

AFFIRMING ACTIONS, FALLACY OF AMERICAN POST RACIAL SOCIETY.
INSTITUTIONAL INEQUITY AT THE HIGHEST
LEVEL OF POWER AND INFLUENCE: POLICY
ANALYSIS AND CRITIQUE OF THE UNITED
STATES SUPREME COURT EFFECTS
ON BLACK STUDENT ACCESS
TO HIGHER EDUCATION.

by

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THESIS ABSTRACT

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Title: Affirming Actions, Fallacy of American Post Racial Society: Policy Analysis and Critique of United States Supreme Court Effect on Black Student Access to Higher Education.

Since the inception of the country that is now known as the United States of America, the inquiry of racial equity and inclusion for Black Americans is one that has not been unequivocally and diligently answered. In attempt to remedy these societal burdens, the government leadership has retreated to various affirmative action policy initiatives. The affirmative action policies range from Executive Order from the President of the United States, policies in governmental contractor's work sector, to university admissions policies. The US Supreme Court has legally attenuated these policies, especially the college admissions policies. Consequently, the Courts decisions have been injurious to Black Americans access to education and economic prosperity. Furthermore, society's increasing apprehension and non-understanding of the fundamental goals of affirmative action suggests that the Supreme Courts affirmative action decisions will morph from the restrictive and injurious strict scrutiny to permanent decrease of any utilization of race based policy.

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DEDICATION

This thesis is dedicated

to

My father and mother, Gelgelu Gomalo and Bekelech Kabata. Because of the sacrifice they had to make for my siblings, and me my father and mother were not able to get an education that I am privileged to receive. However, it is my father and mother that imparted knowledge into me, knowledge that is higher than one with the penultimate PHD degree. It is my father and mother who taught me how to read and write when I struggled to do so. It is my father and mother who gave me the confidence and motivated me when everything looked as if it was there to hinder my prosperity. My father and mother are my lifelong professors. Most importantly, they are an example that obstacles are destined to overcome.

I dedicate this thesis to my siblings. My sister and second mother, Demeti, thank you for always supporting me and being such an impactful and inimitable figure in my life. My best friend and younger sister, Mimi, thank you for continuously inspiring me to do and live righteously and always having my back. My affectionately protective sister, Baseti, thank you for nurturing and taking care of me. My older sister, Tiffo, and brothers, Tesfaye and Girma, thank you for everything you have done for me.

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CHAPTER I

INTRODUCTION

Dating back to the Transatlantic slave trade, the question of inclusion and racial inequality has directly correlated with ethnic background, and who is seen and identified as a member of the historically dominant ethnic group. With this historical crux, it is no surprise that affirmative action is one of the most litigious and controversial subject matters in American society. Prior to it even being a policy of higher education, the notion of affirmative action is often met with zealous denunciations and rigid defenders. Despite these fervent beliefs and contradictory perspectives, the root of affirmative action is one that many gloss over.

In judicial principle, affirmative action began when President John F. Kennedy issued Executive Order 10925 and obliged all government contractors to "take affirmative action to ensure that applicants are employed, and employees are treated during employment, without regard to their race, creed, color, or national origin."¹ Nevertheless, the core of affirmative action is to preemptively remedy the extensive length of time it took for race based equitable changes such as ending discrimination in employment to occur in society. Moreover, it was to alleviate the extensive length of time it takes for the lawsuits to even reach the courts. Discrimination lawsuits customarily take many years to get through the courts. Due to this extensive delay there was scant increase in Black employees among government contractors in accord with 10925 in the years

¹John F. Kennedy: "Executive Order 10925—Establishing the President's Committee on Equal

following its issuance.² The Lyndon Johnson administration therefore began to keenly focus on the outcome, how much change (or lack thereof) there had been in the proportion of the populations.³ This process of looking at outcomes, led to affirmative action.⁴

In essence, modern social protest, especially by students and their demand for a comprehensibly equitable access to institutions of higher education is society's search for equitably pertinent outcomes (proportionally equal outcome given equal qualification). In these protests, African-American students focused on the direct changes that the Civil Rights Act of 1964 had promised. Through the creation of the Student For Non-Violent Coordination Committee, Black students supported their civil rights leaders and continued to put the pressure on the administrations of their respective universities.⁵

In the adamantly challenged and or defended deliberation of affirmative action, the enthralling yet puzzling key detail that is quite often unknown or rarely discussed is the fact that affirmative action was never legally required.⁶ Affirmative action began as a permissible policy.⁷ In particular, it was a policy that began on the federal level with government contractors.⁸ As a result, many other organizations began to voluntarily

²Anderson, Bernard E. "Employment of Negroes in the Federal Government." *Monthly Labor Review*, vol. 88, no. 10, 1965, pp. 1222–1227. www.jstor.org/stable/41835890.

Last visited: November 19, 2016.

³Lyndon B. Johnson: "Commencement Address at Howard University: "To Fulfill These Rights."," June 4, 1965. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project*. <http://www.presidency.ucsb.edu/ws/?pid=27021>. Last visited: November 19, 2016.

⁴Ib.

⁵Robert J. Weiss. *We Want Jobs: A History of Affirmative Action* Last visited (New York: Garland Press, 1997) Pg. 51

⁶John F. Kennedy: "Executive Order 10925—Establishing the President's Committee on Equal Employment Opportunity," March 6, 1961. United States Department of Labor. <https://www.dol.gov/ofccp/about/50thAnniversaryHistory.html>. Last visited: November 19, 2016.

⁷Ib.

⁸Lyndon B. Johnson: "Executive Order 11375—Amending Executive Order No. 11246, Relating to Equal Employment Opportunity," October 13, 1967. Online by Gerhard Peters and John T. Woolley, *The*

create their versions of affirmative action policy to help give equitable opportunities to African-American, other minorities, and women. The form of each institution or organization's policy varied. This practice of affirmative action policies has been attacked in the US courts, especially the US Supreme Court.

The voluntary or optional nature of affirmative action is important because it marks the difference between a permitted policy and law. Regarding race, law mandates that it is illegal to discriminate. Nevertheless, the law does not state what policy one can have or what policies are excluded. For this reason, many organizations, including institutions of higher learning, initially had room to develop their own affirmative-action-like programs, with their own varied policies. As mentioned, it is those policies that led to lawsuits, by white students, although not so much by white faculty.⁹ Before the US Supreme Court began to strike it down, affirmative action was practiced to remedy the discriminatory treatment of African-Americans in the employment sector. These actions, initiated through the Office of Federal Contract Compliance and the Executive Order 11246,¹⁰ mandated that all federal contractors and subcontract programs create equitable employment prospects for African-Americans and other protected classes. In an attempt to remedy past societal inequities, President Richard Nixon enacted the 1969 Philadelphia Plan.¹¹ The Philadelphia Plan mandated comparatively balanced representation of African-Americans in government contractors' jobs.¹² Moreover, Title VII¹³ of the Civil

American Presidency Project. <http://www.presidency.ucsb.edu/ws/?pid=60553>. Last visited: November 19, 2016.

⁹Ib

¹⁰Ib

¹¹Richard Nixon: "Statement About Congressional Action on the Philadelphia Plan," December 23, 1969. Online by Gerhard Peters and John T. Woolley, *The American Presidency Project.* <http://www.presidency.ucsb.edu/ws/?pid=2382>. Last visited: January 29, 2017.

¹²Ib.

Rights Act permitted voluntary affirmative action plans to be implemented in the work sector. For example, in 1979 affirmative action case, *United Steelworkers of America v. Weber*, 443 U.S. 193, the United States Supreme Court ruled that Title VII protected employment affirmative action programs that sought to gain the proposed partiality to “eliminate conspicuous racial imbalances in traditionally segregated job categories”.¹⁴

Through the United States Court system, the first case that pivoted the government’s focus from affirmative action to diversity is the *Regents of the University of California v. Bakke*. 438 U.S. 265.¹⁵ In this case, the United States Supreme Court ruled that universities could use race as one criteria of acceptance, because diversity is a compelling interest of the government.¹⁶ The Supreme Court, beginning with Justice Powell’s decision in *Bakke*, defined diversity as “robust exchange of ideas”¹⁷ that along with race, included additional components.¹⁸ The additional components of diversity, according to the Courts, could not be limited to race or ethnicity.¹⁹ According to Justice Powell, diversity comprised of “a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element”.²⁰ In addition, the *Bakke* decision defined and ruled that diversity is a compelling state interest.²¹ This

¹³2 U.S. Code § 1311 - Rights and protections under title VII of Civil Rights Act of 1964. Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/uscode/text/2/1311>. Last visited: January 29, 2017.

¹⁴*United Steelworkers of America, AFL-CIO-CLC v. Weber* 443 U.S. 193 (1979). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supremecourt/text/443/193>. Last visited: January 29, 2017.

¹⁵*Regents of the University of California v. Bakke*. 438 U.S. 265 and selected others are summarized in Appendix B

¹⁶*Regents of the University of California v. Bakke*. 438 U.S. 265 (1978). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supremecourt/text/438/265>. Last visited: November 19, 2016.

¹⁷*Ib.*

¹⁸*Ib.*

¹⁹*Ib.*

²⁰*Ib.*

²¹*Ib.*

definition of diversity has been utilized in many university admissions processes and as a precedent for future cases. Despite this definition of diversity, the Bakke decision has created a social and legal carousel that the state and federal government continue to contest and struggle over. The courts have explicitly stated that past discrimination cannot be used as an argument for current inclusion African-Americans.²² In particular, the US Supreme Court has specifically stated that past discrimination, and its corrections, cannot be used as a singular justification for affirmative action.²³ Ultimately, the courts have deviated towards the current model of diversity by restricting what the law can do and consistently refusing to step in and influence what society does, from their bench.

Some laws may have good intentions. However, the language behind those laws can have detrimental effects. For instance, if not clearly focused on the harmed community, good intended laws and cases such as *Brown v. Board of Education of Topeka*, 347 U.S. 483 can have detrimental effects on society.^{24, 25} The language of *Brown v. Board of Education of Topeka*, 347 U.S. 483 clearly stated that schools had to be integrated.²⁶ Nevertheless, it was a legal opinion that was insipid, and for the lack of better word, “colorless”.²⁷ Moreover, the language of *Brown v. Board of Education of Topeka*, 347 U.S. 483 stated that it is illegal to discriminate based on race, it did not state that you could not discriminate against African-Americans.²⁸ This directly imprecise

²²City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). Justia US Supreme Court. <https://supreme.justia.com/cases/federal/us/488/469/case.html>. Last Visited: March 6, 2017.

²³Ib.

²⁴Brown v. Board of Education of Topeka, 347 U.S. 483 (1954). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supremecourt/text/347/483>. Last Visited: March 6, 2017

²⁵Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) and selected others are summarized in Appendix B

²⁶Ib.

²⁷Ib.

²⁸Ib.

language has opened up the possibility for white students to assert that they have been discriminated against, if they cannot show that they have been discriminated or disadvantaged by the virtue of their race or ethnicity. One way people don't consciously discriminate based on race yet discriminate against African-Americans is by picking out prejudice and inequities that are only pertaining to and effecting African-Americans. This anti-black discrimination might be cultural, social, intellectual, or economic aspects that African-Americans have chronologically been discriminated against. These discriminations, that are unambiguous to and against African-Americans, can range from serious circumstances such as encounters (often deadly) with police to naive instances such as one simply saying they do not see color or race, they see people. For example, through the history of the United States, the African-American community and law enforcement have had a divergent and disconnected relationship. In many instances the Police have rejected the notion of racial prejudice by avowing that they are not racially profiling, they are basing their interactions with civilians based on the civilian's behavior.²⁹ Nevertheless, these behaviors that the police are paying attention to are predominantly exhibited by African-Americans.³⁰ Moreover, a large abundance of the American society inherently presupposes that certain behaviors are attributed to the African-American community. For instance, a great deal of the American society believe

²⁹ Alpert, P. Geoffrey, Bennett, Katherine, Macdonald, John. Dunham, G. Roger, Stroshine, Meghan, (2004). Police Officers' Decision Making and Discretion: Forming Suspicion and Making a Stop. A Report to The National Institute of Justice. <https://www.ncjrs.gov/pdffiles1/nij/grants/213004.pdf>. Last Visited: March 22, 2017.

³⁰ Brunson, R. K. (2007). "Police Don't Like Black People": African-American Young Men's Accumulated Police Experiences. *Criminology & Public Policy*, 6: 71–101. doi:10.1111/j.1745-9133.2007.00423.x

that African-Americans tend to carry weapons.³¹ Studies also demonstrate that professionally trained and legally sworn police officers possess the same presumptions, that African-Americans carry weapons.³² In many cases, the intrinsic behavioral preconception that police officers have, has made it more likely to follow through on these perceptions and shoot African-Americans.³³ The aforementioned examples demonstrate that certain stereotypes may not directly address or target African-Americans. Moreover, a society can also attest that they are not and cannot have prejudice against African-Americans because they do not see color. Nevertheless, the behavioral traits that are predominantly detested are those of African-Americans.

In the oral argument of *Fisher v. University of Texas At Austin* 58 F. 3d 633,³⁴ Justice Antonin Scalia made the argument that most Black scientist in the United States do not attend schools like the University of Texas at Austin, they come from “less advanced, slower track”³⁵ schools. Moreover, Justice Scalia argued that the University of Texas at Austin ought to have fewer black students because “when you take more, the number of Blacks, really competent Black, admitted to lesser schools, it turns out to be less”³⁶ Justice Scalia’s remark is not necessarily targeting African-Americans, it is targeting the intellectual acumen of people that attend and or graduate from the “less

³¹Payne, B K. (2001). Prejudice and perception: The role of automatic and controlled processes in misperceiving a weapon. *Journal of Personality and Social Psychology*, 81(2), 181. <http://psycnet.apa.org/journals/psp/81/2/181.pdf> Last Visited: April 12, 2017

³²Ib

³³Correll, J., Park, B., Judd, C.M., Wittenbrink, B., Sadler, M.S., & Keesee, T. (2007). Across the thin blue line: Police officers and racial bias in the decision to shoot. *Journal of Personality and Social Psychology*, 92(6), 1006-1023. <http://psycnet.apa.org/journals/psp/92/6/1006.pdf>. Last Visited: April 12, 2017

³⁴*Fisher v. University of Texas At Austin* 58 F. 3d 633 and selected others are summarized in Appendix B

³⁵De Vogue, Ariana. (2015). Supreme Court releases audio of Justice Antonin Scalia saying maybe black students don't belong at elite universities. <http://www.cnn.com/2015/12/11/politics/supreme-court-antonin-scalia-african-americans-audio/> Last visited: April 1, 2017.

³⁶Ib.

advanced, slower track”³⁷ schools. Justice Scalia’s comments do clearly elucidate his personal thoughts on the intellectual merit or capacity of African-Americans. Rather, Justice Scalia’s comments are scheming to or reminiscent of the Mismatch Theory. Mismatch Theory explains that racial preference admissions for Black students will harmfully backfire “to the point that they learn less and are less likely to be less self confident than had they gone to less competitive but still quiet good schools”³⁸ Nevertheless, the Mismatch Theory, along with Justice Scalia’s statements are inherently problematic because they presuppose that African Americans abundantly enter a university at the bottom of the incoming class. Moreover, they embody intrinsic bias and fundamental traits of problematic degradation because majority of the non-white people that come from so-called “less advanced, slower track”³⁹ schools tend to be African-American.⁴⁰ On the whole, the aforementioned examples demonstrate that one may not discriminate based on race, but they may discriminate based on something that picks out African-Americans.

The US Supreme Court does not want to deviate from the construct or myth of their legalistic society. In actuality, the decisions of the courts are political and subject to change. Because of this jurist and ideological shift, the court’s interest has deviated to approve the concept of diversity, yet condemn preference on the basis of race. These cases end up with diversity as a value instead of affirmative action, because affirmative

³⁷ Ib.

³⁸ Sander, Richard Henry, and Stuart Taylor. *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It*. New York, NY: Basic Books, a member of the Perseus Books Group, 2012. Pg.18

³⁹ De Vogue, Ariana. (2015). Supreme Court releases audio of Justice Antonin Scalia saying maybe black students don't belong at elite universities. <http://www.cnn.com/2015/12/11/politics/supreme-court-antonin-scalia-african-americans-audio/> Last visited: April 1, 2017.

⁴⁰ Ib.

action would make the courts recognize past injustice. In addition to past injustice, present inequality is a critical basis for the necessity of affirmative action. Modern day based affirmative actions produces critical mass. Endorsed in Justice O’Conner’s *Grutter v. Bollinger*. 539 U.S. 306⁴¹ opinion, critical mass leads to a good student cohort with wide-ranging experience and dynamics.⁴² Additionally, critical mass alleviates stereotypes and teaches a lifelong lesson that there is not one “minority viewpoint, but rather a variety of viewpoints among minority students.”⁴³

Despite its fundamental root of affirmative action, these cases, from Bakke on, end up focusing on diversity as a value because acknowledging the need for affirmative action would make the Courts directly and or indirectly recognize the lack of African-American student and faculty in the United States institute of higher education.

Diversity can be defined in many ways, by different races, ethnicity, gender socioeconomic class, and locale. The Merriam Webster Dictionary defines diversity as “the condition of having or being composed of differing elements: variety; especially, the inclusion of different types of people (as people of different races or cultures) in a group or organization”⁴⁴ The American Heritage Dictionary diversity as “The condition of having or including people from different ethnicities and social backgrounds: diversity on campus... a variety or assortment: a diversity of opinions”⁴⁵ According to the U.S.

Department of Education Fiscal Year 2016-2019 Diversity and Inclusion Strategic Plan

⁴¹Grutter v. Bollinger. 539 U.S. 306 and selected others are summarized in Appendix B

⁴²Grutter v. Bollinger. 539 U.S. 306 (2003). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supct/html/02-241.ZO.html>. Last visited: November 19, 2016.

⁴³Ib.

⁴⁴Merriam Webster Online, Merriam Webster (2017). Definition of Diversity. <https://www.merriam-webster.com/dictionary/diversity> Last visited: April 1, 2017.

⁴⁵The American Heritage® Dictionary of the English Language, Fifth Edition copyright ©2017 by Houghton Mifflin Harcourt Publishing Company. <https://ahdictionary.com/word/search.html?q=diversity> Last visited: April 1, 2017

diversity is “all the characteristics, experiences, and cultural influences that make each of us unique”.⁴⁶ If the aforementioned definitions of diversity are a bit perplexing, lack unanimity, are not concrete, and precise, it is because the fundamental root, point of view, and most importantly, the definition itself is not unanimously agreed upon and is therefore open to ongoing dialogue.

According to Darryl Smith, “access and success of historically underrepresented populations remain the legacy and soul of diversity work today”.⁴⁷ Smith also explains “diversity can function as both inclusive and differentiated”.⁴⁸ Moreover, Smith cautions society to veer away from delineating diversity as a generalized “laundry list of identities”.⁴⁹ Smith’s analysis demonstrates that one’s focus on diversity must be tailored to the needs of each university and community. Furthermore, Smith’s analysis elucidates that diversity, especially in higher education, should capture the fundamental crux, verities and nuances that are reflected in the operation, implementation and equitable institutionalization of diversity in higher education.

In *Fisher v. University of Texas At Austin* 58 F. 3d 633 Justice Kennedy stopped just short of defining diversity. Nevertheless, Justice Kennedy strongly eluded to and described diversity as “the destruction of stereotypes, the promotion of cross-racial understanding, the preparation of a student body for an increasingly diverse workforce

⁴⁶Cuffee-Graves, Cassandra, Chew Michael. (2015). U.S. Department of Education Fiscal Year 2016-2019 Diversity and Inclusion Strategic Plan. United States of America Department of Education, Office of Management, Office of Human Resources, Equal Employment Opportunity Service. https://saylordotorg.github.io/text_leading...cultural.../s04-09-levels-of-culture.html Last visited: April 1, 2017.

⁴⁷Smith, Daryl G.. *Diversity's Promise for Higher Education*. Baltimore: Johns Hopkins University Press, 2010. Accessed May 23, 2017. ProQuest Ebook Central. Pg. ix

⁴⁸Ib

⁴⁹Ib⁵⁰ *Fisher v. University of Texas At Austin* 58 F. 3d 633. (2016). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supremecourt/text/14-981>. Last visited: March 6, 2017.

and society, and the cultivation of a set of leaders with legitimacy in the eyes of the citizenry”⁵⁰ Furthermore, Justice Kennedy explained that universities have compelling interest in pursuing the educational interest of the student body diversity.⁵¹ Harkening back to the perplexing and non-unanimously understood or agreed upon definition of diversity, Justice Kennedy explains “universities are to be afforded considerable deference . . . in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission.”⁵² Customarily, people restrict and use diversity as being for the sole purpose of the presence of minorities. Nevertheless, there is another sense of diversity, which does not focus on African-Americans that are included/excluded and check on how they do once they get into the university. This particular side of diversity focuses on the whole entity, as opposed to the part (African-Americans/minorities) that contribute to the entity of diversity. In essence, this framework of diversity reflects on and accommodates the whole institution, as opposed to thinking about, affirming, and accommodating to the rights and or opportunities of specific people (which, in this instance, are African-Americans). Theoretically, it could be good for the whole institutions to have a certain number of African-Americans, without necessarily making sure that you can get the best candidates that you can possibly get. In principle, you can have diversity yet have silent discrimination, on the assumption that one’s hiring or acceptance is that they are hired on and for the sole basis

⁵⁰Fisher v. University of Texas At Austin 58 F. 3d 633. (2016). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supremecourt/text/14-981>. Last visited: March 6, 2017.

⁵¹Ib.

⁵²Ib.

of diversity and not excellence. On the whole, diversity has a focus of the whole unit as opposed to the excellence of individual parts.

The aim of diversity and affirmative action are two totally different things. The Courts support diversity because diversity makes the institution better, which in turn makes the Courts and government better. In the course of directly helping the institution, diversity can incidentally help the groups that have historically been left out. On the other hand, we are where we are today because affirmative action does not exist. Affirmative action is intended to affirm and directly help those that have faced prejudice and have been left out of academic and professional opportunities of success.

Diversity has been “accepted” by the US Supreme Court because it applies to a whole. However, the existence of diversity does not mean discrimination does not exist. Seeking diversity, a particular organization, and in this case, an institute of higher education, can pick out selected African-Americans (or any person of color) just for the sake of diversity and neglect or ignore others. In retrospect, one of the main criticisms of affirmative action is that it solely focuses on race and gives jobs or opportunities to people that are not qualified. Though this criticism is virtually never accurate, diversity has and can be criticized because one can certainly practice it in the same way. Many critics of diversity believe that it is a camouflaged version of affirmative action and provides unfair benefit and gains to African-Americans and or other persons of color.⁵³

The attainment of equitable success and or attaining equitable success through the

⁵³Daniel Golden, Could There Be Diversity If Affirmative Action Ends? Admissions Preferences Based on Economics, Not Race, Could Also Help Achieve Diversity. Wall Street Journal. <https://www.wsj.com/articles/SB104906938428478400> Last visited: March 6, 2017.

practice of diversity, or diversity focused hiring (which has been approved by the Supreme Court) has also been criticized for being a program that gives jobs and opportunities for those that are not qualified. For example, the fundamental goal of diversity has been viewed and derided as one that is merely rooted in having the presence of African-Americans and or other underrepresented people of color.

Within the framework of diversity, there is no law that states that you have to get the best people hired. With this being said, the aim of diversity has overshadowed and neglected the importance of making a mandatory effort to institutionalize excellence within diversity. In turn, the lack of mandatory institutionalization of excellence undermines inclusion. This lack of mandatory institutionalization of excellence undermines inclusion because it makes it seem as though inclusion comes at the price of excellence. If there were institutionalized excellence, mere identities would not be sufficient. Indeed, if mere identities are sufficient that in turn undermines excellence and becomes a persisting argument against inclusion. Moreover, it certainly undermines the effort of diversity because it gives credence that one has been accepted into an institution or hired based solely on their race. In making institutionalized excellence mandatory it is essential to encompass diversity. Institutionalized diversity is not in itself apart of excellence. However, diversity is certainly apart of institutionalized excellence.

Due to a university's importance to the state's interest⁵⁴ and overall society, the students they accept and faculty they hire are evaluated and held to a high standard. For this reason, excellence is applied to those that are either admitted or hired to help strengthen the academic and social climate of a university. Nevertheless, on the grounds

⁵⁴Regents of the University of California v. Bakke. 438 U.S. 265 (1978). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supremecourt/text/438/265>. Last visited: November 19, 2016.

of diversity and institutionalized excellence, the same credence and standard of excellence are unfairly not applied to the students that are admitted and faculty that are hired. Rather, those that are admitted and or hired on grounds of diversity often report experiences that imply they are stigmatized as unfair hires or academically accepted individuals that are lacking professional merit and intellectual excellence.⁵⁵

⁵⁵Carodine D. Montré. (2015). Teaching While Black. The Chronicles of Higher Education. <http://www.chronicle.com/blogs/conversation/2015/03/13/teaching-while-black/>. Last visited: May 29, 2016.

CHAPTER II

DIFFERENCE BETWEEN NON-DISCRIMINATION (WHICH IS WHAT THE CIVIL RIGHTS ACT ACCOMPLISHED) AFFIRMATIVE ACTION, AND DIVERSITY

In the chronological and contemporary make up of the American social order, the critical mainstay is the presence of inequality. Due to this inequality, one of the first corrections that are made is to totally not allow discrimination. Though this sounds great in theory, the total exclusion of discrimination doesn't always work. Exclusion of racism has led to the enactment of direct and formal rights such as desegregation of schools and the Voting Rights Act. However, exclusion of discrimination has not stopped people or companies from practicing inequitable behavior and implicit bias. In a 2003 study, Harvard economic professor Sendhil Mullainathan and Marianne Bertrand, professor of economics at the University of Chicago, researched the effects of race based implicit bias on employment in the labor market.⁵⁶ Mullainathan and Bertrand utilized a white sounding name such as Emily and African-American name such as Jamal on the similar resumes and sent a total of 5000 resumes for sales, administrative support, clerical service and customer service advertisements in Boston and Chicago newspaper advertisements.⁵⁷ The study concluded that white sounding names received 50 percent more call back for interviews.⁵⁸ As a result, this study also concluded that

⁵⁶Bertrand, Marianne and Mullainathan, Sendhil. 2004. "Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination." *American Economic Review*, 94(4): 991-1013. <https://www.aeaweb.org/articles?id=10.1257/0002828042002561>. Last Visited: March 6, 2017

⁵⁷Ib.

⁵⁸Ib.

legal exclusion of race discrimination does not stop people from being inequitable and treating people differently, based on their race.⁵⁹

In addition to the daunting toll of dealing with and properly combating implicit discrimination, it is practically impossible to prove that people are directly and structurally discriminating against members of minority groups. Consider unemployment among government contractors: The employment figures have not changed. In 2014 African-American unemployment rate was 11.4%.⁶⁰ In particular, African-American males that are 20 and older had an 11% unemployment rate.⁶¹ In comparison, in 1973, the African-American unemployment rate was 9.4%.⁶² Because of this lack of progress the necessity to take affirmative action is crucial.

In academic institutions, the remedy to help remove the presence of inequality pivoted from not discriminating to doing something affirmative through positive action. The construction, execution, and implementation of these positive actions took place through different formats. For example, positive actions included preferences, quotas, and allowing race to be an imperative aspect of admission.⁶³ As opposed to seeing the outcome of these efforts, the United States judicial leaders have consistently diluted or shut them down. In *Grutter v. Bollinger*, 539 U.S. 306, Justice O’Conner ruled that it is

⁵⁹Ib.

⁶⁰Roniqua Allen, For Black Men, a Permanent Recession: The Jobless Rates For African-American males Is More Than That of White Men . Follow Five Job Seekers As They Look For Employment In A Market That Is Stacked Against Them. Aljazeera America. <http://america.aljazeera.com/features/2014/10/for-black-men-a-permanentrecession.html>. Last visited: December 6, 2016.

⁶¹Ib.

⁶²Ib.

⁶³Oppenheimer, B. D. (1988). Distinguishing Five Models of Affirmative Action. Berkeley Law Scholarship Repository. Faculty Scholarship. Berkeley law. <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2100&context=facpubs>. Last visited: April 25, 2017.

permissible to consider race in admission, among other factors.⁶⁴ Many have taken this ruling to mean that African-Americans with equal qualification as non-African-Americans can be chosen and granted admission into the university. Justice O’Conner elucidated her opinion by claiming that universities have a reason to want diversity on their campuses.⁶⁵ As a result of this comprehensive diversity, (which is where the law is currently), Justice O’Conner believed that considering race as apart of the admissions process will not be necessary in twenty-five years.⁶⁶ The deadline for Justice O’Conner is 2028.⁶⁷

In analyzing the fundamental difference between affirmative action and diversity, the other critical aspect the Courts miss is who diversity is actually helping. Diversity is an initiative that is for the good of the whole. This means it is overarchingly good for the majority, because the whole is dominated by the majority. Because of this, the focus changes from aiding the people that have been discriminated against or who’s presence was affirmed. Since the Bakke decision, the enrollment of Black students in medical schools has steadily decreased. In fall of 1970-1971 there were 40, 238⁶⁸ total student enrollment; of this total, 1, 509 (3.8%)⁶⁹ were Black Medical students. In 1971-1972 school year, a total of 43, 560⁷⁰ medical students were enrolled in medical school. Out of

⁶⁴ Grutter v. Bollinger. 539 U.S. 306 (2003). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supct/html/02-241.ZO.html>. Last visited: November 19, 2016.

⁶⁵Ib.

⁶⁶Ib.

⁶⁷Ib.

⁶⁸Frierson, Jr, T. Henry. 2004. Black Medical Students’ Perceptions Of The Academic Environment And Of Faculty And Peer Interaction. Chapel Hill, North Carolina.

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2625558/pdf/jnma00922-0069.pdf> Last Visited: April 11, 2017.

⁶⁹ Ib

⁷⁰ Ib

the 43, 560⁷¹ total medical student enrollment, total student enrollment, 2, 055 (4.7%)⁷² were Black medical students. The 1974-1975 school year had a total enrollment of 53, 554⁷³ medical students. Out of the 53, 554⁷⁴ total student enrollment, 3, 353 (6.3%)⁷⁵ were Black medical students. In 1977-1978 school year, 60, 099⁷⁶ total medical students were enrolled, with 3, 587 (6.0%)⁷⁷ being Black medical students. In 1978-1979 964(39.8%)⁷⁸ In fall of 1979 school year, there was a total enrollment of 63, 800⁷⁹ medical students. Out of the 63, 800⁸⁰ total enrollment, 3, 627 (5.6%)⁸¹ were Black medical students. In fall of 1979-1980, which was the first year after *Bakke* decision, 2, 507⁸² Black medical school applicants; of this number 1, 043 (40.9%)⁸³ were granted admission. In 1980-1981 school year, there were 2, 507 Black medical school applicants, with 1, 043 (41.6%)⁸⁴ gaining admissions. Moreover, in 1981-1982, there were a total enrollment of 2, 572⁸⁵, with 1, 018 (39.6%)⁸⁶ gaining admission. These statistics demonstrate the stark effects that *Bakke* decision has had on the Black medical student acceptance and enrollment rates.

⁷¹Ib

⁷²Ib

⁷³Ib

⁷⁴Ib

⁷⁵Ib

⁷⁶Ib

⁷⁷Ib

⁷⁸Ib

⁷⁹Ib

⁸⁰Ib

⁸¹Ib

⁸²Association of American Medical Colleges. 2017. Longitudinal Applicants, Matriculant, Enrollment, & Graduation Tables. <http://www.aamcdiversityfactsandfigures2016.org/report-section/section-5/applicants-enrollment/> Last Visited: April 11, 2017.

⁸³Ib

⁸⁴Ib

⁸⁵Ib

⁸⁶Ib

Since the *Grutter* verdict, the number of black student enrollment at law schools decreased. *Grutter* authorized regulated legal use of race by limiting it to one of many factors and premising its significance to be singularly tailored to each individual's overall application.⁸⁷ In fact, the *Grutter* verdict instituted a preliminary legality of a limited affirmative action.⁸⁸ The *Grutter* decision critically effected the enrollment and career success of black law students. According to Law School Admission Council data the black law student enrollment decreased from 10,670 in fall 2004 to 10,010 in fall 2005.⁸⁹ Moreover, the black law student enrollment percentage decreased from 9,340 in fall 2006 to 9,090 in fall 2007.⁹⁰ In total percentage, the black law student enrollment declined and changed 0.7%, -6.3%, -6.6%, -0.2% from fall 2004 to fall 2007.⁹¹

The aforementioned examples demonstrate that diversity is a fragile remedy for the government's interest in, and most importantly, for, black students.

⁸⁷ *Grutter v. Bollinger*. 539 U.S. 306 (2003). Cornell University Law School, Legal Information Institute. https://www.law.cornell.edu/supct/html/02-241_ZO.html. Last visited: November 19, 2016.

⁸⁸ *Ib.*

⁸⁹ Law School Admissions Council. Applicants By Ethnicity & Gender/Sex (2000–2009 ARCHIVE). <http://www.lsac.org/lisacresources/data/ethnic-sex-applicants/archive-2>. Last Visited: March 6, 2017

⁹⁰ *Ib.*

⁹¹ *Ib.*

CHAPTER III

SUPREME COURTS PRECEDENT VIEWPOINTS ON HISTORY/RACE:

UTILIZATION OF STRICT SCRUTINY

Regarding the reason for their rulings against affirmative action, it is critical to explain the Supreme Court's viewpoints on history. The Supreme Court has narrowly allowed race to be used as a component to attain diversity, which it contends is a compelling state interest.⁹² However, the Supreme Court has also stated that it will not address past discrimination by allowing race to be used as the lone component of university admissions program.⁹³ Moreover, the Court has also consistently held the viewpoint that you cannot favor any racial groups in hiring or academic admissions to correct the past discrimination.⁹⁴ In addition to this stance, the Court has implemented the *strict scrutiny* standard.⁹⁵ Strict scrutiny is a judicial review that the United States Courts employ to ascertain the principle constitutionality of a particular law in question.⁹⁶

In an affirmative action case, strict scrutiny determines the constitutionality of utilizing race in university admissions process.⁹⁷ The standard of strict scrutiny pertaining

⁹²Regents of the University of California v. Bakke. 438 U.S. 265 (1978). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supremecourt/text/438/265>. Last visited: November 19, 2016.

⁹³City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). Justia US Supreme Court. <https://supreme.justia.com/cases/federal/us/488/469/case.html>. Last Visited: March 6, 2017.

⁹⁴Ib.

⁹⁵Regents of the University of California v. Bakke. 438 U.S. 265 (1978). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supremecourt/text/438/265>. Last visited: November 19, 2016.

⁹⁶Strict Scrutiny. Definition. (2017). Cornell University Law School, Legal Information Institute. https://www.law.cornell.edu/wex/strict_scrutiny. Last visited: March 6, 2017.

⁹⁷Regents of the University of California v. Bakke. 438 U.S. 265 (1978). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supremecourt/text/438/265>. Last visited: November 19, 2016.

to race was initially introduced in Justice Powell’s controlling opinion in *Bakke*.⁹⁸ Under the rigors of strict scrutiny, Justice Powell mandated the following; The utilization of race must clearly demonstrate a compelling governmental interest.⁹⁹ Moreover, Justice Powell wrote that utilization of race must be narrowly tailored to achieve the compelling interest of the government.¹⁰⁰ As mentioned, strict scrutiny is a legal standard that the United States Courts use to ascertain the constitutionality of particular laws.¹⁰¹ Furthermore, it is a judicial concept that is geared to make the government prove that the particular law in question is needed to achieve a compelling interest of the government.¹⁰² Additionally, strict scrutiny is “a framework for carefully examining the importance and the sincerity of the reasons advanced by the institutional decisionmaker for the use of race in that particular context.”¹⁰³

In *Grutter v. Bollinger*, 539 U.S. 306 Justice O’Connor applied a rather lenient (compared to *Bakke*) form of strict scrutiny by giving the university’s the self-determination to tailor their particular admissions programs in not making it always utterly mandatory for the university to prove that its use of race is necessary to achieve the compelling interest of the government.¹⁰⁴ Instead, Justice O’Connor gave the discretion of proving the constitutionality of using race in admissions process to each institution.¹⁰⁵ According to Justice O’Connors majority opinion, “Context matters when reviewing race-based governmental action under the Equal Protection Clause.”¹⁰⁶ Moreover, Justice O’Conner wrote that “Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.”¹⁰⁷ This opinion demonstrates

⁹⁸Ib.

⁹⁹Ib.

¹⁰⁰Regents of the University of California v. Bakke. 438 U.S. 265 (1978). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supremecourt/text/438/265>. Last visited: November 19, 2016.

¹⁰¹Strict Scrutiny. Definition. (2017). Cornell University Law School, Legal Information Institute. https://www.law.cornell.edu/wex/strict_scrutiny. Last visited: March 6, 2017.

¹⁰²Grutter v. Bollinger. 539 U.S. 306 (2003). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supct/html/02-241.ZO.html>. Last visited: November 19, 2016.

¹⁰³Ib.

¹⁰⁴Ib.

¹⁰⁵Ib.

¹⁰⁶Ib.

¹⁰⁷Ib.

Justice O'Connor's belief that the concept of strict scrutiny must apply differently to each situation

CHAPTER IV

**SUPREME COURTS CONTEMPORARY VIEWPOINTS ON
HISTORY/RACE: UTILIZATION OF STRICT SCRUTINY**

Despite its 4-3 ruling in favor of a race-based admissions program, *Fisher v. University of Texas At Austin* 58 F. 3d 633 enacted a narrowly tailored strict scrutiny standard to effectively restrict affirmative action.¹⁰⁸ In the majority opinion, Justice Kennedy ruled that narrowly tailored strict scrutiny “bears the burden of demonstrating that ‘available’ and ‘workable’ ‘race-neutral alternatives’ do not suffice”¹⁰⁹ Moreover, Justice Kennedy ruled that the narrowly tailored strict scrutiny must adjust to changing circumstances and employ “periodic reassessment of the constitutionality, and efficacy, of its admissions program.”¹¹⁰ In addition to the rigidly tailored standard of strict scrutiny, the Court has also definitively stated that any preference that is exclusively based on race is wrong regardless of whether the preference is for members of minorities or members of dominant groups.¹¹¹ Essentially, the Court, will not specifically look at historical remedies.¹¹²

The Court’s current thinking is that favoritism of race, even if the racial group under consideration has a history of discrimination and oppression, is equally harmful to favoring the dominant group(s) solely based on race.¹¹³ In *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 Chief Justice John

¹⁰⁸Fisher v. University of Texas At Austin 58 F. 3d 633. (2016). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supremecourt/text/14-981>. Last visited: March 6, 2017.

¹⁰⁹Ib.

¹¹⁰Ib.

¹¹¹Ib.

¹¹²Ib.

¹¹³Ib.

Roberts clearly elucidated that “the way to stop discrimination on the bases of race is to stop discrimination on the basis of race”¹¹⁴ This ruling shows the Courts fundamental disconnections with race. Moreover, this verdict shows the Courts parallel alignment with the dominant society’s continued disregard of the chronological American racial hierarchy and typical disconnection between those at the top and those at the bottom.

While Chief Justice Roberts, along with the conservative majority of the Supreme Court, are perhaps taking well-intentioned steps of eliminating any form of race-based prejudice, their ruling have had a harmful effect on diversity initiatives and academic advancement of the African-American community. Moreover, they have essentially equated affirmative action to prejudice such as Jim Crow. Though Chief Justice Roberts may certainly not be racist, the rule of his Court is one that encompasses racial bias. According to Eduardo Bonilla-Silva one can partake in actions of “colorblind racism”¹¹⁵ without being overtly racist. Bonilla-Silva explains, “ colorblind racism is an ideology which acquired cohesiveness and dominance, in the late 1960s explains contemporary racial inequality as the outcome of nonracial dynamics”.¹¹⁶ Moreover, Bonilla-Silva explains, colorblind racism is the “New Racism practice that are subtle institutional and apparently non racial”.¹¹⁷ Bonilla-Silva’s statement elucidates that we are not cured of racism and residing in a post racial American society. Rather, we are living in a society were racism, specifically anti-Black racism, has morphed from overt to covert racism.

¹¹⁴Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701. (2007). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supct/html/05-908.ZO.html>. Last visited: March 6, 2017.

¹¹⁵Bonilla-Silva, Eduardo. Racism Without Racists: Color-blind Racism and the Persistence of Racial Inequality in America. Third edition. Lanham: Rowman & Littlefield Publishers, Inc., 2010. Pg. 2

¹¹⁶Ib

¹¹⁷Bonilla-Silva, Eduardo. Racism Without Racists: Color-blind Racism and the Persistence of Racial Inequality in America. Third edition. Lanham: Rowman & Littlefield Publishers, Inc., 2010. Pg. 3

Chief Justice Roberts colorblind judicial viewpoints would protect and eliminate overt racist actions such as Jim Crow laws or heinous actions of the Ku Klux Klan, nevertheless, it will allow covert racism to continue to persist in our society.

CHAPTER V

**BLACK STUDENT DEMANDS AT PREDOMNANTLY WHITE
INSTITUTIONS: SUPREME COURTS CONTEMPORARY
VIEWPOINTS ON HISTORY/RACE: HISTORICAL
SETBACK FOR BLACK COMMUNITY & RATIONAL FOR
REVERSE RACISM**

Currently, there are many demands on college campuses for more diverse faculty, specifically, Black faculty. In the aftermath of the University of Missouri's overt racism against Black students, numerous Black college students protested and demanded equitable changes.¹¹⁸ In a nationwide protest, students publically released and submitted a total of 71 demands at Predominantly White Academic Institutions.¹¹⁹ These list of demands were compiled and made public on an Internet forum called The Demands.¹²⁰ (See Appendix A).

Due to the Court's strict scrutiny utilization of race, universities cannot directly respond to students' demands, on the sole base of race. Nevertheless, many universities have looked boost their faculty by looking to hiring faculty on the basis of their research specialization. That is, it is legal to prefer one who specializes in black history; nevertheless, it is illegal to hire more black people on campus, because they are black.

As mentioned earlier, in the history of affirmative action-influenced race-based admissions lawsuits, the vast majority of discrimination lawsuits have interestingly come

¹¹⁸The Demands. "Across the nation, students have risen up to demand an end to systematic and structural racism on campus. Here are their demands" <http://www.thedemands.org/> Last visited: December 21, 2016.

¹¹⁹Ib.

¹²⁰Ib.

from white students. In contrast, none of the US Supreme Court lawsuits have come from white faculty.

However, in 2005, the United States Equal Employment Opportunity Commission (EEOC), representing three white faculty, filed a racial discrimination lawsuit against Historically Black private university, Benedicts College.¹²¹ In the lawsuit, the EEOC alleged that Benedicts College decline to renew the two professors contracts and offer a faculty position to one professor, based solely on their race.¹²² In 2009, despite declining any wrongdoing, Benedicts College and EEOC reached a settlement and awarded \$55,000 to each faculty.¹²³ Moreover, in a 2005 decision, a three judge panel on the United States Court of Appeals for the Seventh Circuit, reversed an Illinois federal court decision and ruled that Janine Rudin, a white adjunct professor at Lincoln Land Community College, was subject to racial discrimination and has the right to a jury trial.¹²⁴ The Court of Appeals for the Seventh Circuit found that Lincoln Land Community College was liable for abundant “circumstantial” discrimination.¹²⁵ For example, the Court of Appeals found that it was impartial for Lincoln Land Community College leadership to add a Black professor to the pool of candidates.¹²⁶

Despite the lack of Supreme Court judicial verdict directly addressing faculty hiring, Justice Powell’s opinion in *Bakke*, in particular, his viewpoints on race, has been

¹²¹The U.S. Equal Employment Opportunity Commission. Benedicts College Settles EEOC Racial Bias Case. <https://www.eeoc.gov/eeoc/newsroom/release/4-8-09c.cfm>. Last visited: March 6, 2017.

¹²²Ib.

¹²³Ib.

¹²⁴Janine Rudin, Plaintiff-appellant, v. Lincoln Land Community College, Defendant-appellee, 420 F.3d 712. U.S. Court of Appeals for the Seventh Circuit - 420 F.3d 712 (7th Cir. 2005). Justia US Law. <http://law.justia.com/cases/federal/appellate-courts/F3/420/712/539129/>. Last visited: March 6, 2017.

¹²⁵Ib.

¹²⁶Ib.

utilized to address employee hiring in government agencies.¹²⁷ In 1987, Patrick Higgins sued the City of Vallejo, alleging that their Affirmative Action plan cost him an opportunity to gain promotion and directly violated the Title VII, the California Constitution, and the United States Constitution.¹²⁸ Upon receiving this case, the United States Court of Appeals for the Ninth Circuit utilized Justice Powell's decision in *Regents of the University of California v. Bakke*. 438 U.S. 265. and ruled that the City of Vallejo was not at fault because race can be used as a plus factor in hiring or promoting employees.¹²⁹

Despite the intense debate, the majority of American society is either not understanding or not willing to recognize that diversity is not affirmative action. There is a broad and imprecise perception that affirmative action is anything that increases the presence of non-white people on a university campus. This ranges from policy, to academic variety, to the motto of the university. In addition to the lack of precise knowledge of what affirmative action is, there is an inane idea that affirmative action is a form of reverse discrimination. This idea is inane because discrimination is built on history. For this reason, the notion that affirmative action is a form of reverse discrimination is to neglect history and only look at the spur-of-the-present. This perspective lines up with Chief Justice Roberts idea that you must stop discrimination on race by stopping discrimination based on race.¹³⁰ In *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 Chief Justice Roberts ruled that it

¹²⁷Patrick Higgins v. City of Vallejo. U.S. Court of Appeals For The 9th Cercuit – 823 F.2D 351 (1987). Justia US Law. <http://law.justia.com/cases/federal/appellate-courts/F2/823/351/221471/>. Last visited: December 14, 2016.

¹²⁸Ib.

¹²⁹Ib.

¹³⁰Parents Involved In Community Schools v. Seattle School District. No. 1. 551 U.S. 701 (2007). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supct/html/05-908.ZO.html>. Last visited: November 19, 2016.

is unconstitutional for the Seattle School District to achieve integration by utilizing students neighborhood, familial attendance, and racial diversity.¹³¹

Despite the good intentions of the Seattle School District (equitable integration) Chief Justice Roberts ruled that it is unconstitutional to use race to gain this integration.¹³² Moreover, in referring to *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 Chief Justice Roberts has advocated ending race conscious policies and laws such as the Voters Rights Act and affirmative action based policies because he thinks that they are no longer needed in the south and are divisive to the American society. According to Chief Justice Roberts any racial discrimination is bad for society. In *League of United Latin American Citizens v. Perry*, 548 U.S. 399, a case that challenged the constitutionality of the 2003 Texas Redistricting Plan¹³³ and found that it violated the Voters Rights Act,¹³⁴ Justice Roberts, concurring in part of Justice Kennedy's majority opinion, stated that race conscious laws and policies are a "sordid business"¹³⁵

A colorblind government and overall society is one Chief Justice Roberts, and majority of the conservative Supreme Court Justice has endorsed.¹³⁶ Additionally, this colorblind outlook lines up with the thought that society must not see race in any decision-making process. In the big picture, this idea of reverse discrimination continues to have legal and social verity, because the Supreme Court refuses to look at history and how the historical crux of the United States affects members of the present African-American community.

¹³¹Ib.

¹³²Ib.

¹³³*League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supct/html/05-204.ZS.html>. Last visited: March 6, 2017.

¹³⁴Ib.

¹³⁵Toobin, Jeffrey. (2013). Chief Justice out to end affirmative action. <http://www.cnn.com/2013/02/28/opinion/toobin-roberts-voting-rights-act/>. Last visited: March 6, 2017.

¹³⁶Ib.

CHAPTER VI

Conclusion

In a New York Times article published on February 1, 2016, Dr. Henry Louis Gates Jr. stated “we still confront the question that arose the moment the first slave ships arrived: Do black lives matter?”¹³⁷ This statement highlights the importance of looking at history to understand the present climate. In the United States one’s socioeconomic status and access to education are highly predicated by race. America was built of Black slave labor. Slave labor and the overall institution of slavery is the “original sin” that continues to effect generations of African-Americans. If one looks at the chronological effects of American history, it is easy to see that there is inequality without present peculiar or direct discrimination. For example, the Supreme Court’s ruling in *Brown v. Board of Education of Topeka*, 347 U.S. 483 led to legal desegregation of the school system.¹³⁸ Nevertheless, segregation is still persisting in American education system. Education is funded by locale tax, the majority of the predominantly African-American schools are located in an impoverished neighborhood and are therefore underfunded and lack resources for equitable student success.

According to the Pew Research Center, in 2014 the median income for Black family was \$43, 300 while white household income was \$71,300.¹³⁹ Moreover, in 2013,

¹³⁷Louis Gates Jr. Henry. (2016). **Black America and the Class Divide**. The economic gap within the African-American community is one of the most important factors in the rise of Black Lives Matter, led by a new generation of college graduates and students. https://www.nytimes.com/2016/02/07/education/edlife/black-america-and-the-class-divide.html?_r=0 . Last visited: March 6, 2017.

¹³⁸*Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supremecourt/text/347/483>. Last Visited: March 6, 2017

¹³⁹PewResearchCenter. (2016). Social and Demographic Trends. On Views of Race and Inequality, Blacks and Whites Are Worlds Apart. About four-in-ten blacks are doubtful that the U.S. will ever achieve racial

the mean wealth income for Black households was \$11, 200.¹⁴⁰ In comparison, the 2013 median wealth income for white households was \$144, 200.¹⁴¹ Furthermore, a Black household that is headed by one with a college degree has a mean wealth of \$26,300, which is considerably lesser than a white household that is headed by a degree holder, which is a median wealth of \$301, 300.¹⁴² According to the Economic Policy Institute (EPI), in 1963, the unemployment rate for African-Americans was 10.9 percent, in comparison, it was 5 percent for white Americans.¹⁴³

In 2013, the unemployment rate for white Americans was 6.6 percent and 12.6 percent for African-Americans.¹⁴⁴ EPI research also demonstrates that African-Americans have a higher chance of living in an area of concentrated poverty than white Americans.¹⁴⁵ For instance, from 2006-2010, African-Americans had a 45 percent chance of living in concentrated areas of poverty, compared to 12 percent for white Americans.¹⁴⁶ Furthermore, schools are more segregated in 2010 than 1980.¹⁴⁷ According to the EPI research "Although the share of black children in segregated schools had dropped to 62.9 percent by the early 1980s, the subsequent lack of commitment by the federal government and multiple Supreme Court decisions antagonistic to school desegregation have led to a reversal,"¹⁴⁸ Due to the US Supreme Court's decisions and

equality. <http://www.pewsocialtrends.org/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart/>. Last Visited: March 6, 2017

¹⁴⁰Ib.

¹⁴¹Ib.

¹⁴²Ib.

¹⁴³Economic Policy Institute. (2013) **The Unfinished March**. An Overview.

<http://www.epi.org/publication/unfinished-march-overview/>. Last Visited: March 6, 2017

¹⁴⁴Ib.

¹⁴⁵Ib.

¹⁴⁶Ib.

¹⁴⁷Ib.

¹⁴⁸Ib.

laws that have barred direct racial discrimination, one may contend that there is no societal discrimination. Nevertheless, the aforementioned statistics demonstrates that elimination of overt discrimination does not eliminate the inequality that is rooted in historical foundation of America. It is those historical inequalities that have hindered and besieged the African-American population, and denied Black students the equitable opportunity for academic success.

APPENDIX A

BLACK STUDENTS LIST OF DEMANDS

In a nationwide protest, students publically released and submitted a total of 71 demands at Predominantly White Academic Institutions.¹⁴⁹ These list of demands were compiled and made public on an Internet forum called The Demands.¹⁵⁰ Out of the 70 schools, 31 demanded immediate and consistent long-term increase/hiring of Black/African-American faculty members, 29 demanded increase in faculty of color, and 1 demanded hiring faculty from a marginalized community.¹⁵¹ As of November 2015, the University of Alabama's 6.8 percent of Black/African-American population is the highest of any public or private research PWAI's.¹⁵²

¹⁴⁹Ib.

¹⁵⁰Ib.

¹⁵¹Ib.

¹⁵²Strauss, Valerie. In 2015. Where are All The Black College Faculty?. Washinton Post, 12 November. 2015. https://www.washingtonpost.com/news/answer-sheet/wp/2015/11/12/its-2015-where-are-all-the-black-college-faculty/?utm_term=.88162df9d01c Last Visited: December 20, 2016

APPENDIX B

UNITED STATES SUPREME COURT CASE SYNOPSIS

Sweatt v. Painter, 339 U.S. 629 (1950)

In 1946, Herman Marion Sweatt, an African-American male, applied to attend the University of Texas at Austin School of Law. Sweatt's academic and professional resume aligned with the prerequisites needed for admission. Nevertheless, University of Texas was an all white academic institution. For this reason, Sweatt was not qualified and was denied admissions because of his race. University of Texas' ability to deny Sweatt admissions based on his race was rooted in Article VII, Section 7 of the Texas Constitution. This Constitutional provision read: "Separate schools shall be provided for the white and colored children, and impartial provision shall be made for both."¹⁵³ Upon filing the race discrimination lawsuit, the trial courts found equal protection violation because the state of Texas did not have a law school that was aimed to educate African-Americans. Nevertheless, within six months, the state of Texas opened a law school for African-Americans. Upon the opening of the Black law school, the Texas state courts found that parity had been established and consequently denied Sweatt admission as well as further legal reinforcement. Sweatt, claiming a violation of the Fourteenth Amendment Equal Protection clause, appealed this decision to the United States Supreme Court.

Upon receiving the case, the United States Supreme Court attentively evaluated the substantial equality between the University of Texas at Austin Law School and the

¹⁵³Amilcar Shabazz, *Advancing Democracy: African American and the Struggle for Access and Equity in Higher Education in Texas* (Chapel Hill: The University of North Carolina Press, 2004), Pg. 11.

newly opened Black Law School. In its assessment the United States Supreme Court found that the proposed Black Law School was comprehensively inferior and substantially unequal to the University of Texas at Austin Law School. The United States Supreme Court found an objective and subjective inequality. Objectively, the Supreme Court found that University of Texas at Austin Law had superior facilities, faculty, Law Review, renowned alumni, and the title of accredited law school. Subjectively, the Supreme Court found substantial advantages and explained that "what is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school"¹⁵⁴. Moreover, the Supreme Court ruled that "It is difficult to believe that one who had a free choice between these law schools would consider the question close."¹⁵⁵

As a result, the Supreme Court ruled that any state that had a professional academic program for white students only must allow black students to be admitted. In particular, the Supreme Court ruled that the Fourteenth Amendment Equal Protection Clause mandate Herman Sweatt's admission into the University of Texas at Austin Law School.

This case is historically significant for the pathway it opened for Black students to attend and earn a "equal" professional degree from an institute such as University of Texas at Austin School of Law. Nevertheless, the shortcoming of this case is its dissenting opinion that Black students could only apply into professional academic programs that were not available at segregated Black schools.

¹⁵⁴Sweatt v. Painter. 339 U.S. 629 (1950). Cornell University Law School, Legal Information Institute. https://www.law.cornell.edu/supremecourt/text/339/629#writing-USSC_CR_0339_0629_ZO. Last visited: November 19, 2016.

¹⁵⁵Ib.

Brown v. Board of Education of Topeka, 349 U.S. 294 (1955)

Upon initially reaching the US Supreme Court in 1952, the critical yet mostly undisclosed or overshadowed cases known as Belton (Bulah) v. Gebhart [Delaware], Bolling v. Sharpe [District of Columbia], Briggs v. Elliott [South Carolina], Davis v. County School Board [Virginia] rolled into one and became Brown, et al. v. Board of Education of Topeka, et al.¹⁵⁶ These cases were collectively heard by the US Supreme Court because segregation elevated and evolved from a Southern American issue to Comprehensive United States of America problem.¹⁵⁷

In 1954, Oliver Brown, sued the Topeka, Kansas Board of Education. In his lawsuit, Brown contends that his daughter Linda Brown was denied admission to the local all white elementary school on the sole base of her race. Brown asserts that this denial violates the Equal Protection Clause of the 14th Amendment.⁴ In addition to the violation of the Equal Protection Clause, this lawsuit's critical foundation was focused on overturning the 1879 Kansas state legislation, which permitted segregation. This case was initially filed in the United States District Court for the District of Kansas. Utilizing the legal precedent of the "separate but equal" clause in the 1898 Plessy v. Ferguson United States Supreme Court decision, the District Courts upheld the State of Kansas legislation and Board of Education's decision to keep their schools separate.

Upon further petition, the United States Supreme Court took on this case. Subsequently, the Supreme Court voted 9-0 and unanimously decided in favor of Brown. This rule reversed Plessy v. Ferguson decision and made "separate but equal" clause immediately illegal. According to Chief Justice Warren, who delivered the lone opinion

¹⁵⁶Mary Marcus, Brown V. Board of Education National Historic Site. (Western National Parks Association, 2003), Pg. 11

¹⁵⁷Ib.

(agreed to and coincided by the other 8 justices) “in the field of public education, the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal”¹⁵⁸. Moreover, Chief Justice Warren rejected the legitimacy of “separate but equal” clause on the basic premises that the “effect of segregation itself on public education” and not purely “a comparison of...tangible factors.”¹⁵⁹

This ruling demonstrates that segregation or “separate but equal” is unconstitutional because it deprives one of comprehensive equity and equal protection.¹⁶⁰

Regents of University of California v. Bakke, 438 U.S. 265 (1978)

In 1973 and 1974, Allan Bakke, a white male, applied and was denied admissions into the University of California Davis School of Medicine. In both years, Bakke received an interview yet was denied admission¹⁶¹. Subsequently, Bakke sued the University of California Davis Medical School and Regents of the University of California. In 1973 and 1974 University of California Medical School had two admissions programs, regular admissions and a special admissions program that entailed applicant assessment focusing on economically and academically disadvantaged minority groups of African-American, Native-American, Asian-Americana, and Hispanic descent¹⁶². Each application cycle had 100 seats.¹⁶³ 16 out of 100 seats were allotted to

¹⁵⁸Brown v. Board of Education of Topeka. 347 U.S. 483 (1954). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supremecourt/text/347/483>. Last visited: November 19, 2016

¹⁵⁹Ib.

¹⁶⁰Ib.

¹⁶¹Regents of the University of California v. Bakke. 438 U.S. 265 (1978). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supremecourt/text/438/265>. Last visited: November 19, 2016.

¹⁶²Ib.

¹⁶³Ib.

the special admission program.¹⁶⁴ Bakke's lawsuit alleges that the special admissions programs guaranteed allotment of 16 seats led to his denial of admissions and therefore violated the Equal Protection Clause of the Fourteenth Amendment.¹⁶⁵

Bakke's legal course of action began in the trial court of the State of California. As aforementioned, Bakke's legal contention asserts that University of California Davis Medical School special admissions process prohibit his admissions on the singular base of his race. The University of California Davis argued that their special admissions program was legal because it is a part of the academic freedom and autonomy of an institution to choose its students and meet their educational mission. This autonomy, the University argued, is guaranteed in the First Amendment of the United States Constitution. The trial courts ruled that the special admissions program is illegal and is in direct violation of the California State Constitution, United States Constitution, and Title VI of the Civil Rights Act of 1964, which protects people from discrimination based on race, color, and national origin in programs and activities receiving federal financial assistance. Nevertheless, the trial courts did not mandate the University of California Davis School of Medicine to admit Bakke, because he failed to prove that the existence of the special admissions program did not directly lead to the denial of his application.

Upon the trial courts decision, the university appealed the judgment that their admissions program was illegal. Moreover, Bakke appealed the trial courts unwillingness to rule that the university must admit him into the medical program. Following appeals, the California Superior Court concurred and avowed that the special admissions program was illegal. Moreover, the California Supreme Court granted Bakke admission unless the

¹⁶⁴Ib.

¹⁶⁵Ib.

university can sufficiently prove that Bakke would not have been admitted without the existence of the special admissions program. Thereafter, the university yielded its lack of ability to prove that Bakke would not have been granted Admission with the absence of the special admissions program, and appealed this decision to the United States Supreme Court. The university appeal formally inquired certiorari appraisal of the lower courts.

Upon receiving this case, the United States Supreme Court ultimately wrote six non-majority dissents. Justice Powell wrote the controlling opinion. Justice Powell's controlling opinion mandated that that race should be subject to "strict scrutiny" and utilized in compelling government interest.¹⁶⁶ In that compelling interest, Powell wrote, diversity is a government interest.¹⁶⁷ In turn, the government diversity interest justifies the utilization of a "plus one" race factor.¹⁶⁸

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

In 1996, Barbara Grutter, a white Michigan resident applied to attend the University of Michigan Law School. Grutter, who had a 3.8 Cumulative Grade Point Average (GPA) and score of 161 on the Law School Admissions Test (LSAT) was preliminarily placed on the waiting list and ultimately denied admission. In 1997, Grutter filed a lawsuit against University of Michigan and its president Lee Bollinger.¹⁶⁹ In her lawsuit, Grutter contends that she was denied admissions based on her race leading to a direct violation of Title VI Civil Rights Act of 1964 and the Fourteenth Amendment's Equal Protection Clause of the United States of America.¹⁷⁰ Moreover, Grutter alleged

¹⁶⁶Ib.

¹⁶⁷Ib.

¹⁶⁸Ib.

¹⁶⁹Grutter v. Bollinger. 539 U.S. 306 (2003). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supct/html/02-241.ZO.html>. Last visited: November 19, 2016.

¹⁷⁰Ib.

that the University of Michigan Law School utilized race as central feature of the admissions process, and gave illegal advantages to underrepresented minority groups such as those that identity as African-American.¹⁷¹ This central prioritization of race, Grutter alleges, was in overt breach of the 42 U.S.C. § 1981.¹⁷²

In retort, Bollinger and the University of Michigan Law, utilized the University of California Regents v. Bakke precedent and contended that they were following an unbiased and comprehensively compelling state interest that ultimately give a sense of certainty that marginalized subgroups minorities such as African-Americans and Hispanics were adequately represented at their institution. Moreover, Michigan Law School elucidated that their admissions process viewed their applicant's comprehensive characteristic with the goal of achieving diversity. With the legal verdict preceded in University of California Regents v. Bakke, the University of Michigan argued that their admissions process is constitutional because it is tailored to advance government interest, which is, diversity.¹⁷³

Bernard A. Friedman, Chief Judge on the United States District Court for the Eastern District of Michigan ruled against University of Michigan School of Law.¹⁷⁴ In his verdict, Chief Judge Friedman stated that University of Michigan's use of race is unconstitutional because it is not clearly tailored to serve the governments interest, it is rather, "practically indistinguishable from a quota system."¹⁷⁵

¹⁷¹Ib.

¹⁷²Ib.

¹⁷³Ib.

¹⁷⁴Grutter v. Bollinger. U.S. District Court. Eastern District of Michigan Southern Division. University of Michigan Office of Diversity, Equity, & Inclusion. <https://diversity.umich.edu/admissions/legal/grutter/gru-op.html>. Last visited: November 19, 2016.

¹⁷⁵Ib.

Noticeably yet divergently corresponding to the legal precedent of University of California Regents v. Bakke, the Sixth Circuit Court of Appeals overturned the verdict of the District Court.¹⁷⁶ In their ruling, the Sixth Circuit Court of Appeals explained that the University of Michigan Law School legally followed the Bakke precedent by utilizing their admissions process to abide to the state compelling interest.¹⁷⁷ Moreover, the Sixth Circuit Court of Appeals ruled that the University of Michigan Law Schools use of race as "potential 'plus' factor" suitably replicated the Justice Powell ascribed and approved Harvard admissions program.¹⁷⁸

Subsequent to the Sixth Circuit Court of Appeals verdict, Grutter formally implored the US Supreme Court to review their case. The US Supreme Court agreed to Grutter's petition and formally heard the first race based affirmative action case since University of California Regents v. Bakke. In a 5-4 vote, the US Supreme Court upheld the Sixth Circuit Court of Appeals verdict.¹⁷⁹ Written by Justice Sandra O'Connor, the courts ruled that the University of Michigan's Law School did not violate the US Equal Protection Clause of the Fourteenth Amendment because the clause was originally put into law to protect each individual equivalently.¹⁸⁰ Moreover, the Supreme Court ruled that University of Michigan Law School's concentration in attaining a "critical mass" of underrepresented student population was certainly in compliance to the "tailored use" legal precedent verdict of Regents v. Bakke.¹⁸¹

¹⁷⁶Grutter v. Bollinger. 539 U.S. 306 (2003). JUSTIA U.S. Supreme Court. <https://supreme.justia.com/cases/federal/us/539/306/case.html>. Last visited: November 19, 2016.

¹⁷⁷Ib.

¹⁷⁸Ib.

¹⁷⁹Grutter v. Bollinger. 539 U.S. 306 (2003). Cornell University Law School, Legal Information Institute. <https://www.law.cornell.edu/supct/html/02-241.ZO.html>. Last visited: November 19, 2016.

¹⁸⁰Ib.

¹⁸¹Ib.

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

Gratz v. Bollinger is a 2003 Affirmative Action case against the University of Michigan as well as President James Duderstadt, and President, Lee Bollinger Jr. Jennifer Gratz and Patrick Hamacher, whom both identify as Caucasian/White-American, applied for fall 1995 and 1997 academic school calendar, admission to the University of Michigan's College of Literature, Science, and Arts (LSA). University of Michigan's undergraduate admissions policy consisted of 150 point scale evaluation and rank system.¹⁸² In this admissions scale, 110 points are awarded for academic merits, and automatic 20 points is given to those that identify as African-American, Hispanic, and/or Native American.¹⁸³ Moreover, students that are from a Upper Peninsula Michigan Suburb earn automatic 16 points and students that are socioeconomically disadvantaged (regardless of race) or are attending a predominantly minority high school earn automatic 20 points.¹⁸⁴ The automatic 20 points cannot be awarded more than once.¹⁸⁵ Out of 150 scale, those that earn 100 points get guaranteed admissions.¹⁸⁶

Upon review of Gratz and Hamacher application, the University of Michigan's LSA denied their admissions application. Their application was denied because they were not comprehensively competitive enough to be admitted.¹⁸⁷ As aforementioned, Gratz and Hamacher subsequently sued the University of Michigan, LSA, President James

¹⁸²Gratz v. Bollinger. Why Michigan's Former Admissions Systems Comply With Bakke and Are Not Quotas. University of Michigan Office of Diversity, Equity, & Inclusion. <https://diversity.umich.edu/admissions/archivedocs/comply.html>. Last visited: November 19, 2016.

¹⁸³Ib.

¹⁸⁴Ib.

¹⁸⁵Ib.

¹⁸⁶Ib.

¹⁸⁷Gratz v. Bollinger. United States District Court. Eastern District of Michigan Southern Division. University of Oregon Office of Diversity, Equity, & Inclusion. http://diversity.umich.edu/admissions/legal/gratz/gra_opin.html. Last visited: November 19, 2016.

Duderstadt, and President Lee Bollinger in 1997. President Duderstadt was in the lawsuit because he was the president during Gratz's admission application entry year of 1995. President Bollinger was implicated in this lawsuit because he was the President of the university during Hamacher's admissions application year of 1997. In their lawsuit, Gratz and Hamacher allege that they were denied admission because of their racial identification.¹⁸⁸ This prejudice, Gratz and Hamacher alleged were a direct violation of the US Equal Protection Clause of the Fourteenth Amendment.¹⁸⁹ Michigan countered by claiming that their admissions process is impartial, seeks student body diversity, adheres to the precedent Supreme Court verdict and expectations of admissions process and, is therefore, not unconstitutional.¹⁹⁰

In parallel to *Grutter v. Bollinger*, this case began in the United States District Court for the Eastern District of Michigan. Moreover, this case was presided over by Patrick Duggan. Judge Duggan ruled in favor of University of Michigan. In his verdict, Judge Duggan ruled that the LAS departments use of race as a "plus" factor does not violate the constitution because diversity is a compelling interest of the university and the state of Michigan.¹⁹¹ Due to the Precedent of the *University of California Regents v. Bakke* and admissions requirement established by Justice Powell, Judge Duggan ruled that University of Michigan LAS admissions meets impartial and legal strict scrutiny and is constitutional.¹⁹² According to Judge Duggan "the University's interest requires a sufficiently diverse student body"¹⁹³ Moreover, Judge Duggan rules that although "fixed

¹⁸⁸Ib.

¹⁸⁹Ib.

¹⁹⁰Ib.

¹⁹¹Ib.

¹⁹²Ib.

¹⁹³Ib.

racial quotas and racial balancing are not necessary to achieving that goal, the consideration of an applicant's race during the admissions process necessarily is." ¹⁹⁴

Unlike *Grutter v. Bollinger*, the Sixth Court of Appeals did not issue a decision on this case. Nevertheless, the Sixth Court of Appeals allowed a concurrent oral argument hearing sessions of *Gratz v Bollinger* and *Grutter v Bollinger*.

Despite the lack of verdict in the Sixth Circuit Court of Appeals, the United States Supreme Court heard this case because the Gratz successfully filed a Rule 11 Writ of Certiorari. ¹⁹⁵ Upon taking this case, the United States Supreme Court voted 6-3 and ruled that the University of Michigan admissions process to be unconstitutional because it did not meet the strict scrutiny standard of the *University of California Regents v. Bakke* verdict legal precedent. ¹⁹⁶ In a opinion that is written by Chief Justice William H. Rehnquist, the court found the University of Michigan point based admissions system entailed discriminatory crux because it did not have equitable and individualistic review. ¹⁹⁷ This lack of individualistic review, the court ruled, produced the unconstitutional result of allowing majority of the underrepresented minority to be accepted. ¹⁹⁸

¹⁹⁴Ib.

¹⁹⁵Rule 11. Certiorari to a United States Court of Appeals before Judgment. Rules of the Supreme Court of the U.S. Cornell University Law School, Legal Information Institute.

https://www.law.cornell.edu/rules/supct/rule_11. Last visited: November 19, 2016.

¹⁹⁶*Gratz v. Bollinger*. 539. U.S. 244 (2003). Cornell Law School, Legal Information Institute.

<https://www.law.cornell.edu/supct/html/02-516.ZO.html>. Last visited: November 19, 2016

¹⁹⁷Ib.

¹⁹⁸Ib.

Fisher v. University of Texas at Austin, 579 U.S. (2016)

In 2008, Abigail Fisher, a white Texas high school senior's application for undergraduate admissions to the University of Texas at Austin was denied. The University of Texas at Austin admissions program entailed two criteria's.¹⁹⁹ Criteria number one was guaranteed admissions for any Texas high school senior that graduated in the top 10 percent of their class, regardless of race and socioeconomic background. The second criteria for admissions was a holistic process that included (but was not limited to) evaluations of the Standardized Admissions Tests, leadership qualities, community involvement, family circumstances, and race.²⁰⁰ The University of Texas at Austin holistic admissions approach, Fisher contended, was the vital factor of her denial of admission. Fisher argued, the inclusion of race in the holistic approach to admissions explicitly discriminated against her race and accepted less qualified minority students into the university.²⁰¹

In the judicial proceedings, the legal question was whether precedent description of the Equal Protection Clause of the Fourteenth Amendment in the historical decision of the 2003 United States Supreme Court case, *Grutter v. Bollinger*, legally authorize the University of Texas at Austin to have a holistic admissions approach that included race.

As it proceeded up the judicial system Judge Sam Sparks of the United States District Court for the Western District of Texas and United States Fifth Circuit Judges Emillio M. Garza, Carolyn Dineen King and Patrick Higginbotham ruled that the

¹⁹⁹Fisher v. University of Texas at Austin. 14-981. (2016). Supreme Court of the United States. https://www.supremecourt.gov/opinions/15pdf/14-981_4g15.pdf. Last visited: November 19, 2016.

²⁰⁰Ib.

²⁰¹Ib.

University of Texas at Austin adhered to the ruling and expectations laid out by the *Grutter v. Bolinger* United States Supreme Court decision.²⁰² In their ruling, Fifth Circuit Judge Patrick Higginbotham explained that the holistic approach to admissions was necessary and legal because it coincides with criteria number one for admissions (guaranteed admissions for the top 10 percentage of graduating high school seniors) and follows the interpretation of legal precedent.²⁰³ According to Judge Higginbotham, the "ever-increasing number of minorities gaining admission under this 'Top Ten Percent Law' casts a shadow on the horizon to the otherwise plain legality of the *Grutter-like* admissions program, the Law's own legal footing aside"²⁰⁴

In 2011, as a consequence of losing in the Circuit and District Courts, Fisher successfully petitioned and was granted a review by the United States Supreme Court. The United States Supreme Court officially began to take on the case and hear each side's oral arguments. Upon reviewing this case the Supreme Court agreed to a majority based 7-1 decision that the United States District Court for the Western District of Texas and United States Fifth Circuit Court did not adhere to the precedent United States Supreme Courts race centered academia admissions ruling because they were unable to sufficiently "hold the University to the demanding burden of strict scrutiny".²⁰⁵ Writing on behalf of the majority, Justice Kennedy explained that the Fifth Circuit made their decision based on good faith and not the required analysis of strict scrutiny.²⁰⁶ Therefore, the United States Supreme Court sent this case back to the Fifth Circuit Court. In sending

²⁰²Ib.

²⁰³Ib.

²⁰⁴United States of America Appeals Court. 09-50822. (2011).

http://www.naacpldf.org/files/case_issue/Fisher%20Opinion.pdf. Last visited: November 19, 2016.

²⁰⁵Fisher v. University of Texas et al. Certiorari to the United States Court of Appeals for the Fifth Circuit. 11-345. (2013). Cornell Law School, Legal Information Institute.

<https://www.law.cornell.edu/supremecourt/text/11-345>. Last visited: November 19, 2016.

²⁰⁶Ib.

the case back to the Fifth Circuit Court, Justice Kennedy argued that it is required to adhere to strict scrutiny and make the university responsible for proving that its admissions program is narrowly tailored to obtain the educational benefits of diversity.²⁰⁷

Upon return to the Fifth Circuit Court, led by Circuit Judges Emillio M. Garza, Carolyn Dineen King and Patrick Higginbotham, the Fifth Circuit Court, once again, ruled in favor of the University of Texas at Austin. Subsequently, Fisher sought a rehearing of the case before the entire judicial bench of the Fifth Circuit Court. This request was denied. Hence, Fisher, filed a Certiorari with the United States Supreme Court, and in turn, was granted this review request.

In the second review of the case the United States Supreme Court voted 4-3 and affirmed that the University of Texas at Austin's admissions program is constitutional under the Equal Protection Clause of the Fourteenth Amendment.²⁰⁸ In a majority opinion written by Justice Kennedy, the courts ruled that race could be used as one factor during a university's admissions process.²⁰⁹ Moreover, Justice Kennedy explained "The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies."²¹⁰

²⁰⁷Ib.

²⁰⁸Fisher v. University of Texas at Austin. 14-981. (2016). Supreme Court of the United States. https://www.supremecourt.gov/opinions/15pdf/14-981_4g15.pdf. Last visited: November 19, 2016.

²⁰⁹Ib.

²¹⁰Ib.

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