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Race is Real: The Equal Protection Implications of Desegregation and Affirmative Action

Race *shouldn't* matter. It's an outdated social construct that society has, for the most part and in principle, rejected. But to millions of minority students across the U.S., it's as real as anything, and it *does* matter. Courts have generally been correct in ruling for desegregation, but they have placed too many restrictions on affirmative action.

The Fourteenth Amendment requires states to give the "equal protection of the laws" to everyone, and most agree that equality is a goal to strive towards. The central conflict of the debate over race in schooling decisions is over what, exactly, "equal" should mean. At first glance, one might assume that the most equal system is the one that treats all students the same in all decisions regardless or race. However, this color-blind approach assumes that all other societal factors are equal across races, which they are not due to historical inequalities and contemporary discrimination. Thus, the optimal approach will involve active public school desegregation in cases where demographics create segregated school systems and public college affirmative action to ensure that educationally beneficial racial diversity is achieved in the student body.

There is a long history of court involvement in public school desegregation, beginning most notably with the landmark *Brown v. Board of Education* case. In *Brown v. Board*, the Supreme Court correctly applied psychological evidence to conclude that segregated schools are inherently unequal under the Fourteenth Amendment because "[t]o separate [African-American students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community" (347 U.S. 483). Though the egregious

segregation declared unconstitutional in *Brown v. Board* has passed, schools are still segregated because neighborhoods are still segregated. Schools in Minneapolis and St. Paul, for instance, are now more segregated than they were in the 1970s (Gordon). Thus the potential for marginalization has remained present, and courts have retained the obligation to ensure that schools are desegregated.

Therefore, courts have been broadly correct in supporting desegregation through cases such as *Swann v. Charlotte-Mecklenburg Board of Education*, in which the Supreme Court ruled in favor of strong court powers to correct school segregation when other relevant powers do not act to do so ("Swann v. Charlotte-Mecklenburg Board of Education"). However, when possible, courts should give the other branches of government a chance to solve the problem before mandating a solution. In *Milliken v. Bradley*, the Supreme Court overturned a lower court's attempt to desegregated the Detroit public schools by busing students between districts in the city and its suburbs. This was the correct decision, as the lower court, once it found that the Detroit schools were segregated, should have allowed a reasonable amount of time for the legislature to find a solution ("Milliken v. Bradley"). Though courts have sometimes been overeager to implement their own solutions, the general trend is correctly towards support of desegregation.

The same cannot be said for courts' attitudes towards affirmative action. Affirmative action should be allowed in public schools and college admissions decisions as long as care is taken to keep end goals in mind. In evaluating potentially discriminatory policies, courts often use the "strict scrutiny" test, which requires a "compelling government interest" and a "narrowly tailored" policy — rightly so, as any less stringent form of judicial review opens the door to a slippery slope of harmful discrimination (Strasser). One valid reason for an affirmative action

policy is to create a racially diverse student body. There are notable educational benefits of diversity — according to U.S. News and World Report, greater diversity means a greater number of perspectives to contribute towards the scholarly environment, more creative thinking, and better preparation for the real world, among other impacts (Hyman and Jacobs). In a world where there was no racial discrimination, the race makeup of each school's student body would be representative of the makeup of the community the school serves. Thus, this provides a threshold for how far a school may reasonably go in implementing an affirmative action policy to create a diverse student body; when assessing whether a given policy is sufficiently "narrowly tailored," it should suffice to assess whether the policy serves to increase the representation of underrepresented groups to a level up to (but not exceeding) this demographic threshold.

In a late-1970s case, *Regents of the University of California v. Bakke*, the Supreme Court correctly ruled that race may be used as a factor in admissions decisions. However, by the logic set forth above, the Court incorrectly ruled that the specific system used by the University of California Medical School at Davis, in which sixteen out of one hundred places were reserved for racial minorities (defined as "blacks, Chicanos, Asians, [and] American Indians"), was unconstitutional ("Regents of the University of California v. Bakke"; 438 U.S. 265). Census data from 1980 shows that the total "Black; American Indian, Eskimo, and Aleut; Asian and Pacific Islander; and Hispanic" population was 33.1% of California's population, meaning that it is very likely that the school's policy would fall under the threshold (Gibson and Jung 37).

Applying the threshold logic more broadly, it becomes evident that the courts' current approach, based on a subjective analysis of the severity of schools' affirmative action policies, is flawed. In *Gratz v. Bollinger*, the Supreme Court struck down a point-based system for its broad

and nonpersonal effect, whereas in *Grutter v. Bollinger* and the more recent *Fisher v. University of Texas*, the Supreme Court upheld policies that looked more like "holistic review" — a consideration of each student individually that may take race into account ("Gratz v. Bollinger"; "Grutter v. Bollinger"; "Fisher v. University of Texas"). No matter the specific demographic circumstances of each case, the decisions show that the Court is erroneously making decisions based on the mechanics of how the affirmative action process is carried out, not on whether it is appropriate to achieve the legitimate purpose. Furthermore, by preferring holistic review over more empirical, rigorous, and objective systems like the one at issue in *Gratz*, the Court simply encourages schools to hide their affirmative action methodologies within the minds of admissions officers, rather than spelling them out in a transparent way.

It should be noted that the approach advocated here allows schools considerable freedom when determining how strong an affirmative action policy to implement — they are by no means obligated to give minority students such an advantage as to create a community completely representative of the broader racial demographics. It may or may not be a good idea to do so, but the key is that this should be an educational (and political) policy decision, not a legal one. A demographic threshold-based affirmative action system does not violate the norm of equal protection, and so, up to this threshold, courts should not interfere with whatever affirmative action policies the people, through legislatures and school governing boards, see fit to implement.

The nature of race issues is such that any response (or lack thereof) will be imperfect. Any attempted solution will have unintended consequences. But by mandating that high schools desegregate to minimize "feelings of inferiority," allowing affirmative action up to the point of

creating a student body representative of the general population, and leaving the specifics to the other branches of government, courts can best uphold the Fourteenth Amendment and the principles of equality it embodies.

Words used: 1245

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