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Unraveling Affirmative Action Post-*Grutter*

The Court's 2021-2022 term saw a rapid succession of determining, truncating, and expanding fundamental freedoms. The term was defined by *Dobbs* and *Bruen*. The 2022-2023 term will be defined by the reconsideration of affirmative action in *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*. It will be defined by the Court's treatment of strict scrutiny and judicial review. It will be defined by the Court's treatment of race.

The policy of affirmative action began as a government tool to ensure that companies were not discriminating. Our common understanding of affirmative action was fundamentally shaped by the Civil Rights Act of 1964 and Executive Order 11246. Executive Order 11246 evolved from Executive Order 8802 in 1942, which only outlawed racial discrimination in defense industries, to a policy that extends to women and prohibits discrimination on the basis of sexual orientation in Executive Orders 13279 and 13665 in 2002 and 2014. Each time we revisit the policy, a new layer of complexity is added. Confusion surrounding affirmative action arises with these layers of complexity. One aspect of confusion is that the Civil Rights Act and Executive Order 11246 failed to define discrimination. This task was left to the Court, and the Court held that discrimination is any exclusionary practice not necessary to an institution's activities like hiring and operations (i.e., "employment criteria that operate in a racially exclusionary fashion and do not measure skills or abilities necessary to performance of the jobs for which those criteria are used" [Griggs v. Duke Power Co., footnote 5]).

Further confusion arises over how affirmative action should be implemented. Eventually, the policy of affirmative action took shape such that "each institution should effectively monitor its practices for exclusionary effect and revise those that cannot be defended as 'necessary' to doing business" by setting placement goals and monitoring minority applicants (Fullinwider "Affirmative Action"). This sparked intense debate about whether goals differed from quotas (Fullinwider "The Reverse Discrimination Controversy: A Moral and Legal Analysis" 158-180): goals were predicted metrics assuming nondiscrimination, and it would fine if these metrics were not met as long as no discrimination took place (41 CFR 60-2.16(a)); quotas, on the other hand, were set metrics that had to be met, and it would be a failure if they were not met, thus resulting in reverse discrimination due to the inherent "overutilization" of racial minorities in the workforce.

Because of its long evolution, there are various justifications for the policy. Ultimately, affirmative action in the workplace did not serve to make up for prior discrimination, a form of compensatory justice. Its role was merely to make institutions comply with the Civil Rights Act. Affirmative action's role in higher education was very different.

The primary confusion surrounding affirmative action is that its role in the workplace is very different from its role as a system of preferential admissions that considered racial diversity a "plus factor" in higher education. Therefore, affirmative action in higher education had a very different legal progression from affirmative action in the workplace. The purpose of this paper is to understand this legal progression.

The key consideration in affirmative action's legal progression is strict scrutiny, a form of judicial review where courts take into serious consideration the law at hand because it is discriminatory toward a suspect group or infringes upon a fundamental right. In cases of racial

discrimination, strict scrutiny is applied. Over time, we have seen the Supreme Court's narrowing of scrutiny, which is detrimental to the validity of substantive due process and equal protection policies like affirmative action. The Court's narrowing of strict scrutiny impacts more than affirmative action. This narrowing impacts gay rights and the right to privacy. The treatment of strict scrutiny in the upcoming court case will define our treatment of race.

My goal is not to provide an exhaustive enumeration and critique of all relevant legal literature. I aim to provide an accessible review of the legal progression of affirmative action in higher education so that one might consider the pending court cases' treatment of race and react in an informed manner. Furthermore, I argue that, in terms of affirmative action, we are in the post-*Grutter* era. What one may perceive as an inherently originalist, cyclical reversion to conservatism whose rulings will reverberate history for decades to come is really a long-term expansion of the originalist chipping away at and narrowing of legal precedent.

The Reconstruction Era and the Fourteenth Amendment

The history of affirmative action is well categorized by the eras of United States history. Colonial America (1600s-1763) and Revolutionary America (1763-1783) were characterized by a serious effort to obliterate slaves' African culture. The National and Civil War Reconstruction Periods (1783-1880s) saw the Industrial Revolution, which relied on African labor; this was followed by stringent, punitive laws in response to slaves attempting to escape from states where slavery was legal; eventually followed the Emancipation Proclamation, the post-Civil-War Amendments, the Freedmen's Bureau, and the first Civil Rights Acts. Pre- and Post-World War II (1880-1980s) saw violence against blacks and Jim Crow laws, followed by *Brown v. Board of Education of Topeka*, the Civil Rights Act, and further legislation like Executive Order 11246. Although this view is reductive and in no way all-encompassing—especially regarding the

nuanced dates of the time periods (e.g., Eric Foner's dating of "unresolved" Reconstruction until the 1890s [Gross])—it provides an insightful historical and logical framework that introduces us to the post-*Grutter* era of affirmative action.

To understand the post-*Grutter* era, a broader understanding of the post-Civil War Amendments and their implications for strict scrutiny is needed. During the Reconstruction Era, the Freedmen's Bureau redistributed land to former slaves because to be a freedman without land was to not truly be free in a land-based society, stemming from the Madisonian view of land-owners having a stronger vested interest in the political process (Madison). The Freedmen's Bureau was one of the first instances of "affirmative action," and alongside it stemmed the Thirteenth, Fourteenth, and Fifteenth Amendments that abolished slavery, ensured equal protection under the laws, and gave black men the right to vote. The Reconstruction Amendments were historically reactionary in several ways: directed at racial discrimination against blacks and slavery (Section 1 in all three clauses), to ensure that Confederate states would abide by laws and policies put forth (the Public Debt Clause in Section 4 of the Fourteenth Amendment), to ensure that the laws were recognized as enforceable once ratified (the Enforcement Clause in Section 2, Section 5, and Section 2, respectively), and to function punitively (Section 2, Section 3, and Section 4 of the Fourteenth Amendment).

The Fourteenth Amendment, in particular, is essential to understanding judicial review and strict scrutiny. The Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Herein lie three significant clauses: the Privileges and Immunities Clause, the Due Process Clause, and the Equal

Protection Clause. The two clauses relevant to a discussion of judicial review are the Equal Protection Clause and the Privileges and Immunities Clause.

The Equal Protection Clause cannot guarantee equal "treatment," the clause necessitated a three-tiered system of judicial review, including rational basis review, intermediate scrutiny, and strict scrutiny. Strict scrutiny is the most heightened form of review applied when considering suspect classifications, which are groups that are more likely to be discriminated against, denoted by race, religion, national origin, and alienage. Furthermore, strict scrutiny requires that regulation serve compelling governmental interests and be essential to those interests. In other words, the government must deem that regulation substantially important if it is involved in a case of racial discrimination. It is harder for legislation to pass this test if it harms a group under a suspect classification. Intermediate scrutiny is often triggered when dealing with quasi-suspect classifications like gender or legitimacy and requires that a regulation serve important governmental objectives and be substantially related to the achievement of those objectives. Rational basis review provides the standard when no suspect classifications are involved, such as when considering economic regulations, and requires only a rational relationship to legitimate ends (Feldman and Sullivan 646). The important consideration for my argument is the treatment of race, a suspect classification that is subject to strict scrutiny. One of the fundamental cases that first determined what classifications were suspect was *The Slaughter-House Cases* (1872).

In *The Slaughter-House Cases*, a group of butchers claimed they were subjected to involuntary servitude by the Crescent City Live-stock Landing and Slaughter-House Company because they operated a monopoly by owning the only land where one could slaughter animals. The question was: did this violate the Thirteenth and Fourteenth Amendments? In his majority

opinion in *The Slaughter-House Cases*, Justice Miller ruled that it did not violate the Thirteenth and Fourteenth Amendments because racial classifications were the only classification that was suspect. They did not consider the butchers subject to a suspect classification. Therefore, Justice Miller faltered to define the three-tiered standard of equal protection review that we maintain today. Miller questioned whether or not the Equal Protection Clause usurped the distinction between state and federal protections and ruled that the amendment, if interpreted in the affirmative, would "radically change[...] the whole theory of the relations of the State and Federal governments" (83, U.S. 78). By sufficiently narrowing the interpretation of the Equal Protection clause, this case laid the groundwork for cases such as *Plessy v. Ferguson* (Aynes). Although this claim is relevant for an understanding of the Equal Protection Clause, the case ultimately questioned and truncated the Privileges or Immunities Clause, limiting it to structural or enumerated rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws" (83, U.S. 79), and resulting in the clause rarely being used to invalidate a state law. Some argue what Miller thought untrue was what the framers of the Fourteenth Amendment had in mind, and Miller erred in his ruling (Aynes), while others claim the 1866 Civil Rights Act is not to protect the special privileges or immunities of United States citizens.

The *Slaughter-House* debate elucidates broader constitutional considerations, including the role of history, intentionality, textualism, originalism and non-originalism or living constitutionalism, and precedent, among others, in interpreting the Constitution. Although beyond the scope of this argument, it also calls into question the function of the law. Do we turn to Aristotle, Locke, Montesquieu, Hayek, or Fuller? Is it based on the remnants of common law that were ever so present in our English-influenced legal system and advocated for by William

Baude alongside positivist originalism or what he now terms original law originalism (Baude)? Do we concede to Holmes' footnote that "[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth" (*Konigsberg v. State Bar of California*, footnote 11)? Or do we agree with Scalia's "faint-hearted" originalism or side with Reva Siegel and fight back against what she claims to be anti-democratic constitutionalism (Lessig, Lawrence, et al.)? Ultimately, the debate surrounding affirmative action is so much broader than a cost-benefit analysis of policy. Returning to the more relevant aspects of the implications of *The Slaughter-House Cases*, I will begin my discussion of judicial review.

Post-*Slaughter-House* and Judicial Review

Following *The Slaughter-House Cases*, judicial review underwent a substantial transformation. The Warren Court extended scrutiny to classifications beyond race, including sex, alienage, and legitimacy (Schwartz), making way for rationality review and intermediate scrutiny. Eventually, rationality review shifted from commonplace in the Warren Court to rarely used following the Lochner Court (see judicial deference in *Kotch v. Board of River Port Pilot Commissioners* [nepotistic pilotage laws granting state certificates only to relatives and friends of incumbents] and *U.S. Railroad Retirement Board v. Fritz* [Congress's denial to certain workers entitlement due to the restructuring of the railroad retirement system]). Strict scrutiny evolved into a doctrine that is no longer unitary. Essential to this evolution was *Regents of the University of California v. Bakke* (1978).

Bakke broadened the application of strict scrutiny to any case involving discrimination without the need for additional characteristics, a break from suspect classifications. Although the Court disagreed on the level of judicial scrutiny to be applied because white males are not a "discrete and insular minority" requiring special protection from infringement of fundamental rights (*United States v. Carolene Products Co.*, footnote 4), Justice Powell argued that racial and ethnic classifications are subject to stringent examination without regard to additional characteristics. He also rejected the view that this was merely a Title VI case, as was argued by Justice Stevens, Burger, Stewart, and Rehnquist. He claimed that diversity was sufficient justification for affirmative action, but the University of California, Davis admissions policy was not narrowly tailored to such an end. Furthermore, *Bakke* questioned the efficacy of compensatory justice.

Following *Bakke*, *Richmond v. J.A. Croson Co.* (1989) partly rejected the idea of remedying the effects of past discrimination. Justice O'Connor commented, "To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group. The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs" (III, B.). Furthermore, *Adarand Constructors, Inc. v. Pena* (1995) held that all racial classifications must pass strict scrutiny review. *Croson* and *Pena* confined remedial justifications to the contracting context, resulting in the increasing strictness and skepticism in the Court's review of race preferences in employment. This led to speculation that race preferences in education would meet the same fate, and nonremedial justifications of affirmative action (like diversity) might no longer continue to

justify affirmative action, as we will see in the pending Harvard and University of North Carolina cases. In addition, *Croson* and *Pena* tried to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact" (as was coined by Gerald Gunther in 1972). Instead, some race-conscious measures survive strict scrutiny in the affirmative action context, extending the test to something that is a kind of "strict scrutiny minus" (Feldman and Sullivan 709). Some argue that the gradual laxity of a policy that was intended to be a means to "smoke out" invidious policies is now an untenable cost-benefit analysis doctrine unconstitutional under itself (Rubenfeld). In other words, the initial intention of uncovering discriminatory practices and immediately "smoking [them] out" or declaring them constitutional has now become a practice of looking at the pros and cons of discriminatory laws and determining if the "good" outweighs the "bad," such as was done in *Bakke*. This argument is pervasive in the anticlassification versus antisubordination debate (antisubordination originating with Owen Fiss). The majority opinion sides with the common practice of allowing equal protection based on classifications like race (known as anticlassification), whereas a progressive minority cites the need for a broader view that considers groups that are consistently disadvantaged rather than funneling them into traditional classifications or categories (this view is known as antisubordination) as an essential consideration in equal protection rulings (Balkin and Siegel). I argue both can and should be considered in tandem.

Before making claims about the doctrine's initial intentionality, it is important to consider the origins of strict scrutiny. Strict scrutiny is first referenced explicitly in *Skinner v. Oklahoma* (1942) and *Korematsu v. United States* (1944). However, some claim that the compelling state interest test in strict scrutiny was already an established aspect of First Amendment jurisprudence as a cost-benefit analysis that was never intended to "smoke out" illicit motives;

furthermore, strict scrutiny did not appear in equal protection racial discrimination cases until *Bakke*; fundamental cases like *McLaughlin v. Florida* (1964) and *Loving v. Virginia* (1967) are instances of heightened, but not strict, scrutiny; they only implemented part of modern strict scrutiny and are considered "narrow tailoring" (S. Siegel 406). What *Mclaughlin* and *Loving* did, though, was indicate a significant shift from antisubordination to anticlassification (Balkin and Siegel). The majority still recognize its role as "strict" rather than "heightened" scrutiny in *Brown v. Board of Education of Topeka* and recognize the main function of strict scrutiny to "smoke out" invidious policies (Petersen), even if that was not the original intention when analyzing its piecemeal integration. The distinction between heightened and strict scrutiny, while interesting, is not necessary for most argumentation. I side with Fiss in recognizing the shift of strict scrutiny from a test to "smoke out" invidious laws to a cost-benefit analysis, but I find this almost entirely confined to affirmative action jurisprudence, the above-referenced "strict scrutiny minus." This does broaden the debate around the implications of strict scrutiny potentially being too weak alongside other forms of judicial review like rationality review. The primary finding is that strict scrutiny is not a unitary policy, nor did it evolve as a unitary policy. In addition, the initial "intention" of compelling state interest has no function in strict scrutiny's role to "smoke out" illicit motives. Finally, strict scrutiny's "weakness" poses a very profound question: can less-than-strict scrutiny of benign racial classifications be defended by the original purpose of the Fourteenth Amendment to combat legislation that harmed minorities, specifically blacks?

Grutter **and Post-*Grutter***

Following *Corson* and *Pena*, *Grutter v. Bollinger* (2003) and *Gratz v. Bollinger* (2003) found that seeking diversity is a compelling state interest. Why this is a compelling state interest is subject to debate. Is diversity merely "carefully curated integration, the kind that allows many

white parents to boast that their children's public schools look like the United Nations" (Hannah-Jones)? Does it improve the quality of higher education or distribute the benefits of higher education to a broader cross-section of the population? Are any of these desires cognizable under the Equal Protection Clause? Furthermore, this debate questions the goal of higher education and the role of "meritocratic" and holistic admissions. The pending cases *Students for Fair Admissions, Inc. v. University of North Carolina* and *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* will attempt to answer some of these questions. However, the debate is far from over.

We are seeing a resurgence of Justice Miller in the Robert's Court and a narrowing of privileges and immunities and equal protection rulings as we move toward a post-*Grutter*, supposedly colorblind society, oft-politically-conflated with misinterpretations of Martin Luther King Jr.'s "color-consciousness." This "colorblind," equality-driven movement was clear in *Dobbs*. It will likely be clear with affirmative action. It may be clear with other substantive due process cases. Congress has already made an effort to enshrine certain rights with legislation like The Respect for Marriage Act (2022). The pending rulings may denote a shift in the Court's treatment of strict scrutiny. It may denote a shift in the Court's treatment of race. We may further distance ourselves from common law and distributive justice in our cyclical reversion to originalist conservatism. The debate is about so much more than affirmative action.

In *Students for Fair Admissions, Inc. v. University of North Carolina*, the respondent's arguments were not strong. Chief Justice John Roberts observed that Prelogar's (the respondent's) arguments were very different from what Justice O'Connor put forth in *Grutter*; Justice Samuel Alito questioned the goals of diversity; Justice Neil Gorsuch expressed concern regarding Harvard's 1920s "holistic" review that discriminated against Jews; Justice Amy Coney

Barrett questioned, “When does it end?” The effects of strict scrutiny’s narrowing are imminent, and it is not unique to the post-*Grutter* era. The Court has been chipping away at strict scrutiny and affirmative action since *Bakke*. The Court’s originalist, cyclical reversion to conservatism is better explained as a constant state of originalism, occasionally challenged by a few progressive Justices. Ultimately, Justice O’Connor recognized affirmative action as temporal in *Grutter*, arguing that it would no longer be necessary 25 years after the 2003 ruling. The Court will decide if that end is to be 2028 or 2023. It appears to be 2023.

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