New Jersey Women Lawyers Association 2024 Scholarship Program Essay

Topic I: Diversity, Equality, and Inclusion in College Admissions

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1. A "Colorblindness" Interpretation Undermines the Intended Goal of the Equal Protection Clause

The development of affirmative action in higher education was a key response to the effects of historical state-imposed racial segregation which violated the Equal Protection Clause under the 14th Amendment. It aimed to ensure equal opportunity and access for all individuals in various areas, including education, and placed an affirmative obligation on states who had formerly maintained segregated university systems to consider race in their admissions, recognizing that "the adoption and implementation of race-neutral admissions policies do not alone suffice to demonstrate that a state has completely abandoned its prior 'dual' university system – that is, a system which was racially segregated by law."[1] Where there are still traces of a state's prior de jure segregation system that continue to have discriminatory effects and foster segregation, a racially neutral policy is thus not sufficient for the goal of eliminating all remnants of the prior dual system. Therefore, the use of race as a factor in admissions decisions progressed minority access to higher education, a reality otherwise severely hampered by their earlier exclusion.

Employing a colorblind interpretation of the Equal Protection Clause will greatly undermine its intended goal in the realm of racial equality in educational opportunity. Affirmative action addresses the need for admissions policies to *respond to* deeply systemic, pervasive racial inequalities that have prevented minorities from gaining access to the same

[1] United States v. Fordice, 505 U.S. 717, 729 (1992).

opportunities as others. Race-neutral or "colorblind" measures are simply not sufficient to promote true equal opportunity, as they fail to address the historical implications of racist policies and structures, and will instead only perpetuate the lack of minority involvement and representation in higher education. Regarding constitutional relief, some argue that a merit-based judgment using a colorblind approach will ensure an equal playing field for all. However, this completely ignores the disparities experienced by racial minorities. Operating under the guise of "neutrality," this approach only has one outcome: continued barriers to higher education for minorities.

2. The Supreme Court's Abandonment of Stare Decisis and the Its Encroachment on Legislative Duties

Stare decisis, the doctrine that courts will adhere to precedent in reaching their decisions,[2] has not only been largely disregarded by the Supreme Court in Students For Fair Admissions, Inc. v. President and Fellows of Harvard College[3] and Students For Fair Admission v. University of North Carolina[4] (hereinafter referred to as SFFA), but has furthermore been replaced with the Supreme Court's tiptoeing into the realm of duties not assigned to them – namely, the making of law. While the Supreme Court's tasks involve interpretation, utilizing tools of precedent, current laws, or else congressional intent to reach a decision based on a particular set of facts, determinations like those reached in SFFA reveal a dangerous and unfettered discretion to essentially re-write the law. Now, in a situation of ambiguous terminology or lack of action by Congress, interpretation and involvement by the Supreme Court is certainly expected. However,

[2] *stare decisis*, Cornell Law School Legal Information Institute, https://www.law.cornell.edu/wex/stare_decisis ((last visited Feb. 6, 2024).
[3] Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141 (2023). Decided together with Docket No. 21-707 Students for Fair Admission v. University of North Carolina.
[4] *Id.*

here, where the Equal Protection Clause is being redefined into "colorblindness for all" and standing precedent is being ignored to fit the narrative of the Majority, the impacts are incredibly significant for both the future of equality in higher education, and the role and perception of the Supreme Court.

For over sixty years, race-conscious admissions policies have been upheld as constitutional and consistent with the Equal Protection Clause of the 14th Amendment.[5] Recognizing that such policies respond to widespread racism still existing in educational systems, blocking racial and ethnic minorities from accessing the same resources as white students, these policies aimed to take powerful steps to end discrimination, prevent its recurrence, and create new opportunities that were previously denied.[6] In SFFA, the Majority not only disregarded this long-standing precedent but also the fact that modern day America continues to perpetuate prejudice against minorities, especially in the realm of higher education. This decision thus enables a "superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter."[7] Further, it directly contravenes Congress's intent at the time the 14th Amendment was ratified: to remedy the harms slavery left on the lives of Black Americans.[8] Race-conscious legislation was an intentional act of Congress during the period of the 14th Amendment and even a century later.[9] As will be discussed in the next section, significant impacts of slavery live on in America, and are highly evident in our workforces, higher education student bodies, and communities living in

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[5] Dorothy F. Garrison-Wade and Dr. Chance W. Lewis, *History and Analysis*, THE J. OF COLL. ADMISSION (Summer 2004), https://files.eric.ed.gov/fulltext/EJ682488.pdf.
[6] *What Is Affirmative Action?*, The American Association for Access, Equity and Diversity, https://www.aaaed.org/aaaed/About_Affirmative_Action__Diversity_and_Inclusion.asp (last visited Feb 6., 2024).
[7] 143 S. Ct. at 2263.
[8] Dennis Parker, *The 14th Amendment Was Intended to Achieve Racial Justice — And We Must Keep It That Way*, ACLU (July 9, 2018), https://www.aclu.org/news/racial-justice/14th-amendment-was-intended-achieve-racial-justice.
[9] *Id.*

poverty. The Majority's decision in SFFA thus works counterproductive to not only the goal of legislation like Title VI, which intends to prevent the exclusion of individuals from opportunities based on race, yet which the Majority failed to acknowledge in their opinion, but also to addressing the reality of the America we live in today – one that opens the door for some, and unequivocally slams it for all others.

In addition to the Supreme Court's specific actions in this case threatening advancement toward racial equality in higher education and the protections of the Equal Protection Clause, its shift from judicial review to the making of law also jeopardizes the integrity of the system and public trust in our democracy. Disregarding precedent and undermining well-established laws and doctrines has transformed the Supreme Court from ultimate interpreter, an already problematic role in itself, to ultimate creator, a duty never intended for the Supreme Court but also never wished for as it centralizes immense power in just nine individuals. The Supreme Court has historically been regarded as a highly respected, strongly adhered to institution. However, these decisions and others have threatened this reputation and, more importantly, the public trust in a body that is meant to safeguard the rights of all.

3. Using Grutter Fails to Acknowledge Modern Day America and The Positive Impact Affirmative Action Has Created

In SFFA, the Supreme Court argued that its overturning of Grutter v. Bollinger, which held that the Equal Protection Clause did not prohibit the University of Michigan Law School's narrowly tailored use of race in admissions decision to further a compelling interest in compelling educational benefits that flow from a diverse student body,[10] was to eventually be expected as the Court in Grutter expressed its expectation that, in 25 years, the use of racial

[10] Grutter v. Bollinger, 539 U.S. 306 (2003).

preferences will no longer be necessary to further the interest approved on that day.[11] To say that our higher education systems have reached the interest goal first identified in Grutter that would validate now adopting a "colorblind" approach would be a blatant lie. Minority groups continue to be underrepresented in higher education, and prior examples of states banning the use of racial preferences in admissions reveals how such action has further obstructed their access to education.[12] For example, after California implemented Proposition 209 in 1996, banning the use of racial preferences in admissions, the state experienced a stark decline in Black student enrollment at the University of California, Los Angeles.[13] In 2006, only 96 students (less than 2%) self-identified as Black out of a freshman class of nearly 5,000 students.[14] While enrollment rates have shown some improvement since that time, only 228 (3%) at the University of California, Berkeley identified themselves as Black out of nearly 7,000 freshman students in the fall of 2022, despite the fact that the 2021-2022 high school graduating class in California had approximately 8,700 Black students that met the University of California system admission requirements.[15] Similarly, in 2006, after Michigan adopted Proposal 2, the Affirmative Action Initiative, and a voter referendum also led to a state constitutional ban on race-conscious admissions, enrollment rates for students of color experienced a decline resulting in only 4% of Black enrollment by 2021, even though the growth of college-age African Americans in Michigan rose from 16% to 19%.[16] The reality of these facts cannot be ignored, yet the Majority

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[11] 143 S. Ct. at 2165, 2166.
[12] Jon Marcus, *The college-going gap between Black and white Americans was always bad. It's getting worse*, USA TODAY (May 15, 2023), https://www.usatoday.com/story/news/education/2023/05/15/college-student-gap-between-black-white-americans-worse/70195689007/.
[13] Adewale A. Maye, *The Supreme Court's ban on affirmative action means colleges will struggle to meet goals of diversity and equal opportunity*, ECONOMIC POLICY INSTITUTE (June 29, 2023), https://www.epi.org/blog/the-supreme-courts-ban-on-affirmative-action-means-colleges-will-struggle-to-meet-goals-of-diversity-and-equal-opportunity/.
[14] *Id.*
[15] *Id.*
[16] *Id.*

does so, stating that it is "unclear how a court is supposed to determine if or when such [racial equality] goals would be adequately met"[17] and, ultimately, "race-based admissions programs eventually had to end."[18] Race-conscious admissions programs should end when racial inequality does. Justice so demands it and "speculating about a day when consideration of race will become unnecessary is arbitrary at best and frivolous at worst."[19]

[17] 143 S. Ct. at 2166.
[18] 143 S. Ct. at 2173.
[19] 143 S. Ct. at 2255.