

Roads Not Taken on Affirmative Action

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The law of affirmative action is a mess. In the short term, legal doctrine is constrained by path dependence, but its long-term future is murkier due to the many unforeseen contingencies. To regain a sense of the possible, this Article looks forward to the future of equality jurisprudence by looking backward. It recovers three roads not taken. First, the Supreme Court could have kept expectations minimal by hewing closely to the methods and rhetoric of fairness rather than ratifying a consumerist model of entitlement by deploying an individualistic vision of equality. Second, the justices might have endorsed a robust right to higher education. Doing so would finally tell us about the nature of this social good as well as the scope of judicially enforced access to it. Third, they could have showed consistent respect for universities and colleges as distinctive communities by embracing their collective right to self-expression. Instead of taking any of these roads, the Supreme Court has used the Equal Protection Clause to protect something of uncertain social worth and deepened suspicion of educational institutions. Ultimately, how long this current quandary will remain—aggressive judicial supervision of university admissions and an impoverished conception of higher education as a social good—will depend on whether judges tire of the status quo and the rest of us perceive the real stakes and demand something better.

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INTRODUCTION

The other shoe finally dropped. For years, the Supreme Court flirted openly with imposing a national ban on race-conscious admissions policies through muscular exercise of judicial review.¹ On the march to constrict the scope of the Fourteenth Amendment's Equal Protection Clause across large swaths of America's social landscape,² a majority of justices repeatedly warned—most visibly in *Grutter v. Bollinger*³—that affirmative action policies were increasingly out of step with their vision of a race-neutral polity.⁴ Justice O'Connor even put an expiration date of twenty-five years to the equivocal jurisprudence that had granted affirmative action a reprieve⁵—a sign of pure policymaking, if there ever was one.

Then came *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*).⁶ Chief Justice Roberts's ruling for the Court rejected every single justification offered for race-conscious admissions by Harvard and the University of North Carolina (UNC) as “not sufficiently coherent for purposes of strict scrutiny”—whether the educational goal was preparing graduates to “adapt to an increasingly pluralistic society” or “enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes.”⁷ Besides criticizing these rationales as vague and based on pernicious stereotypes, a majority of the justices finally ran out of patience, saying

¹ See, e.g., *Fisher v. Univ. of Tex.*, 570 U.S. 297, 309–15 (2013); *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003); see also *Gratz v. Bollinger*, 539 U.S. 244, 271–72 (2003).

² See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987); *Washington v. Davis*, 426 U.S. 229 (1976); Robert L. Tsai, *After McCleskey*, 96 S. CAL. L. REV. 1031, 1034 (2013).

³ *Grutter*, 539 at 343; see also *Gratz*, 539 U.S. at 271–72.

⁴ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235–36 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 474 (1989). But see Robert S. Chang, *Our Constitution Has Never Been Colorblind*, 54 SETON HALL L. REV. 1307 (2024); Randall Kennedy, *Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1, 17 (2013) (“The strategy of disregarding race can be used for good. But it can also be used for bad—to cover up injustice.”). Kennedy observes that colorblindness as an ideal is attractive to proponents due to a certain moral clarity and “heroic associations,” but that it is inconsistent with the text and history of the Fourteenth Amendment. Kennedy, *supra*, at 3, 6, 16, 17; see also Angela Onwuachi-Willig, *Roberts's Revisions: A Narratological Reading of the Affirmative Action Cases*, 137 HARV. L. REV. 192, 200 (2023) (“[The *SFFA* holding] omitted key parts of history—specifically, the adapted and ever-evolving forms of structural and explicit racism encountered by Blacks and Latinxs in the United States from Reconstruction to the passage of the Civil Rights Act of 1964 . . .”).

⁵ *Grutter*, 539 U.S. at 343.

⁶ 143 S. Ct. 2141 (2023).

⁷ *Id.* at 2166.

these universities had wrongly offered reasons with “no end point.”⁸ The Court had largely created the psychological sense of anomaly through its own intrusion into admissions decisions and the particular jurisprudential path it had long staked out. Adjusting that would ameliorate the sense of departure felt by judges and citizens. Staying the course ultimately painted the justices into a corner in which they paid only lip service to the notion that “universities may define their missions as they see fit.”⁹ Rather than respect different value choices, the Supreme Court derisively rejected the call to “trust” university officials.¹⁰

At all events, no one can be truly surprised that this day finally arrived. Elections matter, and the 2016 presidential election helped seal the deal by securing a Republican-appointed supermajority on the US Supreme Court. As political scientists warn,¹¹ the Court as a quasi-political body does not venture very far from the dominant party’s priorities. Ending affirmative action has been a GOP objective, while Democrats’ enthusiasm for affirmative action has waned over the same time period. Over time, the Court has absorbed these political forces.¹²

⁸ *Id.* at 2166–68, 2173.

⁹ *Id.* at 2168.

¹⁰ *Id.*

¹¹ See ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT 167–68 (1967); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957); see also ROBERT L. TSAI, ELOQUENCE AND REASON: CREATING A FIRST AMENDMENT CULTURE 99–105 (2008); Robert L. Tsai & Mary Ziegler, *Abortion Politics and the Rise of Movement Jurists*, 57 U.C. DAVIS. L. REV. 2149, 2169–73 (2024).

¹² On the out-of-court political forces altering the environment in which judges render decisions, see, for example, DENNIS DESLIPPE, PROTESTING AFFIRMATIVE ACTION: THE STRUGGLE OVER EQUALITY AFTER THE CIVIL RIGHTS REVOLUTION 123 (2012); LYDIA CHÁVEZ, THE COLOR BIND: CALIFORNIA’S BATTLE TO END AFFIRMATIVE ACTION 112–16, 128–30 (1998). Of course, a Democratic president, Bill Clinton, ordered all federal affirmative action programs to be reviewed. CHÁVEZ, *supra*, at 115. Republicans are certainly not the only ones with qualms about how race-conscious policies have been handled when it comes to the distribution of social goods like jobs, contracts, and spots at exclusive schools. Even some supporters of affirmative action on diversity and social justice grounds have perceived the legal tensions posed by such programs. See, e.g., Paul Brest & Miranda Oshige, *Affirmative Action for Whom?*, 47 STAN. L. REV. 855, 858 (1995), <https://doi.org/10.2307/1229177> (“[W]e find the allocation of benefits based on group membership troubling enough to consider affirmative action an extraordinary remedy that is not to be used lightly. . . . Remedies based on race or ethnicity are in tension with the liberal ideals of our society, they may encourage divisive identity politics, and they may stigmatize and foster antagonism toward members of the groups they are intended to benefit.”).

It is done. What is left to be discussed? Quite a bit, it turns out. I propose that the path forward starts by looking backward. Accordingly, in this Article I advance three points. First, in deploying the rhetoric of equality purely in a negative sense and eschewing notions of procedural fairness, the Court created false expectations about the stakes in the debate over affirmative action. Beyond a simplistic injunction not to use race that became more insistent over time, we got precious little about the duties of citizenship or the role that educational institutions, organizing themselves, play in forging a community of people capable of tackling the challenges of modern life.

Second, while the Court extolled rights foundationalism as the frame for thinking about affirmative action, it persistently failed to articulate the contours of such rights in terms of how they relate to the rest of the political community. But make no mistake: using the national principle of equality had an outsized effect, consistently elevating individual concerns over collective ones. Third, as a result, juridic intervention in an excruciatingly complicated aspect of university life ratified an emerging set of ideas about higher education, elevating an atomistic and consumerist attitude. It will take much work to reverse these larger trends in which judicial participation has been simultaneously incomplete and problematic. Adjusting the jurisprudence of equality is but one piece of the puzzle.

My interest is not in rehashing arguments about the advisability of affirmative action or proposing policy tweaks to ensure diversity within universities despite the Court's hostility toward anything that departs from the anticlassification party line,¹³ although I hope that what is said will bear on the viability of such projects. Rather, my goals are twofold. First, I am principally concerned with recovering the decisional context of the early rulings so as to train attention on some of the jurisprudential paths not taken. Second, recovering the contingency inherent in judicial decision-making also disrupts the status quo, helping us to escape the paralyzing sense that today's legal regime was inevitable and that the future, too, cannot be altered.

¹³ Others have capably done so. See RANDALL KENNEDY, *FOR DISCRIMINATION: RACE, AFFIRMATIVE ACTION, AND THE LAW* 78, 241 (2013); STEPHEN CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* 12 (1991); Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences: Rethinking Racial Projects*, in *RACIAL FORMATION IN THE TWENTY-FIRST CENTURY* 183, 183–86, 188–90 (Daniel Martinez HoSang et al. eds., 2012), <https://doi.org/10.1525/california/9780520273436.003.0010>.

To do so, I implore readers to take the opportunity to reason about our subject from the perspective of political justice.¹⁴ What does that entail? This approach starts with the proposition that the Constitution is insufficiently precise about the legality of race-conscious admissions decisions, neither obviously banning such policies nor permitting them. Consequently, plausible arguments for and against affirmative action can be marshaled using accepted modalities of argumentation—text, history, structure, precedent, ethos, and so on. But to choose wisely among credible conceptions of open-textured provisions, one must be able to go beyond these formal modalities to see the moral-political struggles at stake and ground legalistic arguments in a deeper sense of the institutional arrangements and concepts that befit a democratic republic rather than any counterproductive alternatives. Specifically, affirmative action—like any other policy that regulates a society’s valuable social goods—must be discussed in terms of how political communities can recreate their best selves, foster institutional pluralism across the country, and serve the ends of deliberative democracy.¹⁵

Constitutional law, with its peculiar rhythms and unique capacity to shut down political possibilities, can either facilitate meaningful conversation about what a well-ordered society looks like or obstruct discourse and distract from essential matters at hand. I contend from the start that the Supreme Court’s jurisprudence in this area has done the latter. In the cases from *Regents of the University of California v. Bakke* onward, the Court treated access to higher education as an individual entitlement—one that, in the hands of judges, became increasingly unmoored from the central questions of why institutions of higher learning exist and how they might be allowed to flourish in a democracy.

¹⁴ Justice-based approaches look behind doctrinal infrastructure to identify latent notions of citizen, community, and political arrangements and insist that political concepts be brought to bear in creating legal coherence. See, e.g., MICHAEL J. SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* 6 (2009).

¹⁵ But such answers are not universal; they are contingent upon a particular society’s traditions and mores. Other countries have been less hostile to policies and even constitutional provisions that mention race, sex, or gender. For instance, in recent years, the Chilean people, in redrafting a new constitution, explicitly set aside certain seats at the convention based on geography, as well as by other shared traits like sex and indigenous status. Jennifer M. Piscopo, *Electing Chile’s Constitutional Convention: “Nothing About Us Without Us,”* NACLA (May 12, 2021), <https://nacla.org/news/2021/05/10/chile-constitutional-convention-election-women>. The jury is out as to whether such a move helped or hindered ratification, which ultimately failed after relatively low turnout.

We might call this the consumerist conception of higher education, because getting into a selective school appears to be the sum total of the nature of the thing in controversy. What the applicant-consumer hopes and expects has been centered by legal doctrine rather than an institution's sovereignty over its domain or its place in the political order. Because the precedents in this area also elevate national citizenship and basic rights as features of an individualistic vision of justice, they also suppress an alternative vision of democratic society: many institutions with different goals and understandings of their mission—of which racial and ethnic pluralism might or might not be a communal value. In that respect, the line of affirmative action cases is also antipluralist. They erect legal obstacles to institutions making different value choices than the justices would or as some citizens as consumers might.

The truth is that while the Court has treated access to a college education as an individual right and therefore assumed the existence of a social good of the highest order, it has never articulated its contours in a coherent and satisfying fashion. The justices have not explained to any degree of satisfaction why this social good is so valuable that fundamental precepts restrict distributive choices surrounding it. The right to access higher education has remained inchoate, based almost upon a model of consumer preferences rather than what a political community wants to achieve. As a result, affirmative action has served mostly as a political football in the justices' jockeying for influence within the Court and the major political parties' struggle for the allegiance of voters rather than a set of ideas that foster virtuous citizenship and wise management of a society's precious resources. Instead, the justices have merely developed a jurisprudence of negativity: creating a negative right with unclear constraints on something of uncertain importance.

The Court's failure to articulate the competing considerations at stake and justify the relative relationships among them helped put the country on a doomed path where judges acted to resolve the moral-legal tensions decisively rather than manage them. What has been lost? The opportunity to continue teaching Americans to struggle with the values that tug them in different directions while living in a complex democracy.

What if the past Court had taken (or a future Court took) a different path? Perhaps a different conversation would have unfolded. Part I discusses the ramifications of the Supreme Court deploying the framework of equality rather than fairness. Part II examines what a right to higher education might look like if the nation's highest court

meant what it has merely implied—that education is a basic right of the highest order. Part III considers how the landscape might look very different had the justices taken seriously the proposition that a university’s choice about who to admit expresses what that community values in forming its own members and preparing them for the world beyond.

I. FAIRNESS INSTEAD OF EQUALITY

Justice Powell’s original opinion in *Regents of the University of California v. Bakke*¹⁶ purported to decide the legal questions under the equality principles developed through the Fourteenth Amendment, rather than other plausible constitutional principles, of which there are many.¹⁷ But the better footing, if the justices were going to continue down this path of judicial intervention, would have been to root their enterprise in notions of fairness from the outset.

Justice Powell instead converted the primary concerns in the debate over affirmative action to those of “personal rights” that entail “innocence” and “burdens,” rather than opportunity and responsibility.¹⁸ Importantly, he also adopted the perspective of the applicant/consumer rather than the community that seeks to regulate its boundaries and determine the terms of membership. Deploying the more strident rhetoric of equality, the Court suggested that what the university or college owes each applicant was the fundamental concern rather than what citizens might owe to one another in a well-ordered society. Had matters been posed the second way, American society would have been prodded to engage in a more fulsome conversation about not just rights but what makes a university or college distinctive as a community.

Notice, too, that despite their overheated rhetoric of equality, the justices continued their relentless demand for formalism when it comes to equality. Along the way, the *Bakke* Court harnessed *Brown v. Board of Education* for its universalist drive to root out all racial categories and considerations, sweeping aside policies whether they are born of a desire to harm or liberate.¹⁹

¹⁶ 438 U.S. 265 (1978).

¹⁷ *Id.* at 289–90, 320. Fairness (which I discuss) and federalism stand out the most.

¹⁸ *Id.* at 289, 298 (quoting *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)); see discussion *infra* Part II.

¹⁹ *Id.* at 293–95 (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954)).

I won't tarry over the history-based objections to the justices' resort to legal formalism, which are significant. Instead, I want to focus attention on two other aspects of the Court's embrace of a thin conception of equality focused only upon eradicating distinctions. First, Justice Powell infers from the Fourteenth Amendment's language only terms of "universal application."²⁰ Second, he then assumes that judges themselves can only have a general theory of equality rather than an account that acknowledges differences between differently situated groups.²¹

A big clue to the Court's easy-to-miss retreat to a parsimonious and prohibitory conception of equality can be found in Justice Powell's treatment of *United States v. Carolene Products Co.*, which had offered a deferential model of judicial review.²² In *Bakke*, Justice Powell picked the rights-based exception to the presumption of deference to justify judicial review of university admissions decisions, while rendering the group-based rationales inoperative.²³ But in doing so, the Court simultaneously abandoned any particular obligation to address forms of inequality that could not be immediately attributable to policy and forbade universities from tailoring solutions on their own for subordinated groups.

Had the Supreme Court instead explicitly characterized its justifications based upon the principle of fairness rather than civic equality, public expectations might have been tempered from the start. There is, of course, some overlap between what equality demands and what fairness requires.²⁴ But they are not one and the same. While discourse around equality conveys that first-order interests are at stake, the rhetoric of fairness signals that more nuanced and contingent protections are involved. The latter is most appropriate where, as here, a nation (along with its apex court) has been unwilling to say in the first instance that the subject of dispute—higher education—is an indispensable social good. And it would preserve the core of *Bakke*, which was to avoid a racial spoils system by assuring a competitive process.²⁵

²⁰ *Id.* at 293.

²¹ *Id.* at 295–99.

²² *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

²³ *Bakke*, 438 U.S. at 287–91.

²⁴ See ROBERT L. TSAI, PRACTICAL EQUALITY 37, 50 (2019).

²⁵ See *Bakke*, 438 U.S. at 318.

Even though juridic concepts and reasoning cannot prevent disagreements in the political sphere, they can shape how subsequent debates take place. And the way jurists wrote about educational policy in the affirmative action cases increasingly added heat rather than illumination.

Perhaps it is time to take some of the heat out of this destructive cycle of litigation and political recrimination by changing the way judges talk about what is at stake. The justices can align expectations in this domain with how fairness concerns are addressed in other domains by making crystal clear that an applicant is not entitled to admission into any university, but only a fair shot. One illustration is how procedural due process concerns are handled in the licensing context, where notice and an opportunity to be heard are concerns, but no one is entitled to a positive outcome and judges are more cautious in evaluating constitutional claims so as to not impair regulatory interests.

Of course, in saying that a nonmember of a community has a fair shot at admission rather than an entitlement to it, the Court would have to better explain why only race is put off limits when some other attributes of happenstance (e.g., sex, religion, geography, wealth, one's parents) are not strictly forbidden as a matter of fairness. The principle of fairness can still do the work of ensuring that no applicant is reduced to his or her race.

But the main point is this: by resorting to the strident rhetoric of equality, the justices intensified political conflict over affirmative action and encouraged political forces interested in undermining higher education to do so through increasingly fact-intensive and document-heavy litigation. Until the Supreme Court rethinks its approach, as well as its continued interest in policing admission policies, there is little sign of the broader trend abating.

II. EDUCATION AS A PRIMARY SOCIAL GOOD

But imagine the justices could somehow, under different conditions, find their way to a more robust rationale based on the nature of the social good at stake. They would have to do more work than they have done in this area. Start with the fact that the Court's appeals to a single national community and the rights of American citizenship to an education are not just incomplete; they are paltry.

To be fair, there have been moments when the justices have paused and asked themselves hard questions—e.g., what is the social value of Black and White college students sitting together and learning

from one another?²⁶—but such moments of contemplation have been limited to pedagogical utility and especially the risk of social stigma. That is to say, they have been far more preoccupied with the potential negative harms from social separation than from the intrinsic value of education.

But treating higher education as a social good—indeed, a right of national citizenship—would require decisionmakers to do more intellectual work than they have shown interest in doing.²⁷ First, the justices could derive the basic value of higher education from the social fact of widespread investment in such institutions by every state in the land. They could also note the trend in state constitutions of ensuring education as a right and linking it to “the continuance of . . . government and the prosperity and happiness of the people.”²⁸ Some of these constitutions require a “high quality” or “thorough” education, which implies an experience valued by the community and an obligation that would be enforceable.²⁹

Second, the Court would have to articulate the basic set of skills necessary to participate in a modern deliberative democracy so that access to education is meaningful. To accomplish this, the justices would have to go beyond glittering generalities about the importance of primary education and say something more coherent about the role of higher education in American society. Third, a useful conception of education would have to be more than validating the commercially available entitlement that the Court assumes and enforces in the affirmative action decisions. If the Court ever did articulate the telos of the university, a communal notion of higher education might finally materialize and defeat the consumerist one.

²⁶ See *Sweatt v. Painter*, 339 U.S. 629, 634 (1950); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 641–42 (1950).

²⁷ See Kimberly Jenkins Robinson, *Fisher’s Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185, 231 (2016); Joshau E. Weishart, *Transcending Equality Versus Adequacy*, 66 STAN. L. REV. 477, 508 (2014); Barry Friedman & Sara Solow, *The Federal Right to an Adequate Education*, 81 GEO. WASH. L. REV. 92, 117 (2013); Mark G. Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 420 (1973).

²⁸ See, e.g., N.D. CONST. art. VIII, § 1.

²⁹ See, e.g., ILL. CONST. art. X, § 1; MD. CONST. art. VIII, § 1; MINN. CONST. art. XIII, § 1; N.J. CONST. art. VIII, § IV; OHIO CONST. art. VI, § 2; PA. CONST. art. III, § 14; W. VA. CONST. art. XII, § 1; see also Robert M. Jensen, *Advancing Education Through Education Clauses of State Constitutions*, 1997 BYU EDUC. & L.J. 1, 4 (1997). Most of the litigation under state constitutions has involved primary and high schools via resource equalization suits, but not every education clause is explicitly limited to such contexts.

The utter failure to articulate the contours of education as a collective good from *Bakke* onward, even if conceptual ambiguity has been the price of compromise, left comparatively meager justifications such as diversity on the table like so many scraps for citizens and educators alike. *SFFA* swept those crumbs, once appearing in decisions like *Grutter*, clean off the table.

Some have noted Chief Justice Roberts's parting statement in *SFFA* that admissions committees can still rely on applicant statements about "how race affected [their] life."³⁰ I won't venture a guess as to how much success the courts will permit colleges and universities to enjoy as they seek to diversify entering classes by passing through this needle's eye.³¹ I will only note that the narrow strategy of doing the work of diversity by other means merely underscores the severe degree of judicial supervision, with conservative groups and universities locked in legal combat.

Perhaps the most strident and consistently anti-institutional position has been staked out by Justice Thomas, who can only bring himself to call any educational benefits from diversity "alleged."³² Over the years, Justice Thomas doubled down on the equality approach and stressed that historically marginalized students risk being stigmatized as less qualified by peers and resented by those not admitted to highly selective institutions. It is possible he gave those claims more credence than they deserved due to his personal sense of social dislocation at Yale Law School, which may or may not have had anything to do with his qualifications or fairly attributed to the school's admission policies.³³ But he rightly perceives the full scope of the authority enjoyed by the modern Supreme Court and that making sweeping anticlassification policy as jurisprudence has affected institutions around the nation.

³⁰ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (SFFA)*, 143 S. Ct. 2141, 2176 (2023).

³¹ See, e.g., Jonathan Feingold, *How the War on Affirmative Action Might Have Saved the Fight for Racial Equality 1* (Oct. 26, 2023) (unpublished manuscript) (on file with author).

³² *SFFA*, 143 S. Ct. at 2176 (Thomas, J., concurring). To Justice Thomas, any consideration of race during admission is tantamount to racial discrimination and contrary to his vision of a colorblind Constitution. *Id.* at 2177.

³³ Justice Thomas wrote of his belief that his law degree "bore the taint of racial preference." Isaac Arnsdorf, *In New Book, Clarence Thomas Directs Ire Toward Yale Law*, YALE DAILY NEWS (Oct. 11, 2007, 12:00 AM), <https://yaledailynews.com/blog/2007/10/11/in-new-book-clarence-thomas-directs-ire-toward-yale-law>.

My point is not that having this conversation is a simple matter or that there are obvious answers. Rather, it is that the Court has displaced the more important societal discussions with problematic doctrinal minutiae and siloed policymaking. It has been easier for judges to merely assume the existence of something called education for the purposes of reaching the issues that really interest them. Yet the justices have not done us any favors by being coy about the underlying subject at the heart of affirmative action politics, especially when in other areas, they have ostentatiously announced their choice to step out of the field of action.³⁴

III. AN EDUCATIONAL INSTITUTION'S RIGHT OF EXPRESSIVE ASSOCIATION

There is a third possibility left on the table: recognizing a university's right to define the boundaries of community as a matter of self-definition or autonomy. Aware of our country's robust First Amendment culture, the Supreme Court has already drawn on this reservoir of social support to expand the rights of various groups: civic and economic entities (corporations as well as individuals) that wish to pray, opt out of civil rights laws, or elude campaign finance laws.³⁵ All of these moves have been justified in part based on the importance of pluralism as a first-order organizing principle. Why not accord a similar right of expressive association to institutions of higher learning and treat admissions policies as the product of deeply held organizational values?

This is precisely what Kent Greenfield advocates when he counsels universities to argue in court that they have "a First Amendment claim to refuse colorblindness."³⁶ Pursuing the approach would invoke this

³⁴ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242–43 (2022) (overruling *Roe v. Wade* and returning the issue of abortion to the states); *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491, 2508 (2019) (treating partisan gerrymandering as a nonjusticiable political question); *Bd. of Educ. v. Dowell*, 498 U.S. 237, 240–43 (1991) (holding that a desegregation order must terminate once school district has achieved so-called "unitary status").

³⁵ See, e.g., *Creative 303 LLC v. Elenis*, 143 S. Ct. 2298, 2307–08, 2321–22 (2023); *Masterpiece Cakeshop, Ltd. V. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1723–24 (2018); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 688–91 (2014); see also ROBERT L. TSAI, *ELOQUENCE AND REASON 1* (2008); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453, 1457 (2015); Robert L. Tsai, *Speech and Strife*, 67 LAW & CONTEMP. PROBS. 83, 85–87 (2004).

³⁶ Kent Greenfield, *Using the First Amendment to Save Race-Conscious College Admissions*, 4 AM. J.L. & EQUAL. (forthcoming 2024) (manuscript at 38), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4717126.

tradition in a more complete way and recognize that universities and colleges inculcate an intergenerational sense of identity and loyalty that is stronger than many of these groups with narrower objectives. New students are the lifeblood of universities, just as fresh recruits are integral to the survival of the typical civic organization.

The benefits of locating control over admission policies in a university's sense of itself and its way of life,³⁷ like the Court has done for other social groups,³⁸ would be legion. First, returning to Justice O'Connor's acknowledgement that "universities occupy a special niche in our constitutional tradition"³⁹ and expanding upon her affirmation of "educational autonomy"⁴⁰ would show respect for universities and colleges as valuable social organisms. School officials, enrolled students, and alumni treat the distinctive quality of the educational experience and the values of the college or university with deep reverence. And while institutions of higher learning foster open-minded learning, they also maintain different curricular programs, wax eloquently about institutional heritage and lore, and envision future socioeconomic roles for their graduates. To put it in market terms, not every school's graduates compete with every other school's graduates. Yet recognizing an explicit First Amendment right for universities would certainly offer their policies a more reliable form of deference.⁴¹

Second, this approach would put the Supreme Court in position to foster maximum institutional pluralism across the country. Most colleges and universities would likely continue to insist that demographic diversity lends their educational enterprise legitimacy and fosters an *esprit de corps*, while preparing students for a world

³⁷ There has been some interest in an institutionalist account of the First Amendment, and this Part merely takes those arguments seriously. See, e.g., PAUL HORWITZ, *FIRST AMENDMENT INSTITUTIONS* 3 (2013).

³⁸ See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000); *NAACP v. Button*, 371 U.S. 415, 428 (1963).

³⁹ *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."); cf. *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 186 n.29 (D. Conn. 2005), *rev'd sub nom.* *Burt v. Gates*, 502 F.3d 183 (2d Cir. 2007).

⁴⁰ *Grutter*, 539 U.S. at 329.

⁴¹ It may be possible to find a way to regularize deference to university policy choices, so it is more than just pleasantries sprinkled into opinions that affect universities and colleges, without granting a full First Amendment right. On deference, see Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1068–69 (2008).

wracked by polarizing and alienating forces. Others may choose to develop individual capacities in a narrow set of skills above all else, even if not every social group happens to be well represented.

Third, doing so would eliminate the anomalous situation where many private social groups are accorded maximum rights to associate with like-minded individuals and groups but universities are not permitted similar rights. It's true that most universities do not have thick ideological positions that many social and political groups do. But these might be differences of degree rather than kind. The Court has never required an entire panoply of religious or political beliefs before affording an individual or group an expressive right of association; rather, the Court has looked only for a conflict between a sincerely held belief with some provision of state policy. Moreover, taking this step would close the gap between secular institutions that fervently insist upon an ethically based educational mission and religious schools that enjoy First Amendment protections for certain policies. Greenfield is right to note that religious institutions have long "situate[d] their educational goals as applications of deep-seated religious values" but that a number of secular schools, too, go beyond bland missions of teaching and research to "explain their missions in moral but non-sectarian terms."⁴²

Now endorsing a university's right to self-expression is strong medicine, and not everyone will be happy with all the consequences of doing so. But relying on the nebulous concept of academic freedom has never yielded the sort of tolerance that is the hallmark of self-determination. A new consensus might need to be forged once a commitment to rights-based foundationalism is relaxed.

A related challenge is that the prospect of true institutional pluralism might lead some colleges to push *Brown's* limits and perhaps even insist upon a reversal of the anti-segregation principle.⁴³ It would still be possible to hold public institutions to a higher standard than private ones when it comes to how far an expressive right of association is allowed to go. Additionally, leaving *Brown* as a national norm untouched is consistent with race being treated differently from other traits as a matter of doctrine.

Still, to be a real pluralist, one has to do so in a principled way, not only when a group's value choices aligns with one's own. Institutions that valued the study of Anglo-Saxon heritage or the

⁴² Greenfield, *supra* note 36 (manuscript at 39).

⁴³ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); Charles L. Black, Jr., *The Lawfulness of the Segregation Cases*, 69 YALE L.J. 421, 421 (1960).

Western tradition would be allowed to take applicants' backgrounds (and desired course of study) into account as long as there is not a categorical ban based on race. Historically Black colleges and universities and explicitly religious educational institutions would also be allowed to thrive under the same difference-without-domination approach. Another way to retain the core of *Brown* but permit some flexibility would be to do it institutionally: hold the line and reject expressive association claims for primary schools and secondary schools but permit universities and colleges to assert First Amendment rights to self-definition.

United States v. Virginia (VMI) may have to be revisited.⁴⁴ Things could go one of two ways with a right of expressive association in play. The maximum pluralist view would require reversal of that ruling, thus permitting same-sex institutions so long as comparable opportunities exist in the relevant jurisdiction. Alternatively, institutions like Virginia Military Institute (VMI) might be allowed to consider one's sex as a factor among many as long as there is no formal or hidden sex-based ban. School officials might be able to give sex more or less weight as one among many considerations, including the existing needs of the college or the military.

Perhaps allowing traditional institutions to flourish along these lines would be a price that progressives are willing to pay if it allows them to opt out of restrictions like the Solomon Amendment, a federal law that required educational institutions that accepted federal money to allow military recruiting on campus.⁴⁵ In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR)*, several schools committed to a principle of equality encompassing sexual orientation objected to the law.⁴⁶ At the time, the armed forces barred openly gay people from serving, which contradicted the schools' nondiscrimination policies.⁴⁷ The universities wanted a First Amendment right to exclude the military.⁴⁸

Chief Justice Roberts's decision for the Court rejected the universities' right of expressive association, reasoning that the Solomon Amendment did not interfere with the schools' associational rights because students and faculty remained "free to associate to voice

⁴⁴ 518 U.S. 515 (1996).

⁴⁵ 10 U.S.C. § 983.

⁴⁶ *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 51 (2006).

⁴⁷ *Id.* at 52 n.1.

⁴⁸ *Id.* at 51.

their disapproval of the military's message."⁴⁹ But this conclusion completely ignored the possibility that having employers who engage in sexual orientation discrimination—including military employers—on campus undermines the schools' sense of community and the values they try to instill. That the universities had to accept those who violated the schools' precepts into their community left them with no choice but to engage in counter speech. But such a dilution of the universities' egalitarian message was precisely what the Court refused to countenance when it came to the organizers of the Saint Patrick's Day Parade in *Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston, Inc.*⁵⁰ This part of the ruling in *Rumsfeld v. FAIR* seemed wrong then, but it would be even more egregiously incorrect in a world where universities could actually expect their "complex educational judgements"⁵¹ to be accorded a measure of respect from federal judges.

There is no reason to attempt to draw all these lines now. Suffice it to say that another world is possible if we are willing to live with the tradeoffs. There is no use in worrying about too many of these things until conditions shift once again and jurisprudential revision becomes socially plausible. At all events, an approach that emphasizes institutional pluralism over consumerist-nationalism would lead to a different answer than the one the *SFFA* Court provided. When judges find policy categories a university pursued to be "imprecise" or that its objectives are "imponderable," the answer would not be to ban such considerations through judicial fiat.⁵² Rather, the answer would be to allow every organization to pursue diversity or difference as central to its mission or decline to do so as each sees fit. Even David Bernstein, a fierce critic of race-based policies, observes that such an outcome grounded in a university's right to expressive association "would be that racial preferences in admissions would continue, but in a much

⁴⁹ *Id.* at 69–70.

⁵⁰ *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 559 (1995) (affirming First Amendment right of parade organizers to exclude gay rights group).

⁵¹ *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

⁵² *Students for Fair Admissions v. President & Fellows of Harvard Coll. (SFFA)*, 143 S. Ct. 2141, 2167 (2023).

more honest and healthy way than is the case today.”⁵³ On this, we heartily agree.

CONCLUSION

In this article, I have approached the *SFFA* decision not as an exercise in critiquing it on policy grounds or evading the current Court’s unmistakable goal of ending race-conscious admissions policies. There are some good reasons to support affirmative action policies and some reasons to be troubled by them. Plausible arguments as to their constitutionality can be made either way based upon first principles. Rather, my objective has been to unpack *SFFA* by reopening the legal universes that the ruling has closed, a task that is jurisprudentially more capacious than merely learning to live with the outcome. It is also contingent upon things we cannot know about the forms of politics that have not yet emerged. After all, judges come and go, and the political regimes ratified through jurisprudential consensus rise and fall. In mapping some possibilities, I have urged readers to remember not only the interpretive choices that the Supreme Court has made as a result of past political formations but also to ponder the jurisprudential paths not taken.

I asked: How would societal debate over education proceed if everyone understood that fairness rather than equality governed admissions decisions? Would the politics surrounding this decades-long struggle and our thinking about the difficult foundational questions raised by disputes over affirmative action take on a different character? I then argued that if the justices were true to their word that disputes over college admissions implicated the equal rights of citizenship, then they had an obligation to tell us coherently what we have been fighting so hard over—to ensure that the object of strife is more than just a matter of individual entitlement to a consumer good, and more of a communal good. Finally, I observed that to curb judicial supervision of a university’s membership decisions more effectively, the Court could accord schools a right of expressive association. Otherwise, projects to determine university missions or socially engineer its population will become the province of narrow outside interest groups and political parties rather than left firmly in the hands of the communities with the largest stake in the outcome.

⁵³ David E. Bernstein, *The Right of Expressive Association and Private Universities’ Racial Preferences and Speech Codes*, 9 WM. & MARY BILL RTS. J. 619, 636 (2001), <https://doi.org/10.2139/ssrn.263353>.

Whether one is an ardent defender of race-conscious admissions, a dedicated opponent of them, or a skeptic who falls somewhere in between, we should all be concerned about selective forms of judicial review conducted in this area of law, the undertheorized nature of education, and the growing popular disenchantment with institutions of higher learning.