A PLEA FOR AFFIRMATIVE ACTION

Mitchell F. Crusto∗

Affirmative action1 in the form of race-conscious admissions is being legally challenged by a conservative activist organization.2 During the Supreme Court's 2022 October Term, the Court heard constitutional arguments against the use of race in admissions programs at two prestigious universities: one private, Harvard University, and one public, the University of North Carolina at Chapel Hill.3 With these cases coming on the heels of the Court's decision in Dobbs v. Jackson Women's Health Organization,4 where the Court overturned years of precedent of Roe v. Wade,5 to hold that abortion is not a constitutional right, many observers have predicted that the Court will decide to ban race-conscious admissions.6 In this Essay, I, a Black, first-generation college graduate from a low-income, single-parent household in the formerly racially segregated Deep South, reflect on my personal experiences as an “affirmative action beneficiary” (AAB), that is, a minority-

∗ Henry F. Bonura, Jr., Distinguished Professor of Law at Loyola University New Orleans College of Law. Yale Law School, J.D., 1981; Oxford University (Marshall Scholar), B.A., 1980, M.A., 1985; Yale College, B.A., magna cum laude, 1975. The author is grateful to the John Mercer Langston Black Male Law Faculty Writing Workshop and to family and friends who edited and commented on drafts. The author acknowledges the generosity of the Henry F. Bonura, Jr., Family, the Alfred T. Bonomo, Sr., Family, and the Rosario Sarah LaNasa Memorial Fund. The author is eternally grateful to the staff of the Harvard Law Review for their thoughtful and insightful recommended revisions of this Essay, which were incorporated herein.

1 “Affirmative action” is “a set of procedures designed to . . . eliminate unlawful discrimination among applicants, remedy the results of such prior discrimination, and prevent such discrimination in the future.” Affirmative Action, CORNELL UNIV.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/affirmative_action [https://perma.cc/HFP7-HRX7]. But see John Valery White, What Is Affirmative Action?, 78 TUL. L. REV. 2117, 2118, 2124 (2004) (noting that there is no “rigorous definition” of affirmative action, id. at 2118, and arguing that this remarkable circumstance has distorted and undercut American antidiscrimination law, id. at 2124).


3 In the challenge to the Harvard policy, the Court heard Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 142 S. Ct. 895 (2022) (granting certiorari). In the challenge to the North Carolina policy, the Court heard Students for Fair Admissions, Inc. v. University of North Carolina, 142 S. Ct. 896 (2022) (granting certiorari). While these cases were originally consolidated, they are no longer consolidated so that Justice Jackson could participate in the North Carolina case. See Kimberly Strawbridge Robinson, Supreme Court Decouples Harvard, UNC Affirmative Action Cases, BLOOMBERG L. U.S. L. WK. (July 22, 2022, 4:16 PM), https://news.bloomberglaw.com/us-law-week/supreme-court-separates-affirmative-actions-cases-for-jackson [https://perma.cc/YM55-47YF].

4 142 S. Ct. 2228 (2022).

5 410 U.S. 113 (1973), overruled by Dobbs, 142 S. Ct. 2228.

background student who obtained an education at a formerly white-only, elite college or professional school. Based on my personal experience, I plead for a continued commitment to diversity, equity, and inclusion through the use of race-conscious admissions policies in higher education and professional schools. Caveat: Recognizing that the use of race in university admissions is currently highly regulated by various Supreme Court decisions and arguing that race-conscious admissions should be a remedy for historic, chronic discrimination against Black people, I posit that the Court should uphold its precedents and not ban the use of race-conscious admissions practices. To the Court’s conservative Justices, I say that race-conscious admissions practices continue to serve the diversity rationale of the Court’s existing jurisprudence. To the broader audience of people of goodwill, I argue that enrolling Black students in formerly white-only, elite colleges and professional schools should not merely serve white interests, that Black students are legally and morally entitled to choose where they wish to be educated, that Black students are entitled to admission because they are academically qualified, that society has a debt owed to Black people to redress historical racial inequality, and that society must promote the social and economic mobility that Black people are justly and equally due as Americans.

INTRODUCTION

I am a Black person of African descent who, in 1971, was a highly qualified applicant and was admitted to an elite Ivy League college facilitated by affirmative action. As the Supreme Court is once again poised to assess the constitutionality of race-conscious admissions, and as I recognize that the Court is likely to ban the use of such policies, I wish to testify on behalf of the continuation of the current restricted use of race in collegiate and professional school admissions. In this Essay, I advance the position that universities should have the academic freedom to use race as one of many criteria for admission to achieve the educational goal of diversity, a position which was envisioned by Justice O’Connor’s majority opinion in Grutter v. Bollinger. To clarify, when I speak of “race-conscious” admissions, I mean admissions practices that comply with the current tenets of the law following decades of Supreme Court decisions — namely that an applicant be academically qualified for admission, be evaluated as an individual, and not be admitted as the

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8 See, e.g., NATASHA K. WARIKOO, THE DIVERSITY BARGAIN: AND OTHER DILEMMAS OF RACE, ADMISSIONS, AND MERITOCRACY AT ELITE UNIVERSITIES 104 (paperback ed. 2019) (discussing the commodification of diversity, where white students accept affirmative action only insofar as it benefits them by creating a diverse learning environment); Kimberly Reyes, Affirmative Action Shouldn’t Be About Diversity, THE ATLANTIC (Dec. 27, 2018), https://www.theatlantic.com/ideas/archive/2018/12/affirmative-action-about-reparations-not-diversity/578005 [https://perma.cc/6AJV-2WVP] (“Affirmative action should be about reparations and leveling a playing field that was legally imbalanced for hundreds of years and not about the re-centering of whiteness while, yet again, demanding free (intellectual) labor from the historically disenfranchised.”).
result of a racial quota. In other words, an applicant will not be admitted merely because they are a Black person.

In this testimony, I shall (1) present my family history of being the victims of white supremacists in the State of Louisiana; (2) provide a brief history of challenges to the constitutionality of race-conscious collegiate and professional school admissions; (3) describe my experiences as an “affirmative action beneficiary” (AAB), being admitted into Yale College in 1971; (4) lay out how I contributed to the educational goal of diversity while at Yale; (5) show how I and other AABs have made contributions to society as a result of an inclusive admission policy; and (6) argue why I believe that race-conscious practices are good public policy and should be enhanced and not restricted.

I. VICTIMS OF WHITE SUPREMACISTS

I want to share my history of how white supremacists victimized my ancestors and me over several centuries. It supports my belief that the affirmative action debate is morally flawed if it fails to consider past and present damage to Black people since we arrived in America in 1619. Consequently, affirmative action cannot be viewed in a vacuum; it is an intentional remedy for centuries of blatant discrimination against Black people in all aspects of American life.

I cannot trace my Black ancestry in this country back to 1619; however, both my maternal and paternal roots are founded in the lives of enslaved people of African descent in rural Louisiana in the 1820s. As a matter of Louisiana law and history, white supremacists ensured enslaved Black people literally and figuratively belonged to their white owners as property. Further, similar to those of sex-trafficking victims today, the bodies and sexualities of my Black great-great-grandmothers were the private property of their white enslavers and subjected to their abuse. Those interracial sexual relations produced my biracial ancestors, making me a descendant of free white men and enslaved Black women who were either raped or seduced. In my family, that relationship sometimes resulted in a mutually beneficial, faithful family unit that chose to face racial hatred and scorn.

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14 See generally Crusto, Blackness as Property, supra note 13.
Another feature of the enslavement legal system ensured that the children of interracial relations would not enjoy the freedoms of their white fathers. During our nation’s enslavement history, white supremacists forbade interracial marriage and adhered to the hypodescent rule, classifying anyone with a drop of Black blood as Black, colored, mulatto, or Negro. Furthermore, these biracial children were legally deemed to be “slaves” and “bastards,” not free or heirs of their white fathers. Hence, my great-grandparents were all legally Black, enslaved, and “illegitimates,” with no inheritance rights. Even though one of my white great-great-grandfathers sought ways to transfer some of his property and wealth to his biracial children, the white supremacist laws prohibited enslaved Blacks from owning property or enjoying any privileges of whiteness.

However, while my Black ancestors could not acquire property, they received the benefits of human capital by way of education. As a result, leading up to the Civil War, despite white supremacist laws making it a crime to teach Black people to read and write, my Black ancestors became highly educated. After the Civil War, during Reconstruction, my family, along with many newly freed enslaved people, enjoyed the same constitutional freedoms provided to white citizens, acquiring property and owning businesses. Unfortunately, Reconstruction was short-lived, and when federal troops were removed from the South, white supremacists wearing the ghostly disguises of the Ku Klux Klan (KKK) literally set fire to the hard-earned property and businesses of my ancestors, stole their property, and ultimately restricted their limited educational opportunities to racially segregated schools. Throughout the next century, the KKK terrorized my ancestors and others in the Black community, assassinating my great-uncle by boiling him alive in a vat of smoldering, liquified sugar, and shooting and lynching other Black people.

When it came to education, white supremacists greatly restricted my Black ancestors’ access to learning opportunities. The white supremacists’ creed that no Black person would be better educated than the lowliest white person was a policy effectuated to suppress Black learning. For example, secondary schools for Black youth in New Orleans and throughout the South were called training schools instead of high schools and focused on vocational education to appease racist whites. The blatant discrimination against — and segregation of —
Black people in America’s educational system, particularly in but not limited to the Southern states, was documented in a federal government study,19 which facilitated the landmark decision of Brown v. Board of Education,20 where the Supreme Court ordered the desegregation of the public schools in the South.21

Despite the Supreme Court’s decision in Brown, it took years of judicial battles with white supremacists to desegregate educational institutions in America.22 As a result, my ancestors, and all Black people, were denied admission into the then-white-only universities throughout the country, including Ivy League schools such as my alma mater, Yale College.23 This was also true for my parents and all the Black people I knew growing up in New Orleans. No member of my family until my generation was legally permitted to apply to or attend the elite, white-only schools in Louisiana. They were denied the right to choose and access superior resources and an inclusive educational environment. Notwithstanding, many of my family members were able to obtain superior educations at historically Black colleges, particularly Xavier University in New Orleans.

Furthermore, racial segregation left a deep scar on my emotional and psychological development. Growing up in a city and state filled with hatred for my Blackness, I was the product of a racially segregated world — I attended a Black church, lived in a Black neighborhood, and played with Black children. Despite benefitting from the loving environments in my Black community, I existed in — and was constantly aware of — a racially disadvantaged society. For example, I was not permitted to swim or ride amusements in the white-only Pontchartrain Beach, was restricted to drink water from the Black-only faucets in the Schwegmann Brothers Giant Supermarkets, and could not sit and eat food at the breakfast/lunch counter at the F.W. Woolworth Department

20 347 U.S. 483 (1954). Today, “the de facto separation of students by race continues to be commonplace. As of the 2018–19 school year, one in six public school students attended schools where over 90 percent of their peers had their same racial background . . . .” Halley Potter, School Segregation in U.S. Metro Areas, CENTURY FOUND. (May 17, 2022), https://tcf.org/content/report/school-segregation-in-u-s-metro-areas [https://perma.cc/S2LW-P7JM].
21 See Brown, 347 U.S. at 495–96.
22 See generally JACK BASS, UNLIKELY HEROES (1981) (documenting how some noteworthy U.S. Fifth Circuit judges delivered on the vision of Brown and worked diligently to desegregate Southern educational institutions).
Store until the civil rights protests changed public accommodations. My local race-based traumas were exacerbated when I witnessed on national television the violent assassinations of several civil rights leaders, including Martin Luther King, Jr., Malcolm X, President John F. Kennedy, and Attorney General Robert F. Kennedy.

As an elementary school student in the 1960s, I recall praying that President Kennedy would be sensitized to racial injustice after his experiences of feeling many people’s hatred of him as the first Catholic candidate for the presidency of the United States. I imagined that, as the thirty-fifth President, he might be inspired to act as he witnessed on national television, along with me and the general public, the brutality that some whites inflicted on Black people and white people in the Civil Rights Movement. I thought God answered my prayers when, on March 6, 1961, President Kennedy signed Executive Order 10,925, which established the Committee on Equal Employment Opportunity, to ensure equal governmental employment opportunities and require that government contractors “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”

But executive orders and court cases alone would not integrate white-only schools; in many instances, federal troops were needed to enforce the desegregation laws. Both the Eisenhower Administration in the 1950s and the Kennedy Administration in the 1960s deployed federal troops or marshals to force Southern governors to admit Black students into white-only public universities, such as the integration of the University of Mississippi by a Black student, James Meredith.

Unfortunately, the Supreme Court’s decision in Brown demanding the desegregation of education in the South failed to be enforced in New Orleans. In 1968, I experienced racial segregation in education. I attended a Black, Catholic, male high school, St. Augustine, which was required to compete in the all Black, public high school academic and sports league. To gain access to the white-only Catholic league, St. Augustine sued the Louisiana High School Athletic Association and the State Board of Education and obtained a court order to integrate.

With integration came new challenges: it was my eighth-grade school year and my first speech-and-debate competition when I faced a team from a white, Catholic high school. To my chagrin, the white judges graded my speech before I even delivered it. This was a significant

disappointment. Just when I thought that the world was changing to ensure fair treatment of Black people, I became painfully aware that centuries of white oppression of Black people were not going to be remedi­ated within my lifetime.

Hence, I can testify that, as reflected in my family’s personal history and throughout our nation’s history, my family and practically all Black people were denied admission into white colleges and universities, including professional schools, simply because they were Black. Furthermore, although the Court has failed to honor the original vision of affirmative action as a means to level the playing field,27 I argue that, given our nation’s centuries of exploitation and degradation of Black people, race-conscious admissions should be viewed as a long-overdue remedy for the Black victims of white supremacy, and should be enhanced, rather than restricted or banned.

II. LEGAL CHALLENGES TO AFFIRMATIVE ACTION

Given our nation’s white supremacist history of oppressing Black people and denying them access to education, it should be no surprise that any legal effort to level the playing field to give Black people educational opportunities has been met with great resistance. This is evidenced by a brief history of the constitutional challenges to affirmative action in higher education.

The Civil Rights Act of 196428 made it illegal to discriminate against students and college applicants on the basis of race, color, religion, or national origin.29 Universities that received federal funds were required to document their affirmative action practices and metrics30 — hence, the use of race-conscious criteria as one metric for admission. However, over the years, the Supreme Court has narrowed antidiscrimination policies in response to claims that those policies were “reverse discrimination,” which unjustly harmed applicants who were not Black. Consequently, in the 1978 landmark decision of Regents of the University

27 Cf. Lyndon B. Johnson, U.S. President, Commencement Address at Howard University (June 4, 1965), in Commencement Address at Howard University: “To Fulfill These Rights,” UC SANTA BARBARA: AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/commencement-address-howard-university-fulfill-these-rights [https://perma.cc/KX3B-B899] (“You do not take a person who, for years, has been hobbed by chains and liberate him, bring him up to the starting line of a race and then say, ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair.”).
29 Id. §§ 201(a), 407(a), 601 (codified at 42 U.S.C. §§ 2000a(a), 2000c-6(a), 2000d).
of California v. Bakke, the Court upheld affirmative action, allowing race to be one of several factors in professional school admissions policies. The Court also ruled that setting a racial quota violates the Equal Protection Clause of the Fourteenth Amendment. Hence, with this decision, the Court micromanaged the use of race in university admissions, resulting in schools adopting more nuanced methods to achieve diversity.

In the 2003 landmark case of Grutter v. Bollinger, the Court upheld the use of race-conscious admissions to achieve diversity on university campuses. Writing for the majority, Justice O’Connor promoted the virtues of diversity on university campuses and expressed the hope that positive social changes would one day make the need for race-conscious affirmative action in admissions obsolete. However, the same day it issued the Grutter decision, the Court in Gratz v. Bollinger held that the use of racial quotas for college admissions was unconstitutional. Needless to say, the Court was allowing race-conscious admissions but in a very restricted, measured manner.

While the Court has permitted such policies, in 2014 it issued its opinion in Schuette v. BAMN, another landmark decision on the matter, upholding a Michigan state constitutional provision banning the use of race in law school admissions. In Schuette, the Court held that the Fourteenth Amendment’s Equal Protection Clause does not prevent states from enacting bans on affirmative action in education. As a result, several states have enacted provisions limiting or banning the use of affirmative action in public university admissions.

Despite its apparent wavering on the prodiversity precedent established in Grutter, the Court in 2016 continued its support of restricted use of race in college admissions in Fisher v. University of Texas at

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32 Id. at 314 (opinion of Powell, J.).
33 Id. at 315.
34 539 U.S. 306, 340, 343 (2003) (holding that student admissions process that favors underrepresented minority groups does not violate the Fourteenth Amendment’s Equal Protection Clause so long as it is narrowly tailored to further a compelling interest in obtaining the educational benefits that flow from a diverse student body, such as obtaining a “critical mass” of minority students).
35 Id. at 343.
36 539 U.S. 244 (2003).
37 Id. at 275–76; see also id. at 279 (reasoning that the University’s point system’s “predetermined point allocations,” which awarded twenty points toward admission to underrepresented minorities, “ensure[d] that the diversity contributions of applicants cannot be individually assessed” and was therefore unconstitutional).
39 Id. at 314 (plurality opinion); see id. at 298–99.
40 See id. at 307.
Austin (Fisher II). In that case, the Court held that the appellate court had correctly concluded that the University of Texas at Austin’s undergraduate admissions policy survived strict scrutiny, as required by prior decisions, thereby reiterating the Court’s overall commitment to equity, diversity, and inclusion in higher education.

Therefore, to date, Justice O’Connor’s optimistic vision of diversity in Grutter is still, in my opinion, the law of the land, although it has not been universally embraced, has fallen short, and has been the source of controversy. This Term, race-conscious admissions is back on the table for reconsideration by the Court, with many who believe that the Court will take that opportunity to overrule Grutter and will likely totally ban the use of race in college and professional school admissions. This would be a victory for white supremacy in the United States and a major setback for diversity, equity, and inclusion. I believe, from the perspective of my experiences as a beneficiary of affirmative action, that at the minimum the Court should maintain the status quo and embrace antiracism. Furthermore, I believe that the Court should uphold the nation’s commitment to aggressively enroll and intentionally support Black students, many of whom are first-generation college and professional school aspirants from historically disenfranchised communities.

III. BEING AN AFFIRMATIVE ACTION BENEFICIARY

Now that I have established the imperativeness of this discussion, I want to share my journey and how affirmative action mattered to my career successes. For clarity, affirmative action didn’t make me who I am. However, being an AAB, by which I mean a minority-background student who benefited from an education at a formerly white-only, elite college or professional school, was transformational.

My hard work ethic and dedication to learning came to me from my parents, grandparents, aunts, and uncles. These values were reinforced by my religious training as a Catholic at St. Peter Claver Elementary and St. Augustine High School in New Orleans, Louisiana. However, it was Yale’s commitment to affirmative action that gave me many unique opportunities to grow intellectually and propelled my career.

Let me describe my life in 1970 that led to my decision to apply to attend Yale College. I was raised in hard-times, racially segregated Louisiana. In 1963, when I was nine years old, my father, Alvin, a Navy veteran and business owner, died of cancer at the age of thirty-five. This was a great personal loss. What is more, it meant that our family lost our home and moved in with my grandparents while my mom sought employment to feed her five children. As I considered applying to college, without affirmative action, I would have likely attended Xavier
University, a distinguished, Black Catholic university in New Orleans.\(^{44}\) Continuing to suffer through segregated New Orleans was a very depressive thought. In the fall of 1970, I received a phone call from Michael Bagneris, a graduate of my high school who was in his second year at Yale College. I remember that phone call as if it were yesterday. “Mitchell, Yale is looking for highly qualified Black students, and it is a great place to learn!” I trusted Michael’s sage advice and applied for admission into Yale College in 1970. I accepted the offer to attend, entered Yale in the fall of 1971, and never looked back.

There are many personal benefits I received from my decision to attend Yale because of its commitment to affirmative action. One was not obvious. As I was completing high school, the United States was fighting the Vietnam War. My apparent destiny was to be drafted into the military and die in Vietnam. However, affirmative action saved my life as my acceptance into Yale meant that I didn’t have to fight in Vietnam. Another benefit was the opportunity to leave the racially segregated, impoverished Black community in New Orleans and to flourish on the affluent, success-oriented, resource-rich Yale campus. Obviously, the Yale community provided a phenomenal education, especially in my chosen major of antebellum American history. I had the opportunity to work with exceptional professors, including the noted historians John W. Blassingame and C. Vann Woodward, to name a few. Additionally, I had the opportunity to associate with outstanding students such as Henry Louis Gates, Jr., now the Alphonse Fletcher University Professor and Director of the Hutchins Center for African and African American Research at Harvard University.\(^{45}\)

Most essential to my success at Yale was the critical number of other very intelligent, highly motivated, and accomplished Black students, including Steven Cousins and Larry Thompson, and supportive Black and white faculty and administrators, including Head of College Charles Davis, Dean Eustace Theodore, and Fellow William Ferris. They made me feel that Yale College and the city of New Haven were great places to call home. Nevertheless, being admitted to Yale didn’t ensure that I would easily graduate or excel at Yale. During my time there, no one gave me a good grade because I was Black. I had several professors who questioned whether my outstanding work was mine originally. However, being exposed to very articulate, brilliant classmates, some Black and some white, who were returning to Yale from junior years studying abroad, I was inspired to apply and was awarded a Marshall Scholarship by the British Government to attend to Oxford University,

\(^{44}\) See generally Jennifer M. Smith & Elliot O. Jackson, *Historically Black Colleges & Universities: A Model for American Education*, 14 FLA. A&M U. L. REV. 103 (2019) (documenting the outstanding contributions that Historically Black Colleges and Universities have made to this country and to the education of Black people).

where I earned my first of two law degrees. Ultimately, my outstanding performance at Yale College as a Scholar of the House facilitated my matriculating to Yale Law School.

As to opening doors, a Yale degree helped tremendously; however, it did not erase racism in the workplace. In 1981, I applied for jobs with the largest, white law firms in New Orleans, where there were a total of two Black lawyers. Most of the firms did not return my phone calls or acknowledge my applications, apparently not interested in hiring a Black associate. Later that year, I was hired as an associate attorney with the Jones Walker law firm in its litigation department, a major milestone for them and a personal achievement for me. Needless to say, my Yale College educational experience and degree were tremendous assets that facilitated my intellectual development and financial security.46

IV. DIVERSITY ENHANCES EDUCATION

Next, I believe that my enrollment at Yale added something special to the Yale community. Academically, as a Scholar of the House, I proved to a skeptical History Department that some Black people, both female and male, owned substantial tracts of land and successful businesses in the antebellum South — a little-known and controversial subject.47 In the classroom, I offered a unique perspective on various subjects by drawing on my Catholic education, my knowledge of Southern and creole cultures, and my experiences as a Black man from New Orleans. I remember joining in a voodoo dance with Professor of African Studies Robert Thompson on stage in the middle of his lecture on the African roots of American culture. Many fellow students thanked me for explaining the Mardi Gras traditions and enjoyed a New Orleans dinner in the Calhoun College (since renamed the Grace Hopper

46 See generally Raj Chetty et al., Social Capital I: Measurement and Associations with Economic Mobility, 608 NATURE 108, 108 (2022) (using “data on 21 billion friendships from Facebook to study social capital” — “the strength of an individual’s social network and community” — to conclude that the “share of high-SES [socioeconomic status] friends among individuals with low SES . . . is among the strongest predictors of upward income mobility identified to date”); Raj Chetty, Nathaniel Hendren, Patrick Kline & Emmanuel Saez, Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States, 129 Q.J. ECON. 1553–54 (2014) (using “administrative records on the incomes of more than 40 million children and their parents to describe three features of intergenerational mobility in the United States,” id. at 1553, to conclude that “[h]igh mobility areas have (i) less residential segregation, (ii) less income inequality, (iii) better primary schools, (iv) greater social capital, and (v) greater family stability,” id. at 1554).

47 See Crusto, Blackness as Property, supra note 13, at 99–126 (providing a legal history of Black women’s struggle for property rights in antebellum Louisiana).
College) dining hall after I instructed the cook staff on the proper recipes. These examples of public cultural exchanges should not overshadow the rich intellectual exchanges in the classroom and in private discussions I had with my white classmates, many of whom had never engaged intellectually or socially with a Black person.

During my four years as a Yale undergraduate, the Yale campus life was a cultural center. It was a time when Yale’s African American Studies Department was the best in the country, introducing the campus to the beauty and awe of the Black experience. There were cross-cultural exchanges with students of all backgrounds, including students from around the world. I recall that it was the protest against the Vietnam War, often on the Old Campus or in Battell Chapel, that was a unifying force that transcended race, class, and status. These were the times to make lasting friendships with highly intelligent, ambitious, and inspirational fellow AABs, including Steven Cousins, who went on to become a leading corporate bankruptcy attorney; Larry Thompson, who became general counsel / vice chairman of the Depository Trust and Clearing Corporation; and Hamilton Cloud II, who became one of the youngest executives at NBC television and producer of the annual NAACP Images Awards. The music on the Yale campus was also a unifying feature, including free performances by fellow student and jazzman Nat Adderley, Jr., as was Yale football and the memorable contributions of my Black roommate, James Archer. By the way, Michael Bagneris, who first encouraged me to attend Yale, became a prominent attorney and distinguished judge, in addition to Raymond Diamond, who is a brilliant law professor at the Louisiana State University Paul M. Hebert Law Center.

Further, affirmative action was particularly significant for Black women as Yale admitted its first class of women in the fall of 1969. One of many notable Black female Yale grads is Unjeria Jackson, M.D., who became a groundbreaking maternal-fetal-medicine specialist, mentor, author, philanthropist, and teapot collector. When I entered Yale in 1971, Yale was in the third year of its decision to “go coed,” which means that not only were there more people of color, there were female students, of all races and backgrounds. For me, who came from an all-male high school, it was a welcomed experience to compete with and learn from some of the most intelligent women in the world.

48 Yale Changes Calhoun College’s Name to Honor Grace Murray Hopper, YALENEWS (Feb. 11, 2017), https://news.yale.edu/2017/02/11/yale-change-calhoun-college-s-name-honor-grace-murray-hopper-0 [https://perma.cc/6MDE-AWZU]. Yale renamed Calhoun College in 2017 in light of “John C. Calhoun’s legacy as a white supremacist and a national leader who passionately promoted slavery as a ‘positive good,’” which Yale President Peter Salovey announced “fundamentally conflicts with Yale’s mission and values.” Id.

Socially, as a College Fellow, I ran the guest speakers’ program, bringing to the campus diverse and distinguished luminaries, such as author Hunter Thompson. Later, as an alumnus, I lectured at Yale Law School on my book describing the civil liberties horrors in New Orleans following Hurricane Katrina in 2005. My experiences at Yale convinced me that diversity makes for a rich educational environment — it promotes intellectual exploration, facilitates dialogue and understanding between people from different backgrounds, and challenges university administrators to respond positively to the real-life issues that make for a more relevant learning experience.

Overall, my inclusion as a Black person at Yale, I believe, benefited me and my fellow Black peers, as well as my fellow white peers. It allowed me to interact with some of the most talented students in the country. Along with my fellow Black peers reinforced our shared belief that we were qualified to be enrolled at Yale, in part by receiving and promoting mentoring from one another. For my classmates who were white, I challenged their sometimes-held misconceptions that Black people were intellectually and socially inferior, which, in some instances, resulted in lifelong friendships.

This is a mere glimpse into my experience as an AAB. Once admitted, a Black person on a formerly white-only campus must negotiate a myriad of obstacles. There are issues of belonging, negotiating how to pay for such an expensive education, and conquering intellectual rigors, to name just a few. The point here is that race-conscious admissions are just the starting point in a complex journey that a Black person and their host educational institution must navigate to reach a successful outcome. While I presented how I contributed to the Yale experience, I would be remiss not to mention that there were many times when I didn’t feel welcome at Yale, that I was an unwanted Black token in a white-privileged world where I didn’t belong. Sometimes, this was personal and confrontational. In one case, a philosophy professor wrongly accused me of plagiarism. Upon the conclusion of his oral interrogation, he admitted that my analysis of a philosophy question was the most insightful he had seen in all his years of teaching. He subsequently apologized for doubting the authenticity of my work and awarded me an honors grade.

Enrolling Black people at elite, formerly white-only universities remains controversial. Some argue that Black students are on elite campuses merely to be exploited. That they are political pawns, used to divert attention from the true, unfortunate social and economic plight of Black people in general. Others argue that Black people studying on elite campuses are being indoctrinated to support conservative, white, anti-Black agendas. Further, talented Black athletes who attend elite colleges have mixed blessings — receiving a great education, while playing without pay and historically forfeiting the right to monetize their name, image, and likeness. Despite critiques of affirmative action, for
me and many other AABs, affirmative action has been a positive policy that provides equal opportunity regardless of one’s Blackness.

V. CONTRIBUTIONS TO SOCIETY

Did my admission into Yale benefit society as a whole? I believe so. As a prominent law professor, I develop lawyers with a passion for social justice. As an avid writer, I develop legal arguments that support equal justice. Moreover, as a good citizen, I give money and other needed resources to my community in my hometown of New Orleans. Furthermore, over the years, I have provided valuable public service at all levels, including as a trustee at Lincoln University in Missouri, a presidential appointee at the Small Business Administration in the George W. Bush Administration, and an advisor to President Bill Clinton’s transition team for the Environmental Protection Agency. Most importantly, I serve as a beacon of hope and proof as to what an underprivileged, Black or brown person can accomplish in America, given the right educational opportunities. As a Loyola University endowed law professor in New Orleans, a member of the John Mercer Langston Black Male Faculty Writing Workshop, and a mentor in the Southeastern Association of Law Schools, I have supported and advised the professional development of many students and those entering the law-teaching profession, from all races and backgrounds.

My testimonial of the benefits of affirmative action is not atypical. Many current and past contributors to society, including our first Black President, Barack Obama, and our second Black Supreme Court Justice, Clarence Thomas, are further evidence of the impact of affirmative action in higher education. In their pathbreaking book, Shape of the River, William G. Bowen and Derek Bok lay out how tremendously successful Black alumni from Ivy League universities have been post-graduation, making the metacase to my case.50 Hence, I believe that my experiences show that affirmative action is a public policy that greatly benefits its recipients, institutions of higher learning, and the nation as a whole, by developing the incredible talents of historically underrepresented members of our society.

Ultimately, as reflected in my personal family history, affirmative action helps right historical wrongs, and it also benefits others through diverse learning environments, which consequently benefits society. In this sense, diversity is harmonious with racial equity.51

50 See generally William G. Bowen & Derek Bok, The Shape of the River (2d prtg. 2000) (bringing a wealth of empirical evidence to bear on how race-sensitive admissions policies actually work and clearly defining the effects they have had on over 45,000 students of different races, id. at 297).
VI. GOOD PUBLIC POLICY

As previously noted, the Supreme Court’s decision to hear two cases challenging race-conscious admissions in the fall of 2022 may signal a total ban on the use of race in admission decisions. I believe that the current law promoting such affirmative action measures is good public policy and that such a ban should be avoided for the following public policy reasons.

A. Schools Should Be Allowed Academic Freedom to Manage Their Educational Goals Without Undue Court Interference

I believe that such a ban on race-conscious admissions would violate principles of federalism, as applied to state-owned schools, and the separation of church and state for private schools that are affiliated with religious organizations. Relative to federalism, currently, under the Court’s prior holding in Schuette, any State that chooses to ban the use of race in college admissions at their state schools can do so. While nine states have banned the use of race-conscious criteria in public university admissions, many states have chosen to use race to achieve diversity. Given this fact, a ban on race-conscious admissions would be redundant and supersede state laws, violating the principles of federalism. When it comes to private schools, a ban on the use of affirmative action would have a chilling effect on the scope of federal authority.

This is made even more relevant where the private school is affiliated with a religion, such as the many Catholic universities across the country, like Georgetown University and the Catholic University of America in Washington, D.C. Further, universities should enjoy the freedom to

meaning of diversity in affirmative action cases has been pushed away from a focus on equality to utilitarianism, and that diversity as a concept and value needs to be reinforced with egalitarian ideals).


54 Saul, supra note 41.


56 See OFF. OF NON-PUBLIC EDUC., U.S. DEP’T OF EDUC., FREQUENTLY ASKED QUESTIONS — GENERAL ISSUES RELATED TO NONPUBLIC SCHOOLS 3 (2019), https://www2.ed.gov/about/offices/list/ednon-public-education/files/onpe-faq-s-aug2019.pdf [https://perma.cc/2X4A-8LKZ] (“The Department does not have jurisdiction over private elementary and secondary schools unless they are direct recipients of federal financial assistance from the Department; nor does the Department have jurisdiction over home schools.”).
achieve their educational goals, which may include having a racially diverse student body. Racially diverse student bodies may increase cultural exchange and empathy for others, promote diverse experiences and perspectives, reflect the national population, and fulfill the needs of potential employers. Moreover, evidence shows that bans on race-conscious admissions in state schools are countered with other strategies to achieve the same goal, because in a nutshell, the majority of schools want to include Black and Latinx students in their student body. Furthermore, banning race-conscious admissions practices will likely increase the cost of recruiting Black and Latinx students who are of interest to colleges and professional schools.

B. A Ban on Race-Conscious Admissions Signals to Racial Minorities and Other Marginalized Groups that They Are Unwanted on Elite College Campuses and at Professional Schools at a Time When Talented Labor Is in Great Demand

In my opinion, an unintended result of banning affirmative action admissions policies would be to send a negative message to Black and brown applicants that they are not welcome on elite college campuses. As I mentioned in my personal story, I was encouraged to apply to Yale College because I understood from my Black colleagues that Yale was welcoming Black applicants and that it was, in fact, a great environment for Black students. Evidence shows that a ban on race-conscious admissions discourages Black and Latinx students from applying to the most elite of public and private schools, as documented in a 2020 study.

57 See Halley Potter, Commentary, What Can We Learn from States that Ban Affirmative Action?, CENTURY FOUND. (June 26, 2014), https://tcf.org/content/commentary/what-can-we-learn-from-states-that-ban-affirmative-action [https://perma.cc/5CKN-23UC] (reporting that, in nearly all of the states that banned or voluntarily dropped the use of race in public school admissions, their public flagship universities responded “by implementing new methods of promoting racial, ethnic, and socioeconomic diversity on campus,” including “create[ing] programs to guarantee admission to public colleges for top graduates from each high school in the state” (California, Florida, and Texas); “add[ing] socioeconomic factors to admissions decisions, [and] looking at measures such as family income, wealth, single parent status, neighborhood demographics, parents’ education level, and high school performance” (for example, University of Washington); “create[ing] new financial aid policies to increase support for low-income students, encouraging them to apply” (for example, Nebraska); “increa[se] outreach and support for low-income students” (for example, University of Florida); and dropping legacy preferences for children of alumni (the University of California System, the University of Georgia, and Texas A&M University)).


59 See, e.g., Potter, supra note 57.
from the University of California (UC), Berkeley. That study concluded that the 1996 California ban on race-conscious admissions deterred Black and Latinx students from applying to California’s public universities, reduced underrepresented minority UC applicants’ undergraduate and graduate degree attainment overall and in STEM fields, and resulted in a reduction in average wages earned by underrepresented minority UC applicants.

If in October Term 2022, the Supreme Court, as expected, prohibits colleges and universities from using race in admissions, hundreds of thousands of Black and Latinx students will likely be denied access to quality education, particularly at our nation’s most prestigious private and public schools. At a time in our country’s history when employers are desperately seeking qualified skilled labor, regardless of race, what sense does it make to deny qualified people of color the educational opportunities to make a needed contribution to our economic growth? Such an assault on affirmative action is a regressive development that will result in a multigenerational loss to the educational development of Black people achieved following the Brown decision. Further, I believe that race-conscious admissions policies invite all students to tell their whole story, inclusive of their race, ethnicity, and lived experiences, in addition to their academics.

C. A Ban on Race-Conscious Admissions Would Send a Signal to Society as a Whole that the Court Does Not Value Diversity, Equity, and Inclusion

I believe that promoting the vision of diversity, equity, and inclusion is a great proposition for this nation, especially to support national unity in these politically divided and economically stressful times. If the Court bans race-conscious admissions, that decision will send a signal to society as a whole that the highest court does not value diversity, equity, and inclusion broadly. Further, a ban on affirmative action may fuel

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61 Id. at 15–19; see also DAVID MICKEY-PABELLO, SCHOLARLY FINDINGS ON AFFIRMATIVE ACTION BANS, C.R. PROJECT 1 (2020), https://files.eric.ed.gov/fulltext/ED609274.pdf [https://perma.cc/8UEL-XEMN] (reporting that, according to a 2012 study conducted by Researcher Ben Backes, affirmative action bans decreased Black student enrollment by more than twenty-five percent and Hispanic student enrollment by nearly twenty percent).
62 Cf. Sturm, supra note 9.
63 See discussion supra note 20.
the national resentment of government mandates and further erode the current lack of public confidence in our institutions. Moreover, even if the Court were to mandate such a ban, I am skeptical as to how it would be enforced. Overall, I believe that such a ban is divisive and will create greater animosity on top of what the Court has already created following its decision in *Dobbs v. Jackson Women's Health Organization*.

Some Black people who have benefited from race-conscious admissions argue, understandably, that affirmative action stigmatizes their achievements, which are seen as merely resulting from an unfair advantage based on their race. For example, Justice Thomas claims that because his Blackness was considered when he applied to Yale Law School, prospective employers questioned his qualifications and academic abilities as he applied for jobs after graduating from law school. Honestly, I don’t think that banning the use of race in admissions will eliminate critics who see Black people’s progress as undeserved and government mandated. Additionally, these and other critics argue that we should move to a color-blind or color-neutral society and that the continued use of race in university admissions perpetuates racial division. These are counterfactual thoughts. Unfortunately, because racial discrimination is still prevalent in America, proposing a color-blind society is simply naive.

Then, there is the argument against affirmative action, that it amounts to discrimination by favoring certain racially disadvantaged students over allegedly more qualified applicants. The concept of “reverse discrimination,” or wrongfully discriminating against a white or an Asian applicant in favor of a Black applicant, has been central to many historical cases challenging affirmative action policies, making it a worthwhile concept to address.
I disagree with the reverse-discrimination contention for several reasons. First, no person, regardless of background, is guaranteed admission, and universities have the right to admit whomever they wish; this is particularly true of private schools. Second, unlike Black people, white people are not protected as a historically disenfranchised group due to their innate privilege. Third, many of the claimants are proxies for conservative groups who are using the named plaintiffs to promote a white supremacist agenda.

Therefore, I contend that the status quo that permits a college or professional school to consider a person’s race as one of the many criteria, in addition to standard objective qualifications such as grade point averages and standardized test scores, should be confirmed by the Court for three reasons: First, my personal story exhibits that enrolling Black people in formerly white, elite colleges and professional schools benefits...

71 Cf. Grutter v. Bollinger, 539 U.S. 306, 341 (2003). In Grutter, the Court held that the Equal Protection Clause does not prohibit the narrowly tailored use of race in admission decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body. Id. The Court reasoned that by conducting a highly individualized review of each applicant, no acceptance or rejection is based automatically on a variable such as race and that this process ensures that all factors that may contribute to diversity are meaningfully considered alongside race. Id. at 337, 343. Justice O’Connor wrote, “in the context of [an] individualized inquiry into the possible diversity contributions of all applicants, . . . [a] race-conscious admissions program does not unduly harm nonminority applicants.” Id. Furthermore, in the Harvard case, the district court found “no evidence of any racial animus whatsoever or intentional discrimination,” 397 F. Supp. at 201, and no “evidence that any particular admissions decision was negatively affected by Asian American identity,” id. at 202.

72 While a white or an Asian person can be the victim of “race”-based discrimination, that person would have to prove that they were denied admission strictly on the basis of their race to prove “reverse discrimination.” The past and current claimants do not argue that they were denied admission because they were a certain race. Rather, they argue unpersuasively that they were denied admission because Black people are given preferential treatment because they are Black. Cf. John McWhorter, Opinion, Stop Making Asian Americans Pay the Price for Campus Diversity, N.Y. TIMES (Sept. 23, 2022), https://www.nytimes.com/2022/09/23/opinion/race-admissions.html [https://perma.cc/Z467-QSSH] (“Today, increasing diversity may mean giving preferential treatment to some Black and Latino students who otherwise might not qualify for admission.”). Courts have determined that schools have a compelling interest to create a diverse educational environment—including ensuring that Black people are enrolled in a meaningful number. See Grutter, 539 U.S. at 341; cf. Note, An Evidentiary Framework for Diversity as a Compelling Interest in Higher Education, 109 HARV. L. REV. 1357, 1369–73 (1996) (discussing the contribution of racial diversity to higher education).

73 Contrary to appearances, not all white people or all Asian people agree with the plaintiff in the Harvard and North Carolina cases. In fact, the plaintiff nonprofit in both cases, Students for Fair Admissions, is a conservative group headed by Edward Blum, who led the Fisher II litigation. See Rahem D. Hamid & Vivi E. Lu, Emboldened by Conservative Court, Ed Blum Seeks to Close Out “Long Game” Against Affirmative Action, HARV. CRIMSON (Oct. 28, 2022), https://www.thecrimson.com/article/2022/10/28/sffa-arguments-change [https://perma.cc/ZGQ4-FW72]. Many more people endorse race-conscious admissions. Indeed, approximately sixty amicus briefs supporting Harvard have been filed by a broad range of stakeholders including “major American corporations, higher education organizations, and legal, religious, military, and civil rights groups.” Christina Pazzanese, Harvard Gets Broad Support in Admissions Case, HARV. GAZETTE (Aug. 3, 2022), https://news.harvard.edu/gazette/story/2022/08/harvard-gets-broad-support-in-admissions-case [https://perma.cc/NGV8-XTJW].
those Black students, their fellow students of all races and backgrounds, and society as a whole. Second, affirmative action is not merely about adding diversity to campus life and culture, but it is also remedial, as a debt owed by these schools in particular and by society in general for their past discriminatory practices and disenfranchisement of Black people. Third, academic institutions recognize the market demand from employers who seek Black people to fill various professional and skilled positions. For these three above-stated reasons, I believe that a Court-ordered ban on affirmative action in college and professional school admissions would be a mistake and that the Court should decide to promote affirmative action.

CONCLUDING THOUGHTS

Since the inception of affirmative action in 1961, hundreds of thousands of Black people, and hundreds of millions of Americans, have benefited from the vision of diversity, equity, and inclusion, including women and other historically, socially or economically disadvantaged, marginalized groups. Yale’s commitment to affirmative action greatly enhanced my successes and contributions to society. I, along with many successful Black men and women, am living evidence that affirmative action is an invaluable societal policy, without which college campuses would be robbed of much-needed diversity. Hence, I advocate that, in a land of opportunity, no person should be denied access to our finest educational institutions because of historically based inequities or economic hardship. As it relates to facilitating Black people’s equal opportunity, race-conscious admissions are one of many needed means of providing Black people the resources to participate on the same playing field as their white counterparts and to enjoy long-overdue economic benefits.

In overturning Roe v. Wade in Dobbs, the Supreme Court challenges us to ponder what rights, if any, are protected by the Constitution. In particular, the overruling of Roe undermines the scope of the Fourteenth Amendment, which is the hallmark of due process and equal protection for racial minorities. Ironically, in Dobbs, Justice Thomas, himself an AAB, has sent a clear message that he is eager to overrule other formerly held fundamental rights, including the fundamental right

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74 This includes female applicants who were also not historically admitted into many male-only elite universities. On October 13, 1967, President Lyndon B. Johnson signed into law Executive Order 11,375, which banned discrimination on the basis of sex in hiring and employment both in the United States federal workforce and on the part of government contractors. Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 17, 1967).


76 142 S. Ct. 2228, 2242 (2022).
to marry, in the near future. With the Court’s assault on precedent and stare decisis, one is left to wonder if the Supreme Court might remove “race” from all our laws, which could erase racial progress in voting, employment, and other areas.

In this Essay, drawing on my own experience, I plea that the Justices of the Supreme Court continue to promote a culture of diversity, equity, and inclusion by confirming the constitutionality of race-conscious admissions in college and professional education. To the broader audience, including President Biden, Congress, and all people of goodwill, I plea that we all empathize with and lend undying, heartfelt support to Black students who are continuing to break the glass ceilings that enslavement, racial segregation, and white supremacist forces have constructed — and continue to construct — to frustrate Black achievement. We can do this by making elite college campuses and professional schools places where Black students feel welcomed and valued for being themselves, and not as tokens of white interests.

I urge that the recent Supreme Court’s decision in Dobbs, which violated the sacred judicial principles of precedent and stare decisis and vitiated established foundational due process and equal protection tenets of the Fourteenth Amendment, should not open the floodgates of conservative judicial activism. Moreover, if federalism has any meaning, the Court should recognize the academic freedom that institutions wish to exercise in choosing to use race-conscious admissions policies. I hope that those such as myself who have benefited from affirmative action will stand tall in support of its noble goals of diversity, equity, and inclusion.

77 Id. at 2301–02 (Thomas, J., concurring) (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including Griswold, Lawrence, and Obergefell. Because any substantive due process decision is ‘demonstrably erroneous,’ we have a duty to ‘correct the error’ established in those precedents. After overruling these demonstrably erroneous decisions, the question would remain whether other constitutional provisions guarantee the myriad rights that our substantive due process cases have generated.” (citations omitted) (quoting Ramos v. Louisiana, 140 S. Ct. 1390, 1424 (2020) (Thomas, J., concurring in the judgment); Gamble v. United States, 139 S. Ct. 1960, 1984–85 (2019) (Thomas, J., concurring)).