THE LIFE, DEATH AND POTENTIAL REBIRTH OF AFFIRMATIVE ACTION



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I. GOALS OF THE COURSE

A. Review and understand the Equal Protection Clause of the 14th Amendment to the United States Constitution.

B. Understand the history and goals of equal protection in general and affirmative action in particular.

C. Discuss standards of review in court cases pertaining to constitutional rights.

D. Understand the landmark United States Supreme Court cases pertaining to affirmative action programs in the area of higher education.

E. Review and contrast Diversity, Equity and Inclusion ("DEI") programs.

F. Be empowered as citizens (not just lawyers) to have informed views and opinions pertaining to equal protection, affirmative action and DEI.

II. OVERVIEW OF THE COURSE

A. Background of the Speaker.

B. Goals of the Course.

C. Equal Protection Clause.

D. Principles of Review and Standards of Review.

E. United States Supreme Court Cases Addressing Affirmative Action.

F. Diversity, Equity and Inclusion ("DEI").

G. Conclusion

III. EQUAL PROTECTION CLAUSE

A. Found in Section 1 of the 14th Amendment.

B. The 14th Amendment was ratified in 1868.

C. *"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;* ***nor deny to any person within its jurisdiction the equal protection of the laws.****"*

D. The Equal Protection Clause is sometimes discussed in connection with the following excerpt from the Declaration of Independence: *"[w]e hold these Truths to be self-evident,* ***that all Men are created equal****, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness."*

IV. THE PRAGMATIC REALITY OF EQUALITY VERSUS EQUAL PROTECTION

A. As a matter of pragmatic application, the premise that ***all persons are created equal*** is not necessarily true in all cases. For example, there are racial differences; there are gender differences; some people are in good health, while others have health problems (including mental and physical disabilities that they were born with); people have varying levels of intelligence and physical strength; some people are born rich and advantaged, while others are born poor and disadvantaged.

B. Consequently, an issue that has been struggled with under the Equal Protection Clause is how can the law treat individuals completely equally where individuals are not completely equal with one another? A related issue is whether the law should strive to create "equality" by advantaging one group over another. Also, if ensuring

"equality" is a valid purpose of the law, which differences between individuals need to be addressed by the law to ensure "equality"? Are there some differences that result in "inequality" that the law cannot or should not address?

C. This course discusses how these issues have arisen and been resolved in cases involving affirmative action based on race, particularly focusing on higher education, and then discusses how affirmative action and DEI may be related.

V. WHAT DOES EQUALITY MEAN?

A. Consider the following hypothetical. What happens if, for example, there are 1,000 seats open for incoming students at a prestigious university, and using purely objective admissions criteria—such as highest scores on a standardized test taken by all applicants—leads to an overwhelmingly white class.

1. Is this an acceptable outcome, as it is a result of a "colorblind" process?

2. Does the university have an interest in having a racially diverse student body?

3. If the university receives public funds (which most do) does the government have an interest in ensuring government funded universities have a racially diverse student population?

4. If the answers to the foregoing two questions are in the affirmative, to what extent can a university or the government go in promoting diversity? Is the use of quotas or percentages to allocate seats to various racial groups appropriate? This would certainly increase minority enrollment figures. Should admissions factors be scored and then points be added to final scores if applicants are of a certain race to increase their chance of admission? Can race be considered as one of the admissions factors, along with other factors such as standardized test scores, high school grades, athletic or musical ability or the like? If so, what weight should race be given in the context of overall admission factors?

B. But if seats are capped at 1,000, should a member of a minority racial group be advantaged over a white applicant? Where there are a fixed number of slots, it is impossible to advantage one racial group without disadvantaging another racial group. More to the point, how can this result in "equal protection under the law" for all applicants? In fact, the end result would seem to be the opposite of "equal protection under the law."

C. As we will see, these are the questions courts have wrestled with in connection with the use of affirmative action in admissions policies to colleges and universities.

VI. PRINCIPLES OF JUDICIAL REVIEW PERTAINING TO CONSTITUTIONAL LAW ISSUES

A. **Questions Of Law *(not bound)*.** Questions of constitutionality are considered to be ***questions of law*** which are subject to ***de novo*** and ***plenary*** review. This means that each appellate court is fully empowered to examine the decision of the court(s) below on a constitutional issue anew and as broadly as it likes, without being bound or constrained by how any court below decided the questions of law.

B. **Questions Of Fact *(bound unless abuse of discretion)*.** However, to the extent that a lower court—typically, this is the first and lowest court hearing the dispute, usually a trial court—decided a ***question of fact*** in making its determination about constitutionality, the appellate courts are usually bound by this. In other words, the appellate court must take the fact as true unless it can determine that the trial court ***abused its discretion in deciding the question of fact***.

C. **Witness Credibility *(bound)*.** To the extent a lower court—again, this is typically the first and lowest court hearing the dispute, usually a trial court—decided a question pertaining to the credibility of a witness or witness testimony, the appellate courts are bound by this determination, because the trial court is considered the sole judge of witness credibility. This is because determining credibility involves hearing and seeing a witness during his or her testimony, which occurs in the trial court, and not just reading the witness testimony in a written transcript, which is typically how an appellate court sees the witness testimony.

VII. STANDARDS OF REVIEW IN DETERMING WHETHER A LAW, REGULATION OR POLICY IS CONSTITUTIONAL

A. To determine whether or not a law, regulation or policy is constitutional or unconstitutional, a court applies one of three types of levels of review: ***(i) rational basis review; (ii) intermediate scrutiny; or (iii) strict scrutiny.***

B. Rational Basis Review.

1. Does the law or regulation have a reasonable relationship to a legitimate government interest?

2. This is the lowest standard of review.

3. Most deferential to the legislative branch.

4. Typically applied to the following types of laws:

i. Economic, health, safety and welfare legislation (often collectively referred to as the "general police powers of the state").

ii. *Example 1: State speed limits on roads and highways.*

iii. *Example 2: State licensing statutes or regulations for physicians, accountants, attorneys and other professionals.*

iv. The vast bulk of laws fall under this standard (many do not even involve constitutional issues).

C. Intermediate Scrutiny.

1. **Is the law substantially related to an important government interest**?

2. This is a mid-level standard of review.

3. Still fairly deferential to the legislative branch.

4. Typically applied to the following types of laws:

i. Laws or regulations based on **quasi-suspect classes**, such as gender and legitimacy/illegitimacy of children. Also pertains to regulation of commercial speech (billboards, advertisements, *etc.*) or reviewing time, place and manner restrictions placed on speech.

ii. *Example 1*: All male or all female schools.

iii. *Example 2:* Physical performance standards for jobs that may disadvantage females, for example, standards for serving in the police or as a firefighter.

iv. *Example 3*: Zoning restrictions on billboards and outside advertising.

v. *Example 4:* Contents of commercial advertising.

vi. *Example 5:* Ordinance that prohibits all public protests between 10 p.m. and 10 a.m.

D. Strict Scrutiny.

1. Is the law narrowly tailored to advance a compelling government interest?

2. "Narrowly tailored" means the law uses the least restrictive means to accomplish that compelling government interest.

3. This is the highest standard of review.

4. This standard of review is the least deferential to the legislature.

5. Typically applied to the following types of laws:

i. Laws infringing upon fundamental rights set forth in the Bill of Rights, or laws based on **suspect classes**, such as race, religion or national origin.

ii. *Example 1:* Segregation in public accommodations by race (unconstitutional).

iii. *Example 2:* Law making polygamy illegal (impacts on religious freedom, but constitutional).

iv. *Example 3:* Burning draft card (impacts on expressive political speech but constitutional at the time in the late 1960s and early 1970s).

VIII. AFFIRMATIVE ACTION IN HIGHER EDUCATION

A. Regents of the Univ. of Cal. v. Bakke (1978). U.S. Supreme Court case that applied strict scrutiny to racial preferences in higher education admission and upheld the affirmative action policies. Bakke was interpreted to allow race to be considered as a non-objective factor among other non-objective factors in the admission decision, but as also holding that numerical or percentage quotas by race are unconstitutional.

1. In Brown, the Court ruled segregation to be unconstitutional. However, Brown, while implementing desegregation, did not address affirmative action, where there would be race based preferences in an admissions process to a college or university. There remained a question as to whether such racial preferences would pass constitutional muster.

2. Supporters of affirmative action believed that such programs and policies were necessary to cure past discrimination caused by segregation.

3. A plurality opinion of the Court (meaning there was no clear majority opinion setting forth a majority rule or reason for the ruling) found that race could be considered as a factor in the admissions process to a medical school.

   i. Because affirmative action programs made distinctions based on racial classifications, and race was a suspect class, and this would arguably violate the Equal Protection Clause of the 14th Amendment, strict scrutiny had to be applied to racial preferences in admissions policies used by institutions of higher learning.

   ii. Encouraging diversity was a compelling government interest.

   iii. The question remained whether the particular race based preference admissions policy was narrowly tailored to advance this compelling government interest.

iv. The Court first ruled that ***quotas based on numerical or percentage set asides for seats would be unconstitutional***, in that setting quotas is not narrowly tailored enough to pass constitutional muster. For example, a program could not say 10 out of 50 seats would be allocated to African American students regardless of other qualification or admission factors.

v. Justice Powell, the author of the Bakke opinion, reasoned that where race is considered as one of several non-objective factors in the admissions process, this is constitutional. Such things would be impressions made in an interview, playing a musical instrument, playing sports or the like.

vi. Because it was a plurality opinion, commentators believed that Bakke was outcome based, in that the Court wanted to allow race based affirmative action but struggled to come up with a unified reason to do so that would be approved by a majority of the justices.

B. Grutter v. Bollinger (2003). A U.S. Supreme Court case that largely upheld Bakke. In Grutter, the Court held that an admissions process that favors underrepresented minority groups did not violate the Equal Protection Clause of the 14th Amendment if the process took into account other factors evaluated on an individual basis for every applicant. Racial quotas in the admissions process continued to be unconstitutional.

C. Gratz v. Bollinger (2003). This was a companion case that the U.S. Supreme Court heard at the same time as Grutter. In Gratz, the Court struck down a points-based admissions system that awarded an automatic bonus to the admissions scores of minority applicants. This seemed to clarify that the Court felt that race evaluated on an individualized basis can be considered in admissions, but automatically favoring an entire group of applicants collectively based on race was improper.

D. Thus, the state of the law pertaining to affirmative action after Bakke (also known as the Regents of the University of California case), Grutter and Gratz (also known as the Bollinger cases) was as follows:

1. Racial quotas—whether based on a set target number or by percentage—are unconstitutional.

2. Automatically adding points to the admissions score of an applicant on account of the applicant's race is unconstitutional.

3. However, an admissions policy that considers race as a factor among other factors applied to all applicants is constitutional.

4. Importantly, Justice O'Connor, who wrote the majority opinion in Grutter, put language in the opinion indicating that affirmative action was a temporary solution needed in the present to achieve diversity in higher

education, which was a compelling government interest. She then stated that affirmative action must eventually give way to a "color blind" admissions process. Justice O'Connor predicted that this would occur over the next 25 years, when a "critical mass" of minority students would be achieved which would render affirmative action unnecessary.

E. Fisher v. University of Texas (2016). The U.S. Supreme Court upheld a University of Texas admissions policy that automatically admitted applicants who graduated in the top 10% (later reduced to top 7%) of their high school class. Applicants who did not meet this requirement could still gain admission through a multi-factor admissions process which included race as a factor.

1. Plaintiffs were white female applicants who failed to gain admission, in that they were not in the top percentage of their high school class and then were subsequently disadvantaged because the admissions process that applied to them considered race as a factor.

2. One of their chief complaints was that the applicants automatically admitted because of class rank did not have to submit things like writing samples (there was unequal treatment under the policy).

3. There were several levels of the arguments made in the appellate and U.S. Supreme Court.

4. One argument was that the policy of allowing automatic admission of high school students graduating in the top percentage of their class was essentially a race based quota, in that there were high schools in Texas that were "majority minority" because of the local population, and a student there could gain automatic admission although less qualified than the white plaintiffs who attended more academically challenging and competitive high schools.

5. The university did not necessarily contest this, but argued the automatic admission policy was the most narrowly tailored method it could devise to increase diversity.

6. These arguments caused much debate, including over whether minority students were historically disadvantaged because—despite Brown and integration—"white schools" in Texas were generally better funded than "minority schools." Students from wealthier school districts typically received better and more thorough educations. There was a connection between race and wealth/poverty that could not be ignored.

7. Ultimately, in Fisher, the U.S. Supreme Court affirmed the decision by the 5th Circuit, which found the university's admissions policy constitutional because it was settled that a university "may use race as part of a holistic admissions program where it cannot otherwise achieve diversity," and while the automatic admissions policy based on class rank at individual high

schools may advantage some minorities, other methods that had been tried to create a "critical mass" of minority students had not been successful.

8. Fisher was a 4-3 decision (Justice Scalia had passed away before the opinion was issued and Justice Kagan recused herself). The dissenting justices (Justices Roberts, Thomas and Alito) wrote that any admissions policy that results in the automatic admission of a certain race (whether white, black or Hispanic, *etc.*) without considering other factors was inherently unconstitutional. Since that was the effect of the university's class rank admissions policy, the dissenting justices would have found that policy to violate Bakke, Grutter and Gratz as being an illegal race based quota.

9. Justice Thomas authored a separate opinion stating that he believed that considering race as a factor in a higher education admission process violated the Equal Protection Clause of the 14th Amendment. Justice Thomas wanted to completely eliminate the concept of "race based affirmative action" on the ground it was unconstitutional.

10. At the time, commentators and analysts believed certain U.S. Supreme Court justices considered affirmative action to be "reverse racism" and that it was only a matter of time before race based admissions and hiring policies would be declared unconstitutional. It was also recognized that it was difficult to separate the issue of race-based affirmative action from policies and programs that would help the economically disadvantaged, because there was often an overlap between race and wealth/poverty.

F. Students for Fair Admission v. Harvard (2023).

1. U.S. Supreme Court case that overruled Bakke and Grutter.

2. The Court held that race based admissions policies by universities violated the Equal Protection Clause of the 14th Amendment.

3. However, the Court's ruling did not apply to U.S. military academies, which may have interests pertaining to military readiness in ensuring the officer corps is racially diverse.

4. Facts were uncovered by plaintiffs during discovery, where they obtained documents and examined the university's admission evaluators under oath.

   i. Plaintiffs were Asian students denied admission to Harvard, where allegedly less qualified African American students were admitted instead of them.

   ii. Plaintiffs alleged they often had the highest admission scores based on objective and measurable factors, such as standardized test scores and extracurricular activities, but were scored lower than both whites and blacks on non-objective factors, including being

evaluated during personal interviews that (supposedly) determined positive personality traits such as likeability, courage and kindness.

iii. African American applicants were rated higher in these traits than white applicants, and white applicants were, in turn, rated higher in these traits than Asian students.

iv. Evidence gathered by the Asian plaintiffs seemed to show that the university had instructed or encouraged its admission evaluators to score interviews and other subjective admissions factors to favor black students to overcome their lower "objective" admission scores.

v. Essentially, the Asian plaintiffs argued they were being discriminated against because the university's admission policies designed to encourage increased minority enrollment actually discriminated against them and in favor of black students.

5. The university argued that Asian student enrollment had increased over time, along with black student enrollment. The university argued that due to the popularity of Harvard University, the school received over 40,000 applications for 2,000 spots each year, and if admission was granted solely on objective academic qualifications, this would substantially reduce black enrollment. As the University of Texas did in Fisher, Harvard argued that its admissions policy was the only method it could devise that would increase black enrollment.

6. Both the trial court and the appellate court found in the university's favor, holding that the university's admissions policy was not perfect, but under the circumstances the policy was narrowly tailored enough to pass constitutional muster, considering that there was a compelling government interest in increasing minority enrollment in universities as held in Bakke and Grutter.

7. The U.S. Supreme Court reversed the lower courts.

   i. The Court ruled that the university's race based admissions policies were unconstitutional under the Equal Protection Clause of the 14th Amendment.

   ii. Justice Roberts wrote the majority opinion.

   iii. The majority opinion held that using race in university admissions policies was not a compelling government interest.

   iv. The goals articulated by the university in favor of using a race based admissions policy was to foster viewpoint and intellectual diversity in the student population.

v. Race based admissions policies, no matter how constructed, tracked racial statistics and attempted to statistically increase minority enrollment. This crossed the line into racial quotas, which had always been disfavored.

vi. The Court further found that there was little (if any) correlation between the level of minority enrollment and the stated goals of fostering viewpoint and intellectual diversity in the student population, because a given student's viewpoint and intellect were not necessarily based on the student's race.

vii. The Court did say that a university can consider student discussions in admission interviews or personal statements as to how race affected their lives, "so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university" other than his or her mere race.

8. The Court held that the 14th Amendment's Equal Protection Clause applies without regard to one's race. It applies to every person. The Court stated that eliminating racial discrimination means eliminating "all of it" and that "equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." The Court further held that affirmative action programs lack sufficiently focused and measurable objectives warranting the use of race; unavoidably employ race in a negative manner; involve racial stereotyping; and lack meaningful end points.

9. Students for Fair Admission has been interpreted as meaning that programs that favor one race over another are, themselves, racist. It is irrelevant that a program seeks to advantage a minority racial group that was historically discriminated against. In other words, the case could be interpreted as holding that affirmative action is "reverse racism/discrimination" against whites.

10. Justice Thomas, in a concurring opinion, argued that the Constitution is and should be "colorblind" and that students should be admitted on their individual merit, not lumped into a group where they are either advantaged or disadvantaged in the admissions process based on race. Also, in Justice Thomas' view, the law must treat each individual equally, not advantage one over another based on group characteristics such as race.

IX. REVIEWING THE POLITICAL HISTORY OF AFFIRMATIVE ACTION

A. Affirmative action was intended to promote the opportunities of defined minority groups to give them equal access to the opportunities enjoyed by a defined majority group.

B. One rationale for affirmative action was to correct the effects of ***past discrimination***. However, from the U.S. Supreme Court's recent perspective, if this is the purpose of affirmative action, this purpose is accomplished by disadvantaging the majority group in favor of the minority group. The Court held that this is discrimination based on race which violates the Equal Protection Clause of the 14th Amendment. Whether this is a variation of *"two wrongs don't make a right"* or a general antipathy in the Court to any race based advantage given by a law, regulation or policy (which advantage will always disadvantage members of another race) remains difficult to determine.

C. Another rationale for affirmative action is to cure current discrimination. However, there are already civil rights laws on the local, state and federal levels that prevent racial discrimination. Justice Thomas would no doubt say that enforcement of these laws under individual circumstances is a better way to remedy current discrimination than by collectively advantaging one group while collectively disadvantaging another group based on race.

D. Another rationale for affirmative action was it would increase minority participation which would promote diversity. But the Roberts court so much as said that mere racial diversity alone is not a compelling government interest that would warrant a violation of the Equal Protection Clause by providing one group a race based advantage over another.

E. It is notable that affirmative action as a legal term seems to be traced back to Executive Order No. 10925, signed by President John F. Kennedy in 1961, which included a provision that government contractors "take affirmative action to ensure that applicants are employed, and employees are treated fairly during employment, without regard to their race, creed, color, or national origin."

F. Later, in 1965, President Lyndon Johnson issued Executive Order 11246, which also required government employers to "hire without regard to race, religion and national origin" and "take affirmative action to ensure that applicants are employed and that employees are treated during employment, without regard to their race, color, religion, sex or national origin."[1]

[1] Shortly after commencing his second term, President Trump signed an executive order entitled *"Ending Illegal Discrimination and Restoring Merit-Based Opportunity."* This rescinded Executive Order 11246.

G. Also, the Civil Rights Act of 1964 prohibited discrimination based on race, color, religion, sex or national origin. At the time the Civil Rights Act of 1964 was being debated, critics were worried about whether "affirmative action" would lead to quotas or "reverse discrimination" that would create a group advantage for one race at the expense of another.

H. Supporters of the Civil Rights Act of 1964 argued that neither the Kennedy nor Johnson Executive Orders referencing "affirmative action," nor the Act itself, authorized such group racial preferences. One supporter of the Act, Senator Hubert Humphrey, declared that the Civil Rights Act of 1964 would not provide advantage to one racial group over another, or create any quotas based on race or other related immutable characteristics.

I. However, despite all this, it appears that the U.S. Supreme Court ultimately found that "affirmative action" ***is based on a preferential treatment of one group over another based on race***—in other words, such a policy that advantages one racial group over another is itself discriminatory and violates the Equal Protection Clause.

J. It would appear that affirmative action based on the advantage/disadvantage rubric is a dead letter absent a substantial change in the make-up and philosophy of the U.S. Supreme Court.

K. However, anti-discrimination laws preventing and punishing current discrimination against an individual based on race are—and no doubt will remain—viable tools to combat discrimination.

X. DIVERSITY, EQUITY AND INCLUSION (DEI) ANALYSED AS A LEGAL POLICY

A. To the extent DEI can be considered a legal policy, is it an example of a "distinction without a difference," in that is it merely affirmative action repackaged and rebranded?

B. By analogy, with respect to teaching religion in public schools, it was held that "Intelligent Design" was merely another way to describe "Creationism" for the purpose of teaching the Genesis story of creation alongside the theory of evolution in science classes. Despite the labeling difference, such teaching of "Intelligent Design" in public schools violated the 1st Amendment.

C. Having traced the U.S. Supreme Court's treatment of affirmative action, we can use the same framework to analyze DEI with respect to Equal Protection Jurisprudence.

D. DEI is described as a framework that seeks to promote the fair treatment and full participation of all people in organizations, particularly, in the workplace.

1. ***Diversity*** seeks to establish variety within an organization with respect to race, gender, ethnicity, sexual orientation, disability, age, culture, class, veteran status or religion. ***However, there is a question as to whether creating diversity is a compelling government interest (the Roberts' court would have appeared to answer this question "No" in <u>Students for Fair Admission)</u>***.

2. ***Equity*** refers to concepts of fairness and justice, such as fair compensation and substantive equality. ***But civil rights laws already provide this.*** The concept of ***equity*** also usually includes focusing on disparities and allocating resources and decision-making authority to groups that have historically been disadvantaged, to equalize treatment. ***But this seems identical to affirmative action, in that it is merely another way of saying that one group should be empowered over another now because that group was disadvantaged in the past***.

3. ***Inclusion*** refers to creating a culture where all employees feel that they belong and that their voices will be heard. This concept would seem to have little to do with suspect classes or discrimination. Certainly, organizations may differ in how their employees are valued and treated—an organization could be a poor work environment even though it complies with all anti-discrimination laws. This does not seem to be something that can be legislated into existence.

E. One could conclude that as to current discrimination, DEI as a legal doctrine would seem unnecessary, in that current civil rights laws provide much more adequate and meaningful protections against particularized discrimination.

F. One could also conclude that as a remedy for past discrimination, DEI could run afoul of current U.S. Supreme Court jurisprudence for the same reasons affirmative action has.

XI. THE PRACTICAL PITFALLS OF DEI AFTER <u>STUDENTS FOR FAIR ADMISSION</u>

A. Consider the following hypothetical. A university implements an aggressive DEI program and then connects that program to goals of increasing hiring and promotion of minority employees, and increasing enrollment of minority students. To ensure these goals are met, the university keeps track of racial statistics and notes a substantial increase in enrollment of minority students after the DEI program was implemented, and increasing minority enrollment the longer the DEI program is in existence. At the same time, white student enrollment decreases. There is no objective explanation as to why minority student enrollment is increasing and white student enrollment is decreasing. The number of seats in incoming classes remains the same; the majors available remain the same; the range of standardized test scores remain the same; and the proportional number of applications for enrollment remain the same when measured by race. A white

student denied admission sues the university. A court could easily find that on its face, the DEI policy in question and its results are functionally equivalent to the unconstitutional policy in Students for Fair Admission. Likely, the same litigation strategy would be used by plaintiff, in short, trying to connect the DEI policy to advantages provided to minorities during the admission process. Thus, it would behoove organizations with strong or aggressive DEI policies and training to objectively review whether these are merely a repackaging of an otherwise prohibited affirmative action policy. Proponents of the newly created "DEI Industry" of pre-packaged programs and training may claim otherwise, but their "opinion" about the issue cannot overcome a court "Opinion."

B. The Trump Administration has taken a harsh stance against DEI. President Trump in January 2025 called DEI efforts "illegal and immoral discrimination programs" and, as far as the federal government is concerned, "public waste." President Trump signed an executive order entitled *"Ending Illegal Discrimination and Restoring Merit-Based Opportunity."* This rescinded Executive Order 11246, which was the previously discussed 1965 order signed by President Johnson that imposed affirmative action requirements on federal contractors. There has been a wholesale purging of anything related to DEI from federal websites. It is unclear how these matters will ultimately be addressed, but any business or organization with substantial federal contracts or that depends on federal money for survival should be wary of publicized its DEI programs.

XII. CONCLUSION

A. Affirmative action programs, particularly race based admissions policies at institutions of higher learning, have generally been found to be unconstitutional as violating the Equal Protection Clause of the 14th Amendment.

B. While race may still be considered as a factor in the admissions process, there is little practical guidance as to how it can be used.

C. There is no reason to believe that the current U.S. Supreme Court will uphold affirmative action programs in non-educational settings; the majority of the current Roberts' court seems hostile to such programs.

D. This also puts DEI programs in jeopardy, to the extent DEI programs are shown to be affirmative action programs repackaged under the new "DEI label."

E. The current administration is hostile to affirmative action and DEI programs, and this does not seem likely to change until at least the next presidential election. Businesses and other organizations who are federal contractors or who are dependent upon federal money for their existence must recognize this reality in reviewing any DEI programs or policies they may have.