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“WITH ALL DELIBERATE SPEED”: THE IRONIC DEMISE OF (AND HOPE FOR) AFFIRMATIVE ACTION

*Vinay Harpalani**

Is affirmative action¹ in university admissions about to end? As the United States Supreme Court prepares to decide lawsuits against Harvard and the University of North Carolina Chapel Hill (UNC),² the outlook for race-conscious admissions policies is not good. Even before its recent rightward shift, the Court had long been hostile to such policies, and many observers think it will now overturn *Grutter v. Bollinger*³ and end them altogether.⁴ Such a ruling

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1. Broadly speaking, the term “affirmative action” refers to a wide range of policies that involve “an active effort . . . to improve the employment or educational opportunities of members of minority groups or women[.]” *Affirmative Action*, MERRIAM-WEBSTER (2020), <https://www.merriam-webster.com/dictionary/affirmative%20action> [https://perma.cc/J5XU-2EB9]. Nevertheless, in the public sphere, the term is often used in a narrower sense as synonymous with race-conscious university admissions.

2. *Students for Fair Admissions v. President and Fellows of Harvard Coll.*, No. 20-1199 (U.S. argued Oct. 31, 2022); *Students for Fair Admissions v. Univ. of N.C.*, No. 21-707 (U.S. argued Oct. 31, 2022).

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

4. See Nicholas Lemann, *The Supreme Court Ready, Finally, to Defeat Affirmative Action*, THE NEW YORKER (Jan. 27, 2022), <https://www.newyorker.com/news/daily-comment/the-supreme-court-appears-ready-finally-to-defeat-affirmative-action> [https://perma.cc/3NK8-Q6S5].

would be a painful and paradoxical twist for civil rights advocates. In a classic turn of Orwellian irony, the plaintiffs challenging affirmative action now call themselves Students for Fair Admissions (SFFA). And as the foundation of their argument, these plaintiffs invoke *Brown v. Board of Education (Brown I)*—the landmark ruling where the Supreme Court struck down racial segregation in public schools.⁵ According to SFFA, laws which mandated the total exclusion of Black children from public schools are constitutionally and morally equivalent to policies that increase racial diversity at universities⁶ and have only minimal burden on any racial group.⁷ The plaintiffs argue simply that “[b]ecause *Brown [I]* is right, *Grutter* is wrong.”⁸

But reality has never been so simple for affirmative action. It is a complex tale laden with surprises and ironies.⁹ Race-conscious university admissions policies have been quite resilient in the wake of right-wing attacks, surviving multiple lengthy litigations when they were thought to be doomed. And rather than *Brown I*’s landmark constitutional ruling, what actually resonates with affirmative action jurisprudence is *Brown II*—the Supreme Court’s remedial order that public schools should be desegregated “with all deliberate speed”¹⁰ Many critical observers viewed “with all deliberate speed” as an ironic phrase: a statement which appeared to express the urgency for school desegregation yet sent an indirect signal to Southern states that there was no hurry to implement it.¹¹ The dual meaning here is particularly salient now as we anticipate the Justices’ rulings. The Court has never been friendly to race-conscious admissions policies, but it has nevertheless approached them with all deliberate speed.

Challenges to race-conscious admissions policies began almost immediately after their wide implementation in the late 1960s. But initially, the Justices were not anxious to decide the issue. They punted on their first opportunity to do so:

5. *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954).

6. Brief for Petitioner at 2, *Students for Fair Admissions v. President and Fellows of Harvard Coll. and Students for Fair Admissions v. Univ. of N.C.*, No. 20-1199 & No. 21-707 (U.S. argued Oct. 31, 2022) [Hereinafter Brief for Petitioner SFFA].

7. See Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1049 (2002) (cited in *Gratz v. Bollinger*, 539 U.S. 244, 303 (2003) (Ginsburg, J., dissenting) (“In any admissions process where applicants greatly outnumber admittees, and where white applicants greatly outnumber minority applicants, substantial preferences for minority applicants will not significantly diminish the odds of admission facing white applicants.”)).

8. Brief for Petitioner SFFA, *supra* note 6, at 51.

9. See Vinay Harpalani, *Simple Justice or Complex Injustice?: American Racial Dynamics and the Ironies of Brown and Grutter*, 3(1) U. PENN GSE PERSPS. ON URB. EDUC. (2004), <https://urbanedjournal.gse.upenn.edu/archive/volume-3-issue-1-fall-2004/simple-justice-or-complex-injustice-american-racial-dynamics-and-> [https://perma.cc/HZS9-KG4R].

10. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 301 (1955).

11. See, e.g., CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION (2005). See also *All Deliberate Speed: Brown’s Place in History*, SCHOOL DIVERSITY NOTEBOOK (Jan. 26, 2017), <https://sdnotebook.com/2017/01/26/all-deliberate-speed-browns-place-in-history/> [https://perma.cc/2U3P-WWZW] (“The phrase ‘all deliberate speed’ . . . boil[s] down to one simple translation: ‘slow.’ [Professor] Ogletree describes *Brown II* as ‘a palliative to those opposed to *Brown*’s directive.”).

Defunis v. Odegaard (1974).¹² The Court ruled that this case was moot because Plaintiff Marco Defunis’s graduation from the University of Washington School of Law was imminent after the district court had ordered the Law School to admit him pending appeal.¹³ Four years later, in *Regents of the University of California v. Bakke* (1978), the Court did address the substance of race-conscious admissions, but it could not reach a majority.¹⁴ Four Justices voted to strike down the University of California, Davis Medical School’s set-aside program for underrepresented students,¹⁵ and four Justices voted to uphold it.¹⁶ Writing only for himself, Justice Lewis Powell concluded that universities could use race as a “plus” factor to attain the educational benefits of diversity.¹⁷

Despite its precarious status as precedent, Justice Powell’s view became the blueprint for race-conscious university admissions.¹⁸ And for the next twenty-five years, the Court’s affirmative action jurisprudence proceeded with all deliberate speed.¹⁹ On one hand, the Justices were hostile to race-conscious policies, striking them down in cases involving employment,²⁰ state²¹ and federal²² government contracting, and Congressional redistricting.²³ On the other hand, they did not touch university admissions, repeatedly denying certiorari from lower court petitions.²⁴ Through the 1980s and 1990s the issue became more politicized, with popular referenda banning race-conscious government policies in California and Washington,²⁵ and later in other states.²⁶ Conservative activists also morphed admissions controversies involving “negative action”—discrimination against Asian Americans vis-à-vis White

12. *DeFunis v. Odegaard*, 416 U.S. 312, 319–20 (1974).

13. *Id.*

14. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 267, 269–70 (1978).

15. *See id.* at 265.

16. *See id.* at 266–67.

17. *Id.* at 269, 271–72, 317.

18. *See* Mark Kende, *Is Bakke Now a ‘Super-Precedent’ and Does It Matter? The U.S. Supreme Court’s Updated Constitutional Approach to Affirmative Action in Fisher*, 16 U. PA. J. CONST. L. HEIGHTENED SCRUTINY 15, 18 (2013) (noting that “[h]undreds of educational institutions, workplaces, and lower courts have adopted programs modeled on” Justice Powell’s *Bakke* opinion).

19. *See* *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283–84 (1986); *See* *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 511 (1989); *See* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 238–39 (1995).

20. *See* *Wygant*, 476 U.S. at 283–84.

21. *See* *J.A. Croson Co.*, 488 U.S. at 511.

22. *See* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 238–39 (1995).

23. *See* *Shaw v. Reno*, 509 U.S. 630, 657–58 (1993).

24. Three years after *Bakke*, the U.S. Supreme Court denied certiorari in a case from the California Supreme Court. *See* *DeRonde v. Regents of Univ. of Cal.*, 28 Cal. 3d 875, 879 (1981) (thereby upholding the U.C. Davis School of Law’s admissions policy), *cert. denied*, 454 U.S. 832 (Oct. 5, 1981). The High Court later denied certiorari in three federal circuit cases, even though there was a clear circuit split. *See* cases cited *infra* notes 30–36 and accompanying text.

25. *See* Vinay Harpalani, “*Trumping*” *Affirmative Action*, 66 VILL. L. REV. 1, 12 n. 71 (2022) (discussing various state bans).

26. *Id.*

Americans²⁷—into attacks on affirmative action.²⁸ A growing right-wing movement, spurred on by organizations such as the Center for Individual Rights and the Pacific Legal Foundation, filed legal challenges to affirmative action throughout the 1990s.²⁹ By 2000, the Fifth,³⁰ Ninth,³¹ and Eleventh Circuits³² all ruled in cases involving race-conscious university admissions. The Fifth and Eleventh Circuits struck them down, with the former ruling that diversity was not a compelling interest³³ and the latter leaving that issue open and ruling on narrow tailoring grounds.³⁴ Conversely, the Ninth Circuit declared that diversity was a compelling interest, although Washington’s ban on race-conscious policies in public institutions rendered the case moot.³⁵

However, even after these conflicting rulings, the Supreme Court waited. Not until the Sixth Circuit’s ruling in *Grutter*, the University of Michigan Law School case, did it grant certiorari.³⁶ The Court also took up *Gratz v. Bollinger*, the undergraduate case against Michigan, before the Sixth Circuit could rule.³⁷ On April 1, 2003, nearly twenty-five years after *Bakke*, a much more conservative Supreme Court heard the two cases successively.³⁸ Many thought this would be the end of race-conscious admissions, but it turned out to be an April Fools’ joke on right-wing activists.³⁹ Justice Sandra Day O’Connor, whose earlier opinions had struck down several race-conscious policies in other contexts,⁴⁰ voted to uphold one for the first time. Justice O’Connor’s majority opinion in *Grutter*, joined by four liberal Justices, finally brought five votes to

27. See Jerry Kang, *Negative Action Against Asian Americans: The Internal Instability of Dworkin’s Defense of Affirmative Action*, 31 HARV. C.R.-C.L. L. REV. 1, 3 (1996) (defining negative action as “unfavorable treatment based on race, using the treatment of Whites as a basis for comparison”).

28. DANA Y. TAKAGI, *THE RETREAT FROM RACE: ASIAN-AMERICAN ADMISSIONS AND RACIAL POLITICS* (1993); Vinay Harpalani, *Asians Americans, Racial Stereotypes, and Elite University Admissions*, 102 B.U. L. REV. 233, 283–84 (2022).

29. See generally THE CENTER FOR INDIVIDUAL RIGHTS, <https://www.cir-usa.org/> [<https://perma.cc/N626-ZPNA>]; PACIFIC LEGAL FOUNDATION, <https://pacificlegal.org> [<https://perma.cc/BTB2-K6CG>].

30. *Hopwood v. State of Tex.*, 78 F.3d 932, 934 (5th Cir. 1996).

31. *Smith v. Univ. of Wash., L. Sch.*, 233 F.3d 1188, 1191 (9th Cir. 2000).

32. *Johnson v. Bd. of Regents of Univ. of Georgia*, 263 F.3d 1234 (11th Cir. 2001).

33. See *Hopwood*, 78 F.3d at 944.

34. See *Johnson*, 106 F. Supp. 2d at 1374.

35. See *Smith*, 233 F.3d at 1194, 1200–01. The Supreme Court also denied certiorari for federal appellate rulings on closely related issues. In *Wessmann v. Gittens*, the First Circuit also struck down the race-conscious magnet high school admissions policy at Boston’s Latin School. 160 F.3d 790, 791–92 (1st Cir. 1998). Additionally, in *Podberesky v. Kirwan*, the Fourth Circuit struck down the Benjamin Banneker Scholarship for Black students at the University of Maryland. 38 F.3d 147, 151 (4th Cir. 1994).

36. *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002).

37. See *Gratz v. Bollinger*, 539 U.S. 244 (2003).

38. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz*, 539 U.S. at 244.

39. See generally Gerald Torres, *Grutter v. Bollinger/Gratz v. Bollinger: View from a Limestone Ledge*, 103 COLUM. L. REV. 1596, 1596–98 (2003).

40. See *supra* cases cited notes 21–23.

the compelling interest in diversity.⁴¹ It affirmed the use of race as one flexible factor in a holistic admissions process assessed through individualized review of applicants.⁴² After six long years of litigation and predictions of doom, affirmative action survived.

Yet *Grutter* itself was highly ironic, upholding race-conscious admissions policies but also promising their demise. *Grutter* emphasized the need for an end point to affirmative action.⁴³ It dictated that universities should prefer race-neutral admissions policies over race-conscious ones, if the former could yield sufficient diversity.⁴⁴ Justice O’Connor’s majority opinion stated the Justices “expect that 25 years from now, the use of racial preferences will no longer be necessary”⁴⁵ Most commentators did not see this statement as binding,⁴⁶ and Justice O’Connor later said it was not.⁴⁷ But the Court’s desire to really end affirmative action with all deliberate speed was not lost.⁴⁸ Unlike the vague

41. See *Grutter*, 539 U.S. at 310, 325 (“[The Court] endorse[s] Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”).

42. *Id.* at 340–41. With *Gratz*, the Court struck down the College of Literature, Science, and Arts admissions policy which automatically awarded 20 points on a 150-point scale to underrepresented minority applicants. This split itself was surprising, as the district court had upheld the *Gratz* plan and struck down the *Grutter* plan.

43. *Grutter*, 539 U.S. at 342 (“We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point.”).

44. See *id.* at 339.

45. *Id.* at 343. Justices Thomas and Scalia concurred with that part of her opinion, and Justice Kennedy referred to the majority’s “self-destruct mechanism” is his dissent. *Id.* at 375 (Thomas, J. and Scalia, J., concurring in part); *Id.* at 394 (Kennedy, J., dissenting).

46. See, e.g., Boyce F. Martin Jr., *Fifty Years Later, It’s Time to Mend Brown’s Broken Promise*, U. ILL. L. REV. 1203, 1219 (2004) (arguing that *Grutter*’s twenty-five year timeline for end of race-conscious admissions was aspirational rather than binding); Joel K. Goldstein, *Justice O’Connor’s Twenty-Five Year Expectation: The Legitimacy of Durational Limits in Grutter*, 67 OHIO ST. L.J. 83, 83–85 (2006) (arguing that “the twenty-five year expectation is problematic to the extent that it is understood as imposing a definite endpoint.”). But see Sheryl G. Snyder, *A Comment on the Litigation Strategy, Judicial Politics and Political Context which Produced Grutter and Gratz*, 92 KY. L.J. 241, 260 (2004) (viewing *Grutter*’s twenty-five-year timeline as a binding end point for race-conscious admissions). Some commentators, such as the late Professor Lani Guinier, did not necessarily see the twenty-five-year timeline as binding but did see it as a warning to universities. Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of our Democratic Ideals*, 117 HARV. L. REV. 113, 201 (2003) (viewing *Grutter* as a warning to universities to phase out race-conscious admissions policies within twenty-five years).

47. See Sandra Day O’Connor & Stewart J. Schwab, *Affirmative Action in Higher Education over the Next Twenty-Five Years: A Need for Study and Action*, in THE NEXT 25 YEARS: AFFIRMATIVE ACTION IN HIGHER EDUCATION IN THE UNITED STATES AND SOUTH AFRICA 62 (David L. Featherman, Martin Hall & Marvin Krislov eds., 2010) (noting “that 25-year expectation is, of course, far from binding on any justices who may be responsible for entertaining a challenge to an affirmative-action program in 2028.”).

48. Despite their vast ideological differences, both the late Justice Antonin Scalia and the late Professor Derrick Bell predicted that more litigation would soon ensue. See Derrick Bell, *Diversity’s Distractions*, 103 COLUM. L. REV. 1622, 1631 (2003) (referring to *Grutter* as “litigation-prompting compensation for admissions criteria that benefit the already privileged and greatly burden the already disadvantaged.”); *Grutter*, 539 U.S. at 348 (Scalia, J., concurring in part and dissenting in part) (contending that “[the] *Grutter-Gratz* split double header seems perversely designed to prolong the controversy and the litigation.”). The choice the Court made in its *Gratz-Grutter* doubleheader had consequences here. The obscure nature of holistic admissions, coupled with the growing influence of anti-affirmative action organizations, could only lead to more lawsuits.

decree in *Brown II*, the *Grutter* majority was all too willing to suggest a specific end date for race-conscious university admissions.⁴⁹

And even that end date was not soon enough for some Justices. In contrast to its reticence after *Bakke*, the increasingly conservative Supreme Court now wanted to proceed quite deliberately and with much speed. The Court did not even wait for half of *Grutter*'s twenty-five-year aspirational timeline. Less than ten years after *Grutter*, with right-wing activists bringing more lawsuits, the Justices granted certiorari in *Fisher v. University of Texas at Austin (Fisher I)* (2013).⁵⁰ The Plaintiffs in *Fisher*, represented by conservative lawyer Edward Blum, claimed that the University of Texas at Austin (UT) attained a "critical mass" of underrepresented minority students using the race-neutral Top Ten Percent Law alone—a plan which guaranteed admission to UT for Texas high school students based on class rank.⁵¹ Dissenters from *Grutter* and the new conservative Justices now formed a majority on the Court. Once again, there were calls of doom for affirmative action. However, *Fisher I* merely resulted in a remand to the Fifth Circuit for proper application of strict scrutiny: a determination of whether UT had demonstrated that it needed affirmative action to attain the educational benefits of diversity.⁵² Few had predicted this result,⁵³ and the *Fisher* litigation itself proceeded with all deliberate speed.

In *Fisher II*, the Court again surprised many observers by finding that UT had indeed shown that it needed to use race to attain sufficient diversity.⁵⁴ Justice Anthony Kennedy, who had dissented in *Grutter*, drew from Justice O'Connor's playbook and voted for the first time to uphold a race-conscious policy. Nevertheless, the ironic cycle continued: affirmative action survived once again, but the Court's hostility towards it became even more evident in the process. Justice Kennedy's majority opinion made it clear that UT and other universities would have to continuously demonstrate the need for race-conscious policies.⁵⁵

49. See Harpalani, *supra* note 9.

50. 570 U.S. 297 (2013).

51. Tex. Educ. Code Ann. § 51.803. The Top Ten Percent Law guarantees admission to UT to the top students (originally top ten percent of each graduating class) in all Texas high schools. The law was passed by the Texas legislature in response to *Hopwood v. Texas*. It has been amended several times, with caps placed on the number of students who can be admitted.

52. *Fisher I*, 570 U.S. at 314–15.

53. But see Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. PA. J. CONST. L. 463, 526 (2012) ("If the Supreme Court adopted . . . [the test articulated in this Article], it would vacate the Fifth Circuit ruling in *Fisher I*, but it would not declare UT's race-conscious policy to be unconstitutional. Rather, it would remand the case for review based on the more stringent standard proposed here."); Vinay Harpalani, *Affirmative Action Survives – For Now*, CHI-KENT FAC. BLOG (June 24, 2013), <https://blogs.kentlaw.iit.edu/faculty/2013/06/24/affirmative-action-survives-for-now/> [https://perma.cc/V6KF-63RD].

54. *Fisher v. Univ. of Texas at Austin (Fisher II)*, 579 U.S. 365, 365 (2016).

55. *Id.* at 379–380 (noting that "the University [of Texas] engages in periodic reassessment of the constitutionality, and efficacy, of its admissions program. . . . [T]he University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest."); see also Shakira D. Pleasant, *Fisher's Forewarning: Using Data to Normalize College Admissions*, 21 U. PA. J. CONST. L. 813, 818 (2019) ("The holding in *Fisher II* unquestionably outlined the Court's expectation that [universities] collect, scrutinize, and utilize data to evaluate and refine [the] race-conscious admissions process.").

This could only further prompt affirmative action opponents to sue universities and force them to demonstrate such need, essentially guaranteeing continuous litigation. Although still quite resilient, everyone knew affirmative action was slowly succumbing to the constant right-wing attacks—a death by a thousand cuts.⁵⁶

So came the *SFFA* cases, organized again by Edward Blum.⁵⁷ The *Harvard* case was different from prior ones in that it had Asian-American Plaintiffs and claimed negative action—discrimination against Asian Americans vis-à-vis White Americans—in addition to its attack on affirmative action.⁵⁸ Parties in the *Harvard* and *UNC* cases presented lots of statistical evidence, with competing experts on both sides. Both universities prevailed at the district court. In the *Harvard* case, the district court rejected SFFA’s claim of intentional discrimination against Asian Americans, although it noted the possibility of implicit biases infecting the admissions process.⁵⁹ But the lower courts deemed that Harvard and UNC’s race-conscious admissions policies were consistent with *Grutter*, and the First Circuit affirmed in the *Harvard* case. Before the Fourth Circuit could hear the *UNC* case, SFFA filed its certiorari petition against Harvard and moved to consolidate the cases.⁶⁰ SFFA also asked the Supreme Court to overturn *Grutter*.⁶¹ Similar to its action in *Gratz* twenty years earlier, the Court bypassed the Fourth Circuit and granted certiorari in both cases. The cases were later deconsolidated.⁶² The Court heard them separately but on the same day: October 31, 2022—a spooky parallel to *Gratz* and *Grutter* two decades earlier, and on Halloween to boot.⁶³

Those Halloween oral arguments, along with the Justices’ prior opinions, give some insight on how each one may rule on the *SFFA Cases*. The Court’s breakdown could be complicated, with various concurrences and dissents, and Justices joining only parts of opinions. *Bakke* had eight different opinions and was 5–4 in the judgment. *Grutter* was also 5–4 and had six different opinions. *Fisher I* was 7–1 without a merits ruling and still had four opinions, and *Fisher II* was a 4–3 judgment with three opinions. Justices O’Connor and Kennedy surprised us with their respective votes in *Grutter* and *Fisher II*, but observers knew they were the swing Justices. Conversely, the current Court does not have

56. Taylor Swift, *Death by a Thousand Cuts*, on LOVER (Republic Records 2019).

57. Madeleine Carlisle, *Edward Blum on His Long Quest to End Race-Conscious College Admissions*, TIME (Oct. 27, 2022, 8:00 AM), <https://time.com/6225372/edward-blum-affirmative-action-supreme-court-interview/> [<https://perma.cc/5VSP-6NU4>].

58. See Harpalani, *supra* note 28, at 233.

59. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 308 F.R.D. 39, 51 (D. Mass.), *aff’d*, 807 F.3d 472 (1st Cir. 2015).

60. Petition for Writ of Certiorari, *Students for Fair Admissions v. President and Fellows of Harvard Coll.*, No. 20-1199 (U.S. argued Oct. 31, 2022); *Students for Fair Admissions v. Univ. of N.C.*, No. 21-707 (U.S. argued Oct. 31, 2022).

61. Brief for Petitioner SFFA, *supra* note 6, at 68.

62. See Order in Pending Cases, 597 U.S. 20-1199, 21-707 (2022).

63. Transcript of Oral Argument, *Students for Fair Admissions v. Univ. of N.C.*, No. 21-707 (U.S. argued Oct. 31, 2022) [Hereinafter Transcript of Oral Argument UNC]; Transcript of Oral Argument, *Students for Fair Admissions v. President and Fellows of Harvard Coll.*, No. 20-1199 (U.S. argued Oct. 31, 2022) [Transcript of Oral Argument Harvard].

a single swing Justice, and it is less predictable whose opinion will control.⁶⁴ Swing Justices on the current Court vary by issue.⁶⁵ The mere fact that five Justices voted to overturn *Roe v. Wade* (1973)⁶⁶ last term in *Dobbs v. Jackson Women's Health Organization* (2023)⁶⁷ does not itself dictate that they will do the same with *Grutter*.

With respect to affirmative action, I view the current Court in three general blocks: (1) An ultraconservative wing composed of Justices Clarence Thomas, Samuel Alito, and Neil Gorsuch; (2) A liberal wing with Justices Sonia Sotomayor, Ketanji Brown Jackson, and Elena Kagan; and (3) A “swing” conservative wing made up of Chief Justice John Roberts along with Justices Amy Coney Barrett and Brett Kavanaugh. We have already seen the three blocks in another race and admissions case⁶⁸ on the shadow docket, where the Court issues summary rulings without full briefing and argument.⁶⁹ In *Coalition for Thomas Jefferson v. Fairfax County, VA School Board*, the district court struck down the newly adopted admissions policy which increased racial diversity at Thomas Jefferson High School for Science and Technology (TJHSST).⁷⁰ Although both the old and new TJHSST admissions policies were facially race-neutral, the court found that the new policy was adopted with the knowledge and intent that it would reduce enrollment of Asian American students.⁷¹ But the Fourth Circuit stayed the ruling and kept the new admissions policy in place pending appeal.⁷² In a 6–3 decision, the Supreme Court affirmed the Fourth Circuit’s stay.⁷³ Justices Alito, Gorsuch, and Thomas dissented and would have reinstated the old admissions policy.⁷⁴ Conversely, Justices Roberts,

64. See generally Amelia Thomson-DeVeaux, *The Supreme Court Might Have Three Swing Justices Now*, FIVETHIRTYEIGHT (Jul. 2, 2019, 6:00 A.M.), <https://fivethirtyeight.com/features/the-supreme-court-might-have-three-swing-justices-now/> [<https://perma.cc/VGH6-BURD>].

65. See *id.*

66. Justices Alito, Thomas, Gorsuch, Kavanaugh, and Barrett voted to overturn the landmark abortion rights case in *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2240 (2022).

67. *Id.*

68. See *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21-cv-296, 2022 WL 579809 (E.D. Va. Feb. 25, 2022); *Complaint and Demand for Jury Trial, Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21-cv-00296 (E.D. Va. Mar. 10, 2021); *Order at 1–2, Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 22-1280, (4th Cir. Mar. 31, 2022); *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 22-1280 (4th Cir. Mar. 31, 2022), *pet. denied*, 142 S. Ct. 2672; *Order denied, Coal. for TJ v. Fairfax Cnty. Sch. Bd.* (Apr. 25, 2022); *Plaintiff's Memorandum in Support of Motion for Summary Judgment, Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21-cv-00296 (E.D. Va. 2022).

69. William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 N.Y.U. J. L. & LIBERTY 1, 1 (2015) (describing Supreme Court’s “shadow docket” as “a range of orders and summary decisions that defy its normal procedural regularity”). Professor Stephen Vladeck has noted that the shadow docket is “the significant volume of orders and summary decisions that the Court issues without full briefing and oral argument.” Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. REV. 123, 125 (2019).

70. *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 1:21CV296, 2022 WL 579809 at *36 (E.D. Va. Feb. 25, 2022).

71. *Id.* at *10.

72. *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 22-1280, 2022 WL 986994 at *1 (4th Cir. Mar. 31, 2022).

73. *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 142 S. Ct. 2672, 2672 (2022).

74. See *id.*

Kavanaugh, and Barrett sided with the liberal wing to keep (for now) an admissions policy that promoted racial diversity.⁷⁵ Although not a merits ruling, the breakdown on the Court’s shadow docket order in *Coalition for Thomas Jefferson* does indicate a difference in viewpoints among the six conservative Justices and could hint at how they will view the *SFFA* cases.

We can be reasonably sure of the votes of several Justices. Justice Thomas’s opposition to race-conscious admissions policies is unequivocal: he will vote to overturn *Grutter*. He said so explicitly in his opinions in *Fisher I* (2013)⁷⁶ and *Fisher II* (2016),⁷⁷ and his disdain for the compelling interest in diversity was visible in both his *Grutter* dissent in 2003 and his questioning during the *Harvard* and *UNC* oral arguments on October 31, 2022. Justice Thomas’s *Grutter* dissent was most interesting for its tangential points. He critiqued the use of standardized tests and contended that universities value diversity mostly because of “racial aesthetics.”⁷⁸ Many progressives and Critical Race Theorists share these views, and my law students often find themselves in surprising agreement with Justice Thomas here. One might expect Thomas to rehash these points, perhaps in the midst of references to Frederick Douglass and the Declaration of Independence.⁷⁹

Justice Alito is also quite likely to vote to overturn *Grutter*. His solid opposition to race-conscious policies is not in doubt. Notably, Justice Alito read his long, scathing dissent in *Fisher II* from the bench.⁸⁰ He admonished the University of Texas, articulating that it had not even demonstrated a compelling interest in diversity and “failed to define [its] interest . . . with clarity.”⁸¹ At length, Justice Alito critiqued the majority’s ruling that UT’s race-conscious policy was narrowly tailored and that UT had demonstrated a need to use such a policy.⁸² He mocked the notion of attaining diversity within racial groups which UT and the Obama Administration had invoked as part of the compelling interest,⁸³ noting that it favors affluent students of color over those with less resources.⁸⁴ Justice Alito also delved into controversial issues which were

75. *Id.*

76. 570 U.S. 297, 315 (2013) (Thomas, J., concurring).

77. 579 U.S. 365, 389 (2016) (Thomas, J., dissenting).

78. *Grutter v. Bollinger*, 539 U.S. 306, 355 (2003) (Thomas, J., concurring in part and dissenting in part).

79. Justice Thomas referenced both Frederick Douglass and the Declaration of Independence in his *Grutter* dissent. *See id.* at 349–50, 378 (Thomas, J., dissenting). Interestingly, while the late Justice Antonin Scalia joined most of Justice Thomas’s dissent, he did not join the two sections which contained these references. *Id.* at 349.

80. *See generally Fisher II*, 579 U.S. at 389 (Alito, J., dissenting).

81. *Id.* at 399.

82. *Id.* at 403–05.

83. *See* Brief for Respondents at 61, *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (2012) (No.11-345) (asserting that “[h]olistic review permits the consideration of diversity within racial groups”); Transcript of Oral Argument at 47, *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013) (No. 11-345) (Solicitor General Donald Verrelli noting that universities “are looking . . . to make individualized decisions about applicants who will directly further the education mission For example, they will look for individuals who will play against racial stereotypes . . . [t]he African American fencer; the Hispanic who has [sic] mastered classical Greek.”).

84. *Fisher II*, 579 U.S. at 416–20 (Alito, J., dissenting).

irrelevant or only tangentially relevant to the case. Foreshadowing *SFFA v. Harvard*, he wrote that universities ignore diversity among Asian Americans.⁸⁵ Justice Alito also questioned the role of standardized tests in admissions, albeit less definitively than Justice Thomas.⁸⁶ In much of his commentary, Justice Alito seemed quite interested in fueling social and political controversies that went beyond the scope of legal issues.

Justice Gorsuch will also likely vote to overturn *Grutter*, although his approach may be different. His textualist bend could be especially significant for the *Harvard* case which hinges on Title VI of the Civil Rights Act of 1964.⁸⁷ Title VI applies to private and public institutions receiving federal funding and reads that “[n]o person . . . shall, on the ground of race, color, or national origin . . . be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁸⁸ Writing for the majority in *Bostock v. Clayton County* (2020), Justice Gorsuch interpreted similar language for “sex” discrimination very broadly.⁸⁹ He took Title VII of the Civil Rights Act of 1964 to prohibit discrimination based on any characteristic that implicated an individual’s sex/gender, including sexual orientation and gender identity.⁹⁰ Justice Gorsuch rooted this view in Title VII’s language: “It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s . . . sex”⁹¹ In the same vein, Justice Gorsuch is likely to view any action which considers an individual’s race as prohibited by Title VI. It is unlikely that Justice Gorsuch would have a different view of the Equal Protection Clause, particularly as the Court has suggested that it is coterminous with Title VI.⁹² And a total prohibition on considering race would overrule *Grutter*. Ironically, the same reasoning that led him to a progressive ruling on sexual orientation and gender identity discrimination could drive Justice Gorsuch’s vote to strike down affirmative action.

The liberal wing of the Court will likely be in the minority, but they will provide important dissenting voices. Justice Sotomayor is known for her incisive dissents in cases involving race, as in *Perry v. New Hampshire*,⁹³ *Schuetz v.*

85. *Id.* at 410, 412.

86. *Id.* at 421–22.

87. See Supplemental Brief for Petitioner at 10, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 20-1199 (U.S. argued Oct. 31, 2022).

88. 42 U.S.C. § 2000d.

89. See 140 S. Ct. 1731, 1742 (2020).

90. See *id.* at 1748.

91. See *id.* at 1734; see 42 U.S.C. § 2000e-2.

92. See *Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001) (“Essential to the Court’s holding [in *Bakke*] reversing that aspect of the California court’s decision was the determination that § 601 [of Title VI] ‘proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.’”) (third alteration in original) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978) (majority opinion)); see also *Bakke*, 438 U.S. at 325, 328, 352 (Brennan, White, Marshall, Blackmun, JJ., concurring in the judgment in part and dissenting in part).

93. 565 U.S. 228, 249 (2012).

Coalition to Defend Affirmative Action,⁹⁴ *Utah v. Strieff*,⁹⁵ and *Trump v. Hawaii*.⁹⁶ We may well see another one from her. At the oral arguments, Justice Sotomayor’s questions reflected perhaps the most in-depth knowledge and consideration of arguments brought forth by all parties. She referenced America’s history of racism,⁹⁷ attempts to remedy this racism from Reconstruction onward,⁹⁸ contemporary racial inequities in education,⁹⁹ the efficacy of race-neutral policies,¹⁰⁰ and the value of diversity itself.¹⁰¹ She asked specific questions about past and present racist incidents at UNC, referencing the Student Intervenors’ Brief.¹⁰² In the *Harvard* case, Justice Sotomayor delved into the details of simulations of race-neutral and race-conscious admissions policies at Harvard.¹⁰³ In particular, she was especially concerned about the effect of these policies on the enrollment of Black students.¹⁰⁴ If Justice Sotomayor writes a dissenting opinion, it will likely focus on racial inequities and detail how colorblindness only serves to compound existing inequities.

Justice Jackson can also bring some of these concerns to light. Because she is recused from the *Harvard* case,¹⁰⁵ the Court may have chosen to deconsolidate the two cases so that Justice Jackson could have her voice in the *UNC* arguments. During those arguments, Justice Jackson focused on the role that race plays in holistic admissions, highlighting the nuances of applicants’ identity and experiences. She posed an insightful hypothetical contrasting a White, multi-generational legacy applicant with a first-generation Black applicant descended from slaves.¹⁰⁶ Here, Justice Jackson noted how, if race was eliminated from the application process, the former could discuss their background in detail while the latter would be precluded from doing so.¹⁰⁷ With that in mind, Justice Jackson may write an opinion that delves into racialized experiences and how those relate to both diversity and equity.

Although Justice Kagan is likely to favor Harvard and UNC, she could be a wild card and bring a different angle to the cases. In the past, she has tried to forge compromise and find common ground with conservative Justices.¹⁰⁸ For

94. 572 U.S. 291, 337 (2014).

95. 579 U.S. 232, 243 (2016).

96. 138 S. Ct. 2392 (2018).

97. Transcript of Oral Argument UNC, *supra* note 63, at 12–23.

98. *Id.* at 10–11.

99. *Id.* at 123.

100. *Id.* at 47.

101. *Id.* at 9.

102. *Id.* at 122–23.

103. See Transcript of Oral Argument Harvard, *supra* note 63, at 74–77.

104. *Id.* at 21–22.

105. Lauren Camera, *Jackson will Recuse Herself from Harvard Affirmative Action Case if Confirmed to Supreme Court*, U.S. NEWS & WORLD REP., Mar. 23, 2022.

106. Transcript of Oral Argument UNC, *supra* note 63, at 63–66.

107. *Id.* at 66.

108. See Richard Wolf, *Associate Justice Elena Kagan, After Decade on Bench, Emerges as Supreme Court ‘Bridge-builder’*, USA TODAY (Aug. 4, 2020), <https://www.usatoday.com/story/news/politics/2020/08/04/elena-kagan-after-10-years-supreme-court-justice-wields-influence/5490349002/> [<https://perma.cc/5KJ8-9AHG>]. *But see* Josh Gerstein, *How Justice Kagan Lost her Battle as a Consensus Builder*, POLITICO (Dec. 30, 2022),

example, she joined Justice Alito's dissent in *Ramos v. Louisiana* on grounds that the Court should respect precedent.¹⁰⁹ More recently though, Justice Kagan has critiqued the Justices for departing from precedent—as shown in her dissent in *West Virginia v. EPA*,¹¹⁰ and her joint dissent with Justices Breyer and Sotomayor in *Dobbs*.¹¹¹ During the oral argument in *SFFA v. Harvard*, Justice Kagan underscored the Court's preference for race-neutral admissions and noted that there had been “a lot of questions” about the “end point” of race-conscious admissions.¹¹² Perhaps Justice Kagan could negotiate and join the swing-conservative Justices to forge a compromise—one that salvages *Grutter*, or the remnants of it.

The swing-conservative wing of the Court will be the most interesting. Chief Justice Roberts' disdain for race-conscious policies is well known. In *Parents Involved in Community Schools v. Seattle School District No. 1*, Chief Justice Roberts infamously stated, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹¹³ He also wrote the majority opinion in *Shelby County v. Holder*,¹¹⁴ which struck down Section 4 of the Voting Rights Act of 1965.¹¹⁵ Justice Roberts joined Justice Alito's dissent in *Fisher II*, and in both the *Fisher II* and *UNC* oral arguments, he asked questions about the necessity of using race,¹¹⁶ the viability of race-neutral alternatives,¹¹⁷ and the end point of race-conscious admissions.¹¹⁸ But Justice Roberts also cares about the legitimacy of the Court.¹¹⁹ Although he would have upheld the Mississippi abortion restriction in *Dobbs*, Justice Roberts would not have overturned *Roe v. Wade*.¹²⁰ In similar fashion, perhaps he could be persuaded to keep some aspects of *Grutter* in place, even if he votes against Harvard and UNC. However, either Justice Barrett or Justice Kavanaugh would still have to take a similar view for this to matter.

Although their conservative credentials are not in doubt, Justices Barrett and Kavanaugh are the biggest unknowns. Justice Barrett has an interracial family

<https://www.politico.com/news/2022/12/30/how-justice-kagan-lost-her-battle-as-a-consensus-builder-00075835> [<https://perma.cc/5CKP-ZNG8>].

109. See 140 S. Ct. 1390, 1425 (2020).

110. *West Virginia v. EPA*, 142 S. Ct. 2587, 2634 (2022).

111. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2319–20 (2022).

112. Transcript of Oral Argument *Harvard*, *supra* note 63, at 29–30, 78–79.

113. 551 U.S. 701, 748 (2007) (plurality opinion).

114. 570 U.S. 529, 532 (2013).

115. *Id.* at 557.

116. Transcript of Oral Argument *UNC*, *supra* note 63, at 127–29; see also Transcript of Oral Argument at 49–50, *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365 (2016) (No. 14-981).

117. Transcript of Oral Argument *UNC*, *supra* note 63, at 41–43.

118. *Id.* at 83.

119. The Associated Press, *Chief Justice John Roberts Defends the Supreme Court — as People's Confidence Wavers*, NPR (Sept. 10, 2022, 11:05 AM), <https://www.npr.org/2022/09/10/1122205320/chief-justice-john-roberts-defends-the-supreme-court-as-peoples-confidence-waver> [<https://perma.cc/2E7V-FDM5>].

120. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2314 (2022) (Roberts, C.J., concurring in judgment).

with adopted Black children, but this does not necessarily reflect anything about her views on race-conscious admissions.¹²¹

Her appeals court rulings in two employment discrimination cases did not favor Black Plaintiffs.¹²² Nevertheless, at times during oral arguments, Justice Barrett appeared sympathetic on the issue of diversity. She pressed SFFA Counsel Patrick Strawbridge on whether he “agree[d] that universities have a compelling interest in the educational benefits of diversity” and if so, how he would “suggest that [universities] go about achieving that” interest.¹²³ Justice Barrett also showed interest in the experiences of students of color. She inquired about “affinity groups and affinity housing” and noted that one of their benefits may be to reduce feelings of isolation among students of color.¹²⁴ Her questions also covered how admissions committees could consider applicants’ experiences of discrimination, as opposed to just “[r]ace in a box-checking way.”¹²⁵ Additionally, although she may have been referring to remedial measures rather than diversity, Justice Barrett also “entirely agree[d]” that “it’s established in our precedent that it’s not always illegal to take [into account] race-conscious measures.”¹²⁶

But Justice Barrett was adamant about having an end point to race-conscious admissions, grilling both Harvard Counsel Seth Waxman¹²⁷ and UNC Counsel Ryan Park about it.¹²⁸ She asked whether Harvard was getting closer to that end point and how it was going about trying to do so.¹²⁹ She also had questions about

121. See Justin Driver, *Think Affirmative Action is Dead? Think Again.*, N.Y. TIMES (Oct. 26, 2022), <https://www.nytimes.com/2022/10/26/opinion/supreme-court-case-for-affirmative-action.html> [https://perma.cc/DQ79-RF39].

122. See EEOC v. AutoZone, 875 F.3d 860 (7th Cir. 2017) (per curiam) (AutoZone’s “Black” & “Hispanic” stores do not violate Title VII); Smith v. Ill. Dept. of Transp’t’n, 936 F.3d 554, 561 (7th Cir. 2019) (Use of “n-word” does not itself prove hostile work environment).

123. Transcript of Oral Argument UNC, *supra* note 63, at 58–59.

124. *Id.* at 138–39. In the context of her questions and comments about affinity housing, Justice Barrett also noted that “whatever [the Justices] say or however broadly we wr[i]te this opinion, th[e] rationale about the educational benefits of diversity presumably might have some bearing on those questions that are post-admission questions . . .” *Id.* at 139. Justice Barrett raised this issue with UNC Student Intervenors Counsel David Hinojosa, noting that UNC’s Wilmington campus has affinity housing, but the Chapel Hill campus does not. *Id.* at 140. Hinojosa’s response noted that affinity groups, such as Black student associations, do not exclude any students who are interested, and that their activities benefit not just minority students, but all students. *Id.* See also Vinay Harpalani, “Safe Spaces” and the Educational Benefits of Diversity, 13 DUKE J. CONST. L. & PUB. POL’Y 117 (2017) (discussing how affinity groups and housing are open to all who are interested and can benefit all students). Justice Barrett’s more nuanced interest in affinity groups and housing stands in stark contrast to the late Justice Scalia’s dissent in *Grutter*, which broadly condemned them. See *Grutter v. Bollinger*, 539 U.S. 306, 349 (2003) (Scalia, J., dissenting) (critiquing “universities that talk the talk of multiculturalism and racial diversity . . . but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.”). Justice Scalia’s characterization of affinity groups and housing as “minority-only” or “separate” is therefore, false. See also Harpalani, *supra*, at 136–38.

125. Transcript of Oral Argument UNC, *supra* note 63, at 23–25.

126. *Id.* at 172.

127. See Transcript of Oral Argument Harvard, *supra* note 63, at 91–92.

128. See Transcript of Oral Argument UNC, *supra* note 63, at 80–82.

129. See Transcript of Oral Argument Harvard, *supra* note 63, at 80.

the legal significance of *Grutter*'s twenty-five-year timeline.¹³⁰ Even if she supports the compelling interest in diversity, the question is whether Justice Barrett would be willing to wait a bit before declaring affirmative action to be dead letter.

Justice Kavanaugh's position might be the most unpredictable. Although staunchly conservative, Justice Kavanaugh has shown more interest in racial diversity and equity than the other conservative Justices. In contrast to Justice Barrett, Justice Kavanaugh did rule in favor of Black plaintiffs on an employment discrimination claim as an appeals court judge.¹³¹ Moreover, in *NCAA v. Alston*—where the Supreme Court ruled that college athletes can be compensated for their own names and likenesses—Justice Kavanaugh wrote a concurring opinion expressing concern for the exploitation of Black college athletes.¹³² He is also known for hiring a diverse range of clerks and speaking at events for Black law students.¹³³ And at the *Harvard* oral argument, when SFFA Counsel Cameron Norris referenced “the fuzziness of the interest in *Grutter*[.]” Justice Kavanaugh responded: “No, no, no. No. Accept the interest.”¹³⁴

But Justice Kavanaugh has also often ruled adversely on civil rights issues.¹³⁵ And as far back as 1999, he stated that he “see[s] as an inevitable conclusion within the next 10 to 20 years when the court says we are all one race in the eyes of government[.]”¹³⁶ At both oral arguments, most of Justice Kavanaugh's questions focused on determining the end point for race-conscious admissions. He asked about the efficacy of race-neutral alternatives,¹³⁷ their effect on enrollment of underrepresented students,¹³⁸ and whether universities should have to eliminate legacy admissions and take other measures before being allowed to use race-conscious policies.¹³⁹ Even more than the other Justices, Justice Kavanaugh seemed very interested in Justice O'Connor's 25-year aspirational timeline in *Grutter*. He questioned counsel for both parties about the

130. See Transcript of Oral Argument UNC, *supra* note 63, at 108–09.

131. *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 580–81 (D.C. Cir. 2013) (per curiam) (Kavanaugh, J., concurring).

132. See *NCAA v. Alston*, 141 S. Ct. 2141, 2168 (2021) (Kavanaugh, J., concurring).

133. See Li Zhou, *Kavanaugh Bragged About His Clerks' Diversity. His Legal Record is Another Story.*, VOX, (Sept. 8, 2018, 8:00 AM), <https://www.vox.com/2018/9/8/17821478/supreme-court-nominee-brett-kavanaugh-diversity> [<https://perma.cc/PC3L-6CQQ>]. See also Ann E. Marimow, *Here's How Federal Judges Think About Diversity in Hiring Law Clerks*, WASH. POST (Dec. 1, 2022) <https://www.washingtonpost.com/politics/2022/12/01/appeals-court-clerks-race-diversity/> [<https://perma.cc/6L85-RKYG>].

134. See Transcript of Oral Argument Harvard, *supra* note 63, at 33.

135. See generally NAACP LEGAL DEF. & EDUC. FUND, INC., CIVIL RIGHTS RECORD OF BRETT KAVANAUGH 22 (2018), https://www.naacpldf.org/wp-content/uploads/FINAL_Report-on-Brett-Kavanaugh_FINAL_11_22-2.pdf [<https://perma.cc/C8UX-XDYR>].

136. Warren Richey, *New Case May Clarify Court's Stand on Race*, CHRISTIAN SCI. MONITOR, (Oct. 6, 1999), <https://www.csmonitor.com/1999/1006/p3s1.html> [<https://perma.cc/N2CL-TNDL>].

137. See Transcript of Oral Argument Harvard, *supra* note 63, at 31–32; See Transcript of Oral Argument UNC, *supra* note 63, at 44–46, 86–87, 166–69.

138. See Transcript of Oral Argument Harvard, *supra* note 63, at 34–36; see Transcript of Oral Argument UNC, *supra* note 63, at 15.

139. Transcript of Oral Argument Harvard, *supra* note 63, at 102.

legal significance of the 25-year timeline and even pondered whether allowing race-conscious admissions beyond 2028 would overrule *Grutter*.¹⁴⁰ Given his focus on this timeline, Justice Kavanaugh may view 2028 as the end point and be willing to allow race-conscious admissions for another five years.

How might all of this translate into the holdings of the affirmative action cases? At one extreme, the Court could completely outlaw race-conscious admissions policies. It could overturn *Grutter* and rule that diversity is not a compelling interest. Alternatively, even if the Justices leave diversity as a potential compelling interest, they could find that *Grutter*'s narrow tailoring principles are unworkable¹⁴¹ because they do not have a more specific end point. Such an end point is difficult to determine under *Grutter* because, unlike typical remedial measures, there is no foreseeable end to the benefits of diversity—such benefits will last as far into the future as we can see.¹⁴² And as long as there is vast racial inequity in American society, elite institutions will need race-conscious policies to attain diversity.¹⁴³ When pressed about the end point, Waxman discussed outreach programs, financial aid improvements, elimination of early admission programs, and other facially race-neutral attempts by Harvard to increase diversity, but he could not say specifically when race-conscious policies would be unnecessary.¹⁴⁴ And in the *UNC* oral argument, Solicitor General Elizabeth Prelogar, arguing the Biden Administration's position in favor of affirmative action, referred to ways universities could determine whether race-conscious policies were necessary: graduation and attrition rates, student demographics, and surveys of students' experiences.¹⁴⁵ But neither Waxman nor Prelogar could give any specific timeline for ending race-conscious admissions policies.¹⁴⁶ Essentially, all they could say was that universities will end these policies with all deliberate speed.

140. *Id.* at 39, 115; Transcript of Oral Argument UNC, *supra* note 63, at 55–56, 84–85, 165–66.

141. If the Court keeps diversity as a compelling interest, then there should, at least in theory, be a way to narrowly tailor a race-conscious admissions policy to fulfil that interest; otherwise, “compelling interest” has no meaning. There are various options for a more restrict narrow tailoring regime than *Grutter* provides: see for example, *infra* notes 147–152 and accompanying text.

142. Vinay Harpalani, *Narrowly Tailored but Broadly Compelling: Defending Race-Conscious Admissions After Fisher*, 45 SETON HALL L. REV. 761, 775 (2015).

143. *See id.* at 776.

144. Transcript of Oral Argument Harvard, *supra* note 63, at 78–85.

145. Transcript of Oral Argument UNC, *supra* note 63, at 170–72. Prelogar also astutely highlighted the importance of diversity in military service academics. *See id.* at 144–53, 155–56, 169–70. The amicus brief of military leaders favoring affirmative action was cited by the *Grutter* majority. *See* Press Release, Joe R. Reeder, *Military Amicus Brief Cited in Supreme Court's Decision in the University of Michigan Case*, *Grutter v. Bollinger*, GREENBERG TRAURIG L. (June 27, 2003), <https://www.gtlaw.com/en/news/2003/6/military-amicus-brief-cited-in-supreme-courts-decision-in-the-university-of> [https://perma.cc/4HFM-YNW5]. Beyond diversity itself, invoking the military could implicate national security as a compelling interest.

146. All parties in the *SFFA* cases rejected *Grutter*'s twenty-five-year timeline. The plaintiffs argued that the Court did not need to wait any longer to prohibit race-conscious admissions policies, while the universities, student intervenors, and Biden Administration argued that the Court did not need to end them by 2028. *See* Transcript of Oral Argument Harvard, *supra* note 63, at 3–5, 40–42, 94–96; Transcript of Oral Argument UNC, *supra* note 63, at 69–71, 116–17, 143–44. Similarly, the parties in *Fisher I* had rejected the twenty-five-year timeline. *See* Harpalani, *supra* note 142, at 789 n.141.

It is also possible that if two of three swing-conservative Justices want to uphold the diversity interest and some possibility of race-conscious admissions, they could require universities to employ various race-neutral alternatives before resorting to race-conscious policies. At the Harvard oral argument, Justice Kavanaugh asked Waxman about what “a university ha[s] to sacrifice” before using race-conscious admissions policies and noted that as “a legal question [the Court is] going to have to ultimately figure out.”¹⁴⁷ Unless the answer to this question is that universities must sacrifice everything, there should be some circumstances under which they can use such policies. In *Grutter*, the Court rejected lottery plans and lower academic selectivity as required race-neutral alternatives because they would require universities to sacrifice their educational missions.¹⁴⁸ But in her response to Justices Barrett and Kavanaugh at oral argument, General Prelogar noted that the Biden Administration’s position is that before it can use race-conscious admissions, Harvard should first have to: (1) eliminate legacy preferences, which largely benefit White students;¹⁴⁹ and (2) modestly compromise its academic selectivity, as it could without affecting its academic reputation.¹⁵⁰ Prelogar contended that only if these measures did not increase diversity should Harvard be allowed to use race.¹⁵¹ A majority of Justices could endorse this proposition in principle, and such a holding would leave in place the potential for universities to use race-conscious admissions policies. But that would depend on how such admissions policy changes affect campus diversity, which could vary significantly by institution. Moreover, it is uncertain if universities writ large would be willing to eliminate legacy admissions or reduce academic selectivity to attain diversity.¹⁵²

But there is another possibility—one that could temporarily preserve affirmative action just as we know it. Some commentators have posited that the Court may yield to *Grutter*’s twenty-five-year timeline and make it legally significant.¹⁵³ In the past, Justice Thomas, and former Justices Scalia, Kennedy, and Breyer all alluded to the legal significance of the timeline.¹⁵⁴ And although neither Justice O’Connor nor most past observers have viewed the timeline as binding,¹⁵⁵ nothing prevents the Court from making it so. If two of the three swing-conservative Justices accept the twenty-five-year timeline or set another specific end point for race-conscious admissions policies, they could frame their

147. Transcript of Oral Argument Harvard, *supra* note 63, at 89.

148. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2003).

149. See Transcript of Oral Argument Harvard, *supra* note 63, at 102.

150. See *id.* at 103.

151. *Id.* at 96–97.

152. See, e.g., Stephanie Saul, *Elite Colleges’ Quiet Fight to Favor Alumni Children*, N.Y. TIMES, (July 13, 2022), <https://www.nytimes.com/2022/07/13/us/legacy-admissions-colleges-universities.html%20-courts-decision-in-the-university-of> [<https://perma.cc/5WX6-HQQH>].

153. See Vinay Harpalani, *The Supreme Court and the Future of Affirmative Action*, ISCOTUS NOW, (2019), [HTTPS://PERMA.CC/BBL9-GJFY](https://perma.cc/BBL9-GJFY); Driver, *supra* note 121..

154. See Driver, *supra* note 121; Harpalani, *supra* note 142, at 789 n.141.

155. See *supra* notes 46–48. Professor Justin Driver notes that “sunset provisions are fundamentally the province of the legislature, not the judiciary[.]” but he also contends that *Grutter*’s twenty-five year aspirational timeline “has improbably become the last best hope to extend affirmative action beyond the coming year.” See Driver, *supra* note 121.

ruling as consistent with *Grutter* or as a nominal modification—one that does not overturn precedent. And they would agree with the liberals that universities can still use race-conscious admissions policies for now.

If this happens, there could actually be judgments in favor of Harvard and UNC in the *SFFA* cases.¹⁵⁶ But unless the Court is flexible or ambiguous about the end point, the victory would still be defeat.¹⁵⁷ Universities would have to eliminate race-conscious admissions policies by 2028. Once again, the biting irony from *Brown v. Board of Education* should not be lost. The best hope for affirmative action has always been that the Court continues to end it with all deliberate speed.

156. The relationship between judgment (ruling in favor of one party or another) and holding (rule of law that serves as the basis for the judgment in a case) can be especially complicated in affirmative action cases. *See supra* text accompanying notes 14-18. Justice Powell’s *Bakke* opinion rendered the judgment of the Court for the Plaintiff challenging affirmative action, but the holding, as interpreted by universities, became the blueprint for race-conscious admissions policies. *See id.* Additionally, *Fisher II* rendered judgment for UT, but its holding invited challenges to race-conscious policies and further ensured their demise. *See supra* text accompanying notes 55-56.

157. *See* Bell, *supra* note 48, at 1622 (noting that that “civil rights victory” would be “hard to distinguish from defeat”); Vinay Harpalani, *The Double-Consciousness of Race-Consciousness and the Bermuda Triangle of University Admissions*, 17 U. PA. J.CONST. L. 821, 852 (2015); *Victory is Defeat: The Ironic Consequence of Justice Scalia’s Death for Fisher v. University of Texas*, 164 U. PA. L. REV. ONLINE 155, 160–61 (2016).