The Gutting of Affirmative Action: A Failure To the Fair Pursuit of Happiness

By

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ABSTRACT

Known throughout the world as the land of the free and home of the brave, The United States of America is recognized as a beacon which is enriched with opportunities for its inhabitants. However, beyond the rose-colored lenses, The United States of America, composed of diverse populations on all spectrums, continues to struggle severely with significant and potentially shattering ideological divides, particularly on issues deemed to be political, such as affirmative action. Affirmative action became a trigger term for opinions from all the perspectives following the Supreme Court's landmark decision in Students for Fair Admissions Inc. v. President & Fellows of Harvard College (2023). This ruling reversed long standing precedents, dismantling a system designed to promote educational access for underrepresented minorities, deeming its existence as fundamentally unconstitutional. The decision, critiqued as a setback for Black and Hispanic students, those who have been marginalized in the past of this country, underscores the ongoing struggle for racial equity in higher education institutions. Affirmative action, a policy rooted in addressing historical racial discrimination, is viewed by advocates like the ACLU as essential for creating diverse and inclusive academic environments. This academic Article aims to examine the implications of the Supreme Court's decision through the lens of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, not solely legally, but socially as well. It contextualizes affirmative action within a broader historical and legal framework, tracing its evolution and the legal battles that have shaped its implementation. The analysis of the decision in question underscores the moral and social contract binding American society to uphold principles of fairness and equal opportunity, especially in the educational sphere. By revisiting key cases and sociological shifts, this paper argues for the necessity of affirmative measures to rectify persistent inequalities and foster a more just society.

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INTRODUCTION

The United States is known for being the land of freedom, enriched with opportunities for its citizens by serving as a lighthouse beacon for hope of the American Dream. An emblematic melting pot of cultures, languages, and nationalities that endow the U.S. populace with a mosaic of differing opinions—at least, that is what the American people should be taking away from the variety of perspectives available to them at their fingertips. Instead, the country's people divide themselves based on personal ideologies regarding a wealth of topics, one of the most recent matters in question being the latest ruling on affirmative action by The Supreme Court of the United States and its potential constitutionality in the Summer of 2023. As best said by The New Yorker, "The history of affirmative action is woven into the history of American race relations, and the history of American race relations is woven into the history of America."[1]

On June 29, 2023, the United States Supreme Court decided on *Students for Fair Admissions Inc. v. President & Fellows of Harvard College (2023),* reversing the standing precedent on affirmative action and thus annulling a system created to provide underrepresented individuals with a path to higher education, in the name of colorblindness.[2] According to a New York Times article, said decision of the Harvard Admissions case is a deafening affront to Black and Hispanic students who aspire to attend a competitive university; statistics provided to the New York Times by the United States Department of Education shows the inequity of attendance of minorities into colleges with less than a

[1] Louis Menand, The Changing Meaning of Affirmative Action, The New Yorker, (Jan. 13, 2020), https://www.newyorker.com/magazine/2020/01/20/have-we-outgrown-the-need-for-affirmative-action

[2] Students for Fair Admissions Inc. v. President & Fellows of Harvard College (2023) 600 U.S. ___ No. 20-1199. Although this case is the catalyst for this legal Article, it is a landmark ruling that will be used to uphold future lawsuits; regardless, this case will be analyzed in further detail along the journey of this Article. For more information about this case in terms of specifics, reference: Students for Fair Admissions Inc. v. President & Fellows of Harvard College, 600 U.S. ___ (2023),

twenty-five percent acceptance rate.[3] The decision will dramatically reduce the diversity of incoming classes at selective institutions, creating a domino effect in various sectors across society. Affirmative action is a societal and legal issue that addresses the bigger picture—the need to recommit to greater equity, quality, and accessibility to American higher education for everyone.

In the words of The American Civil Liberties Union (ACLU), affirmative action is a race-conscious policy which aims to address the American track record of racial discrimination by responding to "the structural barriers that have denied underrepresented students access to higher education. Race-conscious admissions practices allow universities to consider a student's race as one factor in the admissions process in order to help create a diverse student body that enriches the educational experiences of all students."[4]

As can be inferred from the ACLU's definition of affirmative action, in order to move forward in creating a just society, it is necessary to acknowledge the country's faults and historical shortcomings to ensure that policies in the modern era are enacted and *protected* to guarantee the highest possible fairness in the land of liberty. Due to the COVID-19 pandemic, the Supreme Court of the United States had not readily convened[5] to illustrate their opinions and dissents

[3] Richard Arum, For Most College Students Affirmative Action Was Never Enough, The New York Times, https://www.nytimes.com/interactive/2023/07/03/opinion/for-most-college-students-affirmative-action-was-not-enough.html

[4] The American Civil Liberties Union was created after World War I. As terror sweeped the nation, many times the liberty of citizens paid the price. The creation of this apolitical organization resulted due to the 1920 "Palmer Raids," in which Attorney General Mithcell Palmer ordered the arrests of thousands of people without warrants and bypassed all their constitutional protections which catalyzed the events which led to the creation of the ACLU. For more information, reference:
aclu.org/news/racial-justice/what-you-need-to-know-about-affirmative-action-at-the-supreme-court

[5] In the following link, CNN Senior Supreme Court Analyst Joan Biskupic speaks about the monumental historic moment that trancurred that moment in the courtroom. Biskupic is an American journalist who analyzed the surroundings of the courtroom live on television; she explained how since the pandemic of COVID-19 rocked the world, the judges had not been physically present to discuss and announce the transition of legal precedent. For more information, reference:
https://www.cnn.com/2023/06/29/politics/affirmative-action-supreme-court-ruling/index.html

as they did in *Students for Fair Admissions Inc. v. President & Fellows of Harvard College (2023).*[6] The historical importance and significance of the new Court Justices coming together for the first time to cement this new shift on the constitutionality of affirmative action is not lost in the court-written opinion as the divided nature of the court is all but evident.

In the Court's reasoning for the decision to forgo the utilization of racial backgrounds in college admissions in *Harvard*, therefore bypassing the *Grutter* decision which will be elaborated upon later in these pages, there is a distinct recognition that was made: the Fourteenth Amendment's equal protection clause is ambiguous, so it cannot—and should not under any circumstance—be used for racially-conscious remedies which, in turn, create racial balancing in higher education institutions; that outcome would be concluded to be unconstitutional according to the opinion of Chief Justice John Roberts.[7] Racial balancing refers to the concept that a school should admit students on an equal scale of the demographics of their community, according to The National Constitution Center.[8] The majority opinion written by the Justices claim that the generality of *equal protection under the law* is not specific or focused enough to allow for the reconciliation of that guarantee with affirmative action, and instead defies its implications on the general scale when compared in the wider scope of society.

[6] *Supra* note 2.

[7] *John G. Roberts, Jr*, Oyez, https://www.oyez.org/justices/john_g_roberts_jr (last visited Jun 27, 2024)

As best described by Oyez, Roberts has been a main character in the legal sphere on the national level in the United States: "John G. Roberts, Jr. has advocated and implemented a refocusing of the Supreme Court to an era of judicial restraint and deference to the existing power structure in American politics… In 2005, Bush originally nominated Roberts to fill the seat left by Sandra Day O'Connor when she announced her plans to retire, but after Chief Justice Rehnquist died, Bush withdrew his nomination in order to nominate him to Chief Justice of the Supreme Court of the United States instead. During his confirmation hearings, the Senate responded very well to his kind Midwestern demeanor and his promise of refocusing the court into a limited role of interpreter, not creator, of laws. The Senate confirmed his nomination, making Roberts the youngest Chief Justice in 100 years. Roberts remained a political pragmatist on the bench, a persona he developed working in the executive branch under Republican leadership."

[8] National Constitution Center, Is racial balancing in schools constitutional?, National Constitution Center, https://constitutioncenter.org/media/files/racialbalance.pdf

The same thought process was first established in *Grutter v. Bollinger* (2003).[9] In *Grutter*, Justice Sandra Day O'Connor[10] delivered the majority opinion of the Court, writing that the University of Michigan's attempt at filling a certain percentage of minority applicants would "amount to outright racial balancing, which is patently unconstitutional."[11] This case, although will be elaborated upon later in this Article, is a legal cornerstone which dismantles the Harvard decision. In the case of *Grutter,* affirmative action was upheld under the emphasis that the measures in question are intended to be solely temporary in order to adequately rectify historical injustices and inequalities. Affirmative action is meant to be in place until the playing field is sufficiently addressed;

[9] *Grutter v. Bollinger*, 539 U.S. 306 (2003). Please reference: https://www.oyez.org/cases/2002/02-241

[10] Sandra Day O'Connor: First Woman on the Supreme Court, The Supreme Court of the United States, https://www.supremecourt.gov/visiting/exhibitions/SOCExhibit/Section2.aspx#:~:text=She%20helped%20repeal%20a%201913,jointly%20held%20with%20their%20spouses. ("Having already served in the three branches of state government, O'Connor was about to make an even more profound mark on history. During his 1980 presidential campaign, Ronald Reagan made a commitment to appoint a woman to the Supreme Court of the United States. When Justice Potter Stewart retired in 1981, President Reagan fulfilled that promise by nominating O'Connor, noting that she was a 'person for all seasons.' The Senate unanimously confirmed her appointment on September 21, 1981, and four days later, she took her seat on the Bench. During her nearly 25 years on the Court, Justice O'Connor was often at the center of the Court's deliberations. While personally disdaining the label 'swing vote,' O'Connor frequently found herself referred to as such by the press because her pragmatic approach to judging sometimes resulted in her vote being cast among the majority in 5-4 decisions. She authored 676 opinions in her career, 301 of which were the Opinion of the Court, touching on a wide range of issues."

[11] Although this reasoning will be further analyzed throughout this writing piece, this is the first time that the logic seems to be unbalanced in terms of the privileges that different ideologies establish as constitutionally acceptable. With both of these cases mentioned, *Grutter, supra footnote four,* and the current catalyst, the *Harvard* case, the mentality of racial balancing being unconstitutional is established by creating a sense that the minority individuals in the U.S. should not receive more assistance while non-minority groups are already on an uneven playing field to begin with. However, the *Grutter* decision served to cement the fundamental necessity of affirmative action thus ensuring its longevity for the foreseeable future, until it's gutting by the Harvard case in 2023. This will be further discussed later on, but for more information of the racial balancing opinion established by O'Connor, reference here: https://teachingamericanhistory.org/document/grutter-v-bollinger-2/

however, this mark has not been reached due to unwavering and significant racial and economic inequalities.

The present ruling in the *Students for Fair Admissions Inc. v. President & Fellows of Harvard College (2023) (the "Harvard Admissions case")* stems from the reasoning that, at the core of the Constitution, the guarantee of equal protection is an actual promise that the government is responsible for treating all citizens equally, regardless of their race, religion, sex and sexual orientations, and nationality.[12] In the fourth and final point addressed by the SCOTUS, the Fourteenth Amendment was called into question along with Title VI of the Civil Rights Act of 1964, which illustrates the prohibition of any person being discriminated against based on race.[13]

This Article aims to interpret what is believed to be the true intention, or rather, the interpretation the Court has now backtracked upon but should have upheld of the Fourteenth Amendment and the Civil Rights Act of 1964, in order to outline the necessity to create diverse mechanisms to aid marginalized groups and thus contextualize the meaning of them in efforts to justify the not-yet-ending necessity of affirmative action. The structure will be constituted by a timeline of the landmark cases which created the regulation of strict scrutiny in the attempt to conclude with a fundamental analysis of the true validity of the decision taken by the Court, taking into consideration the current state of the country and historic sociological eras.

The U.S. is built off the blood, sweat, tears, and sacrifices of all marginalized and non-marginalized groups in the country, thus, the social

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[12] As the US cements itself on the case law provided by other courts, Justice Sandra Day O'Connor (*See* note 9)held monumental importance as the first woman in the United States Supreme Court. She held conservative ideals, which are reflected in the statements echoed above and in the Harvard Admissions case. The sentiment that the government had to disregard race was written in the 1990 case of *Metro Broadcasting, Inc. v. FCC* (Metro Broadcasting v. FCC, 497 U.S. 547 [1990]).
For more information, please reference both:
https://www.law.cornell.edu/supct/html/89-453.ZD1.html#:~:text=At%20the%20heart%20of%20the,1073%2C%201083%20(1983).
[13] *Supra* note 2.

contract binding society together morphs into a moral obligation to establish pathways for everyone's equal opportunity for success. According to the George W. Bush Institute,[14] one of the most marginalized groups of the U.S., immigrants, are part of the foundational structure of the country. Immigrants arrive in the U.S. with an aspiration to seek a better life, chasing the American Dream, whilst enriching the cultural fabric, even when confronted with severe nationalist sentiments.[15] The American Dream is what many wish for themselves and their families; an opportunity for growth in a society that will afford them the chance to be a fraction of a diverse and inclusive society in which basic staples are afforded for citizens, like financial stability and education. The American Dream is a symbol–a metaphoric constellation of wishes for everyone: it can symbolize money, safety, or simply a place where such dreamers think they will get the opportunity to seek one's true potential instead of hitting a glass ceiling, a tragic illusion of opportunity. However, the reversal of affirmative action in educational institutions makes it increasingly difficult for underprivileged students to enter selective colleges, which can be observed

[14] Carlos Gutierrez, Immigrants Put America First: In Coming Here, They Affirm Our Values, The Catalyst, https://www.bushcenter.org/catalyst/democracy/gutierrez-immigrants-validate-values#:~:text=The%20United%20States%20is%20a,and%20making%20our%20democracy%20stronger.

[15] *Id.*
The U.S. is often referred to as a melting pot–it was even referred to as that in the first paragraph of this note. That is a true statement; the country was founded upon immigrants, yet over two centuries later, a nationalist and patriotic sentiment surrounds immigrants in a negative connotation. As described by The George W. Bush Institute, "even though nearly all Americans are descendants of immigrants, [Americans] have often had a tempestuous relationship with newcomers. Whether because of nationalist sentiment, xenophobia, or simply fear of change, our country has at times enacted policies that have run contrary to American ideals. The Chinese Exclusion Act, the 1924 Immigration Act, or quota-based laws restricting immigration from certain parts of the world, are just a few examples of reactionary policies that gained wide support in the past. Today we are living through a resurgence of these sentiments. At a time of rapid change driven by technology, globalization, and demographics, there are many Americans who are directing their fears toward immigrants." There is a clear recognition that marginalized groups, such as immigrants, are part of the backbone and foundation of the U.S., yet these immigrants are discriminated against.

through the following two data sets, thus hindering the fair pursuit of a better future, *of a better tomorrow*.

In an observational study conducted in Texas circa 2004 after the 5th Circuit Court's decision in *Hopwood v. University of Texas* (1996),[16] the primary conclusion enhanced the idea that "the [end of the] use of race in college admissions in Texas [...] immediately impacted the application behavior of minority students."[17] That specific study observes the behavior of student applications in line with the following data points provided by The U.S. Department of Education via The New York Times which analyzes the actual statistics regarding admissions. The data in the aforementioned article accentuates the current demographic state of minority admissions into selective institutions, in which "the majority of Black and Hispanic students attend universities that accept more than three-quarters of their applicants," since according to college admission rates of 2021, less than five percent of minority students who applied to institutions with less than a twenty percent acceptance rate were actually accepted.[18]

The lack of appropriate measures to further promulgate the promise of *Brown v. Board of Education* (1954)[19] is an issue that legislators and politicians

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[16] Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996)

[17] It is important to note and understand the specific statistics that enhance the conclusion that ending affirmative action does indeed lower minority applicants' admissions. In the study conducted for statistics, it was found that Hispanic students applying to college dropped by approximately 1.6 percentage points whilst that of African-American students dropped by 2.1 percentage points; the conclusion parallels the end of affirmative action in Texas due to *Hopwood v. University of Texas* (1996) not affecting the application of white students. This conclusion of affirmative action playing a strong role in the applications of these minority students is also reflected through the plan passed by the Texas State … Legislature. The House Bill 588 of 1997, also commonly referred to as the "Top 10% Rule," guaranteed students who graduated in the top ten percent of their high school class admission to any public college in Texas. After this bill was passed in the southern, heavily immigrant-population based state, the percent of minority students who applied to college increased significantly according to the study.
For more information, reference: Lisa M. Dickson, *Does ending affirmative action in college admissions lower the percent of minority students applying to college?,* Volume 25, Issue 1, Economics of Education Review, Pages 109-119 (2006).

[18] *Supra* note 3.

[19] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (*See* note 49)

must take action upon, and rectify in a timely and adequate manner, in order to render a better future for the next generation of young adults entering positions entrusted with power and authority to mold the tomorrow. The true meaning of *Brown* in today's age is that of a symbol of the continuing disparities in educational access across the nation. According to sixty-five members of the United States Congress, "*Brown* does not stand for an absolute commitment to 'colorblindness.' Rather, the promise of *Brown* has always been about undertaking affirmative efforts to reduce racial isolation and promote educational equity."[20] Unfortunately, not too long ago, there was a time in the country when students of different skin colors could not be taught in the same classroom, which the United States judicial system permitted and reinforced as legal under *Plessy v. Ferguson* which gave rise to the doctrine of "separate but equal."[21]

The deep wound created by past injustices based on the color of one's skin or socio-economic status must be mended. Without affirmative action, there is a weaker legal precedent that forces and enshrines the obligation upon the U.S. population to commit to fostering a more equitable workforce and educational field because as referenced in the surveys' data previously mentioned, the wind to the sails of students dreaming of higher education is cut short because the of the lack of legal precedent standing behind them as a guardian angel.

It is of imperative importance for there to be a bipartisan consensus reached by all citizens in order to work together towards a future that can afford all children an equal chance to succeed, regardless of the color of their skin, their parents' socioeconomic status, or their creed. In order to foster that,

[20] Presented is a memorandum style brief presented by Robert C. "Bobby" Scott, a member of the 118th United States Congress. Along with him, another sixty four members of congress joined him as *amici curiae* supporting respondents in the conclusion reached within this brief. This specific excerpt from the submission showcases the fundamental promise for the promotion and fostering of educational equity, which seems to be a priority that has been lost in favor of other factors in the constitutional and societal juristic hierarchy. For more information, reference: https://www.supremecourt.gov/DocketPDF/20/20-1199/232377/20220801142100516_20-1199%20aNd%2021-707%20Amici%20Brief.pdf.

[21] Plessy v. Ferguson 163 U.S. 537 (*See* note 41).

constitutional precedents and the law of the land must be respected and abided by to ensure a fair system, while additionally being interpreted in such a way that ensures an understanding in alignment with the needs of the society at the time of judgment. Although at first glance one may believe that the previous notion aligns more with colorblind holistic approaches to admissions, it actually orients itself to solve and compensate for past inequities such as Jim Crow laws[22] and discrimination against minorities. These inequities allowed for a social hierarchy to be established, a system that goes against America's creed of individual liberty and freedom which is not compliant with the ideal of individual autonomy, nor is it a respectful and rich legacy to leave the children who now grow up to be the leaders of tomorrow. Creating this harsh, segregated, and unequal playing field based on the color of one's skin only establishes the true and fundamental inconsistency that current policies have with the Declaration of Independence, that although the the pyrrhic truth is self-evident about all being equal, there is no such veracity about the existence of the fair *pursuit of happiness.*

AFFIRMATIVE ACTION'S JOURNEY IN JURISPRUDENCE AND LEGISLATION

In order to be able to analyze the debated unconstitutionality or societal validity of the latest SCOTUS precedent on affirmative action, it is of the essence

[22] History.com Editors, Jim Crow Laws, HISTORY (Feb. 28, 2018), https://www.history.com/topics/early-20th-century-us/jim-crow-laws.
The notion of Jim Crow laws are those which were imposed following the freeing of slaves in the American Southern States, The were constituted as a collection of State and local regulations and statutes enacted that even without slavery, continued to racially segregate and discriminate against African Americams. These measures consisted of "separate but equal" facilities in which White Americans and African Americans could not share the same schools, transportations, and services. This discrimination was also institutionalized by systemic limits put to African Americans in the political system which barred the proper democratic values and procedure to proceed.
(*See* note 48).

to be cognizant of previous landmark jurisprudence which have left a lasting impression on case law regarding the admissions criteria of selective higher education institutions. Starting from the origins of the country in 1776, to 2023, affirmative action stems from the gradual implementation of the blessings of liberty, which were however broken at intervals as a society and justice system. As a common law system, the gradual incorporation and affirmation of such laws and case judgements that rule in favor of creating more equality in American society is contested by the *Harvard* case, a blatant reversal of all progress which will now be organized chronologically. This upcoming segment of the Article aims to create a timeline for a historical contextualization of differing pieces of legislation, jurisprudence, and more that will at length, aid the final analysis to understand the disputed legality of the *Harvard* case.

I. The Declaration of Independence (1776)

1776, a time of turmoil that became a pivotal point in the history of the western world. Aggrieved European settlers' struggle for independence came from the breaking point caused by the treatment that the English Crown had with them from afar. The iconic line which is illusioned in the title of this Article, of *a* [*fair*] *pursuit of happiness,* was coined in The Declaration of Independence (1776), as part of a larger proclamation on the heavily guarded parchment which presented numerous grievances by the people against the monarchy. The Second Continental Congress adopted *the Declaration*, which was drafted by some of the founding fathers of The United States of America with the ideas of the Enlightenment paving its way, and revolutionizing the democratic republics foundation.[23] In this Declaration, it is written that "we hold these truths to be self-evident, that all men are created equal, that they are endowed by their

[23] Matthew Wills, Who Wrote The Declaration of Independence?, JSTOR, (July 2, 2016), https://daily.jstor.org/who-wrote-the-declaration-independence/

Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness."[24]

This is where the derivation of this Article's title comes from. Although The Declaration of Independence legally has no binding effect whatsoever, it resembles more of a patriotic sentiment that the country cherishes and respects to the highest standard as it is the document that purely recognizes freedom, liberty, and the pursuit of happiness to its highest extent. As the United States has progressively become further politically polarized,[25] there is a remnant of ardor to upkeep certain promises that the country was founded upon, one of them being a *fair and equal* pursuit of happiness for all which must be perpetually fought for. *The Declaration* says that all men are created equal, and that equality has slowly but surely been expanded to include groups that were then discriminated against; that is where *fairness* comes in. The term fairness is completely subjective, and so is the concept of happiness– it is but an abstract concept, but the fair pursuit of happiness is the idealistic standard upon which society should revolve around– to work in an effort to reach that ineffable pinnacle.

Certainly, there are codified inalienable rights for all members of the country, but all of them, especially those that are taken away from those who are historically most vulnerable, must be continuously fought for at each strike

[24] Declaration of Independence: A Transcript, National Archives, (July 4, 1776), https://www.archives.gov/founding-docs/declaration-transcript

[25] Andrew Daniller, Americans take a dim view of the nation's future, look more positively at the past, Pew Research Center, (April 24, 2023), https://www.pewresearch.org/short-reads/2023/04/24/americans-take-a-dim-view-of-the-nations-future-look-more-positively-at-the-past/

According to Pew Research Center, the future of the nation seems dim in the eyes of the citizens. A conclusion to a recent study showed that Americans believe multiple factors of their society will steadily decline by the year 2050. Specifically, what is referenced in this Article is that there is already a general consensus among the public opinion that country is politically divided, and that sentiment and division will grow deeper by the year 2050, as will the divide in socio-economic terms which is known to be a a debated political issue in terms of taxation and over national wealth and debt. In this research analysis deduced by Daniller, the surveyed Americans also came to the conclusion that the economy will grow weaker in trend with the decline of the U.S.'s status as a powerful nation, also referred to as a super country, in international relations.

against them in order to ensure a true representation of the people's will, alongside equal protection and opportunity. The sensibility of the founding fathers to include such a point in their beloved declaration of freedom, is to be interpreted contextually in an evolving manner, in which nowadays, that fair pursuit of happiness is expanded to everyone, not solely to those who they had in mind. For instance, since the conception of the happiness pursuit being coined in the Declaration of Independence, the United States' suffrage has expanded to include all free people and in consequence per the same rationale or logic, happiness is a commodity that should be afforded to all as well. That is truly the charm of the law, it is alive and ever-changing with the times, adapting to the needs of those who adhere to its societal contract. Affirmative action should be considered a new aspect of that clauses' scope afforded to all for the pursuit of happiness; it is fundamentally against the principles on which the nation was built on, to not implement certain measures to maximize general welfare, liberty, and consequently, happiness. The idea that *all men are created equal* calls for equality, but there must be equity first. There is an ongoing debate whether affirmative action does not in fact honor the idea of equality among men because of the differing treatment when in reality, equality among men is a goal we must still work towards reaching. Marginalized groups to this day still are not conceded the same prospects in rights as essential as education, and other vital areas of human development, such as employment.[26] Affirmative action focuses on equity and balancing out historical injustices in order to truly honor the concept and ideal of all men being created equal.

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[26] Harry J. Holzer, Why are employment rates so low among Black men?, Brookings, (March 1, 2021), https://www.brookings.edu/articles/why-are-employment-rates-so-low-among-black-men/ ("For decades, a research literature by social scientists has documented earnings and employment gaps between Black and white Americans, and between Black men and other men more specifically, and analyzed their causes. In my view, the major causes of lower employment and earnings among Black men than other groups can be summarized as follows:
Proximate causes: Lower education, skills and work experience
Ultimate causes: Discrimination and social/spatial isolation
Mediating factors: Lower marriage/child custody rates and worse health
Reinforcing long-run factors: Crime/incarceration and child support")

II. The Constitution of the United States (1788), XIV Amendment (1866)

Advancing ahead to years later, the U.S. had gained their independence from the British monarchy claiming ill treatment by the Crown, and fighting for their lawful equality, thus the legendary *no taxation without representation*.[27] In consequence, after trial and error with their first constitution, The Articles of Confederation,[28] the people settled and ratified the arguably oldest Constitution in the world today, the U.S. Constitution.[29] As the father of the Constitution, James Madison carefully crafted the preamble with similar values presented in The Declaration of Independence.[30] The preamble of the supreme law of the land commences with a strong unification of all, "We the People" which continued to enumerate the principles which are aspired to be instilled in the document such as "establish[ing] Justice, insur[ing] domestic Tranquility, provid[ing] for the common defense, promot[ing] general Welfare, and secur[ing] the Blessings of Liberty to ourselves and our Posterity."[31]

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[27] On this day: "No taxation without representation!", National Constitution Center, (Oct 7, 2022), https://constitutioncenter.org/blog/no-taxation-without-representation
The now DC-area license plate motto gains its origin from The Stamp Act Congress that led to the Colonies' declaration that it was fundamentally unfair for the Crown to tax American settlers who lacked proper representation in the British Parliament. This was in the midst of simmering disapproval from settlers against the Crown's blatant disregard for their natural rights.

[28] The Articles of Confederation, National Archives, (1774-1779), https://www.archives.gov/milestone-documents/articles-of-confederation#:~:text=The%20Articles%20of%20Confederation%20were,day%20Constitution%20went%20into%20effect.

[29] 10 Oldest Constitutions In The World (Updated 2023), Oldest, (2023), https://www.oldest.org/politics/constitutions/
With a wide range of time and territory to dive into, the U.S. boasts the arguably oldest Constitution in the world. The term arguably comes from the fact that it is the oldest one in existence which is completely codified; the one that is the oldest, but does not actually have all its papers fully codified is the Constitution of San Marino which was ratified on October 8th, 1600, as part of a unitary parliamentary dictatorial republic.

[30] About the Constitution, National Constitution Center, https://constitutioncenter.org/the-constitution/about-the-constitution-faqs#:~:text=WHO%20WROTE%20THE%20CONSTITUTION%3F,insights%20into%20the%20drafting%20process.

[31] We the People, National Constitution Center, constitutioncenter.org/the-constitution/preamble

This Article aims to establish the unconstitutionality of the latest affirmative action precedent in the United States, by examining case law, but also binding documents of legal nature. This is the first of those documents; the Constitution is the supreme law of the land which comprises the codification of those inalienable rights of the people; many of those which are found within the first ten Amendments of the Constitution, also regarded as the Bill of Rights.[32] The rights to be considered fundamental cornerstones to this Article's argument are those annexed during the Reconstruction Era.

The Reconstruction Era (1865-1877)[33] followed the Civil War period in which the fallout between states induced a necessary desegregation, while also accommodating newly freed people who were about to start their life still in disadvantaged circumstances. There was enactment of legislation which limited the ability of historically disadvantaged groups, in this case referring to recently-freed slaves, which now had the so-called opportunity to construct their own lives independent of others, for the first time in American history; however, this was scantily more than a hollow promise, an illusion of what should have happened but was still a faraways way from the reality. State and local legislatures passed the Black Codes and Jim Crow laws restricting these individuals,[34] but measures to counteract were also instituted, namely the Reconstruction Act of 1867.[35] In a historical way, enfranchised Black people were given a voice, which caused a violent reaction from what is now known as the *Klu Klux Klan*.[36]

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[32] The Bill of Rights, National Archives, (1789), https://www.archives.gov/founding-docs/bill-of-rights-transcript

[33] Reconstruction, History, (April 24, 2023), www.history.com/topics/american-civil-war/reconstruction

[34] *Id* 33.

[35] The Reconstruction Acts of 1867, Facing History & Ourselves, (April 27, 2015), https://www.facinghistory.org/resource-library/reconstruction-acts-1867

[36] As defined by Merriam Webster, The *Klu Klux Klan* (hereinafter the KKK), is a violent secret fraternal society founded post the Civil War, in 1915 in southern region of the United States, to maintain white Protestant cultural and political power so in consequence to upend the Black political and social power that was being established during the Reconstruction era in which Jim

This clear tug-of-war tensions which surged high during the Reconstruction era in the U.S. served as the catalyst for the ratification of what are now known as the Reconstruction Amendments. These amendments are composed of the Thirteenth, Fourteenth, and Fifteenth Amendments. Although all three of these constitutional amendments paved the way for the promulgation of gradual equality in the 1800's epoch of the U.S., the one that has been a sword and shield in jurisprudence is the Fourteenth Amendment, whose frequently litigated clause guarantees equal protection.[37] The Fourteenth Amendment was the piece of legislation that the Supreme Court Of The United States found was violated by affirmative action programs, thus overruling prior decades worth of precedent established in other SCOTUS decisions. In the 6-3 decision of the *Harvard* case, Justice Roberts wrote on behalf the majority, stating that the involvement of ambiguous measures and racial stereotyping cannot be reconciled with the notions of guarantees of the Equal Protection Clause since if it is used as a measure, the touchstones of an individual's skills and abilities is not the deciding factor, but their skin color, thus not based on merits.[38] The legal reasoning which uses the Fourteenth Amendment for the recent precedent is flawed. As Justice Sonya Sotomayor formulated in the dissenting opinion, the equal protection clause has been upheld time after time as "enshrin[ing] a guarantee of racial equality," but that would only be viable if this were in a

Crow laws remained prevalent as well. For more information, please refer to: https://www.merriam-webster.com/dictionary/Ku%20Klux%20Klan

[37] 14th Amendment, Cornell Law School, https://www.law.cornell.edu/constitution/amendmentxiv

[38] However, it must be noted that in this sense, there would be an emphasis on merit and overall governing meritocracy over any other ideological social structure. Although at first glance, this implementation is equal and thus promotes opportunity for all, it falls short in the practical application as its utopic nature is fundamentally the issue. In order for a meritocracy to work, in the abstract sense, there needs to be a binding social contract in which there is absolute certainty that everyone would be solely and uniquely judged on skills and merits, and no consideration on factors such as skin color or ethnicity or socio-economic class. However, although perhaps cynical, the current state of modern society does not allow for the triumph of this idealistic mindset that is a meritocracy, thus–solely basing entrance to a higher education institution when the playing field has been uneven and unequal from the point of commencement, it consequently undermines the unfathomable and unattainable true essence of a meritocracy.

society that was colorblind–which Sotomayor argues that the U.S. has not yet achieved this standard.[39]

III. Plessy v. Ferguson (1896)

To set the scene, succeeding the Reconstruction amendments previously detailed in this Article, *Plessy v. Ferguson*[40] is an influential case due to the societal reinforcement of segregation cemented in the country. This case is one of the most infamous cases in the U.S. which subsequently structured and defined an era of jurisprudence which restrictive laws were founded upon, but ultimately has gradually been the catalyst towards progress in the civil rights arena of the law. For context, this case is a landmark decision that comes about as the consequences of the Reconstruction Era's judicially and constitutionally validated segregation through the doctrine of "separate but equal."

In 1892, an African American man, Homer Plessy, a passenger on a train, refused to sit in the car strictly for Black people, claiming that his constitutional rights were violated. In the end, he was arrested by the onboard train conductor and a private detective. Backtracking, the Louisiana State Government had recently passed The Separate Car Act of 1890 that required all railway passengers to have "separate but equal" accommodations and facilities for Black

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[39] Sonia Sotomayor, Oyez, https://www.oyez.org/justices/sonia_sotomayor (last visited June 9, 2024).
("Sonia Sotomayor–the fearless federal trial court judge who saved Major League Baseball from a ruinous 1995 strike–entered the record book as the first Hispanic and the third woman to serve on the High Court. Sotomayor was born in the Bronx on June 25, 1954 to Juan Sotomayor and Celina Baez, both native Puerto Ricans… [The Obama Administration] nominated Sotomayor on May 26, 2009 and, in what Democrats called an "easy one," the Senate confirmed her on August 6, 2009 on a 68-31 vote divided mostly along party lines. Hispanics celebrated her appointment to the Supreme Court as a first, and the working-class of the Bronx hailed the success of one of their own… Sotomayor has specifically fought for the protection of affirmative action programs. She wrote a 58 page dissent in Schuette v. Coalition to Defend Affirmative Action, which held that prohibitions to state universities from considering race in admission decisions was constitutional.")

[40] *Supra* note 21.

and White Americans.[41] This law was in trend with the general sentiment of White Americans at the end of the century towards African Americans. Although not nearly to the same degree, post-slavery U.S. was starting to see the gradual influence by these previously enslaved individuals in areas of society that were breaking previously pristine molds and limits. This unfamiliar circumstance prompted a strong desire to develop regulations to maintain the races separate, and on paper, equal. The justification of *Plessy v. Ferguson* is indicative of said particular social nature the U.S. was encircled by, since the decision became the justification for the stronger implementation of Jim Crow laws across the southern half of the country.[42] The incident that was the instigator to this case was the inclination by the Committee of Citizens[43] to test and ultimately re-appeal the Separate Car Act. According to Oyez, Plessy was recruited due to this special characteristic of seeming physically Caucasian; Plessy described himself as seven-eights Caucasian and solely one-eighth of color which was the reason he was asked to sit in the "whites only" car on a Louisiana train.[44] This was allegedly the strategy of the lawyer who was going to represent him since theoretically having "someone of mixed descent cause the infraction [would] only highlight further the arbitrary nature of the term 'colored.'[45]

The case embarked to answer the question if the previously mentioned Separate Car Act violated the Fourteenth Amendment. The SCOTUS rejected Plessy's argument of constitutional right violations, and instead ruled in the majority opinion that a law that "implies merely a legal distinction between the

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[41] Plessy v. Ferguson, Georgia College & State University, https://www.gcsu.edu/sites/files/page-assets/node-2213/attachments/separate_but_equal_educational_resources.pdf

[42] *Supra* note 33.

[43] Fatima Shaik, Comité des Citoyens, 64 Parishes, (Nov. 16, 2022), https://64parishes.org/entry/comite-des-citoyens
("The Comité des Citoyens, or Citizens Committee, was an equal rights organization formed in September 1891 by a group of French-speaking men of African descent to resist the resurgence of white supremacy in Louisiana, codified by segregation after Reconstruction."

[44] *Plessy v. Ferguson*, Oyez, https://www.oyez.org/cases/1850-1900/163us537 (last visited Sep 1, 2023).

[45] *Supra* note 33.

white and colored races–a distinction which is founded in the color of the two races and which must always exist so long as white men are distinguished from the other race by color–has no tendency to destroy the equality of the races,"[46] thus the distinction could not merit unconstitutionality even if its decision implied the inferiority of the African-American race. This cardinal affirmation that segregation was constitutional due to the creation and endorsement of the "separate but equal" doctrine which satisfied the requirements of the Fourteenth amendment, leading to further promulgation of the Jim Crow laws and legitimized the U.S. Segregation Era.[47] This doctrine proved to be inherently inaccurate for its purpose since these separate facilities only proved the economic disparities caused by the limitation of African Americans to begin with in many aspects of society. They have been a group historically underrepresented and underprivileged, which is a critical reason as to why disparities caused by race in the education system must be taken into account in the form of some variation of affirmative action in college admissions.

[46] *Supra* note 21.
[47] Jim Crow Laws, History, (Aug. 11, 2023), https://www.history.com/topics/early-20th-century-us/jim-crow-laws ("Jim Crow laws were a collection of state and local statutes that legalized racial segregation. Named after a Black minstrel show character, the laws—which existed for about 100 years, from the post-Civil War era until 1968—were meant to marginalize African Americans by denying them the right to vote, hold jobs, get an education or other opportunities. Those who attempted to defy Jim Crow laws often faced arrest, fines, jail sentences, violence and death.")

IV. Brown v. Board of Education of Topeka (1954)

Fast forward over half a century later, a unanimous ruling[48] in the landmark civil rights case began the path to reversing the *Plessy v. Ferguson*[49] doctrine of "separate but equal." On May 17th, 1954, Justice Earl Warren of the SCOTUS delivered the new reversing precedent of *Brown v. Board of Education of Topeka*[50] that stated that state-sanctioned segregation in public schools was indeed a violation of the Fourteenth Amendment's guarantee of equal protection and was thus declared unconstitutional.

Since *Plessy v. Ferguson,* racially segregated public facilities were validated legally as long as said facilities for both Black Americans and Whites were equal. However, since the 1950's, the National Association for the Advancement of Colored People (NAACP)[51] had been filing lawsuits to challenge segregation in schools on behalf of those restricted. In the case that became famous, the filing plaintiff, Oliver Brown, was the father of a young girl, Linda Brown, who was not allowed to attend school at an institution closer, safer, and better equipped than the one she was assigned to. Brown claimed in this class-action based lawsuit that the facilities for white students were not the same as those afforded to black students in the same area; instead the schools for African Americans were inferior to those offered to white students in terms of facility utility, teachers, and overall quality of education. Although those conditions were brought up during the case, the primary argument made by the NAACP was that the segregation present in these educational facilities was a

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[48] *See* note 50.
A rather interesting nuance to this case that could have created a decidedly different case law path was that the original Chief Justice Fred M. Vinson held the opinion that the verdict of *Plessy* should stand, thus the court was divided on how to rule in terms of school segregation. However, in September of 1953, shortly before *Brown* was going to be heard, Vinson passed away and was replaced by Earl Warren, the Chief Justice who wrote the unanimous opinion and thus shifted and paved the way for the new era of case law in terms of civil rights. See reference: https://www.history.com/topics/black-history/brown-v-board-of-education-of-topeka

[49] *Supra* note 21.

[50] Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)

[51] About NAACP, NAACP, https://naacp.org/about

violation of the Equal Protection clause found in the Fourteenth Amendment because regardless of the previously established "separate but equal" doctrine, the codified goal of the Fourteenth Amendment was to keep the social, educational, and overall quality of life between races equal but those were not the consequences present in the *Brown* case.[52] The corresponding district court heard the case in 1951 and determined that the conditions of the schools called into question were similar, citing the precedent set by *Gong Lum v. Rice (1927)*[53] which upheld segregation in educational institutions.

By the time *Brown* headed to the Supreme Court of the United States, they consolidated *Brown* with three more class-action school-segregation based lawsuits filed by the NAACP including *Briggs v. Elliot (1951),*[54] *Davis v. County School Board of Prince Edward County,*[55] and *Gebhart v. Belton (1952)*[56] while

[52] Brian Duignan, Brown v. Board of Education, Britannica, (Aug. 11 2023), https://www.britannica.com/event/Brown-v-Board-of-Education-of-Topeka

[53]Gong Lum v. Rice, 275 U.S. 78 (1927), Page 275 U. S. 85.
This case faces the question whether a Chinese citizen of the United States is "denied equal protection of the laws when he is classed among the colored races and furnished facilities for education equal to that offered to all, whether white, brown, yellow, or black," in which the decision said that it is not a violation of equal protection of the law.

[54] Briggs v. Elliott, 98 F. Supp. 529 (E.D.S.C. 1951)
This cases faces the declaration that the educational facilities provided for African American children in a South Carolina school district are inferior to those provided to white children in that same distrcit which amounts to the denial thus violation of the "equal protection of the laws guaranteed them by the Fourteenth Amendment to the Federal Constitution, and further that the segregation of Negro and white children in the public schools, required by Article 11, section 7 of the Constitution of South Carolina and section 5377 of the Code of Laws of that state,[1] is of itself violative of the equal protection clause of the Fourteenth Amendment."

[55] Davis v. County School Board of Prince Edward County, 149 F. Supp. 431 (E.D. Va. 1957)
The corresponding U.S. district court decided against the plaintiff, ruling on the basis of *Plessy* citing that they had not been deprived of equal protection under the law because the schools in question were comparable to the all-white schools, or would at least be so by the time the ordered renovation were completed, as ordered by the district court.

[56] Gebhart v. Belton, 87 A.2d 862 (1952)
This case, as is the case with previously referenced ones called into question "whether the State of Delaware, through its agencies, has violated the plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Two actions were filed. They were consolidated for trial purposes and are here being decided." In this case, the minors sued on behalf of themselves and others in similar situations. The plaintiffs are African Americans who are residents of the Claymont Special School District in New Castle Country.

Bolling v. Sharpe (1951)[57] was filed independently. Due to distinguishing circumstances surrounding each unique case, *Brown, Biggs,* and *Bolling* were appealed to and consolidated by the SCOTUS while *Gebhart* and *Bolling* were also considered during *Brown* because each were granted certiorari.

As he wrote for the court, Chief Justice Warren[58] argued beyond the scope of the "separate but equal" doctrine. Justice Warren cited previous SCOTUS rulings which recognized the inequalities between graduate level schools for both African Americans and all-white schools. Specifically, there was a social and pedagogical factor considered which was that the policy in place for the better half of a century which force-separated students wholly based on race created a sense of "inferiority that undermined their motivation to learn and deprived them of educational opportunities they would enjoy in racially integrated schools."[59] Justice Warren concluded that "in the field of public education, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the

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They were refused admission into Claymont High School, a public education institution maintained by the government for exclusively white children only, solely based on the color of their skin and consequently, their ancestry. The plaintiffs are only allowed to attend Howard High School and Carver Vocational School, which are administered by the Wilmington School District which solely has an informal arrangement with the State Board. Both these institutions are also located approximately nine miles from the plaintiffs' residences. To further prove a severe issue, the plaintiffs and guardians belong to a class who are subject to taxes which incidentally are in connection to those used in the construction of Claymont High School, the facility-iwse superior school only for white students; the one they are not permitted to attend under *Plessy's* doctrine of "separate but equal."

[57] Bolling v. Sharpe, 347 U.S. 497 (1954)

In this special and unique case, the U.S. district court ruled that school segregation did not violate the Fifth Amendment's due process clause.

[58] *Earl Warren*, Oyez, https://www.oyez.org/justices/earl_warren (last visited Jun 27, 2024).

("Warren was sworn in as the 14th Chief Justice on October 4, 1953. Since he was not attracted to national politics, however, his role as a "Republican" was not as predictive of his role on the Supreme Court as Ike had thought. Warren's position as Chief was one of courage and flexibility in carving new paths. Warren joined the Court in the midst of some of its most important issues – racial segregation in public schools and the expansion of civil liberties. The new Chief proved an effective leader as he brought the Court from division to unanimity in many cases.")

[59] *Supra* note 50.

segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."[60]

This milestone decision signaled the termination of legalized segregation in schools which slowly spread to other sectors of life in the U.S.. However, it would still be a long path to continue marching for further inclusion and promulgation of equal legislature for all citizens regardless of the color of their skin. This case fueled the civil rights movement; a year later, the mother of the civil rights movement, Rosa Parks,[61] would refuse to give up her seat on a bus in Alabama. This simple yet catalytic action would spark boycotts and demonstrations in the movement that would ultimately end the Jim Crow laws across the South, and later be the trigger for Martin Luther King Jr. to address the nation with the speech full of wishes that one day his dream of an equal society would come true. Many of us are still waiting for his words to one day ring true across all classrooms and workplaces, because, despite its impact, the historical verdict's reparations have arguably not been achieved. A continued debate over racial inequality in the U.S' school system is still largely at play and based on residential, resource, and economic patterns. Until then, one must wait with "all deliberate speed,"[62] as history unfolds into a stronger tomorrow.[63]

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[60] *Supra* note 37.

[61] Rosa and Ramond Parks Institute, Rosa Parks–The mother of the modern day civil rights movement, Black History Month, (Jan. 2, 2023), https://www.blackhistorymonth.org.uk/article/section/civil-rights-movement/rosa-parks-the-mother-of-the-modern-day-civil-rights-movement/

[62] "With All Deliberate Speed," Smithsonian National Museum of American History, https://americanhistory.si.edu/brown/history/6-legacy/deliberate-speed.html#:~:text=The%20Brown%20decision%20declared%20the,the%20opportunity%20to%20organize%20resistance. ("The *Brown* decision declared the system of legal segregation unconstitutional. But the Court ordered only that the states end segregation with "all deliberate speed." This vagueness about how to enforce the ruling gave segregationists the opportunity to organize resistance. Although many whites welcomed the *Brown* decision, a large number considered it an assault on their way of life. Segregationists played on the fears and prejudices of their communities and launched a militant campaign of defiance and resistance.")

[63] Lonnie Bunch, The Little Rock Nine, The Smithsonian's National Museum of African American History and Culture, https://nmaahc.si.edu/explore/stories/little-rock-nine
Three years after the verdict of *Brown,* the event that came to be known as Little Rock Nine came to be known because of nine teens who were the first African American students to enter

V. The Civil Rights Act of 1964, Title VI

As the clock continued to tick, schools slowly became desegregated across the nation. Following the trend, pieces of legislation were slowly introduced into state legislatures and ratified, yet sometimes with resistance as a turbulent time of hate crimes and civil disobedience filled the streets of the Southern states, thus embarking upon a dark age which would lead to the Civil Rights Movement– a fight for equality. *Brown* became the partial catalyst for the civil rights movement across the country that sparked hot debate. Following that judicial decision, in the summer of 1955, there was a unique surge of anti Black violence coined racial terrorism and overall resistance to the desegregation of the races. Some of these violent attacks included the brutal lynching of Emmett Till[64]

Little Rock's Central High School in Arkansas. The decision of *Brown* stipulating "with all deliberate speed" caused a very slow desegregation in public schools since the idea, across the South, was drenched in bitterness and anger by the community. The state governor Orval Faubus ordered the State's National Guard to block the students entrance on September 2, 1957 on that day and again until President Dwight Eisenhower federalized the National Guard and the students were escorted by the U.S. Army 101st Airborne and National Guard soldiers on September 25, 1957. ("However, their ordeal was far from over. Each day the nine teens were harassed, jeered, and threatened by many of the white students as they took small steps into deeper, more turbulent waters. That spring, on May 27, 1958, Ernest Green became the first African American graduated from Central High.")

[64] The Murder of Emmett Till, Library of Congress, https://www.loc.gov/collections/civil-rights-history-project/articles-and-essays/murder-of-emmett-till/
("The murder of 14-year-old Emmett Till in 1955 brought nationwide attention to the racial violence and injustice prevalent in Mississippi. While visiting his relatives in Mississippi, Till went to the Bryant store with his cousins, and may have whistled at Carolyn Bryant. Her husband, Roy Bryant, and brother-in-law, J.W. Milam, kidnapped and brutally murdered Till, dumping his body in the Tallahatchie River. The newspaper coverage and murder trial galvanized a generation of young African Americans to join the Civil Rights Movement out of fear that such an incident could happen to friends, family, or even themselves… Two of Emmett Till's cousins, Wheeler Parker and Simeon Wright, witnessed Till's kidnapping on the night of August 28, 1955 at the home of Moses Wright… Parker describes the funeral in Chicago, which drew thousands of people: 'The solemn atmosphere there, you know, it's just–it's just unbelievable, I guess you could say. The air was filled with just, I guess, unbelief and how could it happen to a kid? People just felt helpless.'")

and white mobs setting upon African Americans[65] but were answered with widespread protests from both Black and White Americans along with civil disobedience; one of these particular instances included the bus boycott in Alabama in December of 1955, led by Reverend Martin Luther King Jr.[66]

As previously seen, after the Civil War, the Reconstruction Amendments were adopted to create a greater sense of equality but other measures were also in place to counteract them, such as poll taxes and literacy tests for African Americans. It took time to eventually pass actual legislation to help close the inequality gap since jurisprudence had taken the brunt of it. The Civil Rights Act's sixth section,[67] the one under security in the *Harvard case*, states that no one on the basis of race, religion or national origin can be excluded from activities or programs receiving financial assistance from the Federal government.[68]

[65] ARCHIVE: Civil Rights Act: How South Responds, The New York Times, (July 12, 1964), https://www.nytimes.com/1964/07/12/archives/civil-rights-act-how-south-responds.html (“The change is taking place far more quickly and easily in urban areas than in rural ones and in those with smaller numbers of Negroes than in the ‘Black Belt’... A lesser degree of obedience seems to be emerging in South Carolina, Georgia, Arkansas and Louisiana, while resistance is strongest in Alabama and Mississippi. Although the law has been in effect a little more than a week, one of the chief difficulties faced by Negroes is readily apparent. It was demonstrated by an incident at Americus, Ga., where an integrated group sought service successfully at a restaurant only to be set upon by a white mob after leaving.”)

[66] Who was Martin Luther King, Jr.?, National Geographic, (Jan 12, 2023) https://www.nationalgeographic.com/culture/article/martin-luther-king-jr# (“In the mid-1950s, King led the movement to end segregation and counter prejudice in the United States through the means of peaceful protest. His speeches—some of the most iconic of the 20th century—had a profound effect on the national consciousness. Through his leadership, the civil rights movement opened doors to education and employment that had long been closed to Black America… In 1964, King was awarded the Nobel Peace Prize for his civil rights and social justice activism. Most of the rights King organized protests around were successfully enacted into law with the passage of the Civil Rights Act of 1964 and the 1965 Voting Rights Act.”)

[67] Public Law 88-352 (78 Stat. 241)

[68] The Civil Rights Act of 1964, Title VI, Sec. 601.

The passage of The Civil Rights Act of 1964[69] is the nation's benchmark law paved the way for further promulgation of desegregation legislation that would create a lasting impact on the social fabric nationwide. It was first proposed by former President John F. Kennedy[70] but was heavily criticized by strong opposition; it was in the end signed by his successor, President Lyndon B. Johnson.[71] Kennedy was known to be skeptical about pushing forward a bill of this kind but in June of 1963, he proposed an extensive bill to which he proclaimed that the nation would "not be fully free until all of its citizens are free."[72] However, after Kennedy's assassination, President Johnson addressed Congress in his first State of the Union address stating "Let this session of Congress be known as the session which did more for civil rights than the last hundred sessions combined,";[73] Johnson's encouragement set wind in the sails of the representatives who moved forward with action.

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[69] Civil Rights Act of 1964; 7/2/1964; Enrolled Acts and Resolutions of Congress, 1789 - 2011; General Records of the United States Government, Record Group 11; National Archives Building, Washington, DC.

[70] John F. Kennedy, The White House, https://www.whitehouse.gov/about-the-white-house/presidents/john-f-kennedy/ ("John F. Kennedy was the 35th President of the United States (1961-1963), the youngest man elected to the office. On November 22, 1963, when he was hardly past his first thousand days in office, JFK was assassinated in Dallas, Texas, becoming also the youngest President to die.")

[71] Lyndon B. Johnson, The White House, https://www.whitehouse.gov/about-the-white-house/presidents/lyndon-b-johnson/ ("In the 1960 campaign, Lyndon B. Johnson was elected Vice President as John F. Kennedy's running mate. On November 22, 1963, when Kennedy was assassinated, Johnson was sworn in as the 36th United States President, with a vision to build "A Great Society" for the American people.")

[72] John F. Kennedy, RADIO AND TELEVISION REPORT TO THE AMERICAN PEOPLE ON CIVIL RIGHTS, JUNE 11, 1963, John F. Kennedy Presidential Library and Museum, (June 11, 1963) https://www.jfklibrary.org/archives/other-resources/john-f-kennedy-speeches/civil-rights-radio-and-television-report-19630611

[73] Mae Bowen, This in History: President Lyndon B. Johnson Signed the Civil Rights Act of 1964, Obama White House Archives, (July 2, 2015), https://obamawhitehouse.archives.gov/blog/2015/07/02/day-history-president-lyndon-b-johnson-signed-civil-rights-act-1964

The Act was later expanded to include other disadvantaged groups in the country such as collegiate-level women athletes and those of the third age.[74] More civil rights legislation soon followed with the Voting Rights Act of 1965 and the Fair Housing Act of 1968 which banned segregation in other aspects of life such as financing a home, which leads us back to the same road that not giving everyone the same opportunity, which in these cases needs to be done through taking into account past historical fallings on the basis of race, is *a failure to the fair pursuit of happiness.*

VI. Regents of the University of California v. Bakke (1978)

A bit over a decade passed before one of the modern era affirmative action cases reached the SCOTUS. Although Congress had ordered the desegregation of all public spaces through official legislation, there was a reluctance by the public to remedy the educational disparity. Due to this, higher education institutions adopted policies and admissions strategies that would compensate for unfair disadvantages of applicants. Allan Bakke, a white thirty-five-year-old man, in the early 1970s applied and was rejected twice to The Medical School of the University of California at Davis (hereinafter Davis). At this point in time, Davis had two separate admissions programs, a regular program and a special one, dedicated for the entering class which would be composed of solely one hundred students. For context, the system utilized was a quota system where, out of the

[74] In this respect, the groups aforementioned in the relevant sentence refer to those that have been disproportionately disadvantaged through policies enacted by the legislature. In terms of disadvantaged, it refers to the idea that their protected status or enshrined rights were not explicitly applicable to them prior to the Act being expanded to not only implicitly, but explicitly, include them within the scope. Women in sports were not taken seriously or regarded as to such a high standard that should be equally protected, which was a sentiment which changed their inclusion in the Act. In terms of those of the third age, it is a reference to senior citizens who potentially are not equally treated as their younger counterparts. As a potential manner to safeguard these groups and fight against potentially ableist or sexist legislation, the explicit inclusion of these groups within the scope of the Act served as a landmark to continue to grow the ideology of equality for all in the land of the free.

one hundred spots available, sixteen of them were reserved for economically and educationally disadvantaged students who would typically apply through the special admissions program. The regular admissions process dismisses the applications of grade point averages that were no higher than 2.5 on a 4.0 scale while the special program did not need to meet nor comply with the 2.5 grade point average cutoff. However, beyond that, both admission collectives were evaluated similarly based on test scores, letters of recommendations, and extracurricular activities which would all constitute the applicant's overall benchmark score which would be used to determine the applicants ranking in the admissions selection process. Bakke's qualifications statistically exceeded those of any minority applicant who was ultimately admitted in the two years in which Bakke applied.[75]

The case of *Regents of the University of California v. Bakke (1978)*[76] came to the forefront of the debate surrounding affirmative action when Bakke, after his second rejection from Davis filed in the California State court an action for "mandatory, injunctive, and declaratory relief to compel his admission to Davis, alleging that the special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment, a provision of the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964, which provides, *inter alia,* that no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance."[77]

A deeply fractured SCOTUS affirmed the California State Supreme Court's ruling that Davis's admission criteria violated both the Equal Protection Clause enshrined within the Constitution but also the Civil Rights Act of 1964 thus favoring the respondent and ordering Davis to admit Bakke. There was no

[75] *Regents of the University of California v. Bakke*, Oyez, https://www.oyez.org/cases/1979/76-811 (last visited Sep 7, 2023).

[76] Regents of the University of California v. Bakke, 438 U. S. 266 (1978)

[77] Regents of the University of California v. Bakke, 438 U. S. 266 (1978), Justia, https://supreme.justia.com/cases/federal/us/438/265/

single majority opinion by the court; instead, four of the nine justices opinionated that any racial quota system was a violation of the Civil Right Act. A dissenting opinion issued by another four judges of the SCOTUS' composition argued that the use of race is constitutionally permissible in higher education admissions. The plurality opinion by Justice Powell agreed with both but also ironically dissented with both spectrums. The way the court reasoned the analysis is that any possible violation of the equal protection clause is inherently discrimination, and is thus prohibited by the Civil Rights Act. The principle of strict scrutiny[78] was applied in this case, which required the admissions process to fulfill and expand a true government interest in the least restrictive means possible. The court did not sense the fulfillment of strict scrutiny since they found that there needs to be other ways beyond a quota-system to achieve balanced representation of traditionally underrepresented minorities thus creating classroom diversity.

The aforementioned fragmented Court left many questions unanswered in the ruling which were then cleared up by the following case *Grutter v. Bollinger (2003).*[79] The door for the utilization of race as a factor of consideration in admission was left open, just not with a quota system like the one Davis had. In the long run,[80] the divided court managed to garner white sympathy by minimizing their opposition and extending gains for racial minorities through affirmative action, which would lead the country into a path of jurisprudence which helped define the place of race in admissions for higher education, until its eventual reversal in July 2023.

[78] Strict Scrutiny, Cornell Law School, https://www.law.cornell.edu/wex/strict_scrutiny ("Strict scrutiny is a form of judicial review that courts use to determine the constitutionality of certain laws. Strict scrutiny is often used by courts when a plaintiff sues the government for discrimination. To pass strict scrutiny, the legislature must have passed the law to further a "compelling governmental interest," and must have narrowly tailored the law to achieve that interest. Strict scrutiny is the highest standard of review which a court will use to evaluate the constitutionality of governmental discrimination.")

[79] *See* note 81.

[80] *Supra* note 75.

VII. Grutter v. Bollinger (2003)

Arguably the fundamental argument to dismantle the validity of the Harvard case, stems from the rationale established in *Grutter v. Bollinger (2003)*[81] (hereinafter *Grutter*). *Grutter* served to affirm the previous case of *Bakke* by holding that the use of an applicant's race as a factor of admissions policy of a public education institution is not a violation of the Fourteenth Amendment's Equal Protection Clause as long as said admissions' strategy is specific and promotes a compelling interest for the government such as a diverse student body by using a holistic criteria process and not a quota system like at Davis. Backtracking for context, over a decade before in 1992, the University of Michigan Law School (hereinafter Michigan) had implemented an admissions policy which created a greater chance for applicants belonging to racial minorities to be admitted; the stated purpose of Michigan's policy was to promote racial diversity—not only in their student body which would help foster better class dynamics and understanding, but also to ensure greater diversity and representation in the legal field. As one of country's top law schools holding number ten on the T14 list,[82] the policy to achieve diversity focused on a variety of factors such as students' academic ability, talents, experiences, and overall potential along with letters of recommendation, an essay, personal statement, and test scores.

In 1996, the University of Michigan Law School, denied admission to Barbara Grutter, a white woman with a 3.8 undergraduate grade point average and an LSAT score of 161; Grutter filed a suit alleging that her named

[81] Grutter v. Bollinger, 539 U.S. 306 (2003)
[82] David Merson, What Are The T14 Law Schools?, Juris Education, (Jan. 18 2023), https://www.juriseducation.com/blog/what-are-the-t14-law-schools#:~:text=The%20University%20of%20Michigan%20Law,the%20T14%20law%20school%20ranking.,
("The T14 law schools are the top 14 schools in the US based [] rankings. Among the T14, there isn't much movement in these rankings year after year. [The] list is ranked in order according to US News World and Report's ranking of Best Law Schools.")

respondent, Bollinger,[83] had discriminated against her for being white, which was a violation to her rights under the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S. Code § 1981[84] which enshrines equal rights under the law for all persons within the jurisdiction of the U.S.. As ruled in the *Bakke* case, the binding precedent established that diversity was indeed a compelling governmental interest if and only the strategy was well-aligned and tailored for its diversity goal. The judicial sphere held an array of judicial decisions on this case starting with the District Court which concluded that Michigan's admissions process was not a compelling one, thus Grutter's rejection was based on unlawful criteria. However, the Court of Appeals held that Justice Powell's opinion in *Bakke* legitimized Michigan's policy regarding the use of race in admissions since Michigan's use of "critical mass" of representation in the legal field could not be considered a functional equivalent of a quota system as in Davis. The SCOTUS delivered an opinion in a 5-4 decision favoring Michigan, thus affirming the Court of Appeals prior judgment. Justice O'Connor gave the majority opinion that held that the Equal Protection Clause was not violated due to Michigan's narrowly tailored use of race which compelled an interest in obtaining educational benefits that would follow from such a purposefully crafted diverse collection of students. The Rehnquist Court reasoned that the individualized attention and review to each application ensured that there was no automatic rejection or acceptance based on race thus it is simply a factor that contributes along with others, so as best said by Justice O'Connor, "the Law School's race-conscious admissions program does not unduly harm nonminority applicants."[85]

A quarter of a century after the precedent marked by *Bakke,* the *Grutter* case helped shape and redefine the place of affirmative action in higher

[83] Lee Bollinger was at the time, the President of the University of Michigan. Grutter named him as the defendant since he had been a strong advocate for Michigan's existing affirmative action policies and strategies thus represented the school in the proceedings. For more information, reference: https://academickids.com/encyclopedia/index.php/Grutter_v._Bollinger

[84] 42 U.S. Code § 1981 - Equal Rights Under the Law

[85] *Supra* note 81, page 309.

education institutions; an important nuance is that the SCOTUS judgment names this as the main case but is followed by an *et al.* The US Supreme Court heard Grutter's case along with Gratz *v. Bollinger*[86] on the same day. *Gratz* challenged the University of Michigan's undergraduate affirmative action program. Both Jenniefer Gratz and Patrick Hammacher were white applicants, who were well qualified but were ultimately denied admission. The ensuing consequences to this rejection by the University of Michigan on the undergraduates manifested themselves in them filing the suit stating that Michigan's admission process was unconstitutional because of the point system being used at the University. The University ranked the applicants on a 150-point scale; if an applicant belonged to a historically discriminated against racial group or attended a predominantly disadvantaged high school, the applicant would receive an automatic twenty point boost.[87]

Gratz v. Bollinger was rendered in favor of the applicants and the admissions process was deemed unconstitutional due to its violation of the Equal Protection Clause. According to the evidence presented, virtually every member of minorities who applied for admission and was well qualified, was then admitted, which caused the Court to argue that "race a decisive factor for virtually every minimally qualified underrepresented minority applicant," the affirmative action program was not narrowly tailored enough as required by the precedent set by *Bakke*. Together, both of these landmark cases affirmed and helped to define the boundaries of affirmative action in the Supreme Court's position on it.

[86] Gratz v. Bollinger, 539 U.S. 244 (2003)
[87] *Id.*

VIII. Fisher v. University of Texas (2016)

Thirteen years later, the SCOTUS affirmed the previous holdings regarding affirmative action's role in higher education. Abigail Fisher, a white female, applied and was rejected for admission to the University of Texas at Austin. At this time, it is important to understand the current plan Texas had in place for higher education in their lone star state.

The mechanics of the strategy were that the Texas Top Ten Percent Plan guaranteed admission to the top 10% of every in-state graduating high school class. However, for the remaining spots, The University of Texas considered many factors in their admissions process, including race to fill the remaining spots of their incoming class.

Fisher sued the University arguing that the use of her race as a consideration, violated her equal protection clause under the Fourteenth Amendment since it put her and other Caucasian applicants at a disadvantage. The University of Texas had their admissions process adopted in 2004 after a year-long study following the two previous Supreme Court rulings which led the University of Texas to conclude that its prior race neutral system was not adequately supporting their educational goal of diversity for their students.

Fisher[88] went through the judicial systems for a long time before it was taken for full review to the Supreme Court per certiorari; however, it was then remanded back to the lower appellate court and then affirmed by the highest court of the Country. *Fisher I* held that the lower court had not appropriately applied the principle of strict scrutiny regarded in *Grutter.* In both times, the Fifth Circuit court found in favor of the University of Texas which caused Fisher to appeal and repeal to the Supreme Court; the Supreme Court heard *Fisher II* and upheld the admissions policy in a 4-3 opinion due to Justice Kagan being recused. The court agreed that the compelling interest of obtaining educational benefits from a diverse student body is a justification of race. *Fisher II* was able

[88] Fisher v. University of Texas, 570 U.S. 297 (2013)

to demonstrate clear goals tailored to their needs which encompassed ending stereotypes, encouraging cross-racial understanding, and preparing students for a diverse workforce were valid reasons for the inclusion of race as part of the admissions process. This passed the strict scrutiny standard because the court viewed no other alternative or available plan to ensure the compelling interest goal was met.

The case especially relevant to the validity of the current precedent set by the *Harvard case* comes from *Fisher II*; the dissenting opinions align with the current precedent of the *Harvard case* because of the same ideology of the oldest judges being present. Justices Roberts, Thomas, and Alito dissented[89] in the fact that they believe that the use of racial stereotypes is unnecessary because the admissions process could be race neutral–this was the deciding majority opinion in the following case which would fundamentally dismantle and undermine affirmative action, and with it, diversity that was forced onto society because historically, without it, there would be none present in education or the workforce.

IX. Students for Fair Admissions Inc. v. President & Fellows of Harvard College (2023)

Finally, in the timeline of affirmative action's life, one reaches its gutting through the infamous *Students for Fair Admissions Inc. v. President & Fellows of Harvard College (2023).*[90] In this case, the petitioner is an organization founded in 2014, Students for Fair Admissions (hereinafter SFFA), who describe themselves as a nonprofit membership group that believes racial classifications in college admissions are unconstitutional, thus have mounted several lawsuits challenging race-conscious admissions policies.[91] Recently, the cases in question

[89] *Fisher v. University of Texas*, Oyez, https://www.oyez.org/cases/2015/14-981 (last visited Sep 8, 2023).
[90] *Supra* note 2.
[91] Students For Fair Admissions, https://studentsforfairadmissions.org/about/

regard SFFA suing two highly regarded universities, Harvard College (hereinafter Harvard) and the University of North Carolina (hereinafter UNC)—however, the outcome now affects all universities and colleges nationwide that considered race as one of many factors in their objectively holistic admissions processes.

Honing in on the Harvard case which is the one this Article is about, SFFA claimed two matters: that the use of a students' race violated their rights enshrined in the Constitution's Fourteenth amendment and in the Civil Rights Act of 1964, and that specifically, Harvard deliberately discriminates against Asian Americans and White Americans due to their race. This comes after the corresponding U.S. District Court in Boston ruled in favor of Harvard's admissions policies, and the First Circuit Court of Appeals affirmed the judgment.[92] According to a statement by Harvard, "The Supreme Court has twice cited Harvard's admission process as a model for how other colleges and universities can consider race consistent with the law and the Constitution. Harvard's qualified, limited use of race is entirely consistent with more than four decades of Supreme Court precedent, established in *Bakke* (1978), affirmed in *Grutter* (2003), and reaffirmed in *Fisher I* (2013) and *Fisher II* (2016)."[93] The Supreme Court has upheld race-conscious admissions policies for over forty years by establishing and continuously affirming that race indeed can be used as one of many factors in admission processes as long as there was not a quota system. Nonetheless, the Roberts' presided Supreme Court in a 6-3 decision, with the minority liberal-leaning Justices being in the dissenting party, overturned all previous jurisprudence regarding the application of affirmative action thus eliminating its precedent and effect from practice.

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[92] Christina Pazzanese, What to know about Harvard's case in Supreme Court, The Harvard Gazette, (Oct. 28, 2022), https://news.harvard.edu/gazette/story /2022/10/what-to-know-about-harvards-case-in-supreme-court/

[93] KEY FACTS: Students for Fair Admissions, Inc. v President and Fellows of Harvard College, Harvard University, https://www.harvard.edu/admissionscase/wp-content/uploads/sites/6/2022/05/FINAL_Key-Facts_FINAL.pdf

As the timeline of this section of the Article progressed, one can observe the policies, doctrines, and judicial decisions that became binding were put in place to boost admission among historically underrepresented and discriminated against groups. However, in the *Harvard* case, the Supreme Court overturned *Grutter v. Bollinger*'s hold that race was able to constitute one of many factors; the previously upheld admissions process used at Harvard and UNC were deemed unlawful under the Equal Protection Clause. The admissions process presented and executed by Harvard had multiple stages in which all applications were given individualized attention by multiple parties. Harvard does admit that at the end, the stage as "Iop" allows for race to tip for a significant advantage when winnowing the final class; however this only happens after the substantial majority of the admissions process has been completed by the required admissions committees.

The Supreme Court ruled, Justice Roberts delivering the majority opinion, that Harvard's policy for admission was inherently unconstitutional and a direct violation of the student's rights because there were not sufficiently focused and measurable enough goals that warranted the use of race–something Harvard relents is not true. Roberts continued writing that "Many universities have for too long wrongly concluded that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned, but the color of their skin. This Nation's constitutional history does not tolerate that choice."[94] However, this seemingly does not conform to the previously established courts' jurisprudence and legal reasoning–which has been a tendency by the Roberts court–, thus unraveling decades worth of legal discernment.

[94] Students for Fair Admissions Inc. v. President & Fellows of Harvard College (2023) 600 U.S. 181 No. 20-1199. Page 8.

VALIDITY OF SCOTUS' OVERTURNED CASE DECISION

With the chronological compendium of jurisprudence recapitulated, it becomes relatively simpler to analyze the validity of the *Harvard judgment*. The fundamental central question of the *Harvard case* surrounds the constitutionality of the race factor in higher education, but its ripple effect will be visible in other areas as this judgment will affect diversity, equity, and inclusion (DEI) practices in potentially employment and grantmaking.[95]

The original and central aim of this Article is to interpret what is believed to be the true intention of the Fourteenth Amendment and the Civil Rights Act of 1964, and its relation to the method of the current chaos that is affirmative action. However, the scope of the legality and acceptability of the *Harvard judgment* extends beyonds this.

The Fourteenth Amendment's interpretation may vary; on one side of the coin, one may argue for it to be taken into consideration on a textual basis of what the words truly mean simply said and no more than that–, but on the flip side, their consideration can be objectively regarded through a societal and rhetorical framework; this arguably precludes to a much larger conclusion whose relevance to the adaptation and progress of the law is fundamental. The peculiar metamorphosis of the Fourteenth Amendment must be analyzed through the light that it itself came to fruition due to the aftermath of the Civil War, for no person to be denied equal protection under the law. After an unstable epoch of turmoil, a moment came to pass, where the inexpressible sense of hope was ever-present for all. The epiphany of the matter was that the present circumstance was nothing more than idealistic, as the tenacious paradigm of idiosyncrasy continued. The perplexity of equality amongst men which had been consistently written about in various treatises of men and declarations was but a

[95] Ami N. Wynne et al., Supreme Court Hears Oral Arguemnt In Challenge To Harvard and UNC Race-Councous Admission Programs, Morgan Lewis, (Nov. 01, 2022), https://www.morganlewis.com/pubs/2022/11/supreme-court-hears-oral-argument-in-challenge-to-harvard-and-unc-race-conscious-admission-programs

commencement for the various movements of the struggle for verifiable equality. The disparate playing field based on the color of one's skin has been a fundamental cornerstone of American society from its inception, and simply due to that, there must be a remedy to ensure that future developments stray away from the previous trends and instead continue to progress.

The *Harvard* case has unraveled decades worth of jurisprudence in which generations of justices have ruled in favor of differing degrees of affirmative action and the implications and application to modern day jurisprudence. Although it is reasonably within SCOTUS' legal scope and capabilities to do so, it must be rooted in legal merits. The explanation by SCOTUS that affirmative action is in reality a violation of the Fourteenth Amendment is valid as the reasoning stands to logic on face value; however, this is not true if seen from a sociological perspective.

Something interesting to note at this point in the Article is the absolute political nature of affirmative action in today's society. Education is a fundamental cornerstone of humanity– an eclipse of its availability would be an ultimate disservice to the individual, to the community, and to the country as a whole– not taking into consideration the implications it can have due to globalization. In recent years, topics regarding education have become increasingly polarized, seen in the book banning discussions to sexual education being part of the curriculum in public schools— the manifestation of this divide has been seen post-Covid-19 and its effects have drastically changed the atmosphere of Board of Education meetings.[96] Attributable to this, it is important to understand this topic beyond a simple political scope, but through

[96] Hetrick, Christian, The next battleground in U.S. politics? School boards, (March 14, 2023), https://priceschool.usc.edu/news/school-boards-politics-covid-racism/
In the recent years, and from personal experience, it has been an incredible change in dynamic from local school board meetings taking place to approve curriculum, being carefully curated by educated professionals in the field of education, to a chaotic and politically charged battlefield in which political ideologies are struggling to make headway in progressing their values of education and its secular nature.

an analytical framework– a more objective tool which in even economic terms can be argued for.

Although seemingly not compatible notions, the two merits of legality and sociological necessities must be both used simultaneously to ensure the proper upholding of the law; the law does not stand to reason if the society will not be bound by it as per the social contract. The social contract is a dual-faceted mechanism, which although allows for the prevalence of order, its complex nature additionally requires its application to not solely be the fairest, but aim towards achieving the harmonious yet utopian society that society would ideally desire. This is to say that if no sociological merit is taken upon consideration, an uproar which can divide the country even more is logical to ensue because the fundamental good of the people can be considered to be overlooked, and thus cause the citizens who are a party to the social contract that the justice system is cemented upon to claim and exercise their right to fight back. This type of sentiment, although sometimes necessary to uphold order, legality, and fairness of the rule of law, can be justified if the legality of statutes are unperceived of their compatibility with the good of the people and with their interests in mind.

Through this analytical framework, it can become possible to view affirmative action via an objective lens– one in which the actual balancing of the merits is rooted not upon bias, but upon the legal and sociological merits. Within this blueprint, one must analyze this issue through its efficiency, fairness, benefit, and the trade-off that must be made. Looking at this, it is a cost-opportunity analysis of sorts, an economic transaction. The implementation of affirmative action needs to take into consideration the sociological impact, the legality of the law, and its overall impact on the society we currently live in. Although the colorblindness argument that the SCOTUS presents is set to instill stability and neutrality, the benefits of such a reversal of previous jurisprudence may not easily outweigh the trade-off that such a declaration will make. In order to come to the most reliable conclusion, merits must be awarded where appropriate. Affirmative action may not allow, realistically, for the most efficient

process in admissions– but the objective which it is trying to accomplish can outweigh this logistical issue. Many times, the biggest issue to overcome, as seen in previous jurisprudence, is finding a manner in which such a policy can be implemented in a way that it is coherent across the board, and allows for a stable and neutral holistic admissions process; neither taking race into account as a factor of many nor claiming to be colorblind are as simple as they seem to be. This opportunity-cost analysis is anything but, and its fundamental yet paradoxical conclusion can be seen as although we as a society need to sacrifice equality, we are aiming to work towards reaching equity– because equality only works when proportionally everyone started from the same or relatively similar point, whilst equity attempts to redistribute the previous inequality. The trade-off is simple in general, but it comes down to an issue of principle and the value which society places upon it. This social conflict has been perpetrated unknowingly through structural violence, affecting previously marginalized groups in the United States within varying aspects of life–politically,[97] in education, and in healthcare, to name a few examples. The term of structural violence, although a bit thespian, does pinpoint the issue of the unequal access to different industries, which concoct disparities in resources, opportunities, and ultimately the oppression of rights; although a lack of access to these fundamental cornerstones of the social contract may be unperceivable without its discussion, the invisibility at first glance does not eliminate the effects that such a scenario will ultimately create. According to Barnett,[98] an American constitutional law professor, the law has evolved and with it, the scope of the Fourteenth Amendment. The Fourteenth Amendment has expanded its scope in becoming a fundamental political right– creating a "right floor," not a ceiling,

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[97] Gerrymandering & Fair Representation, Brennan Center for Justice at NYU Law, (2024), https://www.brennancenter.org/issues/gerrymandering-fair-representation ("Gerrymandering, the practice of drawing districts to favor one political party or racial group, skews election results, makes races less competitive, hurts communities of color, and thwarts the will of the voters. It leads many Americans to feel their voices don't matter.")

[98] Barnett, Randy E., and Evan D. Bernick, *The Original Meaning of the Fourteenth Amendment: Its Letter and Spirit*, Harvard University Press, (2021), https://doi.org/10.2307/jj.2131183.

upon which we can build since its implications does not limit the privileges and immunities that are entitled to along with it.[99] Forbye, in terms of constitutionalism, interpretations must change along with the political landscape– an unfortunate reality of life as ideally, political agendas would remain independent of the judicial interpretation of the supreme law of the country.

However, beyond this analytical framework, the Fourteenth Amendment proves to serve the ensuring that all citizens and people residing within the borders of the country of the free are afforded the same protection under the law–a protection which can be argued to be fundamentally biased and unfair due to past inequalities which still haunt the hollow halls of the American justice system. The equal protection under the law applies in a large scope– in the action to protect this right positively and negatively against a failure to act; inaction on behalf of the State who is entrusted with upholding their end of the social contract, of ensuring equality, and in theory equity for all, is not solely based on prohibiting behaviors, but actively ensuring movement and exertion towards that aim.[100] Attempting to strike down affirmative action on the logic that its application is unfair to those who are not or have historically not been disproportionately marginalized or affected makes sense on paper, but not practically, as the playing field is already uneven from the beginning, disallowing anything but injustice to ultimately lead towards the achievement of justice. In terms of the Civil Rights Act of 1964, which bars and prohibits any discrimination of personal characteristics such as race, gender, etc–, it was a milestone for the desegregation and to champion the rights of marginalized and disadvantaged minorities. As acknowledged throughout the myriad of modern literature relating to the systematic oppression, a rather radical perspective regarding color blindness, the substantive argument made by the SCOTUS, uncovers that "Colorblind racism as a way of ignoring racial differences and

[99] *Id.*
[100] *Id.*

white privilege," and unfortunately, it can be argued to be the current reality as "The nurturing of white innocence supports a lack of concern or empathy toward the injustices suffered by marginalized communities."[101] Analyzing the aforementioned Act in light of this raises the question regarding the application of the Act and whether it should continue linear in the sense that the aim should continue to afford protection, with an emphasis on the groups who were and arguably continue to after-the-fact be affected due to factors outside of their merits. Following the ideology of modern originalism,[102] there should be an evaluation of the facts and of the law through an interpretation of what the text was meant to mean or result in. The notion of colorblindness at this point in time is insensitive to the actual result intended by *Brown.* In *Brown,* the ultimate goal was to reach a pinnacle in which through the application or implication of this historical landmark case, race would no longer be a dividing factor, yet it still is in a negative way, thus it is the reasonability of the party to the social contract to uphold the goal of *Brown* in wanting to keep in mind the measures to be colorblind until it was possible to do so naturally, however, that is not at the point in which society currently finds itself.[103]

Moreover, the *Harvard case* functions as an essential and prime example of the politicization of courts and the implications of such a mechanism fundamentally altering the legal system, legal certainty, the rule of law, and overall, justice as we know it. In the modern era of media consumption, it has become clear as water to visually be able to understand the upheaval of the justice system due to political motivations, even in the highest courts. The justice system has a fundamental obligation to the people it defends and represents, to

[101] Jayakumar, Uma M., and Annie S. Adamian. "The Fifth Frame of Colorblind Ideology: Maintaining the Comforts of Colorblindness in the Context of White Fragility." *Sociological Perspectives* 60, no. 5 (2017): 912–36. https://www.jstor.org/stable/26579842.

[102] Calabresi, Steven G.,On Originalism in Constitutional Interpretation, National Constitution Center, (2024), https://constitutioncenter.org/the-constitution/white-papers/on-originalism-in-constitutional-interpretation

[103] *Supra* note 101.

be unbiased and apolitical–Lady Justice carries both the balance and the sword blindly, a significant position to demonstrate the blindness to third-factors that is necessary to ensure the absolute closest to fairness that the system could possibly achieve. Creating and further promulgating this harsh and unequal playing field based on the color of one's skin only establishes the true inconsistency that current policies have with the Constitution and continue to have, and that is that in all reality, *there is no such thing as a fair pursuit of happiness*. Happiness, although subjective, is a reasonable and worthy attainment, that the justice system must continuously strive to protect and shield. As the politicization of the judicial system radicalizes the jurisprudence, as seen with the overturning of *Roe v. Wade*[104] and the current ongoing cases against the former President of the United States of America and his lawsuits,[105] both civil and criminal. Jurisprudence in the contemporary day tends to stray towards political ideologies and with political party motivation and obligations. In turn, it becomes necessary to keep trying to analyze and dictate the law through the relevant circumstances.

In the European Union, the European Consensus tends to be a marker used when judging a case, to keep the country's uniform and in line with each other in terms of social comparisons; in consequence, the concept of the living instrument doctrine, although mainly applicable to human rights law, it is an imperative tool to continue to visualize the intent to continuously evolve the law in line with that ideology of society to thus continue to renew and comply with the social contract entered upon by the citizens and government. Regardless of the margin of appreciation, the living instrument doctrine is a conceptually

[104] Roe v. Wade, 410 U.S. 113 (1973)

[105] Former President of the United States of America, Donald J. Trump currently at the time of the editing of this Article has been deemed guilty to thirty-four civil counts, while the criminal charges regarding insurrection have yet to be judged. However, these cases have not deterred the Former President to postulate himself for the highest position of the country once more, thus perfectly showcasing the politcation of the judicial system, which does not aim to be fair subjectively, but to, whether one way or the other, push the political agenda aligning with personal beliefs, not the objective meter stick that is the law. For more information, please refer to: https://www.nytimes.com/article/trump-investigation-conviction.html

necessary mechanism to understand the need for a hand-in-hand approach towards innovation and progress.[106]

THE PHILOSOPHICAL BASIS FOR AFFIRMATIVE ACTION

In the final analysis, a last parameter which must be uniquely regarded is the philosophical justification for affirmative action. Affirmative action has time and time again been a scandalous theme in political discussions surrounding college admissions and race-conscious policies, used to remedy past injustices as aforementioned. Affirmative action is a complex policy due to the debatable contradictory nature of it. As expressed in the previous section, it becomes imperative for one not only to understand the legality of affirmative action but the moral and societal grounds upon which it is a necessity in the present moment.

Fundamentally, the notion of justice and fairness is contentious as the defining features become muddled from person to person due to their background and experiences in the society they know. For instance, fairness and justice may ring differently for an African-American in a southern state of the US versus a Venezuelan citizen living through endless political turmoil within their home country. The two situations are completely incomparable, and that is the exact issue one is faced with when analyzing the true meaning of justice and fairness, it is not completely possible to obtain that pinnacle for everyone, but a steady pursuit of it is a sure-enough way to continuously combat injustices which unequivocally exist in any society one finds themselves within.

Although the last paragraph may have sounded cynical–that as a society there is no easily viable solution for reaching fairness–the very nature of that sentiment seems contra-intuitive to the aim of affirmative action which is to

[106] For more information on the living instrument doctrine and the margin of appreciation, please refer to: https://www.bihr.org.uk/get-informed/legislation-explainers/the-living-instrument-margin-of-appreciation-principles

alleviate that unfairness to a certain extent in college admissions. Although not easily reconcilable, both ideas are able to coexist as they are not mutually exclusive. The eternally optimist hope that one day the effort put in will lead to a utopian-esque world is not realistic, at least not in this lifetime, but arguably small-scale actions and enacted policies can lead to, at least on a progressive scale, that idealistic outcome.

Legislative policies, binding judicial decisions, and an overall will of the people are necessary instruments to enact change in the current social contract that citizens are subscribed to. Affirmative actions originate as a remedy, as a tool to seek equality of sorts for those who historically have been underrepresented in higher education. If everyone supported these policies, there would be a progression of more remedies being implemented to help solve all the injustices in the US educational system.

Although a dated example, it unfortunately still highlights the national disgrace that is the education system in the US: in the early 2000's, a social experiment was conducted in Chicago with two extremely different high schools, Harper High School in the low-income Chicago neighborhood of Englewood and Neuqua Valley High School in Naperville, IL, only thirty-five miles away.[107] Test students from each school switched classroom for a day and the difference astounded them; Neuqua's facilities at that point in time were valued at $65 million, complete with an olympic size swimming pool, award-winning fine arts department, and a course curriculum offering more than two dozen advanced placement courses compared to Harper, where they only offer two of these courses, have a pool which had not been filled in over a decade, and did not have enough musical instruments for everyone so they would improvise with the material they had, like banging on desks.

For context, public schools in the United States are funded by property taxes, paid by the citizens living in that school district. To further concrete this, according to a 2021 report, the average Englewood household income is $22,507

[107] Failing Grade, OPRAH, (April 11, 2006), https://www.oprah.com/world/failing-grade/all

a year.[108] Meanwhile, the World Population Review calculated for their 2024 report that the average household income in Naperville is $171,081 a year.[109] The students who participated in this social experiment realized how disproportionate their access to resources really was, and that is something that the US education system still needs to address to this day. Neuqua is no longer open today, as its last graduating class consisted of less than twenty students and the facilities even resulted in students becoming hospitalized.[110] At Neuqua Valley at the point in time of the experiment, 78% of students achieve proficiency in reading according to Illinois standards, while 76% meet the science standards, and 77% meet the mathematics standards. In contrast, at Harper, only 16% of students meet the reading standards, 1.5% meet the science standards, and just 0.5% meet the mathematics standards. Such disparities of the education system stem from the first time students enter a classroom, and although race plays a factor, so does one's socio-economic status.

To be able to visualize this, imagine the following example: envision two students who have exemplary grades, but one of them goes to Neuqua Valley and the other to Harper. The Neuqua Valley student has a vast amount of resources, extracurriculars, and well-connected and safe neighborhood to aid them in the creation of a college application, while the Harper student probably needs to work to help their parents make ends meet, and does not have time for extracurricular activities, provided that they even existed at their institution, and beyond that, they live in an unsafe area where gang violence prevails–yet they both have exemplary grades.

Affirmative action seeks to help give both students an equal opportunity to higher education, or level the field; one can assume that the Harper student is

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[108] Community Profile: Englewood, University of Chicago Medicine, https://www.uchicagomedicine.org/-/media/pdfs/adult-pdfs/community/chna-community-profiles/englewood-community-profile.pdf

[109] Naperville Illinois Population 2024, World Population Review, (2024) https://worldpopulationreview.com/us-cities/naperville-il-population

[110] We Need Outrage and Action Over Harper high School's Bloody Story, GOOD, (Feb. 22, 2013), https://www.good.is/articles/we-need-outrage-and-action-over-harper-high-s-bloody-story

likely of color or at the very least of a low socioeconomic status. However, even if the race of the student was different, it still means that from the very start the playing ground was not even, not even close. Affirmative action seeks to even it, by including race as a factor; however, let this serve as a clarification, race may be a factor taken into consideration in college admissions, however it is not the only one nor the defining component of a student's application as universities and institutions also take into account the merit of each individual. Due to this, many scholars and political scientists are turning towards a more comprehensive approach to affirmative action, one that takes into account race, socioeconomic status, the context of each individual's family life, and their academic merit.

Furthermore, the theories of philosophers such as John Rawls and Rudolf von Jherring help illustrate the contradictory complexity for the necessity affirmative action holds in society. From the abstract mindset that in the face of legislation, policies would be enacted to counteract these injustices and ensure that regardless of the position one is in, a fair chance and opportunity to strive towards higher education would be a possibility. To do this, one can employ John Rawls's veil of ignorance, a cornerstone of his political philosophy enshrined in his 1971 *Theory of Justice*.[111] The veil of ignorance is a hypothetical thought experiment to guide the formulation of the principles which ideally would be employed in a just society–fundamental fairness and impartiality in the creation of social and political structures. Rawls envisions the following scenario: one is about to enter into a social contract[112] to establish basic principles by which society will be governed, however, in this scenario, one does not know absolutely anything about their life or themselves–their abilities, gender, race, talents,

[111] Philosopher John Rawls is well known for a crucial yet utopian thought experiment known as "the Veil of Ignorance" which is in depth explained in his 1971 book, Theory of Justice.

[112] In the seventeenth century, philosopher John Locke argued for the idea of a social contract, and ultimately its fundamental importance is the continuation of a just, transparent, and functional society where order is clear and allows for the well-being of the people. The people subjected to the social construct are under the obligation to comply with the authority of the government, but also in turn hold the power to overturn and rebel against the government who does not respect or fulfill their part of the social contract. For more information, please reference: https://plato.stanford.edu/entries/locke-political/

socioeconomic status, or any other particular attributes. That exact absence of knowledge is what constitutes the symbolic veil of ignorance. The argument Rawls makes is that the ignorance of those who hold the power to choose the principles of justice would ensure fairness and impartiality as they would be motivated to create a society that safeguards the interest of all, not just theirs, because they do not know where they themselves will end up. The veil of ignorance serves as a construct for individuals to think behind a blind perspective, preventing them from favoring particular positions or groups due to their personal circumstance, instead opting for a society that ensures fairness and justice for all as one's very human nature would not be willing to risk ending up in a disadvantaged position. The theory of the veil of ignorance guides the notion of the necessity in practice and morally of affirmative action.

Affirmative action refers to policies aimed at addressing historical and systematic inequalities; behind the veil, individuals would recognize the possibility of being born into a disadvantaged group who has been historically marginalized. These individuals would then theoretically understand that societal structures are not always just to certain groups who could be systematically oppressed. In choosing principles of justice by which to govern society, it would be a recognition that the playing field is not at an equal level and that corrective measures are needed to fulfill the principle of justice that individuals would choose behind the veil of ignorance. However, it becomes crucial to note that affirmative action should be carefully designed and implemented to avoid perpetuating new forms of injustice or creating reverse discrimination, instead, to genuinely address historical and systemic injustices. Rawls' philosophical foundation for understanding the moral and practical need for affirmative action defends the need for diversity, to affirm opportunity, and reduce racial disparities present since the founding of the United States. There is difference between color blindness and racelessness, and at the core of the SCOTUS' ruling in Harvard, the colorblindness claimed is not truly blind at all in the way that Lady Justice has her vision taken away to ensure fairness–

instead, colorblindness acknowledges the need to ignore systematic oppression associated with the color of one's skin, instead opting to wear another pair of rose-colored lenses to attempt to be blind to the differences that have been ingrained into American society and its people.

Affirmative action serves as a defense for diversity by recognising that a just and equitable society requires the deliberate promotion of historically marginalized groups. By embracing diversity, the effects of it enrich the work force consequently with a mosaic of perspectives, experiences, and talents as active inclusions of diversity fosters a more nuanced and holistic perspective to the understanding of societal challenges faced by different groups. Affirmative action affirms the principle of equal opportunity by acknowledging the historical injustices and systemic discrimination that have created invisible and impenetrable barriers that hinder certain groups from accessing the same opportunities as others. In the workplace, affirmative action profoundly impacts diversity as described by a Harvard alum, who emphasizes the vital role of affirmative action in shaping diverse learning environments; she underscored the impact that diversity and affirmative action had on her academic and career success.[113] A specific nuance to exemplify is that although affirmative action has served as an instrument to allow for marginalized groups to have an opportunity to access higher education, namely based on race, one of the demographics which has clearly and extensively benefited by affirmative action throughout history is women, specifically white women.[114] The reversal of affirmative action in modern society does not stop short of no longer requiring or encouraging a diverse and equally distributed class. Historically, universities only accepted male students into higher education institutions and only into the 19th and 20th centuries allowed for women to share in the knowledge of their male counterparts.

[113] 'Students will suffer': Harvard and UNC students, alumni react to 'disappointing' Supreme Court ruling rejecting affirmative action in admissions, CNBC, (June 29, 2023) https://www.cnbc.com/2023/06/29/scotus-affirmative-action-ruling-harvard-and-unc-students-alums-react.html

[114] Impact of Affirmative Action on Women, NOW, (July 26, 2023), https://now.org/blog/the-impact-of-affirmative-action-on-women/

This sentiment of striving, *reaching*, for a more inclusive and fairer tomorrow is an atemporal feeling, present in every moment. Whether it be for women's equality rights, the fight for rights for every man regardless of race, and thus the fight for education and knowledge. Jherring's "Struggle for Law" encapsulates the perpetual struggle for rights and justice, a timeless path narrated by women and racially marginalized communities. The struggle for women's rights is a vital aspect of this ongoing endeavor, encompassing the continuous effort to break down systemic obstacles–likewise while rights based on race address ingrained disparities within the very fabric of society, necessitating an ongoing challenge against discriminatory frameworks that endure despite societal advancements. At its core, Jherring's "Struggle for Law" accentuates the timeless verity that the pursuit of rights, be it grounded in gender or race, constitutes an unyielding force demanding unwavering dedication and persistent fight. Affirmative action, firmly entrenched within this philosophical paradigm, embodies a purposeful stride towards redressing historical injustices, ensuring a future characterized by equity for all. It astutely acknowledges that the pursuit of justice is an enduring narrative, intertwined into the very fabric of the human experience, where deliberate actions become threads weaving together a tapestry of equitable futures. In today's society, the United States' imposing nature of freedom and opportunity has been on the decline in the global sphere for some time now. It held the title for the country with the education system foreign students dreamed of because it meant something– it meant an opportunity for the fostering of their careers and lives. However, the facade is unfortunately only true for a limited number of students in a country that boasts such a dream.[115] The Fourteenth Amendment in itself represented a foundational principle that citizens had absolute equality and must not be discriminated against but the repetitively oppressive nature of the

[115] Education Rankings by Country 2024, World Population Review, (2024), https://worldpopulationreview.com/country-rankings/education-rankings-by-country

nation inherently requires discrimination for equality due to the past historical failing.

CONCLUDING REMARKS

As this Article comes to its finalization, it is 2024, and there is arguably still a long way to go to ensure a fair society in today's age. Although idealistic thinking, there must be a realistic and practical method to get there. The mesmerizing tapestry of American society is fundamentally ingrained with the threads of injustices spanning decades–however, it is the story of our country and something unchangeable, as the very shred of the identity that the country is founded upon is arguably anything but. The aspect that is still malleable is that which takes place now, as society collectively gravitates towards the necessity to move forward and learn from past inequities and thus remedy them. In the modern reading of jurisprudence, the *Grutter*[116] decision served as a benchmark for reevaluation of the societal progress in bridging distinctions and discriminatory measures put in place after the Civil War. As long as the country still needed this mechanism, it would stay in place; arguably, the United States is at a point, that although progress has been fundamentally made with the funding of HBCU schools[117] and other instruments, affirmative action is still required to further foster diversity in the educational sphere which will ultimately benefit the diversity shared down the line in the career-oriented sphere.

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[116] *Supra* note 81.

[117] FAST FACTS Historically Black Colleges and Universities, National Center for Education Statistics, U.S. Department of Education,
("Historically Black colleges and universities (HBCUs) are institutions that were established prior to 1964 with the principal mission of educating Black Americans. These institutions were founded and developed in an environment of legal segregation and, by providing access to higher education, they contributed substantially to the progress Black Americans made in improving their status.")

The work force as of now has become accustomed to greeting not only a well-balanced group, but a diverse one, in order to create a workplace that enhances perspectives and problem solving. This much aftereffect of affirmative action is a positive step in the direction of inclusion and working against perpetuated trends which have been ingrained in the history of the United States. Whether it be by establishing affirmative action or creating an alternative mechanism with similar aims, such as class-based affirmative action which would expand those who fall under the groups identified as minorities,[118] it is necessary to examine the legality of affirmative action, objectively, apart from its politicizing nature.[119]

At a first glance, it is understandable that affirmative action can potentially go against The Civil Rights Act of 1964 and its enshrined protections, along with those embedded in the Constitution, however, it is undeniably a resource for the marginalized social groups to have a greater opportunity at higher education institutions. Universities taking the race of an applicant into account on a holistic approach with other factors based on merit is arguably a justified necessity due to past injustices, however, other factors such as socio-economic status of the applicants should be considered as a thorough review of the candidate to ensure that all those groups in the modern age which are disadvantaged or marginalized are judged on an equal playing field. Through the *Grutter* decision, race is solely one of many factors taken into consideration, and affirmative action's very nature is an instrument to harmonize contemporary society with equity.

Although of theoretical and philosophical nature, the necessity of creating potential injustices to cure past injustices may be a cynical approach to the

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[118] Julia Gelatt, et al., A Profile of Low-Income Immigrants in the United States, (Nov. 2022), https://www.migrationpolicy.org/sites/default/files/publications/mpi_low-income-immigrants-factsheet_final.pdf

[119] Margaret C. Simms, et al., RACIAL AND ETHNIC DISPARITIES AMONG LOW-INCOME FAMILIES, The Urban Institute, (Aug. 2009), https://www.urban.org/sites/default/files/publication/32976/411936-racial-and-ethnic-disparities-among-low-income-families.pdf

development of society and could be regarded as a sense of backtracking or lack of movement towards the new, but the fabric of American society is marked by that which construed the nation from its founding. Fairness is not real, however, that does not ever take away from the fact that it is worth fighting for and trying to achieve every single day. An impossibility is but a hindrance, when the true challenge and formative experience is the way to getting there, which in this case, will be what continues the legal system for the future and beyond the scope of affirmative action.

As the life of affirmative action has come to an end for the time being, it is of utmost importance to recognize its impact in society and the effects of its absence and barring. Consequently, because of its overturnal, it also becomes increasingly interesting to remain up to date with the latest developments regarding the backlash that ensues because of affirmative action's barring. As alluded to earlier, the very root and concept of fairness is unattainable, and the struggle for a just position in society will be forever lasting, simply because the world is far from perfect. That is the very reason to keep fighting, and through a legal lens, analyze social backlash in the judicial system manifest itself. Namely, how now after the reversal of affirmative action, legacy admissions at prestigious universities across the country are under fire for the fundamental injustices claimed in the *Harvard* case.[120] The law is rooted in the Hammurabi Code–an eye for an eye–a social backlash that is manifestly encountered in the legal and judicial system of the country that claims to be that of the free.

The legal and judicial system is not perfect; no one claims that it is–if they did, they would be wrong. The system is built off mistakes and prejudices, and that is not changeable unless the system as a whole is dismantled, piece by piece, law by law, idea by law. That is fundamentally against the rule of law and legal certainty, so in practical and abstract terms, it is not the most feasible, however,

[120] The tradition of 'legacy' college admissions is under fire, The Washington Post, (July 28, 2023), https://www.washingtonpost.com/education/2023/07/28/legacy-admissions-explained-harvard-lawsuit/

that simply means that ensuring that at the very least, the current laws and policies are read in light of society, an effective trade-off needs to be made and given thought to, as it helps avoid the necessity for a total reconstruction, instead, choosing redirection. Redirecting society to a better tomorrow, to a fairer society, to a path that will not be easy, but it will one day lead to the *fair pursuit of happiness.*