Abstract

Recent scholarship on affirmative action has primarily examined the practical fallout of the Court's stance against race-conscious admission policies in *Students for Fair Admissions v. Harvard (SFFA)*. This article has a different purpose. It argues that the *SFFA* majority opinion, like Critical Race Theory bans, is a part of a collaborative assault on the nation’s collective memory of race and racism. The article makes three distinct contributions: *First*, by analyzing the *SFFA* majority opinion through the lens of constitutional memory-making, it exposes how it distorts collective recollections of racism, undermining the legitimacy of racial redress. As a *second* contribution, this article analyzes the amicus curiae briefs submitted to the Court in *SFFA* to show how universities and other proponents of affirmative action participated in forming the ahistorical narrative that was ultimately adopted and applied by the *SFFA* majority. *Third*, the article proposes strategies for reshaping collective memories at the grassroots level. It urges universities and racial justice advocates to treat the *SFFA*’s loss as an opportunity to reclaim diversity in ways that reflect past and present racial experiences in America rather than strategies aimed solely at making affirmative action seem attractive for conservative justices.

Last paragraph of the conclusion:

University deans, administrators, school principals, CEOs and other who support efforts to diversify their institutions, can and should become “memory activists” and strategically change the stories they tell about why these efforts are important in a way that more accurately reflects the past and how it resonates today.[[1]](#footnote-1) I argue that the doctrinal loss of race-conscious affirmative action and the fact that there is no moderate swing justice on the Court that is likely to reverse it in the near future, could be, somewhat paradoxically, a liberating moment for advocates of racial justice, who should use it to reclaim and reshape constitutional memories with respect to race. Reclaiming diversity is essential not because it might influence the Court one day, but because it works to democratize constitutional memory and initiate its reshaping from the grassroots level as a society, ways that reflects real life experiences of race in America.

1. Yifat Gutman & Jenny Wüstenberg, *Challenging the meaning of the past from below: A typology for comparative research on memory activists*, 15(5) Memory Studies 1070 (2022) (defining “memory activists as actors (individual or collective), who engage in the strategic commemoration of the past in order to achieve or prevent change in public memory by working outside state channels.”). [↑](#footnote-ref-1)