

Affirmative Action: The Unequal Protection Clause

By Sayd Hussain

Introduction

With the current climate around race continuing to be challenged by Federal courts, including the U.S. Supreme Court, the U.S. braces for a new era of Affirmative Action policies in the academic setting of universities, ones not based on race but on race-neutral policy. Race-neutral affirmative action is relatively new and it is mainly implemented in states where race-based Affirmative Action is banned. The real question behind this new era of Affirmative Action is, does this policy violate the equal protection clause of the 14th Amendment of the U.S. Constitution or can race-neutral Affirmative Action be enough to satisfy universities' desire for a diverse student body? Before we can answer these questions, we must look at the history of Affirmative Action.

History of Affirmative Action

“Affirmative Action” was coined in executive order (EO) 10925 signed by President John F. Kennedy on March 6th, 1961. This order required government contractors to have an Affirmative Action policy within their employment that treats employees fairly.¹ Furthermore, it created the President’s Committee on Equal Employment Opportunity (EEOC) and the Office of Federal Contract Compliance Programs. On September 24th, 1965, President Johnson signed EO 11246, expanding the prohibiting of U.S. government contractors from discriminating

¹ *Executive Order 10925, Establishing the President’s Committee on Equal Employment Opportunity*, EEOC, <https://www.eeoc.gov/eeoc/history/35th/thelaw/eo-10925.html>, (last visited March 18, 2019.)

against people of color.² Also, the EO must have established a non-discriminatory hiring/employment policy. These policy changes were largely ignored by the public according to Mark Naison, an Affirmative Action professor at Fordham University.³

After African-Americans rioted in American cities during the 1960s, elite universities decided to embrace President Kennedy's Affirmative Action policies to include "goals, quotas and racial preferences for black students in college admissions."⁴ Universities felt that by promoting Affirmative Action to recruit underrepresented groups of Americans, it can help undo the years of not admitting these excluded groups of color. Natasha Warikoo, an associate professor of education at the Harvard Graduate School of Education, argued that universities such as Harvard systematically excluded African Americans and by adopting Affirmative Action policies, universities can move towards social and racial justice in America.⁵

In *Brown v. Board of Education*, the U.S. Supreme Court decided a case that changed America, and determined that "separate but equal" was very unequal after all.⁶ This opened a new era of the American

² *Executive Order No. 11246, NonDiscrimination in Government Employment*, EEOC, <https://www.eeoc.gov/eeoc/history/35th/thelaw/eo-11246.html>, (last visited March 18, 2019.)

³ *What To Know About Affirmative Action As The Harvard Trial Begins*, NPR, <https://www.npr.org/2018/10/16/657499646/what-to-know-about-affirmative-action-as-the-harvard-trial-begins>, (last visited March 9, 2019.)

⁴ *Id.*

⁵ *The Era of Affirmative Action May Not Last Much Longer*, The Atlantic, <https://www.theatlantic.com/education/archive/2018/07/the-era-of-affirmative-action-may-not-last-much-longer/564416/>, (last visited March 9, 2019.)

⁶ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), <https://www.law.cornell.edu/supremecourt/text/347/483>, (last visited March 18, 2019.)

education system where all schools in seventeen states have to desegregate to accommodate for people of color.⁷ Affirmative Action was created to address historically excluded students, but it was not a smooth process. Each school had different ways to address Affirmative Action. Racial quotas and preferences initially opened doors to historically excluded students, but legal challenges quickly followed.⁸

The University of California Medical School decided to create racial quotas as its Affirmative Action policy. The Medical School created two separate admissions programs, general and special admissions. The general program handled most applicants while the special program admitted minority and economically disadvantaged applicants.⁹ Although white applicants could have applied through the special program, no white applicant has ever been accepted throughout the history of the special program. For every 100 seats opened for its medical school, 16 spots were reserved for minority or historically unrepresented students in the special program.¹⁰

Twice denied admission to California's medical school program, Allan Bakke believed quotas created an unfair application system and was the

⁷ *History of Affirmative Action in Education, Infographic*, Pearson (2016), <https://www.pearsoned.com/history-of-affirmative-action-in-education/> (last visited Mar 10, 2019.)

⁸ Lindsay H. Hoffman, *Affirmative Action in College Admissions: Yes or No?* The Huffington Post (2017), https://www.huffingtonpost.com/lindsay-hoffman/affirmative-action-in-col_b_8972502.html, (last visited Mar 10, 2019.)

⁹ *Let's ace law school, Case Briefs, Outlines, Lessons, and Exam Prep for Law School Student*, Quimbee, <https://www.quimbee.com/cases/regents-of-university-of-california-v-bakke>, (last visited Mar 10, 2019.)

¹⁰ Adam Harris, *The Era of Affirmative Action May Not Last Much Longer*, The Atlantic (2018), <https://www.theatlantic.com/education/archive/2018/07/the-era-of-affirmative-action-may-not-last-much-longer/564416/>, (last visited Mar 10, 2019.)

reason that he was denied admissions to the University of California Medical School. Bakke had significantly higher scores than the admitted minorities who took up the 16 seats, which led him to bring a lawsuit against the university on the grounds that its policy violated the Equal Protection Clause of the 14th Amendment. The case of *Regents of the University of California v. Bakke*¹¹ in 1978 became the first U.S. Supreme Court case to address Affirmative Action policies. The Equal Protection Clause of the 14th Amendment requires that no state "... deny to any person within its jurisdiction the equal protection of the laws."¹² Furthermore, Bakke argued that the university violated Title VI of the Civil Rights Act of 1964.¹³ The U.S. Supreme Court ruled that racial quotas during the admission process violated the equal protection clause of the 14th Amendment. A victory for Bakke, but the Supreme Court also ruled that Affirmative Action was constitutional in some circumstances.¹⁴

As *Bakke* became the first Supreme Court case to deliberate Affirmative Action practices, the opinions of the justices became the precedent for the future. Justice Lewis F. Powell, Jr wrote the controlling *Bakke* majority opinion where he stated that a quota system based on race is a

¹¹ *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), Justia, <https://supreme.justia.com/cases/federal/us/438/265/>, (last visited March 18, 2019).

¹² LII Staff, *14th Amendment*, LII / Legal Information Institute (2018), <https://www.law.cornell.edu/constitution/amendmentxiv>, (last visited Mar 10, 2019.)

¹³ *Title VI of the Civil Rights Act of 1964*, 42 U.S.C. Section 2000D et seq., U.S. Department of Justice, <https://www.justice.gov/crt/fcs/TitleVI-Overview>, (last visited March 18, 2019.)

¹⁴ Alex McBride, *The Supreme Court, Expanding Civil Rights, Landmark Cases, Regents of University of California v. Bakke* (1978), Thirteen, https://www.thirteen.org/wnet/supremecourt/rights/landmark_regents.html, (last visited Mar 10, 2019.)

violation of the U.S. Constitution.¹⁵ However, he also stated that giving preference to qualified minorities was “vital to an integrated society.”¹⁶ Justice Thurgood Marshall, the first African-American Justice on the U.S. Supreme Court, argued that the Equal Protection Clause can be used to remedy past discrimination practices.¹⁷ The Equal Protection Clause, from the 14th Amendment, is the “idea that a governmental body may not deny people equal protection of its governing laws.”¹⁸ Since the U.S. Constitution did not prevent past discrimination for the past 200 years, how can the Constitution now be interpreted as a barrier to institutions trying to remedy the legacy of past discrimination?¹⁹ Justice Marshall believed that Affirmative Action policies were necessary because ending racial segregation did not “automatically end segregation, nor did they move Negroes from a position of legal inferiority to equality.”²⁰

Nonetheless, Justice Powell’s majority opinion would be the lasting judicial precedent whereby the Court viewed the 14th Amendment based on individuals’ rights, regardless of race. The court determined that Affirmative Action can be used if an institution has a compelling

¹⁵ *Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978), Justia, <https://supreme.justia.com/cases/federal/us/438/265/>, (last visited March 18, 2019.)

¹⁶ *Id.*

¹⁷ Lincoln Caplan, *Thurgood Marshall and the Need for Affirmative Action*, *The New Yorker* (2017), <https://www.newyorker.com/news/news-desk/thurgood-marshall-and-the-need-for-affirmative-action> (last visited Mar 10, 2019).

¹⁸ LII Staff, *Equal Protection*, Cornell Law School, (2018), https://www.law.cornell.edu/wex/equal_protection, (last visited Mar 11, 2019.)

¹⁹ Joseph Berger, *Education; The Bakke Case 10 Years Later: Mixed Results*, *The New York Times* (1988), <https://www.nytimes.com/1988/07/13/us/education-the-bakke-case-10-years-later-mixed-results.html>, (last visited Mar 10, 2019.)

²⁰ *Id.*

interest to promote diversity.²¹ However, the 1996 case of *Hopewood v. Texas*,²² which was an appeal from the Fifth Circuit Court of Appeals, was the first successful legal challenge to Affirmative Action, banning the use of race as a factor of admissions in order to achieve diversity. The Supreme Court denied accepting the case for review thereby allowing the appellate decision to become precedent.²³ But seven years later, the decision in *Hopewood v. State of Texas* was overturned by *Grutter v. Bollinger*.²⁴

The 2003 U.S. Supreme Court decision of *Grutter* upheld Affirmative Action policies of the University of Michigan Law School.²⁵ Although race was a factor in admissions, it was not enough to be considered a racial quota, but an overall part of the student's evaluation. Justice O'Connor, who authored the majority opinion, wrote, "by enrolling a "critical mass" of underrepresented minority students, the policy seeks to ensure their ability to contribute to the Law School's character and to the legal profession."²⁶ The majority opinion followed the precedent of *Bakke*, allowing the use of race to be an additional factor to promote racial diversity. However, Justice Scalia along with Justice Thomas dissented, stating that, "[The] nonminority individuals who are deprived

²¹ Adam Harris, *The Supreme Court Justice Who Forever Changed Affirmative Action*, The Atlantic (2018), <https://www.theatlantic.com/education/archive/2018/10/how-lewis-powell-changed-affirmative-action/572938/> (last visited Mar 10, 2019).

²² *Hopewood v. State of Texas*, 78 F.3d 932 (5th Cir. 1996), Justia, <https://law.justia.com/cases/federal/appellate-courts/F3/78/932/504514/>, (last visited March 18, 2019.)

²³ Id.

²⁴ *Grutter v. Bollinger*, 539 US 306 (2003), <https://www.oyez.org/cases/2002/02-241>, (last visited March 18, 2019.)

²⁵ LII Staff, *Grutter V. Bollinger*, LII / Legal Information Institute (2003), <https://www.law.cornell.edu/supct/html/02-241.ZS.html> (last visited Mar 10, 2019).

²⁶ Id.

of a legal education, a civil service job, or any job at all by reason of their skin color will surely understand".²⁷ Justice Scalia and Justice Thomas viewed Affirmative Action as a form of reversed racism against non-minority students, creating an unequal system based on race.

Due to the legal challenges of Affirmative Action, an alternative was introduced called race neutral Affirmative Action. Race neutral policies were explored in states such as Florida, Michigan, and California. These states have banned the use of raced based Affirmative Action either by voter referendum or executive order. For example, voters, through a referendum, banned racial preferences in California, Arizona, Washington, Oklahoma, Nebraska, and Nebraska. Florida is the only state that banned racial preferences by executive order while New Hampshire is the only state that banned it through state legislative action.²⁸

Voter referendums were legally challenged in the U.S. Supreme Court in *Schuette v. Coalition to Defend Affirmative Action* in 2014.²⁹ The U.S. Supreme Court ruled in an unprecedented 6-2 majority, that voters have the right to ban race based Affirmative Action policies. Justice Kennedy wrote the majority opinion, stating that he believed states can perform lab-style tests of different policies to create solutions. These solutions can include implementing race neutral Affirmative Action

²⁷ Id.

²⁸ Halley Potter, *What Can We Learn from States That Ban Affirmative Action?*, The Century Foundation (2016), <https://tcf.org/content/commentary/what-can-we-learn-from-states-that-ban-affirmative-action/> (last visited Mar 10, 2019).

²⁹ *Schuette v. Coalition to Defend Affirmative Action*, 568 U.S. 1249 (U.S. 2013), Oyez, <https://www.oyez.org/cases/2013/12-682>, (last visited March 18, 2019.)

policies to indirectly increase diversity.³⁰

The 2016 Supreme Court case on Affirmative, *Fisher v. University of Texas*, warned institutions that not all Affirmative Action policies will pass constitutional analysis. Justice Kennedy wrote the majority opinion and said that in order for a university to use race to promote a diverse student body; it must satisfy the condition that a race-neutral option would not produce a diverse student body.³¹ “The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity,”³² he said. Justice Alito warned in his 51-page dissent that the U.S. Supreme Court decision will help African-Americans but harm Asian-Americans.³³ This warning became a reality when the Students for Fair Admissions (SFFA) filed a lawsuit against Harvard University. This is the first type of Affirmative Action case that involves higher achieving non-white students against other racial groups, unofficially creating a racial quota system.³⁴

³⁰Richard D. Kahlenberg et al., *Did the Supreme Court Just Kill Affirmative Action?* Politico (2014), https://www.politico.com/magazine/story/2014/04/did-the-supreme-court-just-kill-affirmative-action-105934#.U59C7_ldWSo, (last visited Mar 10, 2019.)

³¹ *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013). [https://scholar.google.com/scholar_case?case=6883717302676149601&q=Fisher+v.+University+of+Texas+at+Austin,+133+S.+Ct.+2411+\(2013\)&hl=en&as_sdt=40006&as_vis=1](https://scholar.google.com/scholar_case?case=6883717302676149601&q=Fisher+v.+University+of+Texas+at+Austin,+133+S.+Ct.+2411+(2013)&hl=en&as_sdt=40006&as_vis=1), (last visited March 18, 2019.)

³² *Id.*

³³ Adam Liptak, *Supreme Court Upholds Affirmative Action Program at University of Texas*, The New York Times (2016), <https://www.nytimes.com/2016/06/24/us/politics/supreme-court-affirmative-action-university-of-texas.html>, (last visited Mar 10, 2019.)

³⁴ Anemona Hartocollis, *Asian-Americans Suing Harvard Say Admissions Files Show Discrimination*, The New York Times (2018), <https://www.nytimes.com/2018/04/04/us/harvard-asian-admission.html>, (last visited Mar 10, 2019.)

Analysis of Race Based Affirmative Action

Affirmative Action has become a top discussion among universities, Justices and voters alike. It begs the question of whether Affirmative Action policies are needed in 2019, some 65 years after *Brown*.³⁵ The current state of Affirmative Action is that it is a necessary tool for institutions to promote a unique and diverse student body.

Justice O'Connor mentioned in her majority opinion in *Grutter*³⁶ that, "[T]he Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."³⁷ Although Justice O'Connor voted to keep Affirmative Action alive, at the same time, she gave it a hopeful timeline of 25 years of existence. Furthermore, Justice O'Connor stated that race-neutral Affirmative Action is the future of institutional policy, "The Court takes the [Michigan Law School] at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable."³⁸

Fast forward to 2014 and the U.S. Supreme Court upheld the Michigan voter referendum to ban race based Affirmative Action as part of the *Schuetz* case.³⁹ This put the Michigan law school at odds with its established race-based Affirmative Action policy. Justice Sonia Sotomayor sharply disagreed with the majority opinion in *Schuetz*. In

³⁵ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), <https://www.law.cornell.edu/supremecourt/text/347/483>, (last visited March 18, 2019.)

³⁶ LII Staff, *Grutter V. Bollinger*, Cornell Law School (2003), <https://www.law.cornell.edu/supct/html/02-241.ZS.html>, (last visited Mar 10, 2019.)

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Schuetz v. Coalition to Defend Affirmative Action*, 568 U.S. 1249 (U.S. 2013), Oyez, <https://www.oyez.org/cases/2013/12-682>, (last visited March 18, 2019.)

her dissent, she wrote, "For members of historically marginalized groups, which rely on the federal courts to protect their constitutional rights, the decision can hardly bolster hope for a vision of democracy that preserves for all the right to participate meaningfully and equally in self-government."⁴⁰ Justice Kennedy, who voted in favor the Michigan Law's Affirmative Action policy in 2003, was with the majority during *Schuette* because, "Michigan voters used the initiative system to bypass public officials who were deemed not responsive to the concerns of a majority of the voters with respect to a policy of granting race-based preferences that raises difficult and delicate issues."⁴¹ Therefore, the University of Michigan must end its race based Affirmative Action policy and find new techniques to achieve racial diversity.

In 2016, two years after the ban on Affirmative Action in Michigan, the University of Michigan shockingly outlined their experiment with race-neutral Affirmative Action in their amicus curiae brief filed in *Fisher*.⁴² Michigan argued that race neutral affirmative action failed to bring in the racial and ethnic diversity compared to racial policies. The brief highlighted "[E]xtensive efforts to consider socioeconomic status in admission and recruiting," which some consider to be the strongest component of a race neutral policy.⁴³ The university wrote that it, "reinforced stereotypes," to believe that admissions based on economic backgrounds will bring in minority students, considering there are six

⁴⁰ Bill Mears, *Michigan's ban on affirmative action upheld by Supreme Court*, CNN (2014), <https://www.cnn.com/2014/04/22/justice/scotus-michigan-affirmative-action/index.html>, (last visited Mar 11, 2019.)

⁴¹ *Id.*

⁴² *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411 (2013).

[https://scholar.google.com/scholar_case?case=6883717302676149601&q=Fisher+v.+University+of+Texas+at+Austin,+133+S.+Ct.+2411+\(2013\)&hl=en&as_sdt=40006&as_vis=1](https://scholar.google.com/scholar_case?case=6883717302676149601&q=Fisher+v.+University+of+Texas+at+Austin,+133+S.+Ct.+2411+(2013)&hl=en&as_sdt=40006&as_vis=1), (last visited March 18, 2019.)

⁴³ *Id.*

times as many white students who come from low socio-economic status than African-American students.⁴⁴

This is evident by the data released in their brief, showing an approximate 12% decrease in undergraduate minority enrolled students and a 14.5% decrease in the graduate programs since 2006.⁴⁵

Undergraduate enrollment of African-Americans has been down 33% since 2006 while there was an increase of African-American applicants, from 16% in 2006 to 19% in 2015.⁴⁶ Due to the decline of minority enrollment, the absence of diversity meant that students will have a significantly reduced opportunity to make meaningful connections across racial boundaries. Michigan believe it is “[E]ducationally valuable in dispelling stereotypes and exposing students to new viewpoints.”⁴⁷ The amicus curiae brief ended by stating, “The University’s nearly decade-long experiment in race neutral admissions thus are a cautionary tale that underscores the compelling need for selective universities to be able to consider race as one of many background factors about applicants.”⁴⁸

Analysis of Race Neutral Affirmative Action

Chief Justice Roberts questioned during the court session of *Fisher v. University of Texas at Austin*, “What unique perspective does a minority student bring to a physics class?” Justice Ruth Bader Ginsburg questioned the top 10% admissions rule, saying, “[I]t’s totally dependent upon having racially segregated neighborhoods, racially

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Id.

⁴⁸ Id.

segregated schools, and it operates as a disincentive for a minority student to step out of that segregated community and attempt to get an integrated education.”⁴⁹

The Century Foundation, a public policy firm, found that 7 out of the 11 flagship universities that have race neutral Affirmative Action policies achieved racial diversity in the classroom except for the University of Michigan and the University of California Berkeley and Los Angeles. The study found five strategies that the successful universities used to achieve ethnic diversity without having a race-based admission process, which are, creating percent plans, adding economic factors in admissions, new financial aid programs, improved recruitment and drop legacy preferences.⁵⁰

One of the several strategies, percent plans, allowed students from the top 10% of their high school graduating class to receive a preference or automatic acceptance into the State University system. States such as Texas, Florida, and California guarantee automatic acceptance for top performers in high school which helps meet universities’ diversity based on geography rather than race. The report shows that in 2004, the University of Texas freshman class was 4.5 percent African American and 16.9 percent Hispanic.⁵¹ In other words, the combined African-American and Hispanic percentage actually rose from 18.6 percent under the old race-based policy to 21.4 percent under the race-neutral

⁴⁹ Adam Liptak, *Supreme Court Justices' Comments Don't Bode Well for Affirmative Action*, *The New York Times* (2015),

<https://www.nytimes.com/2015/12/10/us/politics/supreme-court-to-revisit-case-that-may-alter-affirmative-action.html?module=inline>, (last visited Mar 11, 2019.)

⁵⁰ Halley Potter, *What Can We Learn from States That Ban Affirmative Action?* The Century Foundation (2016), <https://tcf.org/content/commentary/what-can-we-learn-from-states-that-ban-affirmative-action/>, (last visited Mar 10, 2019.)

⁵¹ *Id.*

programs.⁵² The California system saw an increase of diversity using a percent plan after voters voted to banned Affirmative Action in 1996. Initially, California saw a decreased enrollment of minority students but by 2008, it had an increased from 18% to 24% of Latino and African-American students.⁵³ The University of Florida, which saw a decrease in Latino and African-American enrollment after Governor Bush signed an executive order, banning race based affirmative action in 1999. In the long-term however, race neutral Affirmative Action has exceeded racial Affirmative Action policies. For example, Hispanic enrollment dropped initially from 12% to 11.2% but now, it has increased to 16.6%.⁵⁴

To explain the successes of race neutral policies in Florida, Texas, and California, it is important to recognize that these states have a larger population of Hispanic and other non-White applicants. Universities will have an easier time reaching its critical mass of diversity without racial Affirmative Action in states with a diverse population. Elite universities, such as UC Berkeley, UCLA and Michigan, have been the most affected by banning race based Affirmative Action.

The Century Foundation found that elite schools that do not have race based Affirmative Action have difficulty enrolling competitive, diverse students. The reason is that elite schools are highly selective regardless of the racial background of the applicant. Furthermore, competitive, diverse students may receive better, more competitive offers from elite schools with an existing race based Affirmative Action program. In other words, if a student gets accepted to elite school such as the University of Michigan without racial preference, the student is more

⁵² Richard D. Kahlenberg, *A Better Affirmative Action*, The Century Foundation (2016) <https://tcf.org/assets/downloads/tcf-abaa.pdf>, (last visited Mar 11, 2019.)

⁵³ Id.

⁵⁴ Id.

likely to get into other competitive elite schools that do implement a racial preference.⁵⁵ Therefore, the majority of race neutral Affirmative Action policies works in the long term for most cases to bring economic and ethnically diverse students to universities.

A study from the Educational Testing Service (ETS) in 2015 simulated a college admissions system where socioeconomic Affirmative Action was used to determine if it is a replacement for racial Affirmative Action. The simulation tested different Affirmative Action policies and the effect each caused on enrolled students in a randomly generated freshman class. Universities without any Affirmative Action policies had an enrollment of 86% white, 8.6% Asians, 3.9% Hispanic and 1.9% African-American.⁵⁶ Universities that implemented a strong race based Affirmative Action policies saw student demographics of 68% white, 6% Asian, 15% Hispanic, and 11% African-American. During this period, race based Affirmative Action saw an increase of Hispanic and African-American enrollment while there was a decrease in white and Asian enrollment.⁵⁷ Universities that implemented a strong socioeconomic Affirmative Action policy however, had a demographic of 82% white, 7.4% Asian, 6.8% Hispanic, and 3.4% African American.⁵⁸

From the ETS simulated college admissions test, it is evident that race neutral Affirmative Action did not reach similar racial diversity compared to race based Affirmative Action. At the same time, the

⁵⁵ Id.

⁵⁶ Sean F. Reardon, *Can Socioeconomic Status Substitute for Race?* Educational Testing Service (2015) https://www.ets.org/Media/Research/pdf/reardon_white_paper.pdf, (last visited Mar 11, 2019.)

⁵⁷ Id.

⁵⁸ Id.

percent plans did in fact help bring economic diversity within the enrolled freshman class. Therefore, a combination of both racial and economic Affirmative Action is recommended to bring both racial and economic diversity to a university student body.⁵⁹ The simulation concludes that, “[E]ven relatively aggressive [race-neutral] Affirmative Action policies do not mimic the effects of race-based policies on racial diversity; likewise race-based Affirmative Action policies do not mimic the effects of [race-neutral] policies on diversity; (b) there is little evidence of any systemic mismatch induced by [race-based] Affirmative Action policies; students who benefit from Affirmative Action are not, on average, admitted to colleges for which they are underqualified; and (c) the use of Affirmative Action policies by some colleges affects enrollment patterns in other colleges as well.”⁶⁰

It is understandable to see that race neutral Affirmative Action policies are designed solely to bring in economic diversity while race based Affirmative Action solely brings in racial diversity. Justice Ginsburg commented during *Fisher* about race neutral affirmative action, “It’s totally dependent upon having racially segregated neighborhoods, racially segregated schools, and it operates as a disincentive for a minority student to step out of that segregated community and attempt to get an integrated education”.⁶¹ In other words, it is not accurate to expect racial diversity by socioeconomic Affirmative Action policies

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Adam Liptak, Supreme Court Justices' Comments Don't Bode Well for Affirmative Action *The New York Times* (2015), <https://www.nytimes.com/2015/12/10/us/politics/supreme-court-to-revisit-case-that-may-alter-affirmative-action.html?module=inline> (last visited Mar 11, 2019).

alone.⁶²

The ETS study also strengthens the idea that race based Affirmative Action does not place minority students in classrooms they cannot excel in, even with poorer statistics.⁶³ They found no evidence that this is based on race based Affirmative Action and found little evidence to show that these policies impact academic preparation for minority students compared to white students.⁶⁴ “Until racial disparities in educational preparation are eliminated, then, other strategies are needed.⁶⁵ The study concluded that race-based Affirmative Action is still needed in the present day.⁶⁶ This is because race neutral Affirmative Action does not do enough to bring ethnic diversity into the classroom, thus, failing to reach the critical mass universities desire to have. However, having a system with both race and socioeconomic based Affirmative Action can further complicate the academic admissions process. “The under-representation of poor and working class at elite universities is far greater than the under-representation of students of color.”⁶⁷ It allows those who were affected by previous discrimination, who didn’t gain generational wealth and live in rougher neighborhoods, to get a chance to live a better life regardless of their skin color.⁶⁸

⁶² Adam Liptak, Supreme Court Justices' Comments Don't Bode Well for Affirmative Action The New York Times (2015),

<https://www.nytimes.com/2015/12/10/us/politics/supreme-court-to-revisit-case-that-may-alter-affirmative-action.html?module=inline> (last visited Mar 11, 2019).

⁶³ Sean F. Reardon, *Can Socioeconomic Status Substitute for Race?* Educational Testing Service (2015),

https://www.ets.org/Media/Research/pdf/reardon_white_paper.pdf, (last visited Mar 11, 2019.)

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Id.

⁶⁷ Id.

⁶⁸ Id.

Therefore, the safest legal method to counter past discrimination is smart, socioeconomic Affirmative Action policies. It is the fairest system available and it allows universities to avoid the costly race based Affirmative Action. Justice Scalia and Justice Thomas, critics of Affirmative Action, state their preference for socioeconomic Affirmative Action.⁶⁹ The Century Foundation's report further shows that, "[A]t the top twenty law schools, 89 percent of African Americans, and 63 percent of Latinos come from the top socioeconomic half of the population."⁷⁰ Therefore, it is unfair to have a system based on race because not every person of color is poor and not every white person is rich. By having a system based on the socio-economics of the student while factoring in the hardships of students' academic and professional life, it can create a fair system for all students to succeed.

Analysis of Students for Fair Admissions v. Harvard Cooperation Pending Lawsuit

Students for Fair Admissions (SFFA) is an organization whose mission is "[T]o defend human and civil rights secured by law, including the right of individuals to equal protection under the law, through litigation and any other lawful means."⁷¹ The organization, comprised of 21,000 volunteer members, launched a lawsuit in federal court against Harvard University claiming that the university discriminated against Asian applicants. SFFA argued that Harvard holds Asians to higher standards

⁶⁹ Id.

⁷⁰ Id.

⁷¹ *Students for Fair Admissions v. Harvard Cooperation*, 1:14-cv-14176 ADB (D.M. 2018), SCRIBD, <https://www.scribd.com/document/391361594/Trial-Evidence2>, (last visited March 18, 2019.)

than any other racial applicants, including whites.⁷² Furthermore, SFFA alleges evidence that proves Harvard sets racial quotas on Asian applicants which were previously ruled by the U.S. Supreme Court as unconditional in *Regents of the Univ. of Cal. v. Bakke*.⁷³

The President of Harvard University, Lawrence S. Bacow, wrote a letter to the community on October 10, 2018. He said, “The College’s admissions process does not discriminate against anybody. I am confident the evidence presented at trial will establish that fact. The Supreme Court has twice ruled on this issue and has held up our admissions process as exemplar of how, in seeking to achieve a diverse student body, race may enter the process as one factor among many in consideration.”⁷⁴ To support President Bacow’s claims, in 2012, Harvard filed an amicus brief in *Fisher*, asserting that Harvard, “considers all aspects of an applicant background and experience, including in some circumstances the applicant’s racial or ethnic background.”⁷⁵

Nonetheless, the SFFA cited that because Harvard accepts federal funds, it is required to follow Title VI of the Civil Rights Act and the Equal

⁷²*The Harvard Plan That Failed Asian Americans*, Harvard Law Review, <https://harvardlawreview.org/2017/12/the-harvard-plan-that-failed-asian-americans/>, (last visited Mar 11, 2019.)

⁷³ Anemona Hartocollis, *What's at Stake in the Harvard Lawsuit? Decades of Debate Over Race in Admissions*, The New York Times (2018), <https://www.nytimes.com/2018/10/13/us/harvard-affirmative-action-asian-students.html> (last visited Mar 11, 2019.)

⁷⁴ Lawrence S Bacow, *Harvard Admissions Lawsuit*, Harvard University (2018), <https://admissionscase.harvard.edu/news/letter-community-harvard-president-lawrence-s-bacow>, (last visited Mar 11, 2019.)

⁷⁵ *Students for Fair Admissions v. Harvard Cooperation*, 1:14-cv-14176 ADB (D.M. 2018), SCRIBD, <https://www.scribd.com/document/391361594/Trial-Evidence2>, (last visited March 18, 2019.)

Protection Clause of the 14th Amendment. Therefore, if the university is found liable for discriminating against Asian-Americans, Harvard would be faced with legal scrutiny of their actions.⁷⁶ SFFA continues to maintain a strong stance in Federal Court, publishing all their court filings on their website.⁷⁷ According to student records that were released to the public, Asian-Americans scored the lowest in “positive personality, likability, courage, kindness and being widely respected.”⁷⁸ Also, these court documents show that Harvard audited its own admissions process and found it did have a bias against Asian-American applicants.⁷⁹ This audit might be further evidence that the university discovered a biased against Asian-American applicants and never made an attempt to correct the mistake, making Harvard negligent. The SFFA claims that, based on the court documents, Harvard “killed the investigation and buried the reports.”⁸⁰ Harvard has attempted to introduce race neutral Affirmative Action policies. However, the university did not believe in this policy, preferring race based Affirmative Action policy.⁸¹

⁷⁶*The Harvard Plan That Failed Asian Americans*, Harvard Law Review, <https://harvardlawreview.org/2017/12/the-harvard-plan-that-failed-asian-americans/>, (last visited Mar 11, 2019.)

⁷⁷ *Students for Fair Admissions v. Harvard Cooperation*, 1:14-cv-14176 ADB (D.M. 2018), SCRIBD, <https://www.scribd.com/document/391361594/Trial-Evidence2>, (last visited March 18, 2019.)

⁷⁸ Anemona Hartocollis, *What's at Stake in the Harvard Lawsuit? Decades of Debate Over Race in Admissions*, The New York Times (2018), <https://www.nytimes.com/2018/10/13/us/harvard-affirmative-action-asian-students.html> (last visited Mar 11, 2019.)

⁷⁹ *Id.*

⁸⁰ *Students for Fair Admissions v. Harvard Cooperation*, 1:14-cv-14176 ADB (D.M. 2018), SCRIBD, <https://www.scribd.com/document/391361594/Trial-Evidence2>, (last visited March 18, 2019.)

⁸¹ *Id.*

As the court battle between Harvard and the Students for Fair Admissions continues, it is important to take a step back and remember that every applicant that applies to a university has dreams for a better future and every student deserves equal opportunity. A student cannot choose the color of their skin. Therefore, universities should not choose the color of their applicants. Although universities justify the use of race to promote a perfect society, the United States continues to diversify naturally, therefore, the use of race based Affirmative Action will be no longer necessary in the near future.

Conclusion

While the U.S. Congress has never created a law on Affirmative Action, states have taken it into their own hands, either with an executive order, legislative action or voter referendum to decide the future of Affirmative Action. The benefits of race-neutral Affirmative Action, such as the 10% plan, allows underprivileged students to have the opportunity to pursue higher education without as many roadblocks. Although this policy has worked in states with large diverse populations, states such as Michigan, which is less diverse, suffer from these policies to reach diversity.

Nonetheless, universities should not force diversity by using people of color to fill in the critical mass of diversity. All students should earn their spots to make the admissions process a fair and equal one. Thus, students will feel that their admissions decision will be based upon the holistic review of a student's entire application, not just a racial one. Yale Law School alumni, Justice Thomas, said it best, "I'd graduated from one of America's top law schools, but racial preference had

robbed my achievement of its true value.”⁸²

⁸² Luke Johnson, *Thomas Compares Affirmative Action to Slavery*, The Huffington Post (2013), https://www.huffingtonpost.com/2013/06/24/clarence-thomas-affirmative-action_n_3491433.html, (last visited Mar 11, 2019.)