

Rose Colored Lenses:

How the color-blind vision of equality within *SFFA v. Harvard* has changed DEI programs

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Hidden beneath the cloak of color-blind rhetoric within our Constitution rests the unbroken thread of systemic racism that has bound and torn our nation since its founding. Following Justice John Marshall Harlan's great dissent in *Plessy v. Ferguson*¹, the color-blind neutral narrative has been touted and utilized to achieve racial diversity. Within *Students for Fair Admissions (SFFA) v. Harvard*², Chief Justice John Roberts harbored the suppression of affirmative action under a veil of color-blindness which sought to eliminate "all" racial discrimination.³ Through the Court's purported effort to eliminate all racial discrimination, it effectively deemed affirmative action unconstitutional under Title VI of the Equal Rights Act of 1964 and the equal protection clause of the Fourteenth Amendment.

As the Supreme Court eliminated affirmative action, it concurrently eliminated the ability to obtain substantive equality within academic institutions. Substantive equality, as used in affirmative action, is designed to ensure the equality of outcomes, not merely the equality of treatment. Substantive equality requires society to acknowledge that equality is not equity; due to the barriers of systemic racism, under-represented minorities require more resources and consideration to be able to access and make use of the opportunities their white counterparts have had. To ensure that under-represented minorities can experience these opportunities and outcomes, policies such as affirmative action have been put in place to guarantee that minorities are given adequate resource allocation and heightened consideration. As diversity, equity, and inclusion (DEI) programs enforce policies that afford greater resource allocation and racial consideration to achieve equity, they have historically embodied substantive equality. The fate of substantive equality hangs in the balance as the new legal precedent has prescribed new boundaries and confinements for DEI programs within education across the country. While The *SFFA* precedent established that diversity programs may use race-neutral means to achieve their objectives, diversity programs cannot achieve such a conception of equality in a color-blind manner, nor can they achieve the same objectives within academic institutions without implicating the Fourteenth Amendment.

To first examine why DEI programs within academic institutions cannot be structured to achieve the same objectives without implicating the Fourteenth Amendment, it is necessary to examine why they cannot be color blind. *Brown v. Board of Education*⁴ and *Regents of the University of California v. Bakke*⁵ demonstrate how DEI programs cannot be compatible with

¹*Plessy v. Ferguson*, 163 U.S. 537 (1896).

²*Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

³*Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

⁴*Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

⁵*Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

color-blindness due to their emphasis on substantive equality. *Brown* laid the foundation for the dialogue used in *Bakke* which explicitly rejects color-blindness. *Brown* transformed the conception of equality when Chief Justice Warren extended beyond the legal basis of segregation and examined the effect of segregation. Chief Justice Warren stated, “The question presented in these cases must be determined not on the basis of conditions existing when the Fourteenth Amendment was adopted, but in the light of the full development of public education and its present place in American life throughout the Nation.”⁶ The *Brown* Court sought to examine the effect of segregation on the character of the education system as well as its effect on minorities. Substantive equality was reflected within *Bakke* with the Brennan opinion. When examining the University of California, Davis program’s racial quota in relation to its objective, *Bakke* states that only race-conscious measures could reduce the representation of minorities within the medical school, thus rejecting race-neutral alternatives as equally effective.⁷ The Brennan opinion, joined by Justices Marshall, White, and Blackmun, furthers this notion and explains why the equal protection clause and Title VI permit racial quotas.⁸ Justice Brennan emphasized, “We cannot let colorblindness become myopia which masks the reality that many ‘created equal’ have been treated within our lifetimes as inferior both by the law and by their fellow citizens.”⁹ While Brennan’s opinion in *Bakke* was authored to address affirmative action, it is duly effective in its application on DEI programs. Establishing color-blind DEI programs undermines the very essence and purpose of such programs, whose function is to create an equitable society by acknowledging and mitigating the systemic barriers to which under-represented minorities are subjected. Thus, to be equally as effective, DEI programs must embrace race-conscious measures as the *Brown* Court endorsed and the *Bakke* Court exemplified.

DEI programs will forever tread under the *SFFA* precedent as they are bound within colorblindness and curtailed by the equal protection clause of the Fourteenth Amendment. DEI programs cannot be structured to achieve the same objectives in a color-blind manner without implicating the Fourteenth Amendment. Unless DEI programs completely alter their objectives, which will undermine their intended purpose, they will not be permissible under the Fourteenth Amendment. The justices’ conception of the equal protection clause paired with the Court’s application of strict scrutiny within *SFFA* illustrates how race-conscious measures within academic DEI programs will inherently be unconstitutional far beyond affirmative action.

DEI programs will likely be found to violate the Fourteenth Amendment per the precedent regarding the equal protection clause in *SFFA*. The conception of the equal protection clause endorsed by the Roberts Court lays the foundation for the implication of DEI programs.

⁶*Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

⁷Allan Sindler, “The University of California v. Bakke: The Court’s Three Decisions | AEI,” American Enterprise Institute - AEI, September 1, 1978, <https://www.aei.org/articles/the-university-of-california-v-bakke-the-courts-three-decisions/>.

⁸Allan Sindler, “The University of California v. Bakke: The Court’s Three Decisions | AEI,” American Enterprise Institute - AEI, September 1, 1978, <https://www.aei.org/articles/the-university-of-california-v-bakke-the-courts-three-decisions/>.

⁹*Regents of Univ. of California v. Bakke*, 438 U.S. 265 (1978).

Chief Justice Roberts stated within *SFFA*, “Eliminating racial discrimination means eliminating all of it. Accordingly, the Court has held that the Equal Protection Clause applies ‘without regard to any differences of race, of color, or of nationality’— it is ‘universal in its application.’”¹⁰ DEI programs cannot be universal in their application; for DEI programs to effectively equalize opportunities for under-represented minorities, they must rely on race within their policies to be able to allocate more resources to under-represented minorities and heighten consideration for them. DEI programs cannot equalize opportunities when providing more resources to those who already have access and have obtained those opportunities. Thus, DEI programs directly violate the bounds of the equal protection clause as the Court conceives it in *SFFA*; their policies are not universal in their application because they explicitly afford more resources and consideration to minorities.

For a state policy to be exempt from this standard of the equal protection clause, it must undergo and pass the highest standard of scrutiny, strict scrutiny, which involves two components. Firstly, the justices examine if the racial classification and policy in question are used to further a compelling governmental interest. Secondly, the justices examine whether the government's use of race is narrowly tailored, otherwise known as necessary to achieve that interest.¹¹ If the compelling governmental interest can be achieved through race-neutral means, it is not necessary to invoke a racial classification. In *Bakke*, the justices questioned why it is necessary to use racial classifications to mitigate systemic racism. If challenged after violating the equal protection clause, a DEI program would have to undergo and pass the test of strict scrutiny for the program’s objectives and policies to be upheld. The Court would have to find and validate that the program has a compelling governmental interest in creating equity, then determine that the racial classifications in question are necessary. The Court’s majority indicated in *SFFA* that DEI programs will not pass this test of strict scrutiny through their application of the test on Harvard’s affirmative action policy and through their rejection of substantive equality.

In *SFFA*, the justices in the majority found that Harvard failed to meet both the criteria required of strict scrutiny¹², establishing that diversity was not a compelling governmental interest and that their racial classifications within admissions were not necessary and therefore not narrowly tailored. The Court rejected the purpose and need for affirmative action when stating: “respondents have failed to present an exceedingly persuasive justification for separating students on the basis of race that is measurable and concrete enough to permit judicial review, as the Equal Protection Clause requires.”¹³ When the Court denied the purpose of affirmative action, it indicated that it would also deny the purpose of DEI programs under the standard of strict scrutiny.

Such an indication rests within the majority opinion in *SFFA*. Chief Justice Roberts, who wrote the majority opinion, stated “acceptance of race-based state action is rare for a reason:

¹⁰*Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

¹¹*Grutter v. Bollinger*, 539 U.S. 306 (2003).

¹²*Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023), 21–34.

¹³*Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023), 22–26.

‘distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.’¹⁴ Here Chief Justice Roberts rejected the concept of substantive equality when he narrowly determined what comprises equality. Chief Justice Roberts disputed systemic racism across generations by contending that citizens are now all equally born free and that no level of racist history can disrupt that. This very notion of equality undermines what substantive equality looks like and undermines the purpose of DEI programs. If the justices were unable to accept the purpose of affirmative action within contemporary American society, it is unlikely they would endorse the use of DEI programs within educational institutions.

The status of academic institutions, such as universities and colleges, is supplemental to their violation of the Fourteenth Amendment as those institutions are held under a different standard than private foundations. As demonstrated within *SFFA*, part of the reason Harvard and the University of North Carolina (UNC) could not be reconciled with the equal protection clause was because they are federally funded. Harvard and UNC were not just challenged under the equal protection clause of the Fourteenth Amendment in *SFFA v. Harvard*, they were also challenged under Title VI of the Civil Rights Act of 1964. The equal protection clause, as used in *SFFA*, enforces that the law will be applied universally and equally to all people, regardless of race.¹⁵ Title VI of the Civil Rights Act permits a right of action to be taken against federally funded institutions or programs, otherwise known as 501(c)(3) status organizations, which discriminate or violate the Fourteenth Amendment. Per the IRS, 501(c)(3) status organizations can be categorized into both public and private foundations, while both receive federal tax breaks from the government, public charities receive federal funding as opposed to private foundations who do not.¹⁶ Examples of such federally funded organizations, or public 501(c)(3) status organizations, are churches, hospitals, federally funded charities, and academic institutions such as universities and colleges. Harvard is effectively a 501(c)(3) public charity because it receives federal funding as an institution, which is evidently what led Harvard and UNC’s affirmative action programs to be found impermissible under the Fourteenth Amendment. At an academic institution such as Harvard, DEI programs will face a similar fate to that of affirmative action due to their ability to be challenged under Title VI of the Civil Rights Act and their unlikely ability to prevail under the test of strict scrutiny. Private foundations or those with private 501(c)(3) status may, however, be able to enforce and employ DEI programs as they see fit without implicating the Fourteenth Amendment.

The revolutionary precedents of *Brown v. Board of Education*, *Grutter v. Bollinger*, and *Regents of the University of California v. Bakke* are woven throughout DEI programs across the nation. Such cases emulate the spirit and the purpose of the Fourteenth Amendment, which was to ensure that all Americans would live equally both under the law and through opportunity.

¹⁴*Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

¹⁵*Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023).

¹⁶“Public Charities | Internal Revenue Service,” www.irs.gov, n.d., <https://www.irs.gov/charities-non-profits/charitable-organizations/public-charities>.

Though DEI programs may implicate the current Court's standard of the Fourteenth Amendment, they do not violate the spirit of the Fourteenth Amendment as evidenced in the legal frameworks of *Brown*, *Bakke*, and *Grutter*. These cases thread the progress and battles of our nation's efforts to mend its stain of systemic racism. However, color blindness, as conceptualized by the Roberts Court, is entirely myopic and incompatible with DEI programs at academic institutions. When imploring that race-neutral alternatives can achieve the same objectives as those that are race-conscious, substantive equality is evidently lost, and *Brown* and *Bakke* are merely disregarded. Though the spirit of the Fourteenth Amendment is shrouded by the color-blind rhetoric of the Supreme Court, its message prevails as institutions across the country engage in dialogue, reformation, and revision to uphold their commitment to diversity, equity, and inclusion.

Bibliography

Brown v. Board of Education, 347 U.S. 483 (1954).

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

Hall, Kermit. "We've Got to Get Working.... The Clock Is Ticking': Equity in Education and the Legacy of *Brown v. Board*." *Marquette Law Review* 89, no. 1 (January 1, 2005): 115. <http://scholarship.law.marquette.edu/mulr/vol89/iss1/10>.

Internal Revenue Service. 2024. "Public Charities: Internal Revenue Service."

<https://www.irs.gov/charities-non-profits/charitable-organizations/public-charities>.

Plessy v. Ferguson, 163 U.S. 537 (1896).

Regents of University of California v. Bakke, 438 U.S. 265 (1978).

Sindler, Allan. "The University of California v. Bakke: The Court's Three Decisions: AEI." American Enterprise Institute - AEI, September 1, 1978. <https://www.aei.org/articles/the-university-of-california-v-bakke-the-courts-three-decisions/>.

Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 600 U.S. 181 (2023).

Thompson Ford, Richard. "The False Promise of Colorblind Admissions." *The Chronicle of Higher Education*, May 16, 2023. <https://www.chronicle.com/article/the-false-promise-of-colorblind-admissions?sra=true>.