THE CONSTITUTIONALITY OF DIVERSITY FELLOWSHIP PROGRAMS AT BIG LAW FIRMS:

What are Diversity Programs and Why Should You Care If They Exist?

Michael Stallworth

Abstract

This paper examines the constitutionality of diversity fellowship programs at major law firms, contextualized within recent Supreme Court rulings on affirmative action and ongoing legal challenges to diversity, equity, and inclusion (DEI) initiatives. The analysis begins by exploring the role and importance of diversity fellowship programs in promoting inclusion and addressing systemic inequities in the legal profession. The paper then delves into the implications of the Supreme Court's decisions on affirmative action for Black law students, highlighting the potential impact on admissions, educational experiences, and career opportunities. Furthermore, it scrutinizes the attacks on diversity fellowships by conservative legal activists and the subsequent changes made by law firms to their fellowship programs to avoid litigation. The discussion also considers the application of the American Bar Association's Rules of Legal Ethics to these diversity programs, questioning their constitutionality in light of recent legal developments. Through this analysis, the paper argues that while diversity fellowships are essential for fostering a more representative legal profession, they face significant challenges in the current legal and political climate.

About the Author

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Table of Contents

Introduction

Diversity fellowship programs at law firms work to contribute to fostering a more inclusive and representative legal profession. This is accomplished in many different ways: promoting diversity and inclusion, addressing any systemic inequities, creating role models and mentoring opportunities, and improving client relations. The existence of diversity fellowship programs is extremely important for fostering and creating a more inclusive, representative, and equitable legal profession. Diversity fellowship programs address historical disparities, making it more suitable for firms to cater to their clients' needs and improve social change.

I. The Recent Supreme Court Decision on Affirmative Action

Students for Fair Admissions, Inc., Petitioner v. President and Fellows of Harvard College and *Students for Fair Admissions, Inc., Petitioner v. University of North Carolina, et al.* refer to two separate, but related, lawsuits concerning affirmative action in college admissions, specifically focusing on Harvard College and the University of North Carolina.[1] Students for Fair Admissions (SFFA) brought this action against Harvard College and the University of North Carolina- two prominent institutions of higher education in the United States.[2]

[1] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA), 600 U.S. 181, 197–98 (2023).

[2] *Id.*

SFFA[3] is a nonprofit advocacy group founded by conservative activist, Edward Blum, that opposes affirmative action policies in college admissions.[4]

As elite, private institutions, Harvard College and UNC allegedly previously gave "advantages" to Black and Latinx applicants, reasoning that they were some of the most diverse applicants, and to also make amends for past and ongoing racial discrimination.[5] However, SFFA argues that Asian American applicants are being discriminated against and the universities are engaging in "racial balancing", which amounts to a quota system: "Harvard is "failing to use race as merely a 'plus factor' in admissions," but instead, that it is a dominant factor in each application."[6] Thus, Harvard believes that "race-neutral alternatives can achieve the beliefs of diversity."[7] SFFA argues that this can be done by considering socioeconomic diversity or even ending legacy advantages, working to create the same diversity effect.[8]

The Supreme Court ruled that "affirmative action is dead: any American universities that accept federal funding, whether they are private or public institutions, are forbidden to take students' race into account as part of their holistic admissions process."[9] The Court found "that the Harvard and University of North Carolina admissions processes violated the Equal Protection Clause of the Fourteenth Amendment, which ensures equal protection under law for all Americans."[10] Chief Justice John G. Roberts Jr. explains that "applicants can still discuss "how race affected his or her life, be it through discrimination, inspiration, or otherwise" in their personal essays. As long as applicants are judged by their character traits in relation to their racial identity, universities need not be so colorblind that they forbid mention of race altogether in applications."[11] His opinion "was grounded in a theory called "colorblind constitutionalism," which holds that the Constitution does not allow any distinctions based on skin color

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[3] https://studentsforfairadmissions.org/

[4] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA), 600 U.S. 181, 197–98 (2023).

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] Anna Salvatore, Charlie Roth & Laura Robertson, The Supreme Court's decision on affirmative action, explained The Princetonian (2023), https://www.dailyprincetonian.com/article/2023/06/princeton-supreme-court-ruling-affirmative-action-explained-college-admissions#:~:text=What%20exactly%20did%20the%20Supreme,of%20their%20holistic-%20admissions%20process. (last visited Nov 3, 2023).

[10] *Id.*

[11] *Id.*

or race—even if those distinctions are intended to remedy past discrimination."[12] Simply put, affirmative action is "a policy that encourages state institutions to take affirmative action to make sure their processes are fair."[13] Affirmative action "is intended to reverse historical exclusion and promote diversity and inclusion."[14] And the SFFA believes that this can be achieved without considering race in admissions decisions.

II. The Impact of the Supreme Court's Decision on Black Law Students

Black people are the main group of students that will be impacted by this decision. Socially and economically speaking, since Black people are the bottom of the social ladder, it will remain a challenge for them to "climb" the ladder and achieve social and economic mobility. For this reason, many consequences are likely to happen:

- *Admissions:* An immediate effect of this decision is that Black law students will have an even though challenge gaining admission to law schools. Affirmative action has played a significant role in ensuring a large representation of historically excluded students in higher education, including law schools and other graduate programs. How has this been accomplished? By leveling the playing field for historically excluded communities, including Black people, by considering their racial backgrounds in the admissions process. The end of these policies may result in a decrease in the number of Black students admitted to law schools, potentially limiting the diversity within these institutions. Without affirmative action, Black students may face more significant challenges in gaining access to law schools. As Jesse Rothstein and Albert H. Yoon explained it best, "without affirmative action, the legal education system would produce many fewer black lawyers."[15] Our classrooms and workplaces must make up the racial composition of the streets we walk on and the people who come to us for legal representation.
- *Experiences:* Black law students might face greater isolation and underrepresentation in the classroom and on campus, which can impact their overall educational experience. The absence of diverse perspectives can

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[12] *Id.*

[13] TodayShow, What is affirmative action? policy explained in simple terms TODAY.com (2023), https://www.today.com/news/what-is-affirmative-action-rcna91857 (last visited Nov 3, 2023).

[14] *Id.*

[15] Rothstein, Jesse and Yoon, Albert H. (2008) "Affirmative Action in Law School Admissions: What Do Racial Preferences Do?," University of Chicago Law Review: Vol. 75: Iss. 2, Article 2, 70.

hinder learning and diminish the quality of legal education. Black law students who gain admission to law schools may find themselves in less diverse educational environments. This can affect their overall educational experience by limiting exposure to different perspectives and reducing opportunities for intersectional learning and understanding. It can also lead to feelings of isolation and a lack of representation within the student body. Additionally, this can constitute a lack of access to prestigious positions at firms, such as diversity fellowships. The lack of representation may deter Black students from wanting to work at the firm, or even feel comfortable enough to do so. In an interview with Best Colleges, I echo this same sentiment: "I think that a lot of people of color are going to be deterred from receiving an education, especially an education that they think will really prepare them for the type of career they want."[16]

- *Access:* Ending affirmative action may exacerbate any disparities that currently exist in higher education. Black law students, who often come from historically excluded backgrounds, may find it more challenging to gain admission to law schools without the assistance of affirmative action policies. In admission essays, the writing prompts may become vague or discourage students from mentioning their racial and ethnic backgrounds because "new questions are intended to inspire applicants to "reflect upon your motivations for attending law school, as well as the contributions [they] will bring to the [school] community and the legal profession."[17] This language makes the prompts up for interpretation, intentionally confusing applicants.
- *Representation:* A diverse legal profession is essential for ensuring that the legal system serves all members of society effectively. A lack of diversity can lead to a legal profession that does not adequately reflect the demographics and experiences of the population it aims to serve.
- *Opportunities:* Black law students may face additional hurdles in securing clerkships, internships, and job opportunities if they are underrepresented in law schools. Employers often seek diverse candidates who are targeted in recruitment tactics, and a reduction in diversity within law schools could limit Black students' career prospects. As a result, may opt out of recruitment events such as On Campus Interviewing or Career Fairs.

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[16] TodayShow, What is affirmative action? policy explained in simple terms TODAY.com (2023), https://www.today.com/news/what-is-affirmative-action-rcna91857 (last visited Nov 3, 2023).

[17] Sloan, K. (2023, August 23). *Law schools' admission essays revamped after Supreme Court Affirmative Action Ruling*. Reuters. https://www.reuters.com/legal/government/law-schools-admission-essays-revamped-after-supreme-court-affirmative-action-2023–08–23.

III. The Impact on the Legal Profession: On the Subject of Diversity and Inclusion

- *Diminished Diversity:* The legal profession could become less diverse if there is a decline in the number of Blacks law students and lawyers. This shrinkage of diversity could hinder the profession's ability to address the unique needs and concerns of Black clients and communities.
- *Equity and Justice:* A less diverse legal profession may struggle to advocate effectively for racial equity and justice in society. Diversity within the legal profession is crucial for advancing civil rights and addressing systemic racial disparities. If affirmative action in higher education were to be discontinued, there would be a need for alternative strategies to promote diversity and equal access in higher education and the legal profession:
  (a) *Socioeconomic-Based Admissions:* Universities could consider socioeconomic factors as a way to address disparities in access to education. Admissions policies could take into account an applicant's economic background, family income, and educational opportunities.
  (b) *Holistic Admissions:* Institutions could adopt a holistic admissions process that considers a wide range of factors, including an applicant's life experiences, community involvement, work experience, achievements, and potential contributions to the institution. This would go beyond standardized test scores and grade point averages. This approach can help identify promising candidates from historically excluded backgrounds without relying solely on race or ethnicity.
  (c) *Outreach and Pipeline Programs:* Law schools and legal organizations could invest in outreach and pipeline programs that target underrepresented communities at earlier stages of education to encourage more students to pursue legal careers. UCLA Law does a great job of this, through the UCLA Law Fellows Program. I completed this program in 2019. Through my experience in the UCLA Law Fellows Program paired with my social justice education, I had the opportunity to refine the skills needed in areas such as knowledge of legal education, leadership and involvement, academics, and community service. As a UCLA Law fellow, I received extensive knowledge about the different fields of law by attending academies and read a variety of case briefs to complete law school homework assignments. Since my alma mater, UC Santa Barbara, did not have many pre-law resources for undergraduate students, this program gave me insight about the profession of law.

(d) *Mentorship and Support:* Providing mentorship and support networks for Black law students can help them navigate the challenges they may face in a less diverse educational environment. This is why I am dedicated to being a mentor to Black law students through the UCLA Law Fellows Program and Critical Race Studies Program. Additionally, I meet with prospective law students via Zoom and FaceTime to discuss their application process and my personal experience and journey to law school.

(e) *Advocacy and Policy:* Legal organizations and civil rights advocates could continue to push for policies and legislation that promote diversity and inclusion in higher education and the legal profession.

(f) *Reforms in K-12 Education:* Addressing disparities in primary and secondary education is crucial to creating a more equitable pathway to higher education. Policymakers should focus on improving K-12 education for historically excluded students to ensure that all students have an equal opportunity to pursue higher education and receive a career in law that suits their interests.

(g) *Social Media:* Since social media is a huge form of communication with the new generations, social media platforms such as YouTube, Tiktok, Instagram, etc. can be used to highlight academic and professional students of Black students. The legal profession tends to gatekeep knowledge about what lawyers do and how they obtain positions of interest. This creates some mystery around the occupation, how law school prepares people for their careers, and steps a person can take in order to do so. Personally, to tear down this barrier, I started a YouTube channel called "Michael Stallworth" and an instagram account called "It'sStallworthIt" to do just that—share my experiences with my community in hopes of dispelling myths about law school and the legal profession, as well as giving viewers a glimpse into the life of a law student.

IV. Big Law Fellowships are Under Attack

Conservative legal activist, Edward Blum, "has founded a group called Students for Fair Admissions, which just won at the Supreme Court against Harvard and the University of North Carolina, in a decision that effectively ended race-based affirmative action policies in American college admissions."[18]

[18] Adam Liptak, Supreme Court rejects Affirmative Action Programs at Harvard and U.N.C. The New York Times(2023), https://www.nytimes.com/2023/06/29/us/politics/supreme-court-admissions-affirmative-action-harvard-unc.html (last visited Nov 18, 2023).

You would think that since Blum received a favorable outcome both the cases *Students for Fair Admissions, Inc., Petitioner v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc., Petitioner v. University of North Carolina, et al.*, that he would stop there.[19] Instead, he has decided to shift his focus to jobs in the private sector.[20]

Blum has an opposing view of racial preferences in American life that he has been very vocal about. This includes affirmative action and voting rights. Due to this, he has filed two racial discrimination lawsuits through his organization, The American Alliance for Equal Rights (AAEA).[21] Blum and AAEA allege that big law firms Morrison Foerster (MoFo) and Perkins Coie and Fearless Fund, a firm in Atlanta led by women of color that supports Black women entrepreneurs, unconstitutionally offer fellowships to diverse candidates.[22] As a result, Morrison Foerester changed the language in their diversity fellowships to be inclusive of students of all races.[23] The main question at hand is what impact this will have on a firm's effort to recruit and retain diverse talent in the legal field.

Blum is not alone in his quest to advocate for the change of corporate diversity, equity, and inclusion initiatives (DEI). Founded by Stephen Miller, Donald Trump's former senior advisor, America First Legal (AFL) also alleges that DEI at firms raise fundamental issues about how corporations address inequality in the workplace.[24] Other workplaces AFL mentions include Starbucks, McDonald's, and Morgan Stantely.[25] Blum believes that DEI initiatives and programs are discriminatory and environmental, social, and government principles, as well as critical race theory, perpetuate these narratives.[26] Further, he argues that DEI initiatives label white people as "racist",

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[19] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (SFFA), 600 U.S. 181, 197–98 (2023).

[20] *Id.*

[21] Dan Roe, Lawsuits over big law diversity fellowships prompt firms to scrutinize DEI program language The American Lawyer (2023).

[22] Darreonna Davis, Two law firms sued over DEI programs after affirmative action overturned Forbes (2023), https://www.forbes.com/sites/darreonnadavis/2023/08/22/two-law-firms-sued-over-dei-programs-after-affirmative-action-overturned/?sh=7f413b981322 (last visited Nov 18, 2023).

[23] *Id.*

[24] Jessica Guynn, Affirmative action wars hit the workplace: Conservatives target "woke" DEI programs USA Today(2023), https://www.usatoday.com/story/money/2023/09/08/affirmative-action-republicans-target-diversity-programs/70740724007 (last visited Nov 18, 2023).

[25] *Id.*

[26] *Id.*

while simultaneously shifting away from merit-based hiring and promotion metrics.[27] Blum argues that their goal is to file the suit, see program changes at firms, and move on after this—allowing them to be victorious in their goals.[28]

V. What is a Diversity Fellowship?

Perkins Coie was the first law firm to create a diversity fellowship. In 1991, Perkins Coie launched their diversity fellowship in order to support law students who were historically excluded and underrepresented in the legal profession.[29] Big law firms, firms with a large number of attorneys and legal professionals, a substantial amount of offices, and a wide range of practice areas, offer chosen candidates diversity fellowships for summer associate positions.[30] The purpose of diversity fellowships is to promote diversity and inclusion within the legal field. The intended accomplishment is to provide financial support, mentorship, professional development, and networking.[31] Diversity fellowships range from $25,000 to $50,000 per summer. They are offered to candidates on the basis of their diversity, such as race, ethnicity, gender, sex, religion, sexuality, etc.[32] When a candidate accepts a diversity fellowship, they expect that firms will commit to fostering a more diverse and inclusive legal community. On the other hand, firms expect the summer associate to contribute to the diversity and inclusivity at the firm, and become a legal and professional representative of the firm on their behalf. Diversity fellowships serve as a pipeline for the recruitment of talented and qualified candidates from historically excluded groups.[33] Law firms nurture and foster these relationships with diverse law students as soon as their first summer of employment in order to increase diversity at their firm and begin preparing these students for their legal career.[34]

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[27] *Id.*

[28] Monnay, T. (2023, December 6). *Blum says he's done suing law firms as Winston yields on DEI (2)*. Bloomberg Law. *https://news.bloomberglaw.com/business-and-practice/blum-says-hes-done-suing-law-firms-as-winston-yields-on-dei#*.

[29] Raymond, N. (2023, October 6). *Second major US law firm changes Diversity Fellowship after lawsuit*. Reuters. https://www.reuters.com/legal/second-major-us-law-firm-changes-diversity-fellowship-after-lawsuit-2023–10–06/#:~:text=In%20the%20lawsuit%20against%20Perkins,underrepresented%20in%20the%20legal%20profession.%22

[30] Todd Carney, Law school diversity scholarships Biglaw Investor (2023), https://www.biglawinvestor.com/law-diversity-scholarship (last visited Nov 18, 2023).

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.* As a 1L LCLD Scholar at Hogan LovellsUS LLP this past summer, I was able to gain valuable experience about

VI. Changes in Diversity Fellowships

In order to avoid lengthy and expensive litigation, Perkins Coie revised the language used in their applications for diversity fellowships.[35] The new language states that the firm will consider the following factors:

- "Academic achievement – A demonstrated record of academic achievement and excellent writing and interpersonal skills, as well as experience that will contribute to a successful career in the legal field.
- DEI leadership – Engagement in efforts to advance diversity, equity, and inclusion within the community and/or legal profession, including during college or law school.
- Resilience – Obstacles or challenges you have encountered and overcome, how you overcame those obstacles, and what you learned from doing so.
- Perspective – Life experiences that have shaped your perspectives and professional goals."[36]

Since Perkins Coie's diversity fellowship is now open to all law students, they aim to prevent white law students from feeling excluded from applying to their diversity fellowship program. Another prominent big law firm, Gibson Dunn, also adjusted their eligibility requirements for their diversity fellowship. Applicants are now encouraged to submit a personal statement explaining how they have advocated for diversity and inclusion and why this matters in the legal field.[37]

Although Blum has decided to withdraw suits they filed against firms due to them removing "mentions of race or gender in their programs' eligibility criteria, other firms have quietly made similar changes to their criteria out of fear of being Blum's next target." One firm in particular, Winston & Strawn, decided to take action themselves.[38] Each summer, "Winston hosts an annual diversity fellowship for first-year law students in collaboration with the Leadership Council on Legal Diversity." According to their website, they have removed aspects of the eligibility criteria that made mentions of applicants' "membership in a disadvantaged and/or historically underrepresented group in the legal

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[35] Sara Merken, American Bar Association denounces "attack" on law firm Diversity Initiatives Reuters (2023), https://www.reuters.com/legal/legalindustry/american-bar-association-denounces-attack-law-firm-diversity-initiatives-2023–08–25 (last visited Nov 18, 2023).

[36] https://www.perkinscoie.com/en/about-us/careers/law-students/1l-opportunities.html

[37] https://www.gibsondunn.com/diversity/diversity-recruiting/

[38] Monnay, T. (2023, December 6). *Blum says he's done suing law firms as Winston yields on DEI (2)*. Bloomberg Law. https://news.bloomberglaw.com/business-and-practice/blum-says-hes-done-suing-law-firms-as-winston-yields-on-dei#

profession."[39] Here is what Winston had to say about this change: "Although we have updated the language for our program, Winston's abiding commitment to diversity, to innovative ways to enhance it, and to our LCLD scholars program will continue, notwithstanding the recent wave of litigation attacking the motivations behind DEI programs."[40] Winston's directed message towards Blum stated this: "Your implication that the terms 'disadvantaged' and 'historically underrepresented' necessarily refer to race is baseless. Winston & Strawn does not make employment decisions on the basis of race or ethnicity."

Changes like these are complicit with the voiced concerns and issued warnings to law firms about their "unconstitutional" DEI initiatives, but take away from the true intention of programs and fellowships alike. When these decisions are made, they are not made with historically excluded communities in mind. Instead, they are made based on the comfortability and social status of white people, and how their social and economic mobility will be impacted.

Simpson Thacher and Paul Weiss are responding to client demands triggered by this summer's Supreme Court affirmative action decision by creating or expanding diversity and equality practice groups. Simpson Thacher & Barlett "created its equity and civil rights reviews practice in August after it found company general counsels increasingly inquiring about racial equity audits and other issues related to diversity programs."[41] Firms are finding ways to target their diversity efforts more effectively and efficiently, without being scrutinized.

Changes in diversity fellowships will undoubtedly have an impact on recruitment in the legal profession. A partner at Pillsbury Winthrop explains why: "These fellowship programs are to create that pipeline, and to create more leaders, so that cannot be an excuse for why in major corporations and law firms there aren't more minorities, more women and more diversity."[42] Since firms have changed the language in their applications to ask applicants about their commitment to diversity in the legal profession instead of race-based criteria they previously used, this will impact the diversity rates in the legal profession.

VII. Applying the American Bar Association Rules of Legal Ethics

In order to determine whether diversity fellowships are unconstitutional, as Blum alleges, we must analyze the American Bar Association (ABA) Rules of Legal Ethics. However, the legal profession is not formally regulated by the

[39] *Id.*

[40] *Id.*

[41] Monnay, T. (2023, November 17). *Wall street firms build diversity practices after court decision*. Bloomberg Law. https://news.bloomberglaw.com/business-and-practice/wall-street-firms-build-diversity-practices-after-court-decision

[42] *Id.*

ABA. Further, "its ethics rules are simply a model code that states are free to adopt, modify, or reject. But the ABA does exert enormous influence over the regulation of the legal profession at the state and federal level by promulgating standards that are adopted by courts, agencies, and bar associations."

Rule 8.4, focusing on misconduct and maintaining the integrity of the profession, states:

> "It is professional misconduct for a lawyer to:
> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
> (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
> (d) engage in conduct that is prejudicial to the administration of justice;
> (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law; or
> (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
> (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status [or socioeconomic status] in conduct related to the practice of law."[43]

Conduct that is related to the legal profession can be defined as "representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law."[44] As such, it has been argued that "Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law

[43] https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/

[44] *Id.*

student organizations."[45] The main reason why diversity fellowships have been created is to promote diversity and inclusion and increase representation in the legal profession, which is not in violation of Rule 8.4. Rule 8.4 also mentions that "A lawyer does not violate paragraph (g) by limiting the scope or subject matter of the lawyer's practice or by limiting the lawyer's practice to members of underserved populations in accordance with these Rules and other law."[46] With this in mind, even if a firm wanted to hire and recruit diverse talent for these reasons, they would not be in violation of any rule.

The Preamble lays out the obligations and responsibilities of lawyers as public servants:

> As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.[47]

Therefore, it is a lawyer's responsibility to ensure that everyone has equal access to the legal profession and that the legal profession is an accurate representation of the cultures, races, ethnicities, etc. of our society.

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[45] *Id.*

[46] https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/

[47] *Id.*

VIII. United States Equal Employment Opportunity Commission

The United States Equal Employment Opportunity Commission (EEOC) states that "it is illegal to discriminate against someone (applicant or employee) because of that person's race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information."[48] The EEOC is responsible for protecting anyone from employment discrimination. With respect to recruitment, an application, and hiring, "it is illegal for an employer to discriminate against a job applicant because of his or her race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information. For example, an employer may not refuse to give employment applications to people of a certain race."[49] In combination with the American Bar Association (ABA) Rules of Legal Ethics, it is both unethical and illegal to discriminate against someone pursuing employment opportunities.

IX. Is This Unconstitutional?

Groups such as AAEA and AFL argue that diversity fellowships are unconstitutional and violate the Equal Protection Clause of the Fourteenth Amendment states that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[50] Analyzing the constitutionality of diversity fellowships under this clause, big law firms are technically not prohibiting a group of people, white people specifically, from being considered for diversity fellowships. This can be explained through a critical race lens, on the basis of intersectionality, intent doctrine, essentialism, critique of merit, and interest convergence:

(i) Intersectionality

(1) Intersectionality is an analytical framework that understands power, discrimination, and harm as multi-dimensional, rather than stemming from a singular identity-based axis. As Kimberlé Crenshaw, leading civil rights activity and legal scholar, explains, intersectionality is a "metaphor for understanding the ways multiple forms of inequality and oppression compound themselves and create obstacles"

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[48] https://www.eeoc.gov/prohibited-employment-policiespractices

[49] *Id.*

[50] https://constitution.congress.gov/browse/amendment-14/#:~:text=No%20State%20shall%20make%20or,equal%20protection%20of%20the%20laws.

that is a new way of understanding oppression.[51] In the context of *Buck v. Bell*[52], Carrie Buck's intersectional identity as a white woman placed her at an increased risk for sterilization that other groups were not experiencing at that particular moment in time due to the eugenics movement which was focused on protecting healthy white bloodlines. Alternatively, in the context of LGBTQ+ equality, queer people of color experience heightened discrimination within the queer community because of their intersectional identities of being both queer and a person of color. A person can be both white and possess another quality of diversity, making them an eligible candidate for diversity fellowships.

(ii) Intent doctrine

(1) The intent doctrine establishes that discrimination on the basis of a protected characteristic, such as race or gender, is unconstitutional only if it was motivated by a discriminatory intent or purpose. This doctrine was established in *Washington v. Davis* where the Court held that "the insidious nature of law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."[53] Thus, the intent doctrine requires that a plaintiff making an equal protection claim must show that the defendant intended to discriminate against them on the basis of a protected characteristic. AAEA and AFL may try to argue that the intent doctrine plays a major role in this suit, but the sole purpose of diversity fellowships is to ensure that people of color are similarly situated as White people.

(iii) Essentialism

(1) Essentialism is the belief that a monolithic (or essential) experience is definitive of a particular identity, and that things have a set of characteristics which make them what they are.[54] It believes that the task of science and

[51] Crenshaw, Kimberle´ Williams, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics." University of Chicago Legal Forum (1989), 149.

[52] Buck v. Bell, 274 U.S. 200, 47 S. Ct. 584, 71 L. Ed. 1000 (1927).

[53] Washington v. Davis, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976).

[54] Carbado, Devon W., "Critical What What Commentary: Critical Race Theory: A Commemoration: Afterword" (2011), 1597.

philosophy is their discovery and expression; the doctrine that essence is prior to existence.[55] Gender essentialism is the idea that there is a monolithic "women's experience" that can be isolated from other aspects of identity and contrasted to men's experience. Racial essentialism is the idea that there is "a monolithic 'Black Experience' or 'Chicano Experience.'"[56]

(iv) Critique of Merit

(1) The critique of merit challenges the view that meritocracy is a fair system of determining access to opportunities, and that the status quo is the natural result of individual merit.[57] Instead, it posits that individuals' placement in society and their achievements go deeper than merit—or one's skills, abilities, and natural talent—and is rather based on factors such as one's race, gender, family you were born into, etc.[58] Because structural inequalities limit different groups' access to resources and opportunity, the idea of a meritocracy is inherently flawed. Building on this, the critique of merit argues that merit-based systems further perpetuate social inequality by rewarding those who have been privileged enough to gain access to valuable resources and opportunities. This creates a vicious cycle—individuals coming from privileged backgrounds continue to have access to these coveted resources and opportunities due to their "merit," thereby continuing the exclusion of those who come from less privileged backgrounds who do not have "merit." The critique of merit further argues that the idea of merit is often used as a veneer for discrimination and bias, as it can be used to justify the exclusion of individuals who do not fit into dominant cultural norms. People of color are at the bottom of the social and economic hierarchy. Thus, diversity fellowships are a way to close the wage gap disparity and ensure that people of color have access to professional development opportunities.

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[55] *Id.* at 1600.
[56] *Id.* at 1614.
[57] *Id.*
[58] *Id.*

(v) Interest convergence

(1) Derrick Bell's theory of interest convergence proposes that the interest of Black people in achieving racial equality "will be accommodated only when it converges with the interests of whites."[59] Alternatively, the rights of Black people will not be protected where the remedy sought "threatens the superior societal status of middle and upper class whites."[60] In the context of *Brown v. Board*[61], there were many national interests that supported the goal of unifying with the Black community including the Cold War, Black GIs, and southern modernization. More broadly, racial progress and reforms typically only occur "when the equality interest of people of color converges with the interest of powerful elites."[62] And as Carbado explains, "even when the interest convergence results in an effective racial remedy, that remedy will be abrogated at the point that policy makers fear that the remedial policy is threatening to the dominant social order."[63] This posits that gains in favor of marginalized groups do not occur until/unless their interests align with the interests of those who are in power. In relation to diversity fellowships, we will continue to see firms have their programs attacked if they are benefiting white professionals.

(vi) Implicit bias

(1) Implicit racial bias refers to the unconscious or automatic associations and stereotypes that individuals hold about different racial or ethnic groups, often influenced by societal and cultural messages. These biases can shape an individual's attitudes, beliefs, perceptions, and behavior towards others, even if they are not consciously aware of these biases. Blum's ideology of attacking diversity fellowship programs is based on the assumption that people of

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[59] Bell, D. A. (1980). Brown v. Board of Education and the Interest-Convergence Dilemma. *Harvard Law Review*, *93*(3), 523.

[60] *Id.*

[61] Brown v. Bd. of Ed. of Topeka, Shawnee Cnty., Kan., 347 U.S. 483, 873 (1954).

[62] Carbado, Devon W., "Critical What What Commentary: Critical Race Theory: A Commemoration: Afterword" (2011), 1597.

[63] *Id.*

> color should not be similarly situated as white people and there are no racial and economic disparities. However, this is rooted in discrimination and prejudice.

Conclusion

Diversity fellowships constitutionally demonstrate a commitment to social progress. Not only do diversity fellowships and initiatives help law firms meet their expectations and requirements, but they allow law students to bring diverse perspectives, ideas, and approaches to problem solving in the legal profession. This enhances creativity and innovation within law firms, while working to bridge the wage gap in society. With a growing legal market, we must continue to address historical disparities in order to achieve a more inclusive, representative, and equitable legal profession.