

"We seek...not just legal equity...not just equality as a right and a theory, but equality as a fact and equality as a result."

President Lyndon B. Johnson announced this in a commencement address at Howard University almost 60 years ago. This former conservative Democrat from the deep South who once used racist rhetoric to win votes eventually became one of the most consequential presidents for civil rights. He secured the Civil Rights Act of 1964, the Voting Rights Act of 1965, and many federal programs that our society relies on heavily to this day. And when he delivered his address, he laid a clear framework for affirmative action, one based on "equality as a fact and equality as a result." One based on equity.

With today's question about affirmative action, we cannot ignore that its original intent was to affirm equity by correcting centuries of slavery, segregation, and racism. Sadly, though, the jurisprudence of affirmative action has strayed far from this original intent, which is why I believe that affirmative action should be overturned and revamped to address our country's long legacy of injustice. To support this argument, I will discuss the history, the impact, and the future of affirmative action.

Let us begin with my first point. When looking at its history, instead of correcting the pernicious legacy of slavery, segregation, and racism, affirmative action has been watered down to promote diversity.

The term affirmative action was first used in 1961 when the Kennedy Administration required all government contracting agencies to "take affirmative action to ensure that applicants are employed...without regard to their race, creed, color, or national origin." It was literally meant to affirmatively build economic equity through the workforce.

However, despite this original intent, Supreme Court rulings have strayed from the affirmative nature of affirmative action. This began with 1978's ruling in *Regents of the University of California v. Bakke*. Allan Bakke, a Caucasian male, filed the case because he was twice denied admission to the UC Davis Medical School despite having higher qualifications than minority students admitted. Not only did the Court order the university to admit Bakke and end the use of racial quotas, but it also reduced race to just one factor that is permissible in admissions.

This trend continued with the 2013 Supreme Court ruling in *Fisher v. University of Texas*. Abigail Fisher, a Caucasian woman who was denied admission, argued that the university violated the Equal Protection Clause of the 14th Amendment. While the court ruled against Fisher, it also cautioned that not all affirmative action programs will pass constitutional muster.

Now, the Supreme Court seems poised to eliminate affirmative action altogether when it hears the cases of *Students for Fair Admissions, or SFFA, v. Harvard College* and *The University of North Carolina*. SFFA argues that these institutions violated Title VI of the Civil Rights Act and the 14th Amendment by discriminating against Asian American applicants. It is widely expected

that the conservative majority will rule that race-conscious admissions are unlawful, thus overturning affirmative action.

The net result of these rulings has been to derail affirmative action from its original purpose. As Stanford Law professor Richard Thompson Ford argued in the Chronicle of Higher Education, “‘diversity’ has...become a lazy stand-in for any discussion of the generations of race-based exclusion and exploitation...In this way, ‘diversity’ has encouraged us to ignore and minimize past injustices and distorted our understanding of what justice requires today.”

And the justice that is required today brings us to my second point: While affirmative action has opened doors of opportunity for some, underlying injustices have persisted and even worsened with affirmative action.

For one, it employs a racial lens that stigmatizes its beneficiaries. The normally quiet Supreme Court Justice Clarence Thomas has spoken publicly about this. Comparing his experiences at the College of the Holy Cross in Massachusetts and at Yale Law School, Justice Thomas wrote, “As much as it stung to be told that I’d done well in the seminary despite my race, it was far worse to feel that I was now at Yale because of it.”

Many students from the Northern Marianas have experienced this stigmatization when going off-island for college. Yes, affirmative action may have helped them gain admission, but at what cost when they face accusations of reverse-discrimination and doubts about their ability?

Moreover, by using a racial lens focused on diversity, affirmative action ignores underlying socioeconomic problems that have worsened in the past 50 years. According to the Pew Research Center, the wealth gap between White and Black households continues to widen, with White households now averaging \$190 thousand per year and Black households averaging only \$24 thousand per year. And, according to a Segregation Index developed by the University of Southern California, over the past 30 years, school segregation increased by 35% and economic segregation increased by 47%.

So, while affirmative action focuses on increasing diversity on college campuses, it is ignoring how worsening socioeconomic trends have caused even more inequities on those campuses. According to recent data from the US Department of Education, White students are twice as likely to graduate from college than Black, Hispanic, and Pacific Islander students.

After they graduate, the US Department of Commerce has reported that Black, Hispanic, and Pacific Islander workers earn about \$5,000 to \$10,000 less per year than their White counterparts. And in a study recently commissioned by the Federal Reserve Bank of St. Louis, Black adults held more and higher student loans than their White counterparts.

These problems are the inescapable legacy of hundreds of years of slavery, segregation, and racism. It is a legacy we can no longer ignore, which brings us to my third point: We need to

shift affirmative action away from its current focus on diversity and closer to its original focus on equity.

First, we must prioritize admissions for low-income and first-generation students. Rather than giving preferential treatment to wealthy legacy students, colleges and universities should give it to disadvantaged students who need it more.

Second, we must make college more affordable. The skyrocketing costs of higher education has made it even harder for many students of color to afford college. We need to better control college expenses, shift the burden of paying for college from students to communities, and increase financial aid for all students.

Third, once students are in college, institutions need to offer a wider range of support services to help them succeed in college. We should offer robust advising programs, stronger interventions against dropping out, and better job-placement services.

Taking these steps will help all students, especially those from the Northern Marianas, who often struggle when they leave for college. Taking these steps will also honor the original intent of affirmative action and honor the call for equity that President Johnson issued in 1965. It is a call that harkens back to the time right after the Civil War, when the Reconstruction Amendments were passed, the 13th, 14th, and 15th amendments.

Unfortunately, the courts have overlooked this history and, instead, have employed a form of strict constructionism that perverts the original intent of the amendments, such as misinterpreting the Equal Protection Clause to deny equity to the very people who need it the most. We must never forget that these amendments were ratified at a time when the Ku Klux Klan was terrorizing the South, Jim Crow laws were oppressing freed slaves, and everywhere, Black Americans were still deprived of life, liberty, and the pursuit of happiness. The amendments were in direct response to these atrocities and were supposed to fulfill the promise of true equity.

It is time we fulfilled that promise and heed the call of President Johnson when he spoke to all those hopeful graduates almost 60 years ago and 100 years after the Reconstruction Amendments. He asked, "For what is justice? It is to...[affirm] the dignity of man...[so that] each could become whatever his qualities of mind and spirit would permit--to strive, to seek, and, if he could, to find his happiness. This is American justice."

It is time to affirm this justice with affirmative action, not as it is, but as it should be, an unequivocal negation of injustice and a resounding affirmation of equity. Students of color deserve better. Our students deserve better. We deserve better. Thank you.