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SCHUETTE AND AFFIRMATIVE ACTION: WHY THERE ARE LIMITS TO WHAT A MAJORITY OF THE PEOPLE MAY DO

ROSSANNA C. HERNANDEZ MITCHELL*

When I call myself an affirmative action baby, I'm talking about the essence of what affirmative action was when it started.
U.S. Supreme Court Justice Sonia Sotomayor[1]

Introduction

The importance of *Brown v. Board of Education* in educational opportunities is well known, but it was not until my second semester in law school that I learned the importance of affirmative action in my decision to study law. Affirmative action is defined as:

> An action or set of actions intended to eliminate existing and continuing discrimination, to redress lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination, all by taking into account individual membership in a minority group so as to achieve minority representation in a larger group.[2]

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[1] Interview by Savannah Guthrie with Sonia Sotomayor, U.S. Supreme Court Justice, New York, N.Y. (Jan. 14, 2013); Scott Stump, *Sonia Sotomayor: There is 'still a need' for Affirmative Action*, TODAY (Jan. 14, 2013, 9:11 am), https://www.today.com/news/sonia-sotomayor-there-still-need-affirmative-action-flna1B7963373.

[2] *Affirmative Action*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 495 (1954) ("[w]e conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."); *see Grutter v. Bollinger*, 539 U.S.

In 1978, the U.S. Supreme Court's plurality decision in *Regents of University of California v. Bakke* established that although student body diversity is a compelling state interest that can justify the use of race in university admissions, a quota system cannot be used to achieve this goal.[3] The Court, however, allowed for race to be used as a "plus" that is weighted equally with all other factors in the admissions process.[4]

However, there is a hitch in the later decision of *Schuette v. Coalition to Defend Affirmative Action*, where the Court established that the Constitution gives voters the power to use the political process to decide whether to ban the use of affirmative action or not.[5] What is

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306, 343 (2003) ("the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."); *see also* Marcia G. Synnott, *The Evolving Diversity Rationale in University Admissions: From Regents v. Bakke to the University of Michigan Cases*, 90 CORNELL L. REV. 463, 463 (2005) ("[s]ince the 1970s, Americans have wrestled with whether and how to implement affirmative action initiatives to equalize economic and educational opportunities for members of minority groups. The role of affirmative action in higher education is central to this debate.").

[3] *Regents of U. of California v. Bakke*, 438 U.S. 265, 317 (1978) (holding that the university could not reserve sixteen out of 100 seats in the medical school class for members of minority groups).

[4] *Id.*; *see also Grutter*, 539 U.S. at 343 ("the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body."); *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (holding that the University of Michigan's policy to automatically assign extra points to minority applicants was not narrowly tailored and violated the Equal Protection Clause of the Fourteenth Amendment); *Fisher v. U. of Texas at Austin*, 570 U.S. 297, 314 (2013) (upholding its previous decisions in *Bakke, Grutter, and Gratz*).

[5] *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality By Any Means Necessary (BAMN)*, 572 U.S. 291, 314 (2014) ("[t]here is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters."). As of 2020, eight states have banned affirmative action, some through amendments to their constitutions, others by executive order, and others by statute (California – 1996 – constitutional amendment; (1) Washington – 1998 – statute; (3) Florida – 1999 – executive order; (4) Michigan – 2006 – constitutional amendment; (5) Nebraska – 2008 – constitutional amendment ; (6) Arizona – 2010 – constitutional amendment; (7) New Hampshire – 2011 –statute; and (8) Oklahoma – 2012 – constitutional amendment);

wrong with that? Everything. This article will be divided as follows: Part I will examine American legislative history and its failure to end discrimination in fact. Part II will analyze the claims of the States and the people regarding affirmative action. Part III will explore past trends in judicial decisions and their conditioning factors, including political party platforms and United States Supreme Court appointments. Part IV will evaluate changes in those conditioning factors that may alter future decisions, including the best- and worst-case scenarios. Lastly, Part V will provide recommendations on the best approach to remediate past discriminations. [6]

I. Discrimination in Fact

To put the problem into context, a journey through history is beneficial. The first enslaved Africans arrived in the New World in 1619, 400 years ago.[7] They were not emancipated nor Constitutionally free until 1865, 155 years ago.[8] "Separate but equal" was constitutional for six decades before it was overruled in 1954, 66 years

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Drew Desilver, *Supreme Court says states can ban affirmative action; 8 already have*, PEW RESEARCH CENTER (April 22, 2014), https://www.pewresearch.org/fact-tank/2014/04/22/supreme-court-says-states-can-ban-affirmative-action-8-already-have/.

[6] As a Black Latina, I may possess the potential for strong beliefs and biases, but I recognize that this article is intended to educate the reader, therefore, Parts I through IV will remain as impartial and objective as possible, following the New Haven School. *See* W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, Commentary, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575, 576 (2007) [hereinafter *The New Haven School*]; Carol Castleberry, *The Moral Imperative to Change Unjust Laws and the New Haven School*, 14 INTERCULTURAL HUM. RTS. L. REV. 279, 284 (2019) ("[t]he New Haven School's goal is to solve pressing social problems rationally and comprehensively, using a series of five practical steps, or "intellectual tasks" adapted from cultural anthropology's systematic description of social process.").

[7] *Slavery in America*, HISTORY, https://www.history.com/topics/black-history/slavery (last updated Jan. 12, 2021).

[8] Jim Chen, *Mayteenth*, 89 MINN. L. REV. 203, 208 (2004); *13th Amendment,* HISTORY, https://www.history.com/topics/black-history/thirteenth-amendment (last updated June 9, 2020); U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.").

ago.[9] After years of desegregation pushback from Southern states, The Civil Rights Act, prohibiting the discrimination under federally assisted programs on the grounds of race, color or national origin, was signed in 1964, only 56 years ago.[10] After a century of Jim Crow laws, The Voting Rights Act, banning literacy tests and giving the Attorney General the duty to challenge poll taxes, was enacted in 1965, only 55 years ago.[11] As sex discrimination in education became a priority, Title IX of the Education Amendments, prohibiting discrimination in

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[9] *Plessy v. Ferguson*, 163 U.S. 537, 543 (1896), *overruled by Brown v. Bd. of Ed. of Topeka, Shawnee Cty., Kan.*, 347 U.S. 483, 495 (1954) ("[a] statute which implies merely a legal distinction between the white and colored races — a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color — has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude."); *Brown*, 347 U.S. at 495; *see also Brown v. Bd. of Educ. of Topeka, Kan.,* 349 U.S. 294, 301 (1955) (due to the resistance by local governments to integrate schools, the Court rendered a second opinion, mandating for integrating "with all deliberate speed."); *Black History Milestones: Timeline*, HISTORY, https://www.history.com/topics/black-history/black-history-milestone (last updated June 6, 2020) [hereinafter *Black History Milestones*] ("[t]hough the Court's ruling applied specifically to public schools, it implied that other segregated facilities were also unconstitutional, thus striking a heavy blow to the Jim Crow South."); *see* Pamela W. Carter & Phoebe A. Roaf, *A Historic Overview of Brown v. Board of Education*, 51 LA. B.J. 410 (2004) for an analysis of *Brown* and the history leading to it.

[10] The Civil Rights Act was a product of the John F. Kennedy Presidency and was being debated in Congress when President Kennedy was assassinated, which left President Johnson, not known for his support of Civil Rights, with the responsibility of seeing that the Act became law; *see Black History Milestones*, *supra* note 9; *see also* Civil Rights Act of 1964, 42 U.S.C. §§ 2000d (2018).

[11] Literacy tests were used to measure a voter's ability to read and write used with the excuse of aiming for educated and informed voters, when in reality they were to keep Black people from voting as through segregation, their education was kept limited by white people. *See Literacy Tests*, NAT'L MUSEUM OF AM. HIST., https://americanhistory.si.edu/democracy-exhibition/vote-voice/keeping-vote/state-rules-federal-rules/literacy-tests (last visited July 2, 2020); poll taxes were fees that voters had to pay in order to cast a vote, there was one exception through the "grandfather clause," for those who had ancestors that voted before the Civil War, therefore white people did not have to pay poll taxes. *See Poll Taxes*, NAT'L MUSEUM OF AM. HIST., https://americanhistory.si.edu/democracy-exhibition/vote-voice/keeping-vote/state-rules-federal-rules/poll-taxes (last visited July 30, 2020); *see also Black History Milestones*, *supra* note 9; Voting Rights Act of 1965, 52 U.S.C. § 10101 (2018).

education programs receiving federal financial assistance on the basis of sex, was signed into law in 1972, only 48 years ago.[12] These historic milestones were great strides towards "equality," however, the problem is that discrimination based on race and gender may have ended in writing, but it has not ended *in fact* and will not end in fact for a very long time.[13]

One problem with these legislations is that they focus on race and gender separately.[14] Although this article strongly emphasizes racial discrimination and the color-blind mentality, one must keep one concept in mind, intersectionality. Introduced by Professor Kimberlé Crenshaw, intersectionality explains that each person experiences discrimination differently depending on their membership in multiple

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[12] *Women's History Milestones: A Timeline*, HISTORY, https://www.history.com/topics/womens-history/womens-history-us-timeline (last updated Feb. 5, 2020) [hereinafter *Women's History Milestones]*; 20 U.S.C. §1681-§1688 (2018).

[13] Affirmative action measures have continuously been seen as temporary measures, and in 2003, the U.S. Supreme Court stated in *Grutter v. Bollinger* that "[they] expect[ed] that 25 years from [then], the use of racial preference [would] no longer be necessary to further the interest approved [in that case]." *Grutter*, 539 U.S. at 343; *See Understanding equality,* EQUALITY AND HUMAN RIGHTS COMMISSION, https://www.equalityhumanrights.com/en/secondary-education-resources/useful-information/understanding-equality (last updated Aug. 2, 2018) ("Equality is about ensuring that every individual has an equal opportunity to make the most of their lives and talents. It is also the belief that no one should have poorer life chances because of the way they were born … Equality recognises that historically certain groups of people with protected characteristics such as race, disability, sex and sexual orientation have experienced discrimination").

[14] *See* Racism, MERRIAM-WEBSTER DICTIONARY (2020) ("2. a. the systemic oppression of a racial group to the social, economic, and political advantage of another"); *see also* David Williams, *A Missouri Woman Asked Merriam-Webster to Update its Definition of Racism and Now Officials Will Make the Change*, CNN https://www.cnn.com/2020/06/09/us/dictionary-racism-definition-update-trnd/index. html (last updated June 12, 2020) ("'I kept having to tell them that definition is not representative of what is actually happening in the world,' she told CNN. 'The way that racism occurs in real life is not just prejudice it's the systemic racism that is happening for a lot of black Americans'"); *see* Racism, Marriam-Webster Dictionary (11th Ed. 2020); *see also* David Williams, *A Missouri Woman Asked Merriam-Webster to Update its Definition of Racism and Now Officials Will Make the Change*, CNN (June 12, 2020), https://www.cnn.com/2020/06/09/us/dictionary-racism-definition-update-trnd/index.html.

groups.[15] When discrimination is addressed by group, some people are erased. In the case of Black women, the feminist movement was fought by women, for white women; and the civil rights movement was fought by Black people, for Black men.[16] Consequently, Black women were erased, hence we did not only need the Supreme Court to establish that "separate but equal" was unconstitutional, but we also needed them to hold that the "majority" does not get to decide whether the safeguards put in place to afford us equal opportunity are still needed or not, thus affirmative action should be .[17]

II. The States and the People

In *Schuette*, the Court emphasized that the issue at hand was not how the debate on the constitutionality of affirmative action should be resolved, but rather the issue was *who* should resolve it.[18] The Court held that neither the Constitution nor precedent established that it should not be the electorate.[19] It has been recognized that States have a legitimate and substantial interest in remediating past racial

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[15] *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

[16] *See* Christina Coleman, *Black Panther 50 - Here Are the Women of the Black Panther Party*, ESSENCE (Oct. 21, 2016), https://www.essence.com/holidays/black-history-month/women-black-panther-party/#77113 (Notorious female Black Panther leaders included Elaine Brown, who was chosen as the party's leader after founder Huey P. Newton was exiled to Cuba. She eventually left the Black Panthers due to no longer being able to tolerate the sexism within the party as "[a] woman in the Black Power movement was considered, at best, irrelevant. A woman asserting herself was a pariah. If a black woman assumed a role of leadership, she was said to be eroding black manhood, to be hindering the progress of the black race."); Jennifer C. Nash, *'Home Truths' on Intersectionality*, 23 YALE J.L. & FEMINISM 445, 451-52 (2011) ("In an era marked by the proliferation of feminisms that focused on white women and anti-racist projects that focused on black men, black feminist organizations produced a set of theories, texts, and politics that insisted on the existence-and the importance-of the black female subject's experience. In so doing, black feminists spoke against the prevailing logic of the time, that 'all the women are white, all the blacks are men,' and replied boldly with 'some of us are brave'"). (citation omitted).

[17] *See Brown*, 347 U.S. at 495; *Schuette*, 572 U.S. at 314. .

[18] *Schuette,* 572 U.S. at 314.

[19] *Id.*

discrimination.[20] Along with the States' interest, as citizens of a democratic nation whose constitutional system creates a fundamental right to vote, the people have an interest that consists of the right to speak, debate, and ultimately make decisions through the political process.[21]

In a 2019 survey by the Pew Research Center, 73% of Americans surveyed said that colleges and universities should not consider race or ethnicity when making decisions about student admissions.[22] In the same survey, 81% said that gender should not be considered.[23] These findings were a stark contrast to a 2014 Pew Research survey where only 30% of Americans surveyed said that the use of affirmative action in college admissions was a bad thing.[24] In addition, eight states have already acted on their interest, and five states' citizens have already voted to constitutionalize their views.[25]

Opponents of these claims include Justices Sotomayor and Ginsburg. In *Schuette,* Justice Sotomayor reminded the Court that after a century of being kept out of Michigan colleges and universities, racial minorities succeeded *twice* in receiving the U.S. Supreme Court's blessing on the constitutionality of affirmative action policies in admission processes.[26] She then drew attention to the fact that after losing two fights in the courts, Michigan and its voters "changed the

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[20] *See Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265, 307(1978).

[21] *Schuette,* 572 U.S. at 312.

[22] The survey's sample size was 6,637 with a margin of error at 95% confidence level. *See* Nikki Graf, *Most Americans Say Colleges Should Not Consider Race or Ethnicity in Admissions*, PEW RESEARCH CENTER (Feb. 25, 2019), https://www.pewresearch.org/fact-tank/2019/02/25/most-americans-say-colleges-should-not-consider-race-or-ethnicity-in-admissions/.

[23] Graf, *supra* note 22; *2019 Pew Research Center's American Trends Panel*, PEW RESEARCH CENTER (2019), https://www.pewresearch.org/wp-content/uploads/2019/02/FT_19.02.25_Admissions_Topline.pdf.

[24] The survey's sample size was 3,335 adults with a margin of error at 95% confidence level. *See* Bruce Drake, *Public strongly backs affirmative action programs on campus*, PEW RESEARCH CENTER (Apr. 22, 2014), https://www.pewresearch.org/fact-tank/2014/04/22/public-strongly-backs-affirmative-action-programs-on-campus/; *About the Survey,* PEW RESEARCH CENTER (2014), https://assets.pewresearch.org/wp-content/uploads/sites/5/legacy-questionnaires/4-22-14%20Affirmative%20Action%20Topline.pdf.

[25] Desilver, *supra* note 5.

[26] *Schuette,* 572 U.S. at 339 (Sotomayor, J., dissenting).

rules in the middle of the game, reconfiguring the existing political process in Michigan in a manner that burdened racial minorities."[27] It was argued that this burden was unnecessary as Michigan voters had ample options to eliminate race-conscious policies that did not require either a decision from the Court nor an amendment to the Michigan Constitution.[28]

Justice Sotomayor cited *Washington v. Seattle School Dist. No. 1*, where the Court held that "the Fourteenth Amendment does not tolerate a political structure that treats all individuals as equals, yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation."[29] Justice Sotomayor identified that the amendment to the Michigan Constitution essentially created two distinct processes via which Michigan citizens may influence admissions policies: "one for persons interested in race-sensitive admissions policies and one for everyone else."[30] For the former, if a person wishes to advocate for a race-conscious policy, they must assume the task of amending the Michigan Constitution.[31] In the latter, however, a citizen advocating for policies that consider factors such as legacy status or athletic ability, needs only to convince the members of the Board of Regents on their views or vote-out and replace board members with those that share those views.[32] Albeit a short list of precedent, affirmative action

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[27] *Id.* at 340.

[28] *See id.* at 339-40 ("[t]hose voters were of course free to pursue this end in any number of ways. For example, they could have persuaded existing board members to change their minds through individual or grassroots lobbying efforts, or through general public awareness campaigns. Or they could have mobilized efforts to vote uncooperative board members out of office, replacing them with members who would share their desire to abolish race-sensitive admissions policies.").

[29] *Id.* at 341 (quoting *Washington v. Seattle School Dist. No.* 1, 458 U.S. 457, 467 (1982) (internal quotation marks omitted).

[30] *Id.* at 340.

[31] *See id.* at 340-41; *see also* MICH. CONS Art. XII, § 1 ("Proposed amendments agreed to by two-thirds of the members elected to and serving in each house . . . shall be submitted, not less than 60 days thereafter, to the electors at the next general election or special election as the legislature shall direct.").

[32] *See Schuette,* 572 U.S. at 340 ("A citizen who is a University of Michigan alumnus, for instance, can advocate for an admissions policy that considers an applicant's legacy status by meeting individually with members of the Board of Regents to convince them of her views, by joining with other legacy parents to lobby

has been at the forefront of change for years and the choices that the U.S. Supreme Court, the States, and the people make can, and are, influenced by various condition factors, both past and present.

III. Past Trends in Decisions and Conditioning Factors

A problem arising out of the body of legislation mentioned in Part I is that there is a strong difference between using race to segregate and using race to integrate.[33] Since the U.S. Supreme Court's decision in *Brown*, the goal has been to remediate past racial discrimination and more specifically, to achieve student body diversity.[34] Pre-*Brown*, the "separate but equal" doctrine legalized the use of race to segregate; post-*Brown*, although race could no longer be used to segregate, institutionalized racism produced a "second generation segregation," creating obstacles in the use of race to integrate.[35] And although *Brown* ended segregation, it only provided

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the Board, or by voting for and supporting Board candidates who share her position").

[33] Turner, *infra* note 68, at 47.

[34] *See Bakke*, 438 U.S. at 307; *Grutter*, 539 U.S. at 342; *Brown*, 347 U.S. at 495.

[35] *See* Roslyn Arlin Mickelson, *The Academic Consequences of Desegregation and Segregation: Evidence from the Charlotte-Mecklenburg Schools*, 81 N.C. L. REV. 1513, 1525 (2003). (describing how second-generation segregation is "the racially correlated allocation of educational opportunities within schools, typically caused by curricular grouping or tracking of core academic classes in English, Math, Social Studies, and Science during secondary school."); *see also* Joe R. Feagin & Bernice McNair Barnett, *Success and Failure: How Systemic Racism Trumped the Brown v. Board of Education Decision,* 2004 U. ILL. L. REV. 1099, 1100 (2004) ("although schools may be officially desegregated, they nevertheless remain effectively segregated due to the following: discrimination in schools by administrators, teachers, and students; racial bias in school curriculum; the separation of students into different ability tracks reflecting racial, class, and gender stratification; and the use of standardized testing that contains significant racial and class bias"). One obstacle has been standardized testing. One of the first standardized exams administered to decide whether a Black student could attend a school was in New Orleans, Louisiana in 1960. Today, standardized exams like the Scholastic Assessment Test (hereinafter "SAT") and the American College Testing (hereinafter "ACT"), measure learned skills which "depend on resources in home and school environments, which often disadvantage the learning process for lower-income children." *See* Debra Michals, *Ruby Bridges*, NAT'L WOMEN'S HIST. MUSEUM, https://www.womenshistory.org/education-resources/biographies/ruby-bridges

a moral and legal authority limited by what "the governing elite would allow."[36]

A. Richard Nixon's Supreme Court

The use of race to integrate had a sound push during the 1950s and 1960s. However, by the 1970s, the rise of conservative presidential administrations and conservative appointments to the U.S. Supreme Court enabled backtracking.[37] President Richard Nixon's 1968 presidential campaign centered around appealing to suburban whites and filling the U.S. Supreme Court with conservative justices.[38] President Nixon's first appointment to the U.S. Supreme Court was Justice Harry Blackmun, whom, while having a 0.115 Segal-Cover score—measured in a scale of 0 to 1 reflecting a Justice's ideological positions in civil liberty issues with zero being "most conservative" and one being "most liberal"—would eventually join the Court's liberal bloc in 62.1% of civil rights cases decided during his tenure.[39]

(last visited Aug. 1, 2020); *see also* Debra Michals, *Ruby Bridges and Desegregation*, STEINBECK IN THE SCHOOLS. SAN JOSÉ STATE UNIVERSITY, https://sits.sjsu.edu/context/historical/hist-context-ruby-bridges-desegregation/ index.html (last visited Aug. 1, 2020); The purpose of the SAT and ACT is to measure a high school student's readiness for college, and provide colleges with one common data point that can be used to compare all applicants. *What is the ACT?* THE PRINCETON REVIEW, https://www.princetonreview.com/college/act-information (last visited Aug. 1, 2020); *What is the SAT?* THE PRINCETON REVIEW, https://www.princetonreview.com/college/sat-information (last visited Aug. 1, 2020); *see also Plessy v. Ferguson*, HISTORY, https://www.history.com/topics/ black-history/ plessy-v-ferguson#section_3 (last updated Feb. 21, 2020); *Plessy,* 163 U.S. at 495.

[36] Feagin & McNair Barnett, *supra* note 35, at 1107.

[37] *Id.* at 1104.

[38] Myron Orfield, *Milliken, Meredith, and Metropolitan Segregation*, 62 UCLA L. REV. 364, 380 (2015).

[39] *See* Jeffrey A. Segal, Lee Epstein, Charles M. Cameron & Harold J. Spaeth, *Ideological Values and the Votes of U.S. Supreme Court Justices Revisited*, 53 J. Pol. 812, 812 (1995) [hereinafter *Ideological Values and the Votes of U.S. Supreme Court Justices*]; *see also* Lee Epstein, Thomas G. Walker, Nancy Staudt, Scott Hendrickson & Jason Roberts, *The U.S. Supreme Court Justices Database*, WASHINGTON UNIVERSITY IN ST. LOUIS, http://epstein.wustl.edu/research/ justicesdata.html (last updated July 30, 2019) [hereinafter *The U.S. Supreme Court Justices Database*]; Orfield, *supra* note 38, at 381; *see also* Lee Epstein, Andrew D.

In *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, Justice Blackmun joined a unanimous Court in upholding a metropolitan-wide desegregation policy that authorized judicial redrawing of school boundaries and the use of school busing to integrate all schools.[40] Angered by his first nominee's part in this decision, President Nixon made it clear that he would not appoint another Justice unless they expressly opposed busing.[41] Consequently, his next appointment was Justice William Rehnquist, whose Segal-Cover score was 0.045 and only joined the Court's liberal bloc in 24.1% of civil rights cases.[42] His second appointment was Justice Lewis Powell, Jr. whose Segal-Cover score was 0.165 and who only joined the Court's liberal bloc in 40.3% of civil rights cases.[43]

By 1974, President Nixon's presidential promises to suburban whites were fulfilled.[44] After a trend of white people moving to suburbs known as "white flight," cities like Detroit, Michigan, saw the population of Black people almost double.[45] In an effort to remediate

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Martin, Kevin M. Quinn, Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1495 fig. 3 (2007) [hereinafter *Ideological Drift Among Supreme Court Justices*].

[40] *Swann v. Charlotte-Mecklenburg Bd. of Ed.*, 402 U.S. 1 (1971); *see also Green v. Cty. Sch. Bd. of New Kent Cty., Va.*, 391 U.S. 430, 435 (1968).

[41] In an audiotape from the Oval Office, President Nixon is heard telling Attorney General John Mitchell: "I want you to have a specific talk with whatever man we consider and I have to have an absolute commitment from him on busing and integration. I really have to. All right? Tell him that we totally respect his right to do otherwise, but if he believes otherwise, I will not appoint him to the court." Audiotape: Conversation Between Richard Nixon and John Mitchell, Oval Office of the White House, Washington, D.C. (Sept. 18, 1971) (Nat'l Archives Nixon White House Tape Conversation 576-6); "Busing, also called desegregation busing, in the United States, [is] the practice of transporting students to schools within or outside their local school districts as a means of rectifying racial segregation." Douglas DeWitt, *Busing,* BRITANNICA, https://www.britannica.com/topic/busing (May 13, 2020); *see Swann*, 402 U.S. at 5; Orfield, *supra* note 38, at 384-85.

[42] Orfield, *supra* note 38, at 385; *The U.S. Supreme Court Justices Database, supra* note 39.

[43] *Id.*

[44] *See* Orfield, *supra* note 38, at 385; *Milliken v. Bradley*, 418 U.S. 717 (1974).

[45] Rapid suburbanization was encouraged by the federal government through prohibitions on mortgage loans to Black people. The Federal Housing Administration, in a manual to lenders stated that "[a]reas surrounding a location are investigated to determine whether incompatible racial and social groups are present,

the now segregated urban and suburban school districts, the City of Detroit implemented an inter-district desegregation policy that required busing in all fifty-four school districts in the Detroit metropolitan area.[46] However, in *Milliken v. Bradley,* in a five to four decision, the U.S. Supreme Court held that a federal court could not require suburban districts that had not intentionally caused segregation to be a part of the City of Detroit's desegregation strategies.[47] The dissenting justices in *Milliken* understood the problem with the majority's decision.[48] Justice Douglas asserted that because schools in Michigan were financed locally, and Black people were more likely to be poorer than white people, ruling against a metropolitan area policy fundamentally created a "separate but equal" system.[49]

It is important to point out that the Equal Employment Opportunity Act of 1972 and Section 718 of Title VII of the Civil rights Act of 1964 were passed and enacted during the Nixon administration.[50] However, it is more important to point out that this was not due to President Nixon's fondness of affirmative action but likely out of the belief that "society is better served by a productive African-American community than one that 'burden[s] the nation with large costs of crime, poverty, illiteracy, and poor health' due to the

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for the purpose of making a prediction regarding the probability of the location being *invaded* by such groups. If a neighborhood is to retain stability, it is necessary that properties shall continue to be occupied by the same social and racial classes. A change in social or racial occupancy generally contributes to instability and a decline in values." FED. HOUS. ADMIN., UNDERWRITING AND EVALUATION PROCEDURE UNDER TITLE II OF THE NATIONAL HOUSING ACT (1938); John Kimble, *Insuring Inequality: The Role of the Federal Housing Administration in the Urban Ghettoization of African-Americans*, 32 LAW & SOC. INQUIRY 399, 405 (2007) (emphasis added); Orfield, *supra* note 38, at 385.

[46] *Milliken,* 418 U.S. at 752-53.

[47] *Id.*

[48] *Milliken,* 418 U.S. at 758 (Douglas, J., dissenting).

[49] *Id.*

[50] "No Government contract, or portion thereof, with any employer, shall be denied, withheld, terminated, or suspended, by any agency or officer of the United States under any equal employment opportunity law or order, where such employer has an affirmative action plan which has previously been accepted by the Government …." 42 U.S.C. § 2000e-17 (2020).

absence of tangible opportunities for advancement."[51] President Nixon's Republican successor Gerald Ford and Ford's Democrat successor Jimmy Carter did not disturb these policies and accordingly supported landmark decisions like *Bakke*.[52]

B. Ronald Reagan's Supreme Court

When Republican President Ronald Reagan took office in 1981, his presidential campaign rode on a promise to end affirmative action by essentially changing the true interpretation of affirmative action and the need for it.[53] While the 1980 Democratic Party Platform saw affirmative action as an essential policy, the 1980 Republican Party Platform stated that:

> The truths we hold and the values we share affirm that no individual should be victimized by unfair discrimination because of race, sex, advanced age, physical handicap, difference of national origin or religion, or economic circumstance. However, *equal opportunity should not be jeopardized by bureaucratic regulations and decisions which rely on quotas, ratios, and numerical requirements to exclude some individuals in favor of others*, thereby rendering such regulations and decisions inherently discriminatory.[54]

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[51] Emmanuel O. Iheukwumere & Philip C. Aka, *Title VII, Affirmative Action, and the March Toward Color-Blind Jurisprudence*, 11 TEMP. POL. & CIV. RTS. L. REV. 1, 7 (2001) (quoting Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 80 (1985).

[52] *Id.*

[53] *Id.*, at 8; Neal Devins, *Affirmative Action After Reagan*, 68 TEX. L. REV. 353, 354 (1989).

[54] *Compare* REPUBLICAN PARTY PLATFORM OF 1980 (1980), *reprinted in* Re Gerhard Peters & John T. Woolley, *Republican Party Platform of 1980*, THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/node/273420 (last visited Aug. 3, 2020) (emphasis added), *with* 1980 DEMOCRATIC PARTY PLATFORM (1980), *reprinted in* Gerhard Peters and John T. Woolley, *1980 Democratic Party Platform*, THE AMERICAN PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/1980-democratic-party-platform (last visited Aug. 3, 2020) ("An effective affirmative action program is an essential component of our commitment to expanding civil rights protections. The federal government must be a model for

This platform, entirely ignoring precedent, created a narrative where affirmative action was no longer an inclusionary policy that allowed merit to prevail over race but instead a quota system that went against the belief that the Constitution and society are color-blind.[55] To solidify the change of affirmative action, President Reagan appointed Justice Antonin Scalia to the U.S. Supreme Court and elevated Justice Rehnquist to Chief Justice.[56] Justice Scalia is known to have been one of the most conservative Justices to ever sit on the U.S. Supreme Court's bench, with a perfect Segal-Cover score of zero and the third-lowest percentage of siding with the Court's liberal bloc in civil rights cases at 30.6%.[57]

City of Richmond v. J.A. Croson Co. gave Justice Scalia an opportunity to express his conservative, anti-affirmative action beliefs.[58] In *Croson*, the Court struck down a plan by the City of Richmond, Virginia that required prime contractors receiving city

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private employers, making special efforts in recruitment, training, and promotion to aid minority Americans in overcoming both the historic patterns and the historic burdens of discrimination.").

[55] The U.S. Supreme Court previously established in *Bakke* that although student body diversity is a compelling state interest that can justify the use of race in university admissions, a quota system cannot be used to achieve this goal. *Bakke*, 438 U.S. at 267; *see also* Robert P. Schuwerk, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV., 723, 734 (1972) ([t]he Philadelphia Plan came out of President Johnson's executive order-No. 11,246, in which he gave power to the Secretary of Labor to require that contractors to make good faith efforts to achieve certain goals of minority employment. Sponsors of the Plan made it clear that it did not impose quotas but in fact made them illegal.); Iheukwumere & Aka, *supra* note 51, at 8-9.

[56] *Justices 1789 to Present*, SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/about/members_text.aspx (last visited Aug 2, 2020). A Chief Justice is appointed by the President and confirmed by the Senate and needs not be a current Associate Justice. A Chief Justice that is "elevated" is a Justice that previously sat on the bench as an Associate Justice. *See* Brian P. Smentkowski, *Supreme Court of the United States*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Supreme-Court-of-the-United-States#ref796949 (last update Oct. 9, 2020).

[57] Justice Rehnquist ranks first with 27.35% (average between 24.1% as Associate Justice and 30.6% as Chief Justice) and Justice Clarence Thomas ranks second with 25%. *The U.S. Supreme Court Justices Database, supra* note 39; *see Ideological Values and the Votes of U.S. Supreme Court Justices, supra* note 39; *see also* Iheukwumere & Aka, *supra* note 51, at 9.

[58] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises (MBEs).[59] Affirming the lower court's reasoning, the Court found no evidence of prior discrimination in contract awards by the city and that the plan was not narrowly tailored.[60] Although he agreed with the plurality's holding, Justice Scalia felt it necessary to write a separate concurring opinion in which he disagreed with the majority's dicta.[61]

Justice Scalia believed that "discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society," and agreed with Justice Harlan's "our Constitution is color-blind" statement in *Plessy v. Ferguson*.[62] However, Justice Scalia used his concurrence not only to establish his beliefs but to inaugurate the new affirmative action narrative:[63]

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[59] *Id.* at 477.

[60] *Id.* at 507 ("[t]he random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination .... Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination."); *but see id.* at 529 (Marshall, J., dissenting) ("I find deep irony in second-guessing Richmond's judgment on this point. As much as any municipality in the United States, Richmond knows what racial discrimination is; a century of decisions by this and other federal courts has richly documented the city's disgraceful history of public and private racial discrimination . . . today's decision marks a deliberate and giant step backward in this Court's affirmative-action jurisprudence).

[61] *Id.* at 520 (Scalia, J., concurring) ("I do not agree, however, with Justice O'Connor's dictum suggesting that, despite the Fourteenth Amendment, state and local governments may in some circumstances discriminate on the basis of race in order (in a broad sense) 'to ameliorate the effects of past discrimination'") (citing *id.* at 476-77).

[62] *Croson*, 488 U.S. at 420 (Scalia, J., concurring), quoting ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 133 (1975).

[63] Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989) (Justice Scalia created a narrative that "can become vivid for the white reader by imagining the oppression that white people might suffer at the hands of black people. When and where blacks are the dominant racial group, they will oppress whites, unless whites act to stop them. Affirmative action is thus the seed that will destroy whites .... Individual imagination may lead the reader to imagined stories of personal disadvantage in the name of affirmative action, ("I did not get the appointment because I am a white male").

> Racial preferences appear to "even the score" (to some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, *making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white.* Nothing is worth that embrace. Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged as such will have a disproportionately *beneficial* impact on blacks.[64]

In this concurrence, Justice Scalia successfully made affirmative action fall under the umbrella of a color-blind Constitution and society. At the same time, he also created a narrative where the definition of affirmative action is now in the hands of the reader's imagination.[65]

C. Schuette *and Justice Sotomayor's Dissent*

The phrase in Justice Harlan's dissent in *Plessy v. Ferguson*, "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens,"[66] has become a beacon for the Court's belief that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[67] By this premise, the Court set a

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[64] *Croson*, 488 U.S. at 528 (Scalia, J., concurring) (emphasis added); *see* Ross, *supra* note 63, at 390 ("[t]he opinion, in terms of what it says, is mostly abstract principles drawn from precedents that Scalia strung together with no recounting of the cases, or principles drawn from an unexplored historical context."); Iheukwumere & Aka, *supra* note 51, at 31 n.235 ("Justice Scalia's unsupported conclusion that color-blindness will benefit Blacks disproportionately, not only ignores studies showing that decision-makers in this society invariably consider race and the color of an individual in the distribution of opportunities and benefits.").

[65] Ross, *supra* note 63, at 381.

[66] *Plessy,* 163 U.S. at 559 (Harlan, J., dissenting); *see also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,,* 551 U.S. 701, 772 (Thomas, J., concurring).

[67] *Parents Involved,* 551 U.S. at 748.

goal to make race an immaterial factor in decision making.[68] Nevertheless, the Court has allowed for legislation such as affirmative action because it also interprets the Constitution to "allow[] local, state, and national communities to adopt narrowly tailored race-conscious programs designed to bring about greater inclusion and diversity."[69] However, in *Schuette*, the Court went further to say, "[b]ut the Constitution foresees the ballot box, not the courts, as the normal instrument for resolving differences and debates about the merits of these programs."[70] Thus, allowing the electorate to decide whether affirmative action is needed or not by way of using the political process instead of firmly establishing the continuing need for affirmative action.[71]

Two strong opponents of these views are Justices Sonya Sotomayor and Ruth Bader Ginsburg.[72] In her dissent in *Schuette*, Justice Sotomayor made it clear that a color-blind approach is far from the reality of society.[73] Justice Sotomayor argued that,

> The way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination. As members of the judiciary tasked with intervening to carry out the guarantee of equal

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[68] *See Parents Involved,* 551 U.S. at 430*; see al*so Ronald Turner, *"The Way to Stop Discrimination on the Basis of Race ...",* 11 STAN. J. CIV. RIGHTS & CIV. LIBERTIES 45, 46 (2015).

[69] *Schuette,* 572 U.S. at 334 (Breyer, J., concurring).

[70] *Id.*; *see also id.* at 314 ("[t]his case is not about how the debate about racial preferences should be resolved. It is about who may resolve it. There is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters.").

[71] Michigan's voting age population in 2006 was 7,597,000. Proposal 2, the Affirmative Action Initiative Amendment received 2,141,010 yeses and 1,555,691 noes. *General Election Voter Registration/Turnout Statistics*, OFF. SECRETARY ST. JOCELYN BENSON, https://www.michigan.gov/sos/0,4670,7-127-1633_8722-29616--,00.html (last visited July 25, 2020*); Michigan Proposal 2, Affirmative Action Initiative (2006)*, BALLOTPEDIA, https://ballotpedia.org/Michigan_Proposal_2,_Affirmative_Action_Initiative_(2006) (last visited July 25, 2020).

[72] *Schuette,* 572 U.S. at 337 (Sotomayor, J., dissenting).

[73] *Id.* at 381.

> protection, [they] ought not sit back and wish away, rather than confront, the racial inequality that exists in our society. It is this view that works harm, by perpetuating the facile notion that what makes race matter is acknowledging the simple truth that race *does* matter.[74]

Consequently, Justice Sotomayor reasoned that although this is a democratic republic, under the doctrine of checks and balances, the Court must understand and prevent "democratically approved legislation [that] can oppress minority groups."[75]

Justice Sotomayor further strengthened her argument by reminding the Court that it must not forget that "to know the history of our Nation is to understand its long and lamentable record of stymieing the right of racial minorities to participate in the political process."[76] Pointing back to times in history where the Court had to strike down the majority's invidious acts against Black people's right to vote, Justice Sotomayor recapped the "political-process doctrine" where "the majority reconfigures the political process in a manner that burdens only a racial minority."[77] Thus, the Court's lack of a majority opinion and Justice Sotomayor's dissent provided a signal of possible future trends where the Court may continue to allow the majority of the people to decide, or it may change its view toward protecting affirmative action even against the will of a majority of the people in a state or local community.

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[74] *Id.*

[75] *Id.* at 337 ("I firmly believe that our role as judges includes policing the process of self-government and stepping in when necessary to secure the constitutional guarantee of equal protection. Because I would do so here, I respectfully dissent.").

[76] *Id.* at 337-38.

[77] *Id.* at 341; s*ee also Grutter*, 539 U.S. at 326 (strict judicial scrutiny requires that the government shows that the law is narrowly tailored and necessary to achieve a compelling government purpose).

IV. Evaluation of Future Trends and Changes in Conditioning Factors

A. The 2000s and 2010s

Although executive administrations and Justices have attempted to change the Court's view on affirmative action, none have been able to sway a majority vote to ban affirmative action under the Federal Constitution.[78] However, the Court's decision affirming the electorate's power to determine the status of affirmative action at a state level, created a path where the new narrative shaped by conservative executive administrations and their U.S. Supreme Court appointments can shape the laws of this Nation.[79]

In the present, the narrative of affirmative action has two sides, and which side a person decides to take is often determined by a person's imagination and the political ideologies that they follow.[80] Each side is supported depending on each executive administration's political views to the extent to which the Constitution allows them to recommend guidelines to universities and colleges for establishing affirmative action policies.[81] The three most recent executive administrations provide unambiguous examples on how the meaning of affirmative action and U.S. Supreme Court precedent can be inversely interpreted to shape policies.[82]

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[78] Therefore, today, an affirmative action policy is constitutional so long as it is narrowly tailored, because the attainment of a diverse student body is a constitutionally permissible goal for an institution of higher education. *See Grutter*, 539 U.S. at 326; *Bakke*, 438 U.S. at 311-12; *Fisher,* 570 U.S. at 310.

[79] *See Schuette,* 572 U.S. at 381 (Sotomayor, J., dissenting).

[80] Devon W. Carbado, *States of Continuity or State of Exception? Race, Law and Politics in the Age of Trump*, 34 CONST. COMMENT. 1, 7 (2019) ("while liberals think the preference is justified because the policy advances diversity, conservatives think the policy is never justified because it instantiates reverse discrimination.") (*citing* Kimberlé Crenshaw, *Framing Affirmative Action*, 105 MICH. L. REV. FIRST IMPRESSIONS 123 (2007)).

[81] Carbado, *supra* note 80, at 7.

[82] At the time this article was written, the three most recent executive administrations were, George W. Bush (Republican) (2000-2008), Barack Obama (Democrat) (2008-2016), and Donald Trump (Republican) (2016-present). *See* Erica L. Green, Matt Apuzzo & Katie Benner, *Trump Officials Reverse Obama's Policy on Affirmative Action in Schools*, N.Y. TIMES (July 3, 2018),

In 2018, the Trump Administration withdrew the *2011 Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education* (hereinafter "2011 Guidelines"). As an Obama era strategy, the 2011 Guidelines confirmed that "postsecondary institutions can voluntarily consider race to further the compelling interest of achieving diversity."[83] It encouraged institutions to apply the Civil Rights Act of 1964 and U.S. Supreme Court precedent, including *Parents Involved, Grutter*, *Gratz*, and *Bakke*, to implement policies "based on [their] particular educational objectives and unique needs."[84] The 2011 Guidelines went on to advise that

> An institution using a race-neutral approach for the purpose of achieving diversity may consider the impact a given approach might have on students of different races, and thus may take into account how employing the approach would help achieve diversity . . . [on the other hand] [w]hen an institution is taking an individual student's race into account in an admissions or selection process . . . the institution should evaluate each applicant's qualifications in a way that does not insulate any student, based on his or her race, from comparison to all other applicants.[85]

To replace the withdrawn 2011 Guidelines, the Trump Administration reverted to guidelines instituted in 2008 by the George W. Bush Administration (hereinafter "2008 Guidelines").[86] The 2008

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https://www.nytimes.com/2018/07/03/us/politics/trump-affirmative-action-race-schools.html.

[83] U.S. DEP'T OF JUSTICE AND U.S. DEP'T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY IN POSTSECONDARY EDUCATION (2011) [hereinafter 2011 GUIDELINES]; U.S. DEP'T OF JUSTICE AND U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: UPDATES TO DEP'T OF EDUC. AND DEP'T OF JUSTICE GUIDANCE ON TITLE VI 1 (2018) [hereinafter 2018 WITHDRAWAL LETTER].

[84] 2011 GUIDELINES, *supra* note 83, at 2-5; *see Parents Involved,* 551 U.S. 701; *Grutter*, 539 U.S. 306; *Gratz*, 539 U.S. 244; *Bakke*, 438 U.S. 265.

[85] 2011 GUIDELINES, *supra* note 83, at 5-6.

[86] The withdrawal letter specified that "[t]he [2011 Guidelines] advocate[d] specific policies and procedures for educational institutions to adopt, analyze a number of

Guidelines focus on explaining *Parents Involved* and "strongly encourages" the use of race-neutral policies as "genuinely race-neutral measures—for instance, those truly based on socio-economic status—do not trigger strict scrutiny and are instead subject to the rational-basis standard applicable to general social and economic legislation."[87]

Comparing both guidelines, they match each political party's platform in the election cycle in which each President was elected and reelected. For example, the 2000, 2004, and 2016 Republican Party Platforms, like in 1980, did not expressly advocate against "affirmative action" but advocated that: "[e]qual access . . . should guarantee every person a fair shot based on their potential and merit;" "preferences, quotas, and set-asides based on skin color, ethnicity, or gender, which perpetuate divisions and can lead people to question the accomplishments of successful minorities and women;" and "[m]erit and hard work should determine advancement in our society, so [they] reject unfair preferences, quotas, and set-asides as forms of discrimination."[88] In contrast, the 2008 Democratic Party Platform expressly stated: "[w]e support affirmative action, including in federal contracting and higher education, to make sure that those locked out

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hypotheticals, and draw conclusions about whether the actions in those hypotheticals would violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution or Title IV or Title VI of the Civil Rights Act of 1964 [and therefore advocate policy preferences and positions beyond the scope of these laws]." 2018 WITHDRAWAL LETTER, *supra* note 83; *see* U.S. DEP'T OF EDUC., THE USE OF RACE IN ASSIGNING STUDENTS TO ELEMENTARY AND SECONDARY SCHOOLS (2008) [hereinafter 2008 GUIDELINES].

[87] 2008 GUIDELINES, *supra* note 86; *see Parents Involved,* 551 U.S. 701.

[88] Gerhard Peters & John T. Woolley, *2000 Republican Party Platform*, THE AMERICAN PRESIDENCY PROJECT (July 31, 2000) https://www.presidency.ucsb.edu/documents/2000-republican-party-platform; Gerhard Peters & John T. Woolley, *2004 Republican Party Platform*, THE AMERICAN PRESIDENCY PROJECT (Aug. 30, 2004) https://www.presidency.ucsb.edu/documents/2004-republican-party-platform; Gerhard Peters & John T. Woolley, *2016 Republican Party Platform*, THE AMERICAN PRESIDENCY PROJECT (July 18, 2016) https://www.presidency.ucsb.edu/documents/2016-republican-party-platform [hereinafter 2016 REPUBLICAN PARTY PLATFORM].

of the doors of opportunity will be able to walk through those doors in the future."[89]

It is clear that the two narratives of affirmative action are continuing to be driven by the political ideologies that created them and consequently want to end them. It is also clear that the American history that some remember seems to be ignored by others. As Republican and Democrat beliefs continue to differ, the recent state of politics and society will likely change the current state of affirmative action by either strengthening or weakening it, depending on future executive administrations and U.S. Supreme Court appointments.

B. The Future: Best- and Worst-Case Scenarios

2020, a year many will never forget, brought to light the broken parts of our society and the holes in a system created to not mend them.[90] Election years are years of change, and 2020 promises to be no different. Currently, in the United States, there is a strong divide between Democrats and Republicans when it comes to a lot of topics, especially social reform pertaining to race relations and affirmative action.[91] Thus, the 2020 presidential election outcome will likely prove to be the climax point for the future of affirmative action.

The 2020 presidential candidates are incumbent President, Donald Trump, and former Vice-President, Joe Biden.[92] As a plain example of the two party's handling of the current turmoil in the

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[89] Gerhard Peters & John T. Woolley, *2008 Democrat Party Platform*, THE AMERICAN PRESIDENCY PROJECT (Aug. 25, 2008) https://www.presidency.ucsb.edu/documents/2008-democratic-party-platform.

[90] *See* AJ Willingham, *2020 Has Changed Everything. And It's Only Half Over*, CNN, https://www.cnn.com/interactive/2020/07/world/2020-year-in-review-july/ (last updated July 3, 2020) for a timeline of "world-changing, paradigm-shifting developments" in 2020.

[91] *See* Lauren Dezenski, *Race Relations Are Now Front-Of-Mind For 2020 Voters*, CNN, https://www.cnn.com/2020/06/08/politics/race-relations-2020-issue-poll-george-floyd/index.html (last updated June 8, 2020) ("60% of Democrats and Democratic-leaning independent voters say race relations are extremely important. Compare that with just 18% of Republicans and Republican-leaners who said the same.").

[92] CNN Politics, *Joe Biden 2020: Polls, News and on the Issues*, CNN, https://www.cnn.com/election/2020/candidate/biden (last visited Aug. 3, 2020).

country, while the Republican Party chose to reuse their 2016 Party Platform, the Democratic Platform expressly addresses that:

> Democrats are committed to standing up to racism and bigotry in our laws, in our culture, in our politics, and in our society, and *recognize that race-neutral policies are not sufficient to rectify race-based disparities . . .* We believe Black lives matter, and will establish a national commission to examine the lasting economic effects of slavery, Jim Crow segregation, and racially discriminatory federal policies on income, wealth, *educational*, health, and employment outcomes; to pursue truth and promote racial healing; and to study reparations. *We must acknowledge that there can be no realization of the American dream without grappling with the lasting effects of slavery, and facing up to the centuries-long campaign of violence, fear, and trauma wrought upon Black Americans.*[93]

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[93] The 2016 Republican Party Platform addresses race and affirmative action in a short sentence: "[m]erit and hard work should determine advancement in our society, so we reject unfair preferences, quotas, and set-asides as forms of discrimination." 2016 REPUBLICAN PARTY PLATFORM, *supra* note 88; Gerhard Peters & John T. Woolley, *2020 Democratic Party Platform*, THE AMERICAN PRESIDENCY PROJECT (Aug. 17, 2020) https://www.presidency.ucsb.edu/documents/2020-democratic-party-platform [hereinafter 2020 DEMOCRATIC PLATFORM]; *see also* United Nations Human Rights Council, *Statement on the Protests against Systemic Racism in the United States* (June 5, 2020), available from https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25927 ([t]he response of the President of the United States to the protests at different junctures has included threatening more state violence using language directly associated with racial segregationists from the nation's past, who worked hard to deny black people fundamental human rights. We are deeply concerned that the nation is on the brink of a militarized response that reenacts the injustices that have driven people to the streets to protest …. Reparative intervention for historical and contemporary racial injustice is urgent and required by international human rights law. This is a time for action and not just talk, especially from those who need not fear for their lives or their livelihoods because of their race, colour, or ethnicity."); *The Republican Party Platform, 2020*, BALLOTPEDIA, https://ballotpedia.org/The_Republican_Party_Platform,_2020 (last visited Aug. 8, 2020).

The Democratic Party's undertaking of these issues offers a path to a best-case scenario where the executive administration will revert guidelines that oppose affirmative action and steer away from "color-blind" ideas. On the other hand, the Republican Party's withholding of a new Party Platform that better addresses the issues at the forefront of America's society today, paves the way for what could be the worst-case scenario.

C. Donald Trump's Supreme Court and Administration

As President Trump's presidency rode on a wave of attacking LGBTQ+ rights, women's rights, ignoring racial injustice, and promises to appoint conservative justices to federal courts, affirmative action was undoubtedly in his line of fire.[94] Although no affirmative action case has been brought to the Court in the last four years, Justice Gorsuch's textualist opinion in *Bostock v. Clayton* provided a glimpse of a certain future for interpreting affirmative action.[95] In *Bostock*, the

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[94] *See* Kate Bennett, *Melania Trump posts video that misleads on the President's LGBTQ policies,* CNN (Oct. 30, 2010), https://www.cnn.com/2020/10/30/politics/melania-trump-lgbtq-donald-trump/index.html ("the administration is rolling back parts of the Affordable Care Act . . . Section 1557 of the Affordable Care Act, passed under former President Barack Obama in 2010, prohibits sex discrimination in federally funded health programs and activities; a 2016 rule interpreted this as including discrimination on the basis of gender identity. The Trump administration has limited the scope of that section of the law to stop offering civil rights protection to transgender and non-binary people."); Sarah Westwood, *Trump says he did not discuss Roe v. Wade with Amy Coney Barrett*, CNN (Sept. 27, 2020), https://www.cnn.com/2020/09/27/politics/trump-amy-coney-barrett-roe-v-wade/index.html ("Trump [] noted that he has been 'surprised' by some of the high court's rulings since successfully installing two conservative justices without providing further detail. 'I've been surprised by some of the rulings we've already had over the last year. You think you know somebody, and then you get rulings that are a little bit different than you think could happen, so you never know what's going to happen,' Trump said.").

[95] Justice Gorsuch—with a Segal-Cover score of 0.11—was President Trump's first appointment to the U.S. Supreme Court and replaced Justice Scalia after his death. *The U.S. Supreme Court Justices Database, supra* note 39. In *Bostock,* Justice Gorsuch sided with the liberal block of the Court as Justice Kavanaugh and Justice Alito joined by Justice Thomas penned two dissents in which they accused the court of making legislation instead of interpreting a statue. 140 S.Ct. 1731, 1738 (U.S., 2020) ("This Court normally interprets a statute in accord with the ordinary public

Court interpreted Title VII of the Civil Rights Act of 1964, to include that "[a]n employer who fires an individual merely for being gay or transgender defies the law."[96] Justice Gorsuch's opinion was based on a textualist analysis of the statute from the lens of the 1964 legislature and recognized that "[t]o 'discriminate against' a person, then, would seem to mean treating that *individual* worse than others who are similarly situated."[97] The problem here is that he is not incorrect, however, this is not how such legislation should be interpreted, especially when the Court has previously interpreted such statutes by their purpose and therefore allowed for voluntary affirmative action policies.[98]

Justice Gorsuch's use of textualism has created a likely precedent to any future discrimination cases that may come in front of the Court. For example, one case making its way up to the Supreme Court is *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, which claims that Harvard's affirmative action policies discriminate against Asian Americans and violate Title VI of

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meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations."); *see* Cass R. Sunstein, *Gorsuch Paves Way for Attack on Affirmative Action*, BLOOMBERG (June 17, 2020), https://www.bloomberg.com/opinion/articles/2020-06-17/gorsuch-gay-rights-opinion-targets-affirmative-action.

[96] *Bostock,* 140 S.Ct. at 1754; Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)(1) (2018) ((a) It shall be an unlawful employment practice for an employer— (1)to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.).

[97] *Bostock,* 140 S.Ct. at 1740.

[98] Sunstein, *supra* note 95; *see also United Steelworkers of Am., AFL-CIO-CLC v. Weber,* 443 U.S. 193, 203 (1979) ("It plainly appears from the House Report accompanying the Civil Rights Act that Congress did not intend wholly to prohibit private and voluntary affirmative action efforts as one method of solving this problem.").

the Civil Rights Act. [99] The U.S. District Court of Massachusetts and First U.S. Court of Appeals disagreed, both holding that Harvard's policies met strict scrutiny and there was no impermissible race balancing. The case has been granted certiorari by the U.S. Supreme Court and will be heard during the Court's 2022-2023 term.[100]

Moreover, The United States Department of Justice (Department of Justice) during the time of the Trump Administration has not only joined as a claimant in *Students for Fair Admissions, Inc.*, but has also filed suit against Yale University.[101] The Department of Justice claims that "[f]or at least 50 years, Defendant Yale University (Yale) has intentionally subjected applicants to Yale College to discrimination on the grounds of race and national origin."[102] Furthermore, it claims that "Yale's discrimination imposes undue and unlawful penalties on racially-disfavored applicants, including in particular most Asian and White applicants."[103] Does this sound familiar? Yes, because it is the re-written definition of affirmative

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[99] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)*, 397 F. Supp. 3d 126 (D. Mass. 2019), *appeal docketed*, No. 19-2005 (1st Circ. Oct. 11, 2019).

[100] *See* Benjamin L. Fu and Dohyun Kim, *What to Expect Next in the Harvard Admissions Suit*, THE CRIMSON (Oct. 13, 2020), https://www.thecrimson.com/article/2020/10/13/harvard-sffa-next-steps/; Joan Biskupic, *Affirmative action: Challenge to Harvard's admissions practices hits federal appeals court*, CNN (Sept. 16, 2020), https://www.cnn.com/2020/09/16/politics/affirmative-action-harvard/index.html; Amy Howe, *Court will hear challenges to affirmative action at Harvard and University of North Carolina,* SCOTUS NEWS (Jan. 24, 2022, 11:44 AM), https://www.scotusblog.com/2022/01/court-will-hear-challenges-to-affirmative-action-at-harvard-and-university-of-north-carolina/.

[101] Press Release, Dep't of Just. Office of Pub. Aff., *Justice Department Sues Yale University for Illegal Discrimination Practices in Undergraduate Admissions* (Oct. 8, 2020) (on file with author); *see* Biskupic *supra* note 100 ("[i]n August, the administration said an investigation had found that Yale is also discriminating against Asian American applicants, and it ordered the school to stop the consideration of race. Yale contends the allegations are baseless.");

[102] Complaint at 1, *United States v. Yale University*, No. 3:20-cv-01534 (Conn. Cir. Ct. Oct. 08, 2020).

[103] Press Release, The United States Department of Justice, *Justice Department Sues Yale University for Illegal Discrimination Practices in Undergraduate Admissions* (Oct. 8, 2020) (on file with Department of Justice Office Public Affairs).

action, the definition introduced in Justice Scalia's *Croson* concurrence.[104]

This is why we do not only need affirmative action, but we need people in power that know what it means and that want us to know what it means—because Supreme Court appointments are for life—and notwithstanding the results of the 2020 presidential election, with six Justices leaning conservative and three leaning liberal, the future of affirmative action is certainly expected to change. However, depending on the results of the 2020 presidential election, that change will either be pushed by the administration that wins or hindered by it.[105]

V. Recommendations

A perfect world is where everyone is treated equally, where everyone is afforded equal opportunity, and where no one is seen as inferior; that world is not the United States today, and that is why we must have these conversations. The main purpose of affirmative action is to redress lingering effects of past discrimination and create systems to prevent future discrimination. To establish equality over time race,

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[104] *Croson*, 488 U.S. at 528 (Scalia, J., concurring) ("Racial preferences appear to "even the score" (in some small degree) only if one embraces the proposition that our society is appropriately viewed as divided into races, making it right that an injustice rendered in the past to a black man should be compensated for by discriminating against a white.").

[105] Please note that this article was written before the 2020 presidential election, and by the time of revisions, President Joe Biden had been in office for three months. In these three months, the Biden administration took major steps to undo the damage to affirmative action caused by the Trump administration. One of these steps was to drop the Justice Department's suit against Yale University cited in footnote 101. *See* Notice of Voluntary Dismissal at 1, *United States v. Yale Univ.*, Civil Action No: 3:20-cv-01534-CSH (D. Conn. Feb. 3, 2021). Additionally, President Biden wasted no time, and on his first day as President signed an executive order stating that "[i]t is therefore the policy of [his] Administration that the Federal Government should pursue a comprehensive approach to advancing equity for all . . . Because advancing equity requires a systematic approach to embedding fairness in decision-making processes, executive departments and agencies must recognize and work to redress inequities in their policies and programs that serve as barriers to equal opportunity." Exec. Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (2021).

gender, and intersectionality must be understood. Justice Sotomayor said it best: "[t]he way to stop discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination."[106] When the U.S. Supreme Court allows the electorate to decide, it does not only allow them to choose between race-conscious or race-neutral approaches, it allows them to choose depending on the narrative of affirmative action they understand, not what affirmative action is.[107] Affirmative action policies are not mandatory, universities and colleges can choose to either have the policies or not. Taking away that choice is a clear undermining of both remediating past discriminations and safeguarding Black people's and women's constitutional rights to equal protection.

Discrimination is not a one solution problem, because discrimination is not one problem, it is a combination of evils, harms, and obstacles that have been piling on since well before 1619. In *Schuette*, the Court held that "[t]here is no authority in the Constitution of the United States or in [the] Court's precedents for the Judiciary to set aside Michigan laws that commit this policy determination to the voters." The Court failed to see and understand that there was no authority because in 1787, when the Constitution was written, affirmative action did not exist nor was there a need for it. The Court failed to see and understand that there was no precedent because *Schuette* was a case of first impression.[108] The Court failed to see and understand that in *Schuette* it should have played the role of policing the process of self-government and should have stepped in to secure the constitutional guarantee of equal protection.[109] *Schuette* may not be a majority opinion, but as a plurality, it authorizes the majority to vote depending on the narrative they want to believe, not the narrative that is correct. Bans on affirmative action are unconstitutional,

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[106] *Schuette,* 572 U.S. at 381 (Sotomayor, J., dissenting).

[107] *See id.* at 342 ("by permitting a majority of the voters in Michigan to do what our Constitution forbids, the Court ends the debate over race-sensitive admissions policies in Michigan in a manner that contravenes constitutional protections long recognized in our precedents.").

[108] *Id.* at 314 (The Court specified that all cases cited as precedent by the parties did not control because the question in *Schuette* was not about *how* racial preference should be resolved, but rather *who* should resolve it).

[109] *See id.* at 342 (Sotomayor, J., dissenting).

because if the Court has interpreted the U.S. Constitution to allow student body diversity as a compelling state interest, then it must not allow the electorate to say it is not.

There are two types of people in this country, those who see color and those who do not. Those who see color are either racists or not racists. Those who do not see color, strengthen the hold racism has on Black people. Ignoring that Black people are Black ignores generations of oppression; it ignores that "[A]ll men [were not] created equal," and the "[they] the people" the U.S. Constitution promises to protect are not the "[w]e the people" it attempts to protect today.[110] The Constitution is not color-blind, and neither is society. Both see color through the lens of the historic and systematic prejudice against the black race, while holding onto a "belief that race is the primary determinant of human traits and capacities and that racial differences produce an inherent superiority of a particular race."[111] A color-blind approach gives an opening to allow those in power, those elected by the majority, and those who see anyone except a white man as inferior, the power to revert back to "the good old days of segregation."[112] Affirmative action is not part of the past, it is part of the present and the future, and although "[w]e are fortunate to live in a democratic society . . . democratically approved legislation can oppress minority groups. For that reason, our Constitution places limits on what a majority of the people may do."[113]

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[110] *See* Paul Gowder, *Reconstituting We the People: Frederick Douglass and jürgen Habermas in Conversation*, 114 NW. U. L. REV. 335, 341 (2019).

[111] *Racism*, MERRIAM-WEBSTER DICTIONARY (2020); *see* David Williams, *A Missouri woman asked Merriam-Webster to update its definition of racism and now officials will make the change*, CNN https://www.cnn.com/2020/06/09/us/dictionary-racism-definition-update-trnd/index.html (last updated June 12, 2020) ("'I kept having to tell them that definition is not representative of what is actually happening in the world,' she told CNN. 'The way that racism occurs in real life is not just prejudice it's the systemic racism that is happening for a lot of black Americans.'").

[112] Nicholas Fandos, *Lindsey Graham, running for re-election, says his reference to 'the good old days of segregation' was sarcastic*, N.Y. TIMES, (Oct. 14, 2020), https://www.nytimes.com/2020/10/14/us/elections/lindsey-graham-good-old-days-segregation.html?auth=login-google.

[113] *Schuette,* 572 U.S. at 337.

Conclusion

We must remember history in order to understand the present. It was only sixty-six years ago that the U.S. Supreme Court struck down "separate but equal," and required desegregation with "all deliberate speed." However, it can be said that it will take more than one lifetime to erase the damage that racism has created.

The continued trend of attempting to create a "color-blind" society not only ignores the same history it seeks to remediate, but makes a mockery out of the lasting effects of that history. Why do we need affirmative action? The answer is simple:

> [F]reedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate [her], bring [her] 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. Thus, it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates . . . *We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result.*[114]

Why do we need affirmative action? Because racism did not end when slavery was abolished, it did not end with the Civil Rights Act of 1964, and it certainly will not end by creating a belief that race does not exist. Affirmative action does not compensate for past injustices to Black persons by disfavoring white people; "affirmative action can't [even] guarantee success, but it can open doors previously closed to women and people of color. The rest is up to those who walk

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[114] Lyndon B. Johnson, President of the United States, Commencement Address at Howard University: "To Fulfill These Rights" (June 4, 1965) (transcript available in the Lyndon Baines Johnson Library and Museum) (emphasis added).

through the doors."[115] Affirmative action is one of the few policies that assures we get to walk through a door for which we are qualified. We have been choked for generations; affirmative action is one of the few policies that assures us that we too get to breathe.

[115] *See* Jeff Cohen & Norman Solomon, *Clarence Thomas: Poster Boy for Affirmative Action*, SEATTLE TIMES (June 26, 1995), https://archive.seattletimes.com/archive/?date=19950626&slug=2128294.