listed government interest. For almost 20 years after Bakke, diversity was used to justify “race-conscious admissions practices by colleges and universities,” as well as
hiring practices for corporations. The utilization of diversity as a justification and goal was problem free and effective. However, this soon took a major turn. In 1994, six Black Texaco employees filed suit against Texaco in what became a “‘game changer’” for modern diversity. The six employees claimed that the company “engaged in a pattern and practice of discrimination against African Americans in ‘promotions, compensations, and the terms and conditions of their employment.’” For about two years “the suit proceeded in relative obscurity,” until an incriminating audio tape involving Texaco employees was released to the press. Amid fear of public boycotting and legal consequences, in the following days Texaco’s stock plummeted, causing them to lose nearly a billion in market valuation. In turn, Texaco was forced to act quickly. Whereas originally the suit had been filed for $71 million, they were forced to settle for a “then record sum of $176.1 million. The money, however, was just the tip of the iceberg. The settlement also “mandate five years of judicial oversight, creation of an outside advisory task force, and implementation of numerous corporate-wide diversity initiatives.” To help further mitigate the damages to the company’s reputation, Chairman Peter Bijur “committed to ‘take Texaco into the 21st Century as a model of diversity.’” This is where the bulk of the change stemmed from. Corporations nationwide both in fear of a similar suit, and in support of promoting diversity were suddenly “awash in diversity programming focused on diversity recruiting and hiring.” Unlike corporations’ previous positions in charge of ensuring legal compliance to affirmative action, many companies began adding Chief Diversity Officers, and

65 Ibid. 81
66 Ibid
67 Ibid
68 Ibid
69 Ibid
began pushing diversity efforts far beyond the legal minimums. Coupled with a later $192 million discrimination settlement by Coca-Cola in 1999, diversity, equity, and inclusion (DEI) efforts took off.\textsuperscript{70} This diversity wave delivered a new and refreshing boost to affirmative action efforts. That being said, it is important to note that while the pursuit of diversity is often used as a justification for affirmative action, diversity is not the same as affirmative action. Pursuing diversity signifies an upgraded much broader, more encapsulating, and less legally restrictive version of antidiscrimination policies. Companies capitalize on their promotion of DEI in hiring to push job opportunities towards minorities, build more diverse workforces, and create new job openings catered for minorities. However, a key stipulation is that DEI efforts promote more than just racial diversity; they also include but are not limited to diversity in sex, gender, orientation, geography, nationality, and experience. While an evaluation of the effectiveness and justness of DEI efforts are certainly well beyond the scope of this paper, the DEI push beginning at the turn of the century allows for programs and policies that teeter along the line of legality under affirmative action to operate. Lastly, the fallout of the Texaco settlement largely left the education-world’s promotion and understanding of diversity untouched as the positive impacts of diversity in education were well established.

\textsuperscript{70} Ibid. 82
Chapter Four: Edward Blum

At this point in the paper, I have selectively laid out the history of affirmative action and diversity movements; now, only the future ought to be discussed. However, the future is not worth discussing unless there is change. Without change, the future will operate in line with the present. Unlike the legislature which the framers designed to churn out legislation and change, the Supreme Court must only review already existing laws to enact change. Without an individual or group challenging specific laws, their role is nonexistent. Every Supreme Court decision altering or defending the function of a law or affirmative action needs one thing, a lawsuit. The future will remain the past without one. A plethora of affirmative action-based programs operate at this very moment, but they cannot be challenged without a plaintiff willing to file suit. Uncoincidentally, the man behind the Students for Fair Admissions (SFFA), has dedicated his professional life to challenging race’s role in government. He investigates controversial programs and seeks change. Edward Blum, the founder of the SFFA, leads a storied and successful career as a Constitutional lawyer in which he has played a significant role for the plaintiff in several Supreme Court rulings. Blum self-describes himself as a “‘matchmaker’” who finds plaintiffs and pairs them with lawyers “in an effort to remove race-conscious policies from American life.”71 Blum was behind SFFA v. Harvard, the voting rights case Shelby County v. Holder which overturned a key provision of the Voting Rights Act, the previously discussed landmark cases of Fisher v. Texas I and II, and several others.72 Blum’s broad philosophy is to ensure that the nation does not “‘remedy past discrimination with new

72Ibid
discrimination.’” He recognizes America’s troubled past and the indubitable existence of the marginalization of certain communities, but sees no utility in affirmative action. He argues that “raising the bar for certain races and lowering the bar for others cannot be the solution to [the] equal opportunity” element of Title VII. His argument is simply that two wrongs do not make a right. Blum’s idea of diversity is not one of skin color or shape of someone’s eyes, but instead the diversity of their upbringing, ideas, and character. He proclaims that he is not against diversity movements, just the government’s race-conscious policies. Ultimately, he yearns for a color blind society where race neither acts as a positive nor negative in individuals’ lives. Blum argues that race should not help or harm life’s endeavors whether it be gerrymandering people into a certain voting district or being rejected or accepted to a university. In the past Blum has targeted his litigation efforts mainly towards academia and voting rights through his foundations of the SFFA as well as the Project on Fair Representation. More recently, however, Blum has refocused his efforts on “employment diversity programs, corporate board diversity quotas, and government contracting requirements.” In channeling his efforts towards employment, Blum created the Alliance for Fair Board Recruitment.

His creation of the Alliance for Fair Board Recruitment generates confusion around who or what Blum’s target is. Does Blum wish to stick it to the government enacting

74Ibid
75Ibid
antidiscrimination policies, or the businesses who carry out antidiscrimination policy and hire according to these laws? Predictably Blum solely wishes to alter official legislation due to his belief in the free market and capitalist. Although certainly not his desire for corporations to carry out affirmative action policies which in his opinion operate to continue, not solve centuries of oppression, he is also a lawyer at his core. Being the lawyer he is, he understands American law, and the contract at will, and wants for every business or individual to possess the liberty to act without restriction. In other words, choosing to favor certain discriminable characteristics such as race is not what he would prefer a business to do, but he does not wish to regulate the businesses who operate in such ways, he only yearns to repeal antidiscrimination laws. The government is his target, corporations are not.

While working on the SFFA v. Harvard case, the hyperactive Blum simultaneously filed suit against the United States Securities and Exchange Commission (the SEC). Blum’s Alliance for Fair Board Recruitment (AFFBR) took exception to a new rule the private stock exchange Nasdaq enacted. The rule “required Nasdaq-listed companies to disclose aggregated information about the diversity of their corporate boards” in order to participate in the exchange.\(^78\) Interestingly, the rule does not mandate a diversity quota, but simply requires companies to publicize the racial composition of their board of directors. However, if a company does not have “a minimum of two diverse board members, including at least one female and at least one underrepresented minority or LGBTQ+ member,” they must disclose why.\(^79\) Although certainly neither explicitly nor specifically mandating diversity, the rule indubitably encourages diversity


among company boards. The AFFBR argues that firms ought to be able to recruit board members without the pressure of this rule impending on their decisions. Further, they find that this rule negatively affects certain groups of people who do not fall into one of the diversity categories. The AFFBR’s goal is to ensure that race does not play a negative role in someone’s ability to acquire a position on a Nasdaq company’s board. More, Blum argues that the rule is unconstitutional under the Equal Protection Clause, and that it “requires Nasdaq-listed companies ‘to… encourage race and sex discrimination.’” On the other hand, the Nasdaq finds that not only is their rule constitutional, but it actually promotes better business practice and results in better corporate performance. Additionally, they argue that their rule is constitutional because it does not force or mandate companies to hiring in a specific way. In October 2023, the US Court of Appeals for the Fifth Circuit upheld the Nasdaq board diversity rule, a small victory, but a victory nonetheless for affirmative action. The court of appeals sided with the SEC because the “Nasdaq is not a ‘state actor’” and their rules “could not be attributed to the SEC.” They found that simply agreeing with the Nasdaq’s rule does not make it law. In reality, Nasdaq’s policy had little chance of being knocked down. However, after the decision the AFFBR petitioned for rehearing en banc and the case is still currently pending. If the case ultimately finds its way to the conservative-dominated Supreme Court, the ruling may likely result in yet another symbolic rollback of affirmative action, however, a failure to do so will fall far short of halting the AFFBR.

Since the 1990s Blum has filed over two dozen cases attempting to remove the concept of race from America’s law, eight of which have made it to the Supreme Court, and only a select

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80Ibid
81Ibid
few were ultimately successful.\textsuperscript{82} Attempting to overturn precedent or to find an existing law unconstitutional proves to be an extremely challenging task, yet when victorious is tremendously impactful. An early failure in his battle to remove race’s role from the corporate world is far from a major setback. The \textit{Alliance for Fair Board Recruitment v. SEC} represents only the beginning of Edward Blum’s newest target in his mission to terminate affirmative action.

Interestingly, Blum filed the \textit{AFFBR v. SEC} case prior to \textit{SFFA v. Harvard} decision which undeniably provides a significant platform for similar anti-affirmative action cases to rely on moving forward. With the \textit{SFFA} decision under his belt, perhaps past cases like \textit{AFFBR v. SEC} may have been decided differently. Blum himself feels “blessed to have [the SFFA] Supreme Court opinion” because it will “energize” similar cases.\textsuperscript{83} Further, Blum feels that selection or favoritism based on race “works the same way” in employment recruitment as it does in admissions.\textsuperscript{84} The \textit{SFFA} decision undeniably will boost the prospective chances of Blum succeeding in a corporate case. Additionally, his success will spur his motivation and self-belief in the possibility of success.

Unsurprisingly, success is exactly what the hyper-active Blum achieved. In a third case running simultaneously to \textit{SFFA v. Harvard} and \textit{AFFBR v. SEC}, the Alliance for Fair Board Recruitment filed suit against California's Secretary of State, Sherley Weber. In \textit{AFFBR v. Weber} Blum argued that California’s AB 979 passed in September of 2020 was unconstitutional under the Equal Protection Clause.\textsuperscript{85} The bill “required California-headquartered public companies to

\textsuperscript{83}Ibid
\textsuperscript{84}Ibid
appoint to their boards a minimum number of individuals from underrepresented groups” including African Americans, Hispanics, and LGBTQ+ individuals.\textsuperscript{86} Depending on the size of the companies, the minimum number of individuals from underrepresented groups ranged from one to three persons, and a violation of the bill could result in a $100,000 initial fine and $300,000 subsequent fines.\textsuperscript{87} While clearly a different law than the Nasdaq’s requirement of publishing one’s board compositions due to this law's direct quotas, the similarities were certainly present. Nonetheless, Blum and the AFFBR indubitably possessed stronger odds than the SEC case due to precedent from cases such as \textit{Regents of University of California v. Bakke} and \textit{Richmond v. Croson} which barred racial quotas. Similar to those cases, Blum and the AFFBR argued that the bill (AB 979) violated the Equal Protection Clause of the 14th Amendment. Ultimately, through relying on the “Supreme Court’s affirmative action jurisprudence” a federal district court found the bill to be unconstitutional.\textsuperscript{88} Relying on the Court’s “jurisprudence” in this case signifies that the Federal Court believes that even if their own personal opinions and interpretations lead them to an alternative ruling, that the precedent the Supreme Court has put forth is consistent with a ruling in favor of the AFFBR. The Federal Court exemplifies how the Supreme Court possesses the ‘supreme’ or final power of judicial review, and that when the Supreme Court clearly articulates a ruling that it may not be contradicted by a lower court. Simply, the lower court does not have a choice, they must rule for the AFFBR, because the Supreme Court has banned racial quotas. Interestingly, no precedent existed regarding the treatment of LGBTQ groups. This lack of precedent forced the Federal

\begin{footnotesize}
\textsuperscript{86}Ibid
\textsuperscript{87}Ibid
\textsuperscript{88}Ibid
\end{footnotesize}
Court’s hand as they were unable to rely on jurisprudence and had to make their own ruling. Anticlimactically, the Court ruled that because the law “was ‘almost exclusively cast in racial and ethnic terms’” that the LGBTQ portion of the law could not stand as law on its own. The Court found that they could not sever the unconstitutional elements of the law regarding race and leave the LGBTQ part because the law was clearly orientated for a racial classification or set asides. Altogether, while AFFBR v. Weber fell short of altering set precedent, the case represents the first of many potential wins for Blum and other suitors looking to eliminate race-conscious hiring practices.

The two key recently decided cases in AFFBR v. Weber and AFFBR v. SEC more broadly encapsulate the overall sentiment regarding race in business recruitment. On one side of the issue, liberal bodies both public and private such as California and Nasdaq are doubling down on their efforts to reinvigorate affirmative action’s role following the SFFA decision. While more difficult for them to be on the attack as they inherently will lie on the defendant side of any potential litigation, they can aggressively defend affirmative action in government by creating more policies involving it. The more they popularize their policies, the more they will be able to alter public sentiment and the sentiment of those on the bench. On the other side of the debate, the AFFBR and others alike are not only doubling down on their efforts to strike down any new legislation but looking to remove more storied and accepted policies as well. As Blum has previously elucidated, he wishes to eradicate all advantages or disadvantages stemming from race, not only the more aggressive forms such as quotas. Lastly, the outcomes of AFFBR v. Weber and AFFBR v. SEC symbolically represent the divide on the issue. One case garnered a ruling defending affirmative action and the other struck it down. Both sides of the issue can cite a

\(^{89}\text{Ibid}\)
victory and both a defeat. Additionally, the issue is not only incredibly controversial, but also incredibly targeted and popular; unquestionably more cases are to come.

Circling back to affirmative action more broadly, certainly affirmative action’s role within education is on the hot seat, but how likely is it that a landmark affirmative action decision from the business world occurs? The answer to this question relies on challengers such as Edward Blum. The more ambitious their goals, the more often business-related affirmative action will be in the news, and the more opportunities for the Court to rule on their side occur. Needless to say, Blum’s impressive resume of landmark cases reveals just how large his ambitions are. His goal is to fight until antidiscrimination law is completely eradicated, and he is off to a solid start.

The current crossroads surrounding affirmative action’s place in business leads us to the remainder of the paper. All significant past and present cases have been covered, and I am unable to predict future lawsuits that may follow. However, what ought to be covered are the varying perspectives on the rationale behind affirmative action’s existence and current Supreme Court positions on the viability of affirmative action.
Chapter Five: Arguments on Antidiscrimination Law’s Role in Business

Richard Epstein’s Libertarian Take on Affirmative Action:

One of, if not the most prominent voice against affirmative action policies is lawyer and author Richard Epstein. Epstein boasts a storied career as a professor at both the University of Chicago and New York University Law Schools. In addition, Epstein is a renowned legal mind holding libertarian views promoting free market and neutral race laws. In 1992 Epstein published his controversial *Forbidden Grounds* book arguing for the repeal of antidiscrimination laws within the workplace. The five-hundred-page book offers several arguments against affirmative action including the ideas that antidiscrimination laws impose on freedom of choice, set racial groups against each other, mandate inefficient employment practices, and ultimately cause more discrimination than they prevent. Epstein relies on both economic and philosophical arguments to lay out why the nation is better off without race-conscious laws. However, before Epstein jumps into his dissection of affirmative action, he asserts the crucial importance of “a broad antidiscrimination principle” that “lies at the core of American political and intellectual understandings of a just and proper society.” He maintains the importance of affirmative action not only in employment, but also in “public accommodations, medical care, education” and “all areas of public and private life.” (Epstein, 1). Here he offers a necessary and almost forced declaration that antidiscrimination holds inherent value. Simply, he acknowledges the problem at hand, discrimination, and he acknowledges that antidiscrimination efforts are beneficial. He sets the foundation for his forthcoming argument by admitting that antidiscrimination cannot be


completely thrown out to begin with, it possesses worth, but the negatives ultimately outweigh the positives specifically in the employment field. To continue, unlike the rampant libertarian views that he holds, Epstein admits that “the enormous successes in changing a misguided, and often hateful, pattern of race relations have all come through sustained government action.”

Continuing with the theme of upholding the utility of antidiscrimination, Epstein admits that government action is the most effective route to enforcing the necessary race-related improvements. The argument is especially compelling coming from a libertarian who would at every turn look to diminish the potential role of the government by opting for a private solution. Moving forward, Epstein zeroes in on the focus of the book and the field of antidiscrimination he views as the most flawed, labor markets. He finds that despite all the value antidiscrimination offers, in the employment field it focuses too heavily on historical injustices, for which there is no adequate remedy, and too little on the economic and social consequences that are generated by the antidiscrimination laws.” This is the overarching crux to Epstein’s argument; he, similar to Edward Blum, believes that past woes ought not to be remedied by vengeance, instead present equality ought to be prioritized. The alternative model to affirmative action that Epstein offers is simply the free market and a society with race neutral laws.

Now that the overall theme to Epstein’s argument has been discussed, next the justifications he uses for dismantling affirmative action in employment ought to be covered. Epstein begins his argument by immediately laying the foundations for his biggest grievance with antidiscrimination laws in employment: its adverse effects on liberty. He opens the book by concurring with Hobbes’ social theory, the need for law, and the prioritization of individual

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93 Ibid. 2
rights. He establishes a need for a "‘common power’" and law so that natural individual rights can be preserved. He continues later in the chapter to emphasize the importance of Hobbes’ self-ownership, right to private property, and liberty. Epstein writes that "self-ownership of individual labor forms the cornerstone for freedom of contract in labor markets." Through citing Hobbes, a philosopher who held significant influence over the Founding Fathers, and hence the Constitution, Epstein attempts to pit affirmative action and constitutional rights against each other. He frames an argument where Hobbes’ key natural rights of life, liberty and property are under attack by affirmative action policies. In his own words, Epstein understands antidiscrimination laws to be "an assault" on "common law rules" and the "natural law system." Affirmative action serves as a threat to liberty because it strips employers of the ability to freely hire whom they wish. Artificially boosting certain individuals' job prospects directly infringes upon allowing individuals to be "the best judge of what he or she wants." In the employment market specifically he accentuates the need for the market to remain private so freedoms can remain strong. Tied in with the basic concept of freedom is the idea of the free market. Later, Epstein argues "that free entry and multiple employers provide ample protection for all workers." He argues that the only form of discrimination that can survive in the long run is not discrimination based on the color of one’s skin, sex, or age, but the productivity, qualifications, and efficiency of the workers. The competitive forces of the free market will drive out employers who choose to discriminate, as their competitors will hire the equal or more qualified workers, perform better, and ultimately put those out of business with less productive

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94Ibid. 15
95Ibid. 24
96Ibid. 26-27
97Ibid. 25
98Ibid 59
employees. Self-interest yields justice, discrimination yields failure. Altogether, his gripe with antidiscrimination law is that it unnecessarily strips agency from employers.

Further on, Epstein takes direct aim at Title VII of the Civil Rights Act, and its subsequent policies. He writes that “Title VII at its best directs us to an end position that would not be attained in the long run in any well-functioning market subject to the usual frictions and uncertainties of business.” Here Epstein argues that even if Title VII worked to perfection by avoiding its many potential downsides, all it would do is present an end goal that would be impossible to attain. In other words, Epstein argues that Title VII would function well in a theoretical world, but due to the human element of business, the goal would never be achieved. More realistically, Epstein finds that “over the life of the Civil Rights Act the simple color-blind norm… has basically done two things: (1) made it permissible to discriminate at will against whites and men, and (2) made it possible to charge race- or sex-neutral firms with discrimination on the strength of statistical techniques whose application is flawed at every critical juncture.” Instead of living up to its impractical ideal potential, Title VII has yielded immense harm. Beginning with his first point, Epstein claims that Title VII allows and almost encourages discrimination against whites and men. His argument is best understood when compared with a world without Title VII. Instead of guaranteeing that no one except for whites or men be discriminated against, Epstein wishes for a race neutral world where only the qualities relevant to production are favored. He understands the value in making sure minorities are not discriminated against, but finds that a world without affirmative action altogether is more just. Further, his second point explains that Title VII creates a pathway for firms that do not favor minorities to be

99 Ibid. 77
100 Ibid. 77-78
charged with discrimination. Whereas Title VII views race-neutral approaches as harmful and prosecutable, Epstein wishes for exactly that. He finds that race-neutral approaches are preferable to forceable discrimination against those who historically were the discriminators. Altogether, Epstein clearly and controversially reveals his cynical view towards Title VII of the Civil Rights Act, and race-conscious laws in general. He argues that they have concretely resulted in discrimination against certain individuals and attacked firms who elect to operate in a color-blind manner. Lastly, through attacking and charging these firms who favor acting freely without awarding advantages to minorities, individual liberties are adversely affected. Forcing firms to deploy favoritism towards certain characteristics subtracts from their freedom.

Besides affirmative action’s harmful effects on liberty, the other major source of contention Epstein holds against antidiscrimination laws is its economic impact. The suboptimal economic impact caused by antidiscrimination laws include higher prices, lower overall employment, stigmatization against the groups the laws are designed to aid, and increased legal expenses. The largest and most direct impact on the economy affirmative action strikes is its adverse effects towards contract at will. Contract at will can be reduced to the idea of a free market, where employees are able to freely choose whom they work for, and employers are able to freely choose who works for them. This concept is directly tied to his outrage against antidiscrimination law’s adverse effects on liberty, but instead of discussing the moral and qualitative consequences, here he discusses the economic and quantitative consequences. Epstein continuously revisits the importance of contract at will and its positive economic impacts. He finds that freedom within the market and the promotion of capitalism more broadly are key to a strong economy, and the positives of antidiscrimination laws are far outweighed by the negative
impacts of restricting contract at will.\textsuperscript{101} He argues that restricting contract at will directly harms economic production. When employers know their employment decisions are legally forced to be altered, employers may elect to outright forgo hiring processes. Epstein argues that with antidiscrimination law, employers still hire people, but without it employers would go through the hiring process more frequently and with more confidence. Having more employees and being more confident in their employees generates more production for businesses, which in turn bolsters several key macroeconomic factors. Outcomes of greater production and more employment are lower prices and higher pay which feed economic activity. Moving forward, Epstein contends that antidiscrimination laws create an inverse stigmatization effect towards the populations they are meant to assist.\textsuperscript{102} When affirmative action mandates a boost to the job and admissions prospects of certain individuals, some are led to believe that because these individuals receive help, they must be less qualified than those who do not receive the assistance. Here Epstein finds yet another negative stemming from affirmative action, furthering his argument that the cons outweigh the pros.

Interestingly, one further criticism Epstein holds against Title VII is the lack of scope it holds. He argues that because Title VII only outlaws discrimination in entry level hiring and leaves “promotion, wages, and job assignments unregulated thereafter,” that the bill is practically useless.\textsuperscript{103} The many loopholes of the bill result in minimal effect because the goal of significantly boosting the wealth of minorities falls far short. He argues that many will still be left in the impoverished financial state the bill aimed to remove them from, because an entry level job is not enough to create real wealth. From this point Epstein sees two options, either

\begin{itemize}
\item \textsuperscript{101}Ibid. 417
\item \textsuperscript{102}Ibid.
\item \textsuperscript{103}Ibid. 162
\end{itemize}
significantly extend the scope of the regulation “until in the end virtually nothing lies outside its scope,” or do away with the bill altogether.\textsuperscript{104} For Epstein personally, he finds that extending the scope to “all aspects of the employment relationship” is far too intrusive of a step, and certainly more intrusive “than the supporters of the [initial] statute had believed or insisted.”\textsuperscript{105} On top of that, he finds it unfeasible for such a major extension of affirmative action to receive enough congressional support to become law. Therefore, by process of elimination the only remaining option is to scratch the bill altogether. He believes that because the positives of the bill only affect entry level positions, the negatives of the bill intruding on liberty and creating economic inefficiencies warrant a termination of Title VII.

Finally, Epstein finds that affirmative action inflates legal expenses by forcing employers to carefully maneuver among confusing antidiscrimination laws to avoid legal trouble. Even worse, if an employer does encounter legal trouble through breaking or being sued under one of these laws, their legal fees increase to great levels. Instead, Epstein believes that a removal of these harmful laws in the first place will not only boost the economy due to the previously argued reasons, but also remove the burden of legal fees.

Although the previous paragraphs have hinted at Epstein’s preferred alternative to affirmative action laws, it is important that his concrete alternative be outlined. Unsurprisingly, Epstein’s libertarian and anti-affirmative action beliefs lead him to favor a merit-based system with an emphasis on liberty. In simpler terms, he opts for the free market to hold discriminatory behavior accountable. He calls for Title VII to be “repealed for all private employment relationships.”\textsuperscript{106} Which in turn will emphasize “the dominance of freedom of contract and

\textsuperscript{104}Ibid. 163  
\textsuperscript{105}Ibid  
\textsuperscript{106}Ibid. 413
voluntary market transactions. Instead of the government interfering, Epstein believes that race-neutral laws will ultimately lead to a just outcome as true discriminators will not be able to survive in the long run.

Additionally, another brief but key takeaway from Epstein’s work is his strict emphasis on Title VII compared to other race-conscious legislation such as the Fourteenth Amendment, the Equal Protection Clause specifically, or Title VI of the Civil Rights Act of 1964. While the other components of American antidiscrimination laws play key roles in numerous Supreme Court decisions, Epstein finds that Title VII far and away possesses the greatest influence over employment, and in turn is the most pressing element in need of annul.

**Andrew Koppelman’s Rebuttal to Epstein:**

Andrew Koppelman, a lawyer and a professor of political science at Northwestern University directly attacks Epstein’s “imperfect understanding of antidiscrimination law.” Koppelman begins his attack by conceding that Epstein “thinks about” affirmative action in the right way. He agrees that the questioning of whether or not antidiscrimination law boosts the economy, allows for freedom, and promotes efficiency is the right question to ask, however, he finds that Epstein arrives at incorrect conclusions. Koppelman instead argues that affirmative action not only has important economic and noneconomic goals, but that it actually meets these goals. These goals are to “remedy the chronic subordination of some groups, thereby creating a society with broader opportunities,” and to “dismantle longstanding structures of dominance and subordination that prevent the state from guaranteeing even those rights that Epstein so

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107 Ibid
109 Ibid
admiredly wants to protect.” Koppelman uses “chronic subordination” in reference to the centuries of oppression against Black people including slavery, Black Codes, and Jim Crow laws. Further, he explains that boosting economic opportunity for those who were systemically pushed down does not halt the growth for those who historically were the oppressors, but solely allows for everyone to have similar opportunities. It levels the playing field. Here Koppelman may be leaving the door open to potential rebuttals by examining cases such as those of Adarand Constructors, Inc. or Allen Bakke who lost out on opportunities because of antidiscrimination laws.

Moving on, he offers that if only some people are fortunate enough to have the opportunity to get an education, become rich, or simply succeed, the economy will do well, but if everyone possesses these same opportunities the economy will do even better. Second, he argues that the noneconomic side of affirmative action effectively protects individual’s most important natural rights of liberty and the pursuit of happiness. He cleverly utilizes Epstein’s “admirable” argument of protecting these certain rights and claims that without antidiscrimination law, the state is unable to guarantee these rights to certain individuals. Beginning with his economic-focused side of the argument, Koppelman states that “a central purpose of the Civil Rights Act of 1964 was to reduce Black poverty by making well-paying positions available to Black workers.” He cites that from 1964 to 1985 “The proportion of Black men working as professionals or managers relative to whites rose from 32 percent to 64 percent” proving the success of the bill. The growth slowed down after the first 20 years, but Koppelman argues that affirmative action indubitably was the reason for the initial success. Here Koppelman’s

10Ibid
11Ibid
12Ibid
argument appears flawless, however Epstein offers a logical and powerful response. He finds that this study and others similar fail to take into account the Jim Crow era “legal restrictions on entry into the labor market prior to 1965.” Epstein implies that the reasoning behind the sharp increase in Black employment after the mid 1960s was not because of the Civil Rights Act intentionally spurring employment, but instead it acted as a deregulator because it repealed Jim Crow regulations barring or disincentivizing the employment of Black people. The restrictions Epstein refers to are largely forced segregation in business such as South Carolina's Criminal Code (167) which barred Black people from working in the same rooms as whites, using the same exit and entrances at the same time, using the same pay ticket windows at the same time, or using the same stairway or windows at the same time. He argues that prior to the Civil Rights Act, existing restrictions on the market barred free market forces from driving out discriminators and incentivized the hiring of White people instead of Black people. The lifting of restrictions coincided with the Civil Rights Act, but allowing for the powers of the free market to operate is responsible for the increase in employment.

Another facet of Epstein’s argument which Koppelman rebuts is his take on contract at will, or the ability to choose whom one engages in business with. Koppelman concurs with Epstein’s background reasoning for the necessity of contract at will, crediting Epstein for laying it out so well. However, unlike Epstein, Koppelman argues that “departing from that rule” is just in the cases of race, sex, and sexual orientation-based discrimination because it “diminishes the amount of oppression in the world.” Whereas Epstein portrays the government barring business owners from discerning who they wish to do business with (based on race, sex, or

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114 Ibid. 246-247
115 Koppelman, Andrew. “Richard Epstein’s Imperfect Understanding of Antidiscrimination Law”
sexual orientation) as “an invasion of our precious liberties,” Koppelman views it as the moral and righteous thing to do.\textsuperscript{116} Koppelman further dismantles the importance of an all-encompassing right to contract at will by offering an economic-based argument. He claims that the market will eventually drive discriminators out of the market because competitors will hire or use the qualified services of those the discriminator refuses to do business with, creating a competitive advantage for others.\textsuperscript{117} Despite this Epstein continues to demand that the Civil Rights Act be repealed both because “it interfere[s] with freedom of contract for no good reason,” and because “in a free market… blacks’ wage (for instance) will be about as high as they would be if there were no discrimination.”\textsuperscript{118} Epstein argues that if the government embraced the laissez-faire attitude and let the forces of the free market take over, then capitalism would nearly eradicate discrimination itself. To sum it all up, both Epstein and Koppelman argue that discrimination would be driven out by the market. On one hand, Epstein argues that because discrimination would be driven out regardless, there is no utility in infringing upon the people’s liberties for a (near) zero-sum gain. However, Koppelman argues that because discrimination would not find a home in the market, the Civil Rights Act not allowing contract at will is harmless at worst because all the Civil Rights Act does is ban something that already does not exist. Unlike Epstein who wishes to do away with the Act, Koppelman opts to keep it for an extra safety against discrimination.

Koppelman wraps up his argument by explaining that the simple existence of a bill banning discrimination on the books provides an overall anti-racism sentiment for all to follow. Although not explicitly in his argument, Koppelman relies on the concept of a legal penumbra to

\textsuperscript{116}Ibid
\textsuperscript{117}Ibid
\textsuperscript{118}Ibid
imply that American laws strongly discourage or ban racism through a collection of affirmative action bills. He argues that the Civil Rights Act extends beyond its strict jurisdiction of discriminating in a public forum or in the economic world but actually combats racism in informal ways such as motivating police officers to be more aware of their prejudice.\footnote{Ibid}

Altogether, Koppelman veers from Epstein not in what the goals of society ought to be, the importance of economic growth, or what rights ought to be protected, but in affirmative action’s effects on these goals. The crux of their disagreement is that Epstein believes society is at a point where delivering benefits to certain historically marginalized groups unjustly boosts these groups to a point where they benefit more and are more apt to succeed compared to those not receiving the benefits. On this same point, Koppelman believes that society still features obvious inequalities and antidiscrimination law does not discriminate against the successful but promotes success for all.

\textbf{Jesse Merriam’s Take on Diversity:}

Another major voice arguing against affirmative action is previously mentioned, Jesse Merriam. The core of his argument is that the prioritization of diversity has allowed for the “derail[ing] [of] the Constitution.”\footnote{Merriam, Jesse. “How Diversity Derailed the Constitution.” Claremont Review of Books, 2023. https://claremontreviewofbooks.com/the-affirmative-action-regime/} Merriam argues that the current “affirmative action regime’s” originally pure intentions to promote diversity have instead taken diversity to mean only racial diversity.\footnote{Ibid} On top of this, universities also have incorrectly interpreted the proper percentage breakdowns of diversity, resulting in anti-white discrimination. His major grievance is that diversity being our core value allows for affirmative action’s negative effects to run

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\textsuperscript{119}Ibid
\textsuperscript{121}Ibid
\end{flushright}
rampant. For example, he pokes fun at North Carolina Solicitor General abusing the “magical words” that “‘diversity is our nation’s greatest source of strength.’”\textsuperscript{122} Merriam explains that by claiming a goal of promotion of diversity, universities and businesses alike are able to discriminate at will. He perceives the promotion of diversity as the perfect cover opening the doors to outrageous policies. Additionally, Merriam asserts that there is ‘no evidence as to why racial diversity, in itself, would strengthen a nation.’\textsuperscript{123} Not only does he extend that promoting racial diversity leads to discrimination towards whites, but he actually believes that promoting racial diversity in the first place is completely aimless. Merriam’s ideal route forward is for the Court to readdress the beating heart of affirmative action, diversity efforts, and make it so the pursuit of diversity is not an implied goal. He wishes for racial diversity to be removed from the government’s list of compelling interests so that equality can be restored. Merriam’s view of equality is a society that features proportional representation of race in its institutions on corporations.

Now that Merriam’s gripe with the prioritization of diversity has been established, the question of what exactly the negative effects of this prioritization of diversity are ought to be answered. Merriam argues that the core of the negative effects arises from an abominable misinterpretation of the idea of racial diversity. He finds that (at no one’s fault) that nation has incorrectly interpreted racial diversity in America to specifically be less white. He simply writes, “to be more diverse is to be less white.”\textsuperscript{124} A prime example of this “can be found in the diversity report cards used by ESPN. For the racial diversity of its players, the National Basketball Association gets a higher diversity grade than Major League Baseball, despite the fact that the

\textsuperscript{122} Ibid
\textsuperscript{123} Ibid
\textsuperscript{124} Ibid
NBA is one of the most racially homogeneous sports leagues, whereas MLB’s racial breakdown closely matches the nation’s percentages.”\textsuperscript{125} Merriam expounds that “the only way to make sense of this ranking is that the NBA is considered more diverse than MLB because it is less white (the NBA is around 18% white, whereas MLB is around 62% white).”\textsuperscript{126} Inherently this does not make sense, diversity in any other field would be considered to be the least homogenous, yet for race in America, it is the least white. Merriam continues by proving that this exact interpretation of racial diversity is what both sides of the \textit{SFFA v. Harvard} case believed. Surprisingly, Merriam attacks Cameron Norris, the lawyer representing the SFFA, and the one responsible for a significant victory against affirmative action. In Norris’ proposed simulation he emphasized how “the ‘number of white students would decrease’ and ‘[he] thinks you’d see lots of benefits in that.’”\textsuperscript{127} Merriam displays how even the ones aiming to rid higher education of affirmative action, are fooled by the popularized incorrect interpretation of racial diversity. He voices his outrage and asserts two arguments: 1) diversity ought not to be the least white, but the least homogenous, and 2) the ideal racial breakdown of institutions aiming to be racially diverse ought to match the nation’s overall racial breakdown.\textsuperscript{128} Zeroing in on the second argument, Merriam argues that optimal diversity levels for any institution in any area, is that they match the breakdown of the national or at least regional pool. For example, he argues that Harvard boasting a percentage of whites over 15% less than the national makeup (of about 60%) does not make them more diverse, but instead more discriminatory.\textsuperscript{129} He finds that it makes implicit sense for an institution to attempt to best mimic the racial structuring of the nation

\textsuperscript{125}Ibid
\textsuperscript{126}Ibid
\textsuperscript{127}Ibid
\textsuperscript{128}Ibid
because that is what is not only most diverse, but most fair. This ties in exactly with why Harvard’s admissions system was found to be unconstitutional, if Whites make up 60% of the country, but only about 45% of the Harvard student body, then somewhere along the way in the admissions process, White students’ race was used against them. All in all, Merriam asserts that the misinterpretation of what it means to be diverse has directly caused Whites to be discriminated against in a detrimental and harmful manner.

**Christopher Caldwell: Evolving Demographics Responsible for Fall of Affirmative Action**

Building off Merriam’s argument, journalist Christopher Caldwell argues that the decline of support for affirmative action cannot be only attributed to the strong conservative majority of the Supreme Court. He finds that certainly having six conservative justices on the Court as opposed to five or only four allows for greater potential to strike down affirmative action, however if this majority existed in say the 1980s, then affirmative action would have still stood strongly. This is because as the racial structuring of the country continues to alter, new demographics have “caused the moral ground to fall out from under” affirmative action. Put simply, the “composition of the Court has changed,” but so has “the composition of the country.” As minorities continue to grow and strengthen their presence in the nation, previous supporters of racial set-asides now feel more and more as if these minorities have established themselves enough to no longer need assistance. While this may be perceived as leaving the marginalized helpless and out to dry, Caldwell argues it is exactly the opposite. Legislators and

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132 Ibid
Judiciaries alike perceive minorities as a well-established, strong, integral part of society. Instead of minorities needing assistance to keep up with the majority, they are now equal. In other words, he finds that while they are still a minority statistically, time has allowed the melting pot that is America to continue to churn, creating a just society needless of handouts. Bringing this back to the Supreme Court, Caldwell conveys that Conservatives justices have always held gripes with antidiscrimination law, but understood the necessity for it in past decades because of the demography of the nation. However, as the nation continues to diversify, we edge closer and closer to a time where affirmative action is no longer morally justifiable. Additionally, he argues that affirmative action’s main field, education, is at an even further diversified point than society, further intensifying the need to repeal the policy. Pew Research Center finds that not only at the commencement of affirmative action was America practically a two race, white-black, nation, but also that as America moves forward it will only continue to diversify. Whereas American society today holds a population of White and White alone at over 60%, one of the nation’s leading universities, Stanford, has only 22% White students in their class of 2026. For many, statistics like this signify that the end goal of affirmative action has been reached, now normalcy ought to be restored. Overall, Caldwell signifies that due to the gradual alteration of the nation’s demographics as well as affirmative action’s significant impact on universities’ racial structuring, conservatives now feel the time is ready to repeal antidiscrimination policies.

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133 Ibid
Another further complication to affirmative action’s current functionality is the issue of blatant discrimination towards Asian Americans. Caldwell argues that if it were not for the “enormous rise in Asian immigration” since 1965, the debate around affirmative action would be a lot less “complicated.”¹³⁶ Through closely dissecting the Harvard admissions process detailed in the *SFFA v. Harvard* case, Caldwell establishes that affirmative action in its current state was simply unsustainable. One interesting statistic that he emphasized was that “a Black applicant in the seventh-highest academic decile of applicants had a better chance of being admitted to Harvard than did an Asian applicant in the highest decile.”¹³⁷ Examples like these from Harvard and universities across the nation demand that if affirmative action ought to continue operating at all, significant alterations to its functionality ought to be made. Here Caldwell conveys that affirmative action may likely be a far less contentious subject without “the complication” that “Asian students, on average, have been considerably more qualified for college than students of other groups.”¹³⁸ He finds that their incredibly impressive tradition of academic excellence pits affirmative action against its intended goal of assisting minority students, an issue that may never have presented itself without the rise in Asian immigration. Coupling this argument back with his original explanation behind the altering demographic structure of the nation, Caldwell argues that America is no longer a biracial nation, but a multiracial one. Further, due to America’s new multiracial status thanks to “half a century of high immigration,” discriminating and assisting populations is now done in a “radically more direct and intrusive” manner.¹³⁹ He finds that because affirmative action can no longer operate in a Black-White or majority-minority manner,

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universities and businesses alike must be more direct and punitive against certain groups in their journey of prioritizing diversity. Altogether, Caldwell demonstrates how new demographics highlighted by the rise of Asian Americans has significantly restructured the structure of affirmative action. Resulting in an introduction of direct and harmful, undeniable discrimination.

Stacy Hawkins Defense of Promoting Diversity:

Despite both Merriam and Caldwell making strong arguments against the improper promotion of diversity and flaws of affirmative action, many still emphasize the promotion of diversity as an absolute necessity. With antidiscrimination law frequently resting on the hot seat and the arguments of Merriam and Caldwell fresh in mind, it is easy to forget that affirmative action once held enough support on the bench in cases like Bakke and Fullilove to allow for its overhaul on admissions and hiring processes. Further, the policy’s intended goal of securing an equal and diverse society still features fervent support from many and is still a listed compelling interest of the government. Put simply, although antidiscrimination law has its critics, its counterpart in DEI undoubtedly offers a strong positive impact. Stacy Hawkins, a professor at Rutgers Law School, reveals how the classic liberal defense of affirmative action still presents a strong case.140 Her arguments are that a rebranding of affirmative action terminology is necessary, America’s understanding of diversity is a healthy one, and its promotion of diversity results in several beneficial outcomes. To begin, she wishes for the replacement of “race-neutral” to “Broader than Race,” and a shifting from “burden on some,” to “individualized consideration for all.”141 These two examples reveal how a shift in the presentation of antidiscrimination law policies will allow for a societal refocus of affirmative action from the negatives to positive.

141Ibid. 112-113
Nowadays dominant headlines pin affirmative action as a discriminatory policy using terms such as “burden on some,” but Hawkins argues that it coming under fire does not signify a time to back down, but a time to double down. Replacing “race-neutral” to “Broader than Race” reminds critics that affirmative action has always been about helping those that are discriminated against, not blindly aiding minorities. The change reemphasizes that antidiscrimination law is exactly what it is branded to be, aiding those effected by discrimination, not creating more discrimination, and not blindly crediting someone for their race. Although writing a decade prior to the SFFA decision, Hawkins’s argument can be interpreted as preemptively accepting the removal of the check the box formatted question on race. Through understanding that affirmative action is far “Broader than Race,” she inherently supports the essay-based approach to evaluating one’s life-long identity journey. Moving forward, her alteration of “burden on some” to “individualized consideration for all” signifies that each person’s advantages and disadvantages are separately considered in a job or university application. Instead of making a generalized assumption that all Whites or Asian are “burden[ed]” in hiring and admissions processes, Hawkins reestablishes that instead the advantages they received in their individual journeys are evaluated. Putting this altogether, Hawkins argues that a rebranding of affirmative action can remind society of the policies’ original intents of limiting the effects of discrimination.

To continue, Hawkins finds that America’s major emphasis on promoting diversity is a healthy one which yields numerous positive results. She writes that whereas diversity was “once viewed as a ‘good’ thing to do,” thanks to modern theories and empirical research, promoting diversity is now “viewed as the ‘necessary’ thing to do.” She structures her argument through two theories of the modern diversity practice: “The ‘Business Case,’” and “Functional

\[142\text{Ibid. 84}\]
Diversity." The business case elects to defend diversity through citing its economic impacts. Hawkins posits that as the American economy continues to globalize, businesses “that fail to leverage diversity to increase competitive advantage, expand market share, and deliver culturally competent products and services will fail to thrive.” Her argument is rather straightforward, White American companies can continue to hire predominantly white employees and in turn continue to market themselves in a way that appeals to predominantly white American consumers, or they use diversity to diversify their business and increase their bottom line. She argues that through hiring a diverse workforce which encapsulates a larger portion of potential consumers, firms’ products or services will be more well-rounded, and better targeted towards all. Although extremely difficult to argue against the fact that American society is becoming “an increasingly diverse nation,” and an increasingly globalized economy, it is possible to argue that hiring a more diverse workforce does not directly correlate to selling increased demand in more diverse markets. Moving on, she argues that diversifying one’s employee base is nearly impossible not to do because of an increasingly diversified influx of people into the workforce. She cites one study that predicted by “the year 2000, eighty-five percent of new entrants to the labor force would be women and minorities.” This number is only due to grow as time goes on. She signifies that jumping ahead of the curve by creating a DEI department and welcoming diversity with open arms opens businesses up to far more employees.

On top of the rapidly diversifying workforce, she establishes that the buying-power in America is simultaneously diversifying. Hawkins cites that from 1990-2009, “Asian American

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143Ibid. 84-88
144Ibid. 84
145Ibid. 84.
and Hispanic growth in buying power… far outpaced growth in white buying power, growing by rates of 336% and 361% respectively,” while white power grew only “139%” during that time. Both of these factors imply that businesses are financially incentivized to promote diversity. Diversity is an economic opportunity, to forgo diversity is to forgo success. Lastly, she argues that not only is it advantageous for businesses to engage in diversity efforts, but that in reality many businesses did exactly this. She finds that those who refused to do so were left behind, and that the successes of the businesses that diversified indubitably convey that the benefits of diversifying outweigh the costs. All in all, she finds that if the “Texaco settlement was the catalyst for the proliferation of modern diversity practice throughout corporate America, the ‘business case’ [theory] was the catalyst for sustaining” this modern diversity practice. In other words, DEI’s positive impacts on business outcomes have earned DEI its role in the American economy.

The second theory she cites is functional diversity. The functional diversity argument is similar in outcome to the “business case” theory, but instead focuses its emphasis on secondary diversity characteristics. The effects or outcomes in pursuing diversity in this case are the same as the business case, i.e. better products, better marketing, and more sales; however, it disregards the characteristics of race and gender. Instead, the functional diversity theory cites that the dimensions of ”socio economic status, geography, work style, learning style, organization role, function, education, experience, etc.” more directly influence business outcomes. Simply, she reminds the reader that diversity encapsulates so much more than racial diversity. Further, the more diverse these characteristics, the better a company’s “problem solving, decision making,

146Ibid. 85
147Ibid. 87
148Ibid. 86
and quality of output” will be. Here Hawkins offers strong insight into the power of diversity, and the many facets it operates in. More importantly, almost unintentionally she reveals DEI’s greatest strength: its ability to stand strong against those looking to rid race-conscious thinking from American government. Moreover, she directly separates the ideas of affirmative action or race, and diversity. Through establishing that diversity boosts business performance via more characteristics than just race, she forces constitutional challenges against diversity to be immensely more difficult as she establishes DEI to not only be a race-conscious hiring practice, but a multitude of other factors-conscious.

\[149\] Ibid
Chapter Six: Conclusion

After discussing several scholars’ arguments and perspectives on affirmative action, a consistent sticking point can be observed. It is apparent that all parties of the debate have one goal in mind, equality, yet their view of equality is the main source of contention. The pro-affirmative action minds argument is clear, equality is created by remedying obvious and undeniable discrimination from the past. Through aiding previously hindered populations, equality is reached, and without this assistance the historically discriminated populations will continue to be at a disadvantage. They convincingly argue that effects of centuries of oppression do not just conveniently disappear when the discrimination officially stops, but that remedial actions are required to bring society to normalcy. The other side of the argument wants to reach equality too. However, they believe that equality is present when no one receives a boost. They believe that the only route to arriving at a society free of racism is to stop accounting for race, or as Chief Justice John Roberts famously put it, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” He argues that the effects of discrimination will cease to exist when race-conscious policies cease to exist. Although certainly in recognition of and empathetic towards populations who were brutally discriminated against, they view affirmative action as discriminatory against those who it is not designed to assist. Their logic is that a plus to one population is inherently a minus to another. Further, their rejection of affirmative action, does not imply in the least that they are against remedial measures towards these populations, just that more discrimination is unequal. Put simply, although unfair and unfortunate, present discrimination is not a just remedy for past discrimination.

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This is really the crux of the Affirmative Action argument, and what will ultimately determine the future of the program. The debate on whether or not society is equal at its present, unadjusted functionality, or if boosts are required to level the playing field. As previously stated, when affirmative action programs embarked on their mission to create an equal society free of racism and discrimination in the 1960s, individuals who claimed that society was equal enough to justify the removal of these programs were few and far between. However, as affirmative action rages on and the nation diversifies, more and more progress is made. For the benefactors of the program, more and more spots at universities are earned, and more and more jobs are secured. Certainly, if preferential treatment continues forever, a point in time will be reached where the treatment is objectively unfair. Say in the year 3024 if affirmative action policies are still intact, then odds are statistics will indubitably show that affirmative action discriminates towards those it does not assist. The point is, affirmative action is designed to be temporary, it will stop at some point because of its inherent vulnerability to create discrimination. However, at the present, the answer of whether it discriminates against Whites and Asians too harshly is far more subjective. Answers vary, and justice’s answers to that question solely determine the constitutionality of affirmative action. Some say that affirmative action overstepped its bounds decades ago, and others may believe that it will hold its justifications for decades to come. As this paper has displayed through the storied history of affirmative action in the Supreme Court, the issue has been a source of fierce contention for decades. Yet this paper has also conveyed the many factors revealing a clear trend towards the discontinuation of affirmative action. Factors such as: Sandra Day O’Connor’s 25-year timeline prediction in *Grutter, SFFA v. Harvard* finding race-conscious admissions unconstitutional, the continued consolidation of what is considered “narrowly tailored,” Edward Blum success in *AFFBR v. Weber*, his future case plans,
Richard Epstein and Jesse Merriam’s attacks on affirmative action, the Republican-nominated domination of the bench, and so many others covered in this paper point towards a steady eclipse of affirmative action. These many factors establishing a trend toward the termination of antidiscrimination law returns the paper back to the research question: How will the decision in SFFA v. Harvard affect the future of affirmative action for corporations? Now that a detailed selection of relevant affirmative action precedents, arguments, and current casework has been covered an answer reveals itself. Antidiscrimination law’s influence over hiring practices for corporations will steadily come to a halt over the next few decades as the Judicial Branch knocks off regulations case by case until they official find affirmative action unconstitutional altogether. As both AFFBR cases involve the boards of public corporations, it is clear that this will be the first field to see the removal of antidiscrimination policies. Following corporate boards, it is likely that affirmative action will cease to operate for all public hiring. Finally, it is unlikely that race-conscious hiring practices will cease to exist anytime soon for private companies as they face far less regulations. The last question left to answer is not if, but when? Although the court indubitably aims to bar antidiscrimination policies, they are doing so in a very gradual and gentle way. Their slow progress signifies that it will likely take a few decades for these predictions to come to fruition, perhaps another 25-year period will suffice.

So what hope is there for those in support of antidiscrimination law? The answer is, quite a lot. Although there will indubitably be a time without affirmative action, coupled with the many legal hurdles and long timelines in the way of repealing affirmative action, the DEI movement boasts incredible significance. Diversity both including race as well as the secondary characteristics offers inherent worth with proven significant impacts and successes. Further, as Merriam argued without the reversal of Bakke’s decision to list diversity as a compelling
government interest, affirmative action’s policies can be adjusted or removed, but the ultimate impact will remain. Unfortunately, some argue that diversity’s major positive impacts are limited to college campuses. Unlike education, the impact diversity creates on a business’ bottom line may be the only factor the Court considers. If this is the case the Court may find that diversity’s ability to foster an ideal learning environment with varying perspectives does not hold the same value in the business world. This final stipulation reveals that affirmative action’s role in higher education may stand on far stronger legal ground in the future if the Court rules that racial diversity is not a compelling interest for corporations. Altogether, DEI efforts act as a pivotal contributor to affirmative action’s role in society; due to the impact of diversity’s more jeopardized status in the business world, antidiscrimination hiring policies will likely not have as long of a career as their counterpart in education.
Bibliography


