

So SCOTUS Struck Down Affirmative Action in Higher Education
(Now Where Do We Go From Here?)

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In a pair of decisions handed down by the United States Supreme Court on Thursday, June 29, 2023, Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina, the high court struck down and declared unconstitutional the race-conscious admissions programs of both schools. The Court found that Harvard and UNC's admissions programs violate the equal protection clause of the Fourteenth Amendment and that the universities' "ends" of improving diversity on their campuses do not justify their "means" of using race as a factor in admissions. These decisions, by votes of 6-3 in the UNC case and 6-2 in the Harvard case (Justice Ketanji Brown Jackson didn't participate in the Harvard case because of her affiliation with the university) reverse a decades-long policy of colleges and universities using race as one of many factors which can be considered in making the determination of which student admission applications are approved and which are not.

The sudden impact of the Students for Fair Admissions decisions has sent shock waves through our society and sent our various institutions and organizations scurrying to respond and to develop counter-strategies. Respond we should, but let me dare suggest that the Supreme Court decisions of June 29th have provided us with a great opportunity for progress. Napoleon Hill, in his classic treatise *Think and Grow Rich*, wrote that "[e]very adversity, every failure, every heartache carries with it the seed of an equal or greater benefit." Albert Einstein, arguably one of the greatest thinkers of the last century said this: "In the middle of every difficulty lies opportunity." And of course, our own Dr. Willie Jolley put it this way: "A setback is a setup for a comeback!" What am I getting at? We now have the opportunity to use the Supreme Court's rulings in the Harvard and UNC cases, and some of the other decisions recently handed down by the high court, like the striking down of President Biden's student loan forgiveness program, to wake the sleeping giant and galvanize voters to reverse the trends that have led to the ultra-conservative takeover of the federal courts and many state legislatures across the country. We saw that happen to a significant degree just last year as the Dobbs v. Jackson Women's Health Organization ruling, where the Court reversed the 49 year precedent of Roe v. Wade, galvanized pro-choice voters and was likely a major factor in Democrats taking back the Senate in 2022.

We have to take a long-game approach and commit to becoming more proactive and less reactive. My friend and radio personality Joe Madison likes to say that there is a difference between a moment and a movement. Quoting the Black Eagle, "a movement requires sacrifice." I don't have a problem with the other strategies being considered, the creation of a financing entity, the building of a college-based Advanced Legal Studies curriculum and the development of a media and social media/hands-on outreach approach. But I don't want us to sleep on this golden opportunity to harness the political forces we can use to undergird our efforts in all of these other endeavors. Think back to the Greenwood District of Tulsa, Oklahoma, in 1921. That community was so economically successful it was known as "Black Wall Street." Yet on June 1 of that year, over a period of just 18 hours, 35 city blocks were burned to the ground, up to 300 people were massacred and churches, schools, businesses, a hospital, a library and more than 1,200 homes were destroyed. Political officials, local, state and reportedly even federal officials, either participated or, at a minimum,

acquiesced in the attack. While we can't compare 1921 to 2023, one can't help but wonder if the fate of Black Wall Street might have been different if its residents had a little more political clout to undergird their financial footing.

I must confess that I threw in the Black Wall Street reference to get your attention. Now that I have it, let me say that I really do think we may be facing the best opportunity for lasting change in almost 60 years. You may not realize it but the Supreme Court's Student's for Fair Admissions decisions were handed down 59 years to the day after the U.S. Senate broke an 83-day filibuster and passed the Civil Rights Act of 1964. Many of us thought that after the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965 a year later, that the American Civil War was finally over. Jim Crow was dead. Liberty and justice for all was finally a reality. But as soon as those momentous pieces of legislature were enacted into law, the other side got busy. Jim Crow put on a suit and tie and became James Crow, Esquire.

First, there was the "restore law and order" for "the silent majority" presidential campaign of Richard Nixon in 1968. It played on the fears of white Americans that their peaceful way of life was being threatened by the lawless rioters they saw on their TV screens. Many of us sat that one out and Nixon was elected. Nixon then appointed conservative judge Warren E. Burger to replace Earl Warren, the Chief Justice who had presided over the unanimous 1954 Brown v. Board of Education decision. Nixon also appointed three other conservatives as Justices of the Supreme Court, Harry Blackmun who wound up becoming a strong liberal, Lewis F. Powell who became a moderate swing vote on the Court, and William Rehnquist who later became Chief Justice and helped push the Court to the right.

Then came the "Let's Make America Great Again" campaign of Ronald Reagan in 1980. (Yes, that's right, it was Reagan, not Trump, who came up with that one.) Many of us sat that one out as well and Reagan became our 40th President. Reagan elevated William Rehnquist from Associate Justice to Chief Justice, appointed another conservative jurist, Sandra Day O'Connor, to be first woman to serve on the Supreme Court and, finally, appointed Antonin Scalia, who then became the most conservative justice on the Supreme Court at the time. (The most conservative current member of the Court today, Justice Clarence Thomas, was appointed to the bench by Reagan's successor, George H.W. Bush, who rode into office on Reagan's coat tails.)

Fast forward to the mid-term elections of 2014. Many of us sat that one out too, allowing the Republicans to seize control of the Senate. That is significant because it was the Republican controlled Senate which, in 2016, refused to give President Obama's choice to succeed Justice Scalia, Merrick Garland, so much as a hearing before the Judiciary Committee, much less a vote on the floor of the Senate. Instead, they left the seat open to be filed by Obama's successor, Donald Trump. Later in the 2016 general election, when we didn't come out in sufficient numbers in certain key states, particularly in the South and the Mid-West, Trump was elected president. Trump, in just four years in office, managed to appoint three conservative judges to the Supreme Court, Neil Gorsuch, who took the seat that should rightfully have been filed by Obama's nominee Garland, Brett Kavanaugh, who replaced the retiring Anthony Kennedy, a conservative who sometimes sided

with his liberal colleagues, and Amy Coney Barrett, who the Republican-controlled Senate rushed through the confirmation process to replace the recently deceased Ruth Bader Ginsburg at the very end of Trump's term in office.

To be clear, the Republicans of today are not your grandfather's Republican's, nor is today's Republican party of the party of Lincoln. The Republican party of 1860 was the party of the abolitionists. Most black people from the time of Reconstruction until the advent of Franklin Delano Roosevelt's New Deal, if they had any party affiliation at all, were Republicans and proud of it. It was the Democrats who opposed black voting rights and championed the so-called "Lost Cause." The Democratic president, who my high school was sadly named after until just a couple of years ago, Woodrow Wilson, segregated the federal government and hosted at the White House on February 18, 1915, the first showing of "Birth of A Nation," the motion picture which romanticized the Ku Klux Klan and painted black men as buffoons and rapists. But during the presidency of FDR and more so, during the presidency of his successor, Harry Truman, when the Democratic Party began to embrace the Civil Rights movement, key Southern Democrats broke with the party and, in 1948, formed the States' Rights Democratic Party, more commonly referred to as "the Dixiecrats." That year, the Dixiecrats ran their own third party candidate for President, Senator Strom Thurman from South Carolina. Like most third parties, the Dixiecrats never gained much traction so, in 1964, Senator Thurman and many other Dixiecrats switched to their party affiliation to Republican. Four years later, during the presidential race of 1968, Nixon, with his "law and order" campaign, won over large numbers of traditional blue collar, union-member Democrats to create a new coalition for the Republican party in the South, the rust-belt of the Mid-West and the mountain West. It was that base that Reagan and Bush tapped into in the 1980s and it was that base that, with the aid of a very well conceived and well-executed plan of misinformation, Trump managed to get a stranglehold on in 2016, a stranglehold that is stronger today than it was seven years ago.

There's a saying that those who don't know their history are doomed to repeat it. With that in mind and before we write our situation off as hopeless, let's look at how we got here and what we can do to change course. The Sunday after the Supreme Court handed down its Harvard and UNC decisions, ABC News conducted a nationwide poll. It may or may not surprise you to learn that 52% of Americans surveyed stated that they agreed with the decision of the Court to strike down affirmative action in college admissions; 52%! How, you might ask, can a majority of our fellow citizens be so far out of line with our thinking on a matter we all thought was resolved long ago? To make sense of it all, in my opinion, you have to look back again, at something that occurred almost 40 years ago. As another consequence of our collective failure to vote in sufficient numbers in the 1980s, President Reagan, the champion of deregulation and the winner of the 1980 and 1984 presidential elections, appointed conservatives to the Federal Communications Commission. For most of its history up to that point, the FCC had held the position that holders of broadcast licenses were public fiduciaries and as such could not use their radio or television stations for their own "private interests, whims or caprices, but in a manner which will serve the community generally." That position led to a policy, introduced by the FCC in 1949, called "the fairness doctrine." The fairness doctrine required broadcasters 1) to devote some of their airtime to discussing controversial matters of public interest and 2) to air contrasting views regarding those matters.

The practical effect of the implementation of the fairness doctrine was that if a station aired a conservative presenter on a topic of interest, it was obligated to provide time for a liberal to present the contrasting view, and vice versa. In the 1969 case of Red Lion Broadcasting Company v. FCC, the Supreme Court held that the fairness doctrine was indeed constitutional, ruling that a journalist, who had been personally attacked on a conservative radio broadcast had the right to be given free time on the station to respond to the attack. But in 1987, the Reagan appointed commissioners of the FCC abolished the fairness doctrine giving rise to the rapid growth of a new industry, unregulated and unrestrained conservative talk radio (as well as conservative television networks, chief among them, Fox News). I had some difficulty finding current figures but in an article published by the Center for American Progress, an independent nonpartisan policy institute, on July 10, 2007, “91% of political talk broadcasting each day is conservative.” And that was 16 years ago. More recently, on October 16, 2022, the CBS News program Sunday Morning reported that Talkers Magazine says that the ten most popular (in terms of numbers of daily listeners) radio talk show hosts are all conservatives. That means that unless you live in one of the major metropolitan areas, mainly on the East Coast or the West Coast, when you turn on the radio (and 90% of Americans 12 years old and older surveyed indicated that they do listen to radio on a daily basis), you are getting your news filtered through the prism of people like Sean Hannity, Dave Ramsey, Mark Levine, Glenn Beck and Laura Ingraham. So if all you hear, day after day, year after year, is that affirmative action is depriving your children of equal opportunity in favor of less qualified people who are having everything handed to them on a silver platter because of something that happened to their ancestors two centuries ago, you are going to support ending affirmative action. What’s more, you are going to be inclined to vote for politicians who promise to appoint federal judges who oppose affirmative action. That’s where we are today.

Why then am I so optimistic about our current state of affairs, you might ask? The margins of political success for the conservative movement, even in spite of the demise of the fairness doctrine, is very slim. Since 1988, only once has the conservative Republican candidate won the popular vote in a presidential election, that being the re-election of George W. Bush in 2004. In the other two Republican victories, Bush in 2000 and Trump in 2016, the race was won in the Electoral College. Victory in the Electoral College is won by strategically racking up victories in the individual states. In 2000, the margin of victory for Bush came down to one state, Florida which Bush won by only 537 votes out of almost 6 million cast. Trump won the 2016 election by narrowly prevailing in a few formerly Democratic leaning tossup states like Pennsylvania, Wisconsin and Michigan. In each of those states, the number of potential voters who chose not to participate or were prevented, through voter suppression from participating was far greater than Trump’s margin of victory. The lesson from all of that is that we need to start now, not wait until 2024, but start now, in all states but particularly in the battleground states, to 1) educate non-participants about the importance of voting, 2) get unregistered potential voters registered, 3) aggressively use all legal means at our disposal to root out voter suppression schemes and mechanisms, and 4) lobby to change laws, such as the one in the Commonwealth of Virginia, which disenfranchise persons who have criminal convictions on their records.

Another thing we need to do is stop conceiting the so-called red states without a fight. During the

run up to the 2020 general election and the January 2021 Georgia U.S. Senate run-off, I worked as kind of a liaison between Sigma Delta Tau Legal Fraternity, the Washington Bar Association and the Transformative Justice Coalition, a nonpartisan voter protection advocacy organization headed by Attorneys Barbara Arnwine and Daryl Jones. As part of that effort, I reached out to a number of attorneys in different regions of the country. One of the calls I made was to a brother in Louisiana. I told him that we were looking to organize an effort to educate, register and turn out voters in sufficient numbers to overcome what we knew would be ongoing voter suppression efforts, especially in battleground states. He answered by stating that Louisiana is not a battleground state. I didn't respond immediately because I understood what he was saying. From 1964 through 2020, Louisiana has voted Republican in every presidential election except in 1968 when the state's electoral college votes went to former Alabama governor George Wallace, who ran under the banner of the segregationist American Independent Party, in 1976 when the Democratic Party nominated Georgia governor Jimmy Carter (who, incidentally, Louisiana voters abandoned when he ran for re-election four years later) and in 1992 and 1996 when the Democratic candidate was Arkansas governor Bill Clinton. Later, though, I asked myself the elephant-in-the-room question: Why is Louisiana, where so many of its citizens are people of color, a solid red state? So I did a little research and here's what I learned.

When you look at the U.S. Census data from 2020, of the twelve states with the highest percentage of residents who identified themselves as solely African-American (as distinguished from biracial or of mixed race), ten of them were among the eleven states that composed the Confederate States of America during the Civil War. The other two, Maryland and Delaware, were slave-holding border states where many of the citizens sympathized with the Confederate cause but never voted to secede from the union. Rounding off the numbers for simplicity sake, Mississippi led the list with a 38% black population followed by Louisiana and Georgia (33% each), Maryland (32%), Alabama (30%), South Carolina (27%), North Carolina (24%), Delaware and Virginia (22% each), Tennessee (20%), and Florida and Arkansas (17%) each. The other one of the eleven Confederate states, Texas, had a black population of 12% but it also had an Hispanic population of 19% and a population of residents who describe themselves as Asian-only of 6%. Those figures suggest that in the so-called solid South, the states I just listed, other than Maryland and Delaware, there are opportunities for breakthroughs. And before you dismiss this as a pie in the sky notion, look at what Stacey Abrams and other grass-roots organizers did in Georgia. By building coalitions, educating voters and engaging in massive voter registration and get-out-the-vote efforts, they were able to turn Georgia purple, if not blue, in a relatively short period of time. Why not use the same strategy in Louisiana, Mississippi, Alabama and North and South Carolina?

Granted we may not have the resources to flip every state with a 20% plus people of color population at once but we can start by targeting one or two. The key is to start now. For far too many people, voting means stepping outside of their comfort zone. They may cite a myriad of reasons: Voting is inconvenient. I can't afford to miss time from work. Voting doesn't matter. All politicians are the same and no matter who gets elected, nothing's going to change. If I register to vote, the government might track me down for unpaid traffic fines or child support. The excuses go on and on. As a general proposition, it's only natural for people to want to be comfortable. To get a person to step

outside of his comfort zone in any arena, whether that arena is business expansion, athletics or public speaking, you have to give him a reason. And now, like manna from heaven, the U.S. Supreme Court may have given us just what we need, reasons to motivate dormant potential voters to register and vote. We should take advantage of this opportunity and mobilize our voter base like never before.

Let me make one more point before I close. While we lament what SCOTUS did in the Students for Fair Admissions cases, we shouldn't lose sight of what the Court did just weeks before in upholding challenges to GOP led racial gerrymandering in Alabama, likely putting the brakes on similar efforts by Republican-controlled legislatures in Louisiana, Georgia and North Carolina. Gerrymandering is the process by which state legislatures redraw the lines on their states' voting district maps so as to minimize the voting power of the party not in power. In Alabama, a state where more than a third of the citizens are either black or biracial, the state legislature redrew the map so that six out of the seven voting districts had solidly white, Republican majorities. The Court, in a 5-4 decision, found that a fairly drawn, non-gerrymandered map should have resulted in at least two voting districts where black people were in the majority. This is good news because it sets a precedent for successful legal challenges to gerrymandering efforts in other states. Keep in mind that today, in the House of Representatives of the 118th Congress, there are 222 Republicans and 213 Democrats. Prior to the last election, the GOP controlled Florida legislature redrew the voting district lines in the state in such a way that they were able to flip five historically reliable Democratic majority Congressional districts into Republican control. If there were five fewer Republican and five more Democratic Members of Congress, the House of Representatives today would be composed of 217 Republicans and 218 Democrats. That's important because whichever party holds the majority sets the agenda for the House, controls all of the committees and subcommittees and determines what legislation is allowed to reach the floor for a vote. The Supreme Court's rulings on gerrymandering provide an opportunity, not a guarantee but an opportunity, to flip control of the House in the 2024 elections. But again, we have to do the work now.

I conclude by saying that I don't look at the Court's recent affirmative action decisions as a setback. I look at them as a setup for a comeback. Yes, let's create the financial support entity, let's build a college-based Advanced Legal Studies curriculum and let's develop an effective media and social media/hands-on outreach approach. But let's not sleep on this window of opportunity to repaint the electoral map in these United States of America. Let's build the coalitions. Let's educate our potential voters. Let's engage in massive organized voter registration and get-out-the-vote efforts. And let's rewrite the narrative for this and the next several generations to come. We have the tools, we have the skills, and thanks to the 6-3 conservative majority, we have a window of opportunity. Now we just need the resolve to get it done.