Racism, By Any Other Name, is Just as Perverse

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- Racism has taken many forms over the years. Slaver, Jim Crow, Black Codes, eugenics, and yes affirmative action.
- In the case Students For Fair Admissions, Inc. V. President And Fellows Of Harvard College, SCOTUS was asked whether race conscious admission was a violation of the Constitution.
- How can America become a colorblind society if we continue these racist policies like affirmative action.

Merriam-Webster's Dictionary defines racism as:

racism noun *a belief that race is a fundamental determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race*

Racism — Merriam-Webster Online Dictionary

This idea has taken many forms in American history, slavery: Jim Crow laws, Black Codes, eugenics and, yes, affirmative action. Regardless of the euphemism you use, all of these policies are based in the idea that race is a fundamental determinant of human traits and capacities.

Two recent cases filed by *Students for Fair Admissions* (SFFA) were combined and heard by the Supreme Court this term. The outcome of these cases give us a glimmer of hope that the

actual systemic racism that still exists in this nation can finally be seen for the perversion it is.

Affirmative Action

Racism, both systemic and societal, has been a problem in this country for centuries. In many ways it was societal racism, the general belief in the inferiority of certain races, that led to many of the racist laws or systemic racism. To me, this leads to a Catch-22. How do you get rid of one without getting rid of the other? While we have gotten rid of many of the racist laws in our country, racist ideas are still around, and they have led to other racist laws. One of those ideas is that a racially diverse student body or workforce is automatically better. Another is the idea that minorities cannot compete in higher education, and many other institutions, without government's help. Put these two ideas together and you get affirmative action.

The term itself refers to both mandatory and voluntary program s intended to affirm the civil rights of designated classes of individuals by taking positive action to protect them from, in the words of Justice William J. Brennan Jr., "the lingering e ffects of pervasive discrimination".

Affirmative Action – The Free Legal Dictionary

Like so many other things, affirmative action sounds good, but look below the surface and you see that it's nothing but racism by another name. Which brings us to the case Students For Fair Admissions, Inc. v. President And Fellows Of Harvard College.

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Although the case heard and decided by the Supreme Court is against Harvard College, the court also looks at the University of North Carolina's admissions policy. There has

been a lot said both for and against the court's opinion, but little of what I have read and heard had anything to do with the Constitution itself. Let's start out with the question at hand as stated in the syllabus of the opinion.

Harvard College and the University of North Carolina (UNC) are two of the oldest institutions of higher learning in the United States. Every year, tens of thousands of students apply to each school; many fewer are admitted. Both Harvard and UNC employ a highly selective admissions process to make their decisions. Admission to each school can depend on a student's grades, recommendation letters, or extracurricular involvement. It can also depend on their race. The question presented is whether the admissions systems used by Harvard College and UNC are lawful under the Equal Protection Clause of the Fourteenth Amendment.

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This is where the first potential problem in this opinion emerges. There is a fundamental difference between Harvard College (part of Harvard University) and the University of North Carolina. UNC is a public school while Harvard College is a private institution. Why is this important? The court points out that the question at hand deals with possible violations of the Equal Protection Clause of the Fourteenth Amendment, which reads:

nor shall any State … deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Amendment XIV

Since Harvard College is a private institution not created by the state, the State of Massachusetts is not responsible for their admissions policies, and therefore the college cannot violate the Fourteenth Amendment. Does that mean that Harvard College's admission policy is not racist? I think a quick look

at the description of the process will answer that question.

At Harvard, each application for admission is initially screened by a "first reader," who assigns a numerical score in each of six categories: academic, extracurricular, athletic, school support, personal, and overall. For the "overall" category—a composite of the five other ratings— a first reader can and does consider the applicant's race. Harvard's admissions subcommittees then review all applications from a particular geographic area. These regional subcommittees make recommendations to the full admissions committee, and they take an applicant's race into account. When the 40-member full admissions committee begins its deliberations, it discusses the relative breakdown of applicants by race. The goal of the process, according to Harvard's director of admissions, is ensuring there is no "dramatic drop-off" in minority admissions from the prior class. An applicant receiving a majority of the full committee's votes is tentatively accepted for admission. At the end of this process, the racial composition of the tentative applicant pool is disclosed to the committee. The last stage of Harvard's admissions process, called the "lop," winnows the list of tentatively admitted students to arrive at the final class. Applicants that Harvard considers cutting at this stage are placed on the "lop list," which contains only four pieces of information: legacy status, recruited athlete status, financial aid eligibility, and race. In the Harvard admissions process, "race is a determinative tip for" a significant percentage "of all admitted African American and Hispanic applicants."

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It certainly appears that while the decisions in the admissions process is not based solely on race, it is a consideration at many points along the way. While not exactly the same, the admissions process at UNC is very similar, including the use of an applicant's race.

One interesting point I found was that *Students for Fair Admissions*' (SFFA) original complaint against Harvard College was that its admissions policy violated *Title VI of the Civil Rights Act of 1964*, not the Fourteenth Amendment. I am not familiar with the details of Title VI of the Civil Rights Act, so I cannot comment on it, although Justice Gorsuch does.

Title VI prohibits a recipient of federal funds from intentionally treating any individual worse even in part because of his race, color, or national origin and without regard to any other reason or motive the recipient might assert. Without question, Congress in 1964 could have taken the law in var- ious directions. But to safeguard the civil rights of all Americans, Congress chose a simple and profound rule. One holding that a recipient of federal funds may never dis- criminate based on race, color, or national origin—period.

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By alleging violations of the Civil Rights Act rather than the Fourteenth Amendment, SFFA would have dealt with the private college issue I previously mentioned. The court could have found that Harvard College was ineligible to take federal funds because their admissions policy violated the Act. Regardless, the court decided that the actions of a private institution was, somehow, a state denying equal protection of the law.

Held: Harvard's and UNC's admissions programs violate the Equal Protection Clause of the Fourteenth Amendment.

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Not surprisingly, the court was split on this decision in many ways. Chief Justice Roberts wrote the opinion, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett.

Gorsuch also wrote a concurring opinion, which Thomas also joined, while Kavanaugh's concurring opinion was all his own. Justice Sotomayor wrote the dissenting opinion, joined by Justices Kagan and Jackson. Justice Jackson also wrote a dissenting opinion to which Justices Sotomayor and Kagan joined. This seemed interesting to me since Justice Jackson did not take part in the consideration or decision of the case.

The Opinion

As is usually the case in such situations, Justice Roberts not only went into great detail regarding the question of whether or not SFFA had standing to bring the case, but into the history of the court's jurisprudence regarding the Fourteenth Amendment as well. In his review of court precedent, Chief Justice Roberts noted:

Then, in Grutter v. Bollinger, the Court for the first time "endorse[d] Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions."

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However, the Grutter court did not expect this to be a permanent situation.

Grutter thus concluded with the following caution: "It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

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Chief Justice Roberts pointed out that the previous courts expectations were flawed.

Twenty years later, no end is in sight. "Harvard's view about when [race-based admissions will end] doesn't have a date on it." … Neither does UNC's. … Yet both insist that the use of race in their admissions programs must continue.

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Chief Justice Roberts went on to say…

Because "[r]acial discrimination [is] invidious in all contexts," …, we have required that universities operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial [review]" under the rubric of strict scrutiny, .. "Classifying and assigning" students based on their race "requires more than . . . an amorphous end to justify it." …

Respondents have fallen short of satisfying that burden.

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Once again, we see the unconstitutional and destructive use of "strict scrutiny" used to subvert the Constitution of the United States and infringe on the rights of the people. Chief Justice Roberts points out that the Supreme Court has, and would continue, to allow racist admissions programs in public schools and universities as long as they could convince the court that there was a government interest sufficient to overrule the supreme law of the land. These cases may not have risen to that level, but the logic of precedent means some other case could. Justice Thomas pointed this out twenty years ago in the Grutter case.

I wrote separately in Grutter, explaining that the use of race

in higher education admissions decisions—regardless of whether intended to help or to hurt—violates the Fourteenth Amendment. … In the decades since, I have repeatedly stated that Grutter was wrongly decided and should be overruled. .. Today, and despite a lengthy interregnum, the Constitution prevails.

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That is not to say that, even in Justice Thomas' mind, the Constitution fully prevails:

Because the Court today applies genuine strict scrutiny to the race-conscious admissions policies employed at Harvard and the University of North Carolina (UNC) and finds that they fail that searching review, I join the majority opinion in full.

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Apparently, even Justice Thomas is willing to violate the Fourteenth Amendment as long as the government has a reason good enough to satisfy him and the rest of the judicial oligarchy.

Justice Thomas also noted that, contrary to the assertions of affirmative action proponents, these programs are actually harmful to those they claim to help.

Even taking the desire to help on its face, what initially seems like aid may in reality be a burden, including for the very people it seeks to assist. Take, for example, the college admissions policies here. "Affirmative action" policies do nothing to increase the overall number of blacks and Hispanics able to access a college education. Rather, those racial policies simply redistribute individuals among institutions of higher learning, placing some into more competitive institutions than they otherwise would have attended. See T.

Sowell, Affirmative Action Around the World 145–146 (2004). In doing so, those policies sort at least some blacks and Hispanics into environments where they are less likely to succeed academically relative to their peers. … The resulting mismatch places "many blacks and Hispanics who likely would have excelled at less elite schools . . . in a position where underperformance is all but inevitable because they are less academically prepared than the white and Asian students with whom they must compete."

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Dissent

As I mentioned before, Justice Sotomayor dissented from the majority's opinion, and was joined by Justices Kagan and Jackson.

The Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality. The Court long ago concluded that this guarantee can be enforced through race-conscious means in a society that is not, and has never been, colorblind. In Brown v. Board of Education,… the Court recognized the constitutional necessity of racially integrated schools in light of the harm inflicted by segregation and the "importance of education to our democratic society."

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Once again we see justices of the court putting their predecessors' opinions above the Constitution, the supreme law of the land. While the history of the Fourteenth Amendment does not include the word race, it does guarantee equality before the law, which is exactly what public affirmative action policies deny.

For 45 years, the Court extended Brown's transformative legacy

to the context of higher education, allowing colleges and universities to consider race in a limited way and for the limited purpose of promoting the important benefits of racial diversity. This limited use of race has helped equalize educational opportunities for all students of every race and background and has improved racial diversity on college campuses. Although progress has been slow and imperfect, race-conscious college admissions policies have advanced the Constitution's guarantee of equality and have promoted Brown's vision of a Nation with more inclusive schools.

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How can the Constitution's guarantee of equality be achieved if people are treated unequally based on the color of their skin? As Chief Justice Roberts pointed out, that core premise is wrong.

The dissenting opinions resist these conclusions. They would instead uphold respondents' admissions programs based on their view that the Fourteenth Amendment permits state actors to remedy the effects of societal discrimination through explicitly race-based measures. Although both opinions are thorough and thoughtful in many respects, this Court has long rejected their core thesis.

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Most troubling of all, is that the dissent must make these omissions to defend: a judiciary that picks winners and losers based on the color of their skin. While the dissent would certainly not permit university programs that discriminated against black and Latino applicants, it is perfectly willing to let the programs here continue. In its view, this Court is supposed to tell state actors when they have picked the right races to benefit. Separate but equal is

"inherently unequal," said Brown. 347 U. S., at 495 (emphasis added). It depends, says the dissent.

That is a remarkable view of the judicial role—remarkably wrong. Lost in the false pretense of judicial humility that the dissent espouses is a claim to power so radical, so destructive, that it required a Second Founding to undo.

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One last thing from Justice Sotomayor's dissent may explain her point of view.

A limited use of race in college admissions is consistent with the Fourteenth Amendment and this Court's broader equal protection jurisprudence. The text and history of the Fourteenth Amendment make clear that the Equal Protection Clause permits race-conscious measures. See supra, at 2–9. Consistent with that view, the Court has ex- plicitly held that "race-based action" is sometimes "within constitutional constraints."

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Conclusion

Chief Justice Roberts noted the inherent racism in such affirmative action policies.

Yet by accepting race-based admissions programs in which some students may obtain preferences on the basis of race alone, respondents' programs tolerate the very thing that Grutter foreswore: stereotyping. The point of respondents' admissions programs is that there is an inherent benefit in race qua race—in race for race's sake. Respondents admit as much. Harvard's admissions process rests on the pernicious stereotype that "a black student can usually bring something

that a white person cannot offer." … UNC is much the same. It argues that race in itself "says [something] about who you are."

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Chief Justice Roberts wasn't the only one to recognize the inherent racism in affirmative actions. Justice Thomas noted it in his concurrence.

Both experience and logic have vindicated the Constitution's colorblind rule and confirmed that the universities' new narrative cannot stand. Despite the Court's hope in Grutter that universities would voluntarily end their raceconscious programs and further the goal of racial equality, the opposite appears increasingly true. Harvard and UNC now forthrightly state that they racially discriminate when it comes to admitting students, arguing that such discrimi- nation is consistent with this Court's precedents. And they, along with today's dissenters, defend that discrimination as good. More broadly, it is becoming increasingly clear that discrimination on the basis of race—often packaged as "affirmative action" or "equity" programs—are based on the benighted notion "that it is possible to tell when discrimination helps, rather than hurts, racial minorities."

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Justice Thomas also noted the long-lasting negative impact of these policies.

Far from advancing the cause of improved race relations in our Nation, affirmative action highlights our racial differences with pernicious effect. In fact, recent history reveals a disturbing pattern: Affirmative action policies appear to have prolonged the asserted need for racial discrimination. Parties and amici in these cases report that, in the nearly 50 years

since Bakke, … racial progress on campuses adopting affirmative action admissions policies has stagnated, including making no meaningful progress toward a colorblind goal since Grutter. … Rather, the legacy of Grutter appears to be ever increasing and strident demands for yet more racially oriented solutions.

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I think Justice Thomas summed it up well.

The great failure of this country was slavery and its progeny. And, the tragic failure of this Court was its misinterpretation of the Reconstruction Amendments, as Justice Harlan predicted in Plessy. We should not repeat this mistake merely because we think, as our predecessors thought, that the present arrangements are superior to the Constitution.

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Then again, Chief Justice Roberts provided a pretty good summary as well.

Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause, we have accordingly held, applies "without regard to any differences of race, of color, or of nationality"—it is "universal in [its] application." … For "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." … "If both are not accorded the same protection, then it is not equal."

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