Stride

A Communication from the NYSBA Committee on Diversity, Equity, and Inclusion

Fall 2024

How New York's Legal Landscape Evolves: A Close Look at the NYSBA's Ninth Edition Diversity Report Card

What Lawyers and Leaders Can Do About Racism and Wealth Equity Where We Live

EEOC Affirmative Action Guidance Poses Risk for Employers in Facing Reverse Discrimination Suits

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Mission Statement

The objectives of the Committee on Diversity, Equity, and Inclusion are to promote and advance the full and equal participation of attorneys of color and other diverse attorneys in the New York State Bar Association and in all sectors and at every level of the legal profession through research, education, fostering involvement and leadership development in NYSBA and other professional activities, and to promote knowledge of and respect for the profession in communities that historically have been excluded from the practice of law.

The Committee shall also foster the development of, monitor progress of and report on diversity initiatives of the Association, as well as partner with the Sections to continue to pursue enhanced diversity and inclusion in the Association, including among the leadership of the Association.

In conducting its work, the Committee shall consult with and engage Association leaders, other entities and individuals, including Sections of the New York State Bar Association, the New York State Conference of Bar Leaders, the Committee on Leadership Development, the Committee on Civil Rights, the Committee on Disability Rights, The Law, Youth & Citizenship Program, minority and women's bar associations, and others with an interest in the Committee's mission and activities.

January 21, 2022

Why is the Diversity, Equity and Inclusion Committee Important to NYSBA?

By NYSBA President Domenick Napoletano

In order to create a more equal society, we need to work together, listen to each other, and consider the opinions of others – even if they do not align with ours. As lawyers, these responsibilities of listening and learning are even more important, to do otherwise would not only be an injustice it would be an insult.

Furthermore, the next generation of lawyers will be looking to join a bar association that prizes diversity, and inclusion and the New York State Bar Association is that bar. Through the works of this Committee an equal, fair, and inclusive community is being developed and that benefits us all. I've attended so far some of the summer section meetings and I've been very impressed by congeniality being shared amongst so many of the participants of diverse backgrounds, its truly inspiring.

During your career, have you ever encountered a matter or matters that caused you to recognize the need for diversity, equity, and inclusion within the legal profession?

Diversity, equity, and inclusion is more than a need. It's a benefit to all sectors of society, including the legal profession. And it has been a theme throughout my life and my career.

As the child of Italian immigrants of modest means, I know what's it like to be from different circumstances than the people around you. I was the first in my family to graduate grammar school – let alone high school, college, and law school.

The Brooklyn neighborhood where I grew up, Red Hook Brooklyn, was diverse – my friends growing up were Black, Hispanic, and Italians. I was able to get into law school basically through a minority program called the Council on Legal Education Opportunity (CLEO) which was being offered at the University of Pennsylvania Law School in the summer of 1977. I spent six weeks there and made friends that are my lifetime friends, including the late Lynn Terrelonge – who became the first African American president of the Brooklyn Bar Association. Lynn was the one who got me involved with the Brooklyn Bar Association, which put me on the path that eventually led to my becoming president of the New York State Bar Association.

In law school, I was the only white member of the Hofstra Chapter of the Black American Law Students Association, (BALSA) which I became involved in by mentoring incoming students in what we called the buddy system. My friend, and Hofstra Chapter President, Charles Walker, endorsed and petitioned for my membership at a regional meeting of an East Cost BALSA Chapter meeting held that year in Boston Mass. Needless to say some folks were surprised by the petition that Charles made but I happily accepted. Charles and I are friends to this day, and he asked me and I accepted to be his daughter, Alia, Godfather when she was born in 1996.

Former Gov. David Paterson was also my law school classmate. We were in the same criminal procedure class. Since he is visually impaired, I would read our assignments to him. We're still close – he even sent a videotaped message of congratulations when I was sworn in as NYSBA president.

I'm glad that I can count people like Lynn, David, Charles and so many more as my friends. These relationships and experiences have enhanced both my personal and professional life more than I can share here.

Is there anything in particular that NYSBA members should expect in the upcoming year in the area of Diversity, Equity, and Inclusion and with NYSBA as a whole?

Already in my term, the House of Delegates voted to oppose all attempts to ban transgender athletes from K-12 sports, making it official NYSBA policy. We are taking a stand against legislation that would bully and isolate transgender children and deny all students the chance to play on an equal playing field.

I am dedicated to fighting age discrimination in the legal profession. Too many lawyers over the age of 50 find themselves shut out of employment opportunities. This is exacerbated when it intersects with other marginalized categories like gender or race. Ageism's negative and inaccurate stereotypes are so ingrained in our culture that they often go unnoticed. An arbitrary age cutoff is illegal and unfair and takes lawyers who still have a lot to give out of the workforce. It is a disservice to our rural areas, which are already woefully short of lawyers.

I also plan to continue the efforts of my predecessor, Richard Lewis, to advance diversity in all fields – along with our continued advocacy to combat hate crimes and stand against anti-Semitism and anti-Asian hate.

How New York's Legal Landscape Evolves: A Close Look at the NYSBA's Ninth Edition Diversity Report Card

By Jocelyn E. Lupetin

At this year's Annual Meeting, the ninth edition of the Diversity Report Card was adopted unanimously by the House of Delegates. The Report Card, produced by the Committee on Diversity, Equity, and Inclusion, is a biennial publication that provides information and observations regarding diversity data collected from NYSBA's leadership, membership and selected Sections. It also provides a status update on NYSBA's Diversity Plan, which was adopted on January 31, 2020. The Report Card offers recommendations to assist in furthering the aims of the Diversity Plan.

Over the course of the year leading up to its publication, the Report Card Subcommittee, co-chaired by Lillian M. Moy and Jocelyn E. Lupetin, worked to review and interpret diversity data to gauge NYSBA's progress in achieving and carrying out the Diversity Plan. The data comprises self-reported anonymous information provided by members in the categories of race/ethnicity, gender, sexual orientation/gender identity, disability status and age.

As in past years, in addition to including analysis and observations regarding the membership data as a whole, the Report Card focused on eight Sections, including a more-detailed analysis of that subset. The Sections focused on in the current Report Card included the Cannabis Law; Dispute Resolution; Entertainment, Arts and Sports Law; International; Labor and Employment Law; LGBTQ Law; Torts, Insurance and Compensation Law; and Trial Lawyers Sections. The cooperation of those Sections was integral to the drafting of this year's Report Card.

While the Report Card contained certain important observations, the most notable takeaway was the lack of data. As stated above, the data comes from NYSBA member self-reporting, and unfortunately that has been lacking. Specifically, there was no data from members in the first-year newly admitted category. The Subcommittee also noted a continuing problem with non-response rate from more seasoned NYSBA members, while noting the commendable response rate of NYSBA leadership. This dearth of data impedes the Subcommittee's ability to draw strong inferences regarding membership, which in turn, inhibits its ability to determine how well NYSBA is accomplishing the goals of the Diversity Plan and meeting the needs of its members. More robust data is needed to ensure that the programs, services and outreach provided more accurately reflect and respond to all NYSBA members. Additionally, a more robust data set helps NYSBA bolster membership.

In light of this, many of the recommendations put forth in the Report Card focus on boosting responsiveness. Specifically, the Report Card urges NYSBA to continue to review the questions used in the data collection tool, encourages each Section and Committee to create new leadership opportunities for diverse members and urges all association leaders to provide the requested data. Additionally, the Report Card urges NYSBA to make the Diversity Coordinator position full-time by June 30, 2024 and strongly suggests that each Section be required to review and revise their Diversity Plan and submit that plan along with their proposed budget every two years.

The Committee on Diversity and Inclusion and, specifically, the Report Card Subcommittee are grateful for the support received from President Richard C. Lewis, President-Elect Domenick Napoletano, together with the Members of the Executive Committee and House of Delegates. It is hoped that all the recommendations are adopted and put into practice over the coming years.

The Diversity Report Card, 9th Ed., can be accessed at: https://nysba.org/app/uploads/2022/03/EC-AMENDED-Diversity-Report-Card.pdf.

What Lawyers and Leaders Can Do About Racism and Wealth Equity Where We Live

By Lillian Moy

The Committee on Diversity, Equity, and Inclusion was proud to co-sponsor the Symposium on Racism, Wealth Equity, and the Law held at the Albany Law School with the Government Law Center on March 20, 2024. NYSBA was also a co-sponsor. The Association, the Committee on Diversity, Equity, and Inclusion members and members of the NYSBA Task Force on Racism, Social Equity, and the Law did substantial outreach and planning for the event. We were pleased that 400 people participated on Zoom and in the room. Participants came from across the nation and included lawyers, health insurance companies, government agencies, private attorneys and healthcare personnel.

The Symposium started with a keynote address by Professor Ciji Dodds, Associate Professor, Law and Peace & Conflict, of the Albany Law School. Professor Dodds gave an important overview of the history of structural racism in New York in the key areas of housing, healthcare and education. She talked about the structural violence that disproportionately impacts health and opportunities for Black New Yorkers. The keynote was followed by panels on housing, healthcare and education. Panelists included: Keisha A. Williams, Esq.; Dr. Henry Louis Taylor Jr.; Caroline Nagy, Esq.; Samantha Darche, Esq.; Lillian M. Moy, Esq.; Johanne E. Morne, M.S.; Heather M. Butts, J.D., M.P.H.; Julia E. Iyasere, M.D., M.B.A.; Hasna Muhammad, Ed.D, M.A.; Nelson Mar, Esq.; Jamaica Miles; and Daniel Morton-Bentley, Esq.

At lunch, NYSBA President Richard C. Lewis introduced our keynote speaker, Kapil Longani, Esq., Senior Vice Chancellor for Legal Affairs & General Counsel of the State University of New York (SUNY). Vice Chancellor Longani shared his personal story as an immigrant and lawyer of color. He paid homage to his key mentors, including his grandmother and Congressman Elijah J. Cummings, and recounted some of his most compelling work, including his work on resolving the Flint water crisis.

Task Force member Clotelle Drakeford, Esq. introduced prerecorded remarks from Ambassador Andrew Young, who saluted New York lawyers for their role in the civil rights movement and the way forward for people of color.

Each panel drew a through line from the history of structural racism in New York State to current challenges faced by Black New Yorkers in each sector, including ongoing appraisal bias, the challenge of recognizing and addressing racism in both healthcare and education. The panels were recorded and are available at NYSBA's online store catalog for CLE credit or at Albany Law School's YouTube channel for viewing at any time. This Symposium gave the Diversity, Equity, and Inclusion Committee a chance to contribute to continued progress for Black and other New Yorkers of color. The Task Force's report was recognized when Governor Hochul convened a commission to study reparations for Black New Yorkers.

The Honorable Leslie E. Stein (ret.), Director of the Government Law Center at Albany Law School, says, "The Center was grateful for the opportunity to work with such a dedicated team from the New York State Bar Association and others within the Albany Law School community to bring together a group of esteemed speakers and panelists with an expertise in the study of and means to address racial inequities in our state. We hope that the discussions have furthered those efforts."

Albany Law School President and Dean Cinnamon P. Carlarne says, "Albany Law School was honored to host such an important event focused on understanding the impact of historic and ongoing ineq-

uities that shape existing legal and political systems and advancing efforts to push back on those inequities to create a more fair and just system for all."

In closing the Symposium, past NYSBA President T. Andrew Brown noted "the relevance of 400 years of American history to fully understanding the full depth of racism and the inequities that persist in all facets of American life. These inequities continue to stand in the way of a truly just society, which should be of importance to all Americans if we are to ever fully achieve the ideals upon which our nation was founded. Lawyers remain the best advocates for change."

So, what can lawyers and leaders do about racism and wealth equity in our own communities? We can work together to mitigate the ongoing impact of structural racism. We can band with others in our community to shine the light on and push back against racism affecting our healthcare, education, housing, income, environmental and criminal justice We can use our skills to advocate for change when needed, and to speak with and for those who

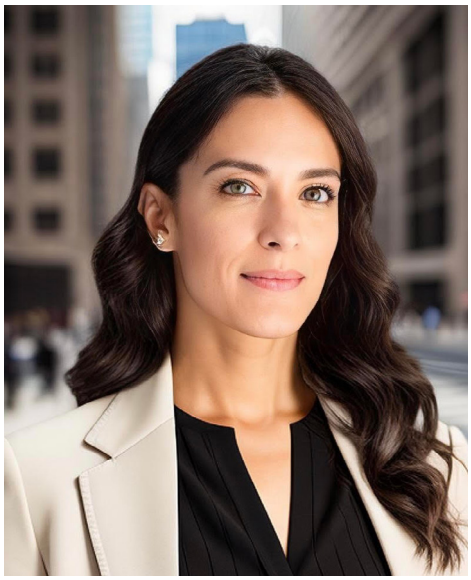
EEOC Affirmative Action Guidance Poses Risk for Employers in Facing Reverse Discrimination Suits After SCOTUS' Decision in Students for Fair Admissions v. Harvard

By Andrew Lieb and Alexandra Licitra

The Equal Opportunity Employment Commission (EEOC) has yet to provide Affirmative Action Guidance that addresses the Supreme Court's ruling from *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 US 181 (2023), and employers who follow the current Guidance may consequently face reverse discrimination lawsuits.

As background, the EEOC is the federal agency entrusted with enforcing employment civil rights laws and combating workplace discrimination. As part of its mission to promote equal employment opportunities, the EEOC offers guidance to employers, helping them to ensure that their policies, practices, and procedures comply with federal discrimination laws, such as Title VII of the Civil Rights Act of 1964 (Title VII). Incident thereto, EEOC issued Affirmative Action Guidance, CM-607, in 1979, which was expressly intended to address the apparent conflict between Title VII's prohibition on considering race, sex and national origin in employment decisions with "the need, often through affirmative action, to eliminate discrimination and to correct the effects of prior discrimination" (see Section 607.1). According to the Guidance, there is no conflict; to wit: Title VII generally permits wholly voluntary affirmative action plans, which are defined as those that were "developed on the employer's own initiative, and not ordered or approved by a governmental agency or court" (see Section 607.11). This 607.11 position, if left unchanged and adhered to by employers, could result in accusations of reverse discrimination, EEOC complaints and litigation.

The current EEOC's Guidance, codified by 607.11, relies on *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), which dealt with affirmative action in university admissions (see Section 607.11(a)(2)). In *Bakke*, the Supreme Court considered whether racial quotas in higher education affirmative action programs violated the Equal Protection Clause of the United States Constitution. Therein, the Supreme Court held that racial quotas were unconstitutional, but authorized race to be considered as one factor, amongst others, in admissions decisions to achieve diversity. This was the basis for EEOC's Guidance that remains published, and strangely, this Guidance on affirmative action is the only topic that EEOC offers employers guidance upon with respect to Diversity, Equity and Inclusion (DEI) programs.



The problem for employers who follow this EEOC Guidance is that *Bakke* is arguably no longer good law. The Supreme Court, in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard*, 600 U.S. 181 (2023), struck down race-based affirmative action in college admissions. In holding that the use of race, as even a "plus factor" among other criteria, violated the Equal Protection Clause and Title VI, the Court arguably overturned the long-standing precedent articulated in *Bakke*.

Although the Supreme Court's ruling in *Students for Fair Admissions* does not directly implicate affirmative action in the Title VII employment context, it implicitly undermines EEOC's reliance on *Bakke*, which was also from the educational context and applied to employment. In fact, Circuit Courts have consistently held that "[f]or additional guidance, we look to cases interpreting Title VII: because of the similarities between Title VI and Title VII, courts frequently have looked to Title VII in determining rights and procedures available under Title VI." *Smith v.*

Barton, 914 F.2d 1330 (9th Cir. 1990). Therefore, EEOC should look to Equal Protection Clause and Title VI precedent from *Students for Fair Admissions* and swiftly update its 607.11 position from Affirmative Action Guidance, CM-607, so that employers can once again rely on EEOC Guidance without risk of being sued for reverse discrimination.

In recent years, there has been an uptick in reverse discrimination lawsuits challenging affirmative action and other aspects of DEI, on the basis that they unconstitutionally factor in race, gender, and other protected categories, mirroring the Court's reasoning in *Students for Fair Admissions*. Beyond these legal attacks, reverse discrimination has become political dynamite that can result in a business being cancelled.

To illustrate the problem, consider the perspective of billionaire entrepreneur and "Shark Tank" investor Marc Cuban, who recently shared his hiring philosophy on a social media platform X (formerly Twitter) as follows: "I only ever hire the person that will put my business in the best position to succeed," said Cuban. "And yes, race and gender can be a part of the equation. I view diversity as a competitive advantage." Cuban's viewpoint underscores a growing trend towards embracing DEI in the workplace and beyond. While this trend, and Cuban's hiring philosophy, are consistent with Affirmative Action Guidance CM-607, they are inconsistent with *Students for Fair Admissions*, which was best articulated by EEOC Commissioner Andrea R. Lucas's strongly worded reply to Mr. Cuban on X, stating, "[u]nfortunately you're dead wrong on black-letter Title VII law. As a general rule, race/sex can't even be a "motivating factor"—nor a plus factor, tie-breaker, or tipping point. It's important employers understand the ground rules here."

If a sophisticated employer like Cuban is confused by EEOC Guidance, which, again, conflicts with Supreme Court precedent, one can only imagine how many others share the same misunderstanding. Without prompt EEOC action to issue DEI Guidance as a replacement for its outdated Affirmative Action Guidance, companies adopting policies to benefit historically marginalized groups or otherwise promoting DEI initiatives will be placed in the lawsuit chopping block. Without DEI Guidance in the face of *Students for Fair Admissions*, a number of prominent companies including Google, Meta and Zoom have rolled back their DEI programs ostensibly fearing that such programs will result in lawsuits. This reality exists given that prominent conservative organizations including American Alliance for Equal Rights and America First Legal have both signaled their intentions to initiate such lawsuits. Plus, considering the Court's treatment of affirmative action in higher education, such attacks have a high likelihood of success.

As can be seen, the EEOC's Guidance is important to employers seeking guidance in amending or developing their workplace diversity, equity, and inclusion initiatives. It is therefore imperative that EEOC immediately updates its Guidance to furnish employers with the information that they need to craft compliant DEI policies. Simply, the world has changed since 1979. Now, 45 years later, in 2024, EEOC needs to publish DEI Guidance because, in the vacuum, companies could be tempted to take their compliance cues from a billionaire's battle with an EEOC Commissioner on X. That is why your authors have submitted a request to EEOC for an Opinion Letter rectifying this issue with the hope that that this request will spur an update to the Guidance. Until then, employers should proceed with caution.

The Supreme Court Has Spoken: Under Siege, Voluntary Affirmative Action? Diversity, Equity and Inclusion? At or About an End Point? What, If Anything, Remains?

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A provocative title, no doubt. Overly dramatic in its expressed concerns? Or . . . going forward, sobering realities and irreconcilable implications we all, no matter what our vested interests or predilections, will have to confront?

Introduction

On June 29, 2023, the Supreme Court, in the consolidated cases of Harvard College and North Carolina University, *Students for Fair Admissions, Inc., v. President & Fellows of Harvard Coll.*,[1] announced its much-awaited ruling on the affirmative action questions there before the Court. At issue were the affirmative actions these institutions *voluntarily* – i.e., of their own initiative – had undertaken in their ongoing efforts in good faith, they thought, to pursue their lawfully encouraged equal opportunity objectives in their admissions programs. In a divided decision authored by Chief Justice Roberts, with concurring opinions by Justices Thomas, Gorsuch and Kavanaugh, and dissenting opinions by Justices Sotomayor and Jackson, the majority not only found unlawful the affirmative action approaches these institutions *voluntarily* had pursued, but spoke of an "**End Point"** to such preemptive efforts.

In a paper I wrote prior to the issuance of the Court's decision, but just after its oral arguments, I addressed the dire predictions and/or concerns by some of the demise of our voluntary approaches to affirmative action as we knew it – not only in the college and university settings, but in other sectors as well.[2] Those predictions and concerns, in key respects, were reflected in the majority opinion of the Court and were addressed in a follow-up paper I wrote[3] soon to be published in the *Hofstra Labor & Employment Law Journal*.

Most striking, as discussed below, was the majority's inexplicable, *irreconcilable rejection* of the very standards it elsewhere in its opinion specifically had *embraced,* i.e., ***"could"* be invoked** by the institutions' admissions officers. Without any explanation it simply labeled these criteria it seemingly had endorsed as **"standardless," "inescapably imponderable," "not sufficiently coherent," and "immeasurable" to the point that *"no court could resolve" such issues as a matter of "judicial review."***[4] It begged the question, could the majority in any way explain – reconcile – its own inherent and fundamental contradictions?

Compounding its analysis was the majority's assessment of "diversity." Acknowledging the pertinence of diversity to the issues before it, "the question in this context," it said, "is not one of no diversity or some; it is a question of degree."[5] That, by definition, necessarily implied *some* justification of diversity as a consideration, but precisely where that line was drawn – what was meant by "a question of degree" –remained to be seen, particularly in light of the majority's references[6] both to the Court's earlier having recognized the "compelling" nature of "diversity" in *Grutter v. Bollinger,*[7] and to Justice Powell's 1978 controlling opinion in *Regents of University of California v. Bakke,*[8] in which the majority declared that "educational benefits that flow from a racially diverse student body" are a "constitutionally permissible goal for an institution of higher learning."[9] Indeed, the majority observed, "Bakke [had] eventually come to 'serv[e] as the touchstone for constitutional analysis of race-conscious admissions policies.'"[10] The question was what, if anything, remained of these precedents?

Confusion? Both prior to and particularly following the Court's *Harvard/North Carolina* decision, few concepts could be said to have been the subject of such confusion and uncertainty as that of affirmative action. *See, e.g.,* The New York Times (April 13, 2024), at A1, in its front page headline: **"State Bans on D.E.I. Prompt Universities to Rebrand Their Efforts"**, including the **"Renam[ing]"** of their "**programs," "job titles," "requirements" or** "**descriptions," "eliminat[ion of] words like 'diversity' and 'equity,'**" and, in some cases, the **"head fake" of such changes "to placate opponents."**[11]

Adding to the confusion, the majority, citing an "expect[ation]" articulated years earlier (2003) in *Grutter*,[12] further observed that in any event we soon would be confronted with an **"End Point"** to our voluntary affirmative action approaches to these issues.[13]

Employing the Socratic Method, I wondered, in assessing the issues of voluntary affirmative action both generally and in the situations here before the Court, how, in the face of these uncertainties, our respective interests, beliefs and predilections notwithstanding, would we advise our clients of their rights and obligations were they to be confronted by these issues? And where would that leave us, in any event, if we were about to reach such an "**End Point"** to affirmative action? The gravity, let alone the reality of such predictions, could not be

overemphasized. Was I missing – overstating –something? What did we need to know? To ask?

Query?

Q: First and foremost, we needed to ask what exactly was meant by the term **"voluntary"** affirmative action? Voluntary? Its vital import in the contexts of our legal framework and seemingly good faith, endless, *preemptive initiatives* to combat discrimination in our recruitment, admissions, staffing and other aspects of the decision-making process? I wondered, how many among us would be surprised by the import alone, in these contexts, of the term "voluntary"?

Q: Given our legal proscriptions as to race, color and other protected categories, are there circumstances where, even the majority agreed, the institutions' admissions officers voluntary affirmative action initiatives nonetheless lawfully ***could*** **take into account the *race, color, heritage, gender, religion, national origin, age, disability or other protected category of the individual?*** Where, for example, in the admissions officers' assessments, indicative or otherwise predictive of such measures as the applicant's ***"Leadership" Potential*****? *"Achievements"? "Character"? "Determination"*****? *"Courage"? "Inspiration"*** and pursuit of expressed ***"Goals"***? Or where pertinent to such objectives as **"Diversity"? "Equity"? "Inclusion"? "Diversity,"** e.g., as to *"thought," "perspective," or* one's "*team approach*" to *"problem solving*?" "**Equity"** and **"Inclusion,"** sensitive to and in furtherance of our concerns about "*Equal Opportunity" and "Fairness"*?

Q: What was meant by the majority's reference to an ***"End Point"***? That after all these decades – *centuries* even, as the majority opinion itself acknowledged[14] – soon we no longer will be able to pursue, or justify, a voluntary, preemptive legal approach to affirmative action? An *End Point* ***to discrimination?*** To our good faith efforts to combat such discrimination? If so, given the frailties of humankind, has the majority totally underestimated the import of such an End Point? Or have those of us who are so concerned about this End Point totally overstated its import?

Q: "Reverse Discrimination"? As some already have feared, might an entity's preemptive, voluntary affirmative action itself be regarded as an unlawful act of *reverse discrimination?* Might we be discouraged, let alone outright precluded, from adapting in good faith to the inevitable population shifts and other changing developments, objectives and circumstances any society or entity is likely to encounter in the course of its natural evolution? A realistic concern? Faced with that dilemma, might you, I or one of our colleagues, or an employing client entity, when so confronted, hesitate to make that decision? If so, would that be counter to the very *preemptive initiatives* our legal guidelines have both encouraged and endorsed?

Q: Are there any among us who believe our society already has reached or is about to reach an "**End Point" *of discrimination*?** That there no longer is or will be a need – or justification – for a voluntary affirmative action approach to discrimination? That, going forward, such issues necessarily would, and should, be addressed *solely* through our litigation processes? That, in short, a preemptive voluntary approach to affirmative action – long considered by many, **an invaluable tool** in our good faith efforts to combat discrimination – has just been discouraged, if not precluded, by the Court and, by its decree, may no longer be an acceptable option? In the words of *The New York Times*, June 29, 2023, at A1, when reporting the Court's decision, ***"sharply curtailing a policy that had long been a pillar of higher education"***? Given the majority's opinion, is that already, or about to be, the new reality?

Q: Are these, at the very least, legitimate concerns and questions in need of addressing, no matter what our respective interests? Will our answers to these and related questions simply be contingent upon our vested interests, e.g., whom we represent? Or is there a broader common ground as to what the standards should be that we all – as members of the Bar – can accept regardless of the vested interests we serve? Would, moreover, the scope of that common ground be clearer if viewed, as well, through an even broader prism that impacts not only our responsibilities as members of the Bar, but the recognition that any one of us, other members of our families or others in our communities or circles might be the accused, the complainant(s), the judge, agency, arbiter or mediator in such a dispute?

The hypotheticals one could pose are many but, by way of example, consider the following additional questions – refinements – triggered by *the legal framework* the majority has now established, a legal framework by which we all are now bound and, accordingly, the sole focal point of this paper. That understanding, I respectfully submit, is especially important, given, as discussed below, the majority's not only having failed to apply the very standards it expressly had deemed appropriate, but instead to denominate those criteria as *"standards-less."*

Q: "*Voluntary*" Affirmative Action: Its Import and the Risks at Stake?

This, I believe, is the most important and, perhaps for many, least appreciated question we must confront at the outset. It is a question I raised in my paper following the issuance of the Court's decision in the case now before us. There, I referred to a 2005 Hofstra Labor & Employment Law Journal article[15] that, even then, expressed grave concerns about the possible *eradication* by the Court of our voluntary approaches to affirmative action in the private employment sector. The article noted that "the law in this area has been shaped by Supreme Court jurisprudence," 29 C.F.R. §1608.1, but at that time "[t]he Supreme Court ha[d] not yet determined whether the EEOC guidelines [we]re entitled to deference by the courts." As there framed (*id*. at 559-560 n. 80):

[The] vast majority of affirmative action programs in the United States do not fall into government contract or court-ordered categories. Rather, most initiatives

are voluntary efforts implemented by employers to further equal opportunity, whether attributable to an "obvious tension between [T]itle VII's prohibitions on discrimination" and such considerations as "Congress' intent to encourage voluntary action by employers in creating opportunities for minorities and women," the need to "correct the effects of past discriminatory practices," "an actual or potential adverse impact," or "a limited labor pool of qualified minorities and women for employment or promotional opportunities due to historical restrictions by employers, labor organizations or others." ***The purpose was "primarily to ensure employers that they can engage in certain voluntary AAPs without fear of a reverse discrimination suit initiated by the EEOC"*** (emphasis added).

Citing Title 29, C.F.R. §1608.1, Statement of Purpose, The *Hofstra Labor & Employment Law Journal* article further elaborated:

D. Currentness

(a) Need for Guidelines. *Since the passage of* [T]itle *VII in 1964, many employers, labor organizations, and other persons subject to* [T]itle *VII have changed their employment practices and systems to improve employment opportunities for minorities and women, and this must continue.* These changes have been undertaken either on the initiative of the employer, labor organization, or other person subject to [T]itle VII, or as a result of conciliation efforts under [T]itle VII, action under Executive Order 11246, as amended, or under other Federal, State, or local laws, or litigation. Many decisions taken pursuant to affirmative action plans or programs have been race, sex, or national origin conscious *in order to achieve the Congressional purpose of providing equal employment opportunity*. Occasionally, these actions have been challenged as inconsistent with [T]itle VII, because they took into account race, sex, or national origin. *This is the so-called "reverse discrimination" claim*. In such a situation, both the affirmative action undertaken to improve the condition of minorities and women, and the objection to that action, are based upon the principles of [T]itle VII. Any uncertainty as to the meaning and application of [T]itle VII in such situations threatens the accomplishment of *the clear congressional intent to encourage voluntary affirmative action.* ***The Commission believes that by the enactment of* [T]itle *VII Congress did not intend to expose those who comply with the act to charges that they are violating the very statute they are seeking* to implement**. ***Such a result would immobilize or reduce the efforts of many who would otherwise take action to improve the opportunities of minorities and women without litigation, thus frustrating the Congressional intent to encourage voluntary action and increase the prospect of Title VII litigation***. The Commission believes that it is now necessary to clarify and harmonize the principles of [T]itle VII in order to achieve these congressional objectives and protect those employers, labor organizations, and other persons who comply with the principles of [T]itle VII.

(b) Purposes of [T]itle VII: Congress enacted [T]itle VII in order to improve the economic and social conditions of minorities and women by providing ***equality of opportunity*** in the workplace. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life. The Legislative Histories of [T]itle VII, the Equal Pay Act, and the Equal Employment Opportunities Act of 1972 contain extensive analyses of the higher unemployment rate, the lesser occupational status, and the consequent lower income levels of minorities and women. The purpose of Executive Order 11246, as amended, is similar to the purpose of [T]itle VII. In response to these economic and social conditions, Congress, by passage of [T]itle VII, established a national policy against discrimination in employment on grounds of race, color, religion, sex, and national origin. In addition, **Congress strongly encouraged employers, labor organizations, and other persons subject to [T]itle VII (hereinafter "persons") to act on a voluntary basis to modify [their] employment practices and systems which constituted barriers to equal employment opportunity, without awaiting litigation or formal government action.** Rather, persons subject to [*T]itle VII must be allowed flexibility in modifying employment* systems and to comport with the purposes of [T]itle VII. 713(b)(1). **Correspondingly, [T]itle VII must be construed to permit such voluntary action, and those taking such action should be afforded the protection against [T]itle VII liability which the Constitution is authorized to provide under this section).**

* * * * *

(c) Interpretation in furtherance of legislative purpose. **The principle[s] of non-discrimination in employment because of race, color, religion, sex, or national origin and … that each person subject to [T]itle VII should take voluntary action to correct the effects of past discrimination and to prevent present and future discrimination without awaiting litigation are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of [T]itle VII.** ***Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in* [T]itle *VII*.** **Affirmative action under these principles means those actions appropriate to overcome the effects of past or present practices, policies, or other barriers to equal employment opportunity**. ***Such voluntary affirmative action cannot be measured by the standard of whether it would have been required had there been litigation, for this standard would undermine the legislative purpose of first encouraging voluntary action without litigation.*** *Rather, persons subject to* [T]itle *VII must be allowed flexibility in modifying employment systems and practices to comport with the purposes of* [T]itle *VII.* ***Correspondingly,* [T]itle *VII must be construed to permit such voluntary action, and those taking such action should be afforded the protection against* [T]itle *VII liability which***

the Commission is authorized to provide under section 713(b)(1). (Emphasis added [to subsections (a), (b) and (c)])

Q: Necessarily implicit in the above considerations as to race, color, and other of our protected categories is the issue of "**diversity.**" Unquestionably a vital issue in any analysis of affirmative action, but how defined and how applied? The majority itself agreed, but up to a point. Addressing the question of "diversity," Chief Justice Roberts, speaking for the majority, sought to explain: "How many fewer leaders Harvard would create without racial preferences or how much poorer the education at Harvard would be, are **inquiries no court could resolve**."[16] Why? *Because,* the Chief Justice stressed, "the question whether a particular mix of minority students produces "engaged and productive citizens," sufficiently "enhance[s] appreciation, respect, and empathy," or effectively "train[s] future leaders" is **standardless.**[17] The interests that respondents seek, "***though plainly worthy*, are *inescapably* imponderable,**" **"not sufficiently . . . *coherent" or "measurable*" to permit "judicial [review]"** under the rubric of strict scrutiny.[18]

Caveat: Confusion? Fundamental, Irreconcilable inconsistencies in the Majority's Analysis?

The Confusion: The majority referenced the "degree" to which diversity should be applied, but at no point actually defined or otherwise really explained what it meant by "degree" or, as a practical matter, how that was to be determined or applied. As noted above, the majority **simply declared, "no court could resolve [h]ow many fewer leaders" the School "would create"** and, accordingly, "**how much poorer the education at Harvard would be, . . . without racial preference**."[19] The factors Harvard and UNC cited, it stated, were **"standardless"; "inescapably imponderable"[20]; "not sufficiently coherent"[21] or "measurable" for purposes of "judicial review**."[22] This choice of words on the part of the majority *rejecting the criteria* before the Court is crucial both to the majority's analysis and, I would argue, its undeniable incompatibility – irreconcilability – with the thrust of the rest of the majority's decision.

The Fundamental, Irreconcilable Inconsistencies in the Majority's Analysis: Exactly what factors had the majority rejected as "standardless," "inescapably imponderable," "not sufficiently coherent" or "measurable" for purposes of "judicial review"? Here is where the confusion and its irreconcilable inconsistencies begin. The majority expressly endorsed the following factors as valid considerations that the "admissions officers **could"** take into account,[23] whether "in the college essay" or when "considering an applicant's discussion of **how race affected his or her life,** be it through **discrimination, inspiration or otherwise"**[24] such qualities as **"courage," "determination," "leadership," "motivation," "achievements" or "attainment of a particular goal … tied to that student's unique ability to contribute to the university['s]" goals.**[25] Addressing the admissions processes, the majority further explained, colleges and universities **often seek in addition to grades, class standing, or certain aptitude tests, standards "based on [a student's] *experiences as an individual" where tied to the "student's unique ability to contribute to the University,"* even when "impacted or otherwise motivated or inspired by the candidate's racial background or experiences."** [26]

Doubtless to say, there likely is not a college, university or other educational institution worth its while, let alone a "Harvard" or "North Carolina," that – employing criteria other than just testing or grades – does not seek to attract those who, exhibiting such qualities, *might* best fit its profile and/or contribute to its particular goals.

This we, of course, know is true from our own expectations and experiences, both personally and in the case of our families or friends, whether in seeking admissions to colleges and universities or in workplaces, law firms, labor organizations and other contexts. Not only do we understand the possible relevance of such life experiences and accomplishments beyond grades, tests or class standing, but we expect nothing less, and that is a good thing. Indeed, no doubt in response to the application processes and criteria of our colleges, universities, law and other graduate schools, many of us have cited our own experiences and accomplishments beyond grades, tests or class standing that we deemed supportive of our applications. The same is also true, we know, for us and our clients in the recruitment processes in employment and other sectors, inclusive of our own legal profession. (My favorite question, when interviewing, is to ask the candidate, "If there is one thing you would want me to know about you, what might it be?")

The problem? To say, as the Chief Justice did, that such criteria as "courage," "determination," "leadership," "inspiration," "motivation," "goals" and "achievements" – the very criteria the majority expressly said admissions officers ***"could"*** take into account – though "worthy," are "standardless" and "inescapably imponderable," is not only difficult to comprehend, but belied by the majority's own above-expressed, unequivocal endorsement of these very criteria: **"Nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration or otherwise."**[27]

"Otherwise"? Lest there be any doubt about the majority opinion's having *unequivocally* endorsed the ability to take the **race** or **color** of an individual into account in these various contexts – what could only be regarded as **'race-conscious'** or **'race-based'** considerations – the majority opinion further elaborated:

"A benefit to a student who **overcame racial discrimination**, for example, **must be tied** to that student's ***courage and determination***. Or a benefit to a student whose **heritage or culture *motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the University.*** In other words, the student ***must be treated based on his or her experiences*** *as an individual* – not on the basis of race."[28]

In short, and summarizing *the majority's own words*, such criteria/considerations as an individual's ***"courage," "determination," "inspiration," "leadership," "motivation," "attainment of a particular goal … tied to [the] student's unique ability to contribute to the university's goals"*** **and** ***"experiences"*** -- even where inspired or otherwise "motivated" by the individual's **"race," "color," "culture," or "heritage" –** or **by the individual's efforts to "overc[o]me discrimination" on such bases – are not only "worthy" considerations, but –** ***the majority unequivocally*** **stated –** ***"COULD"*** **be taken into account by the University admissions officers** (emphasis added).

Some might argue it was not the institutions that invoked the issue of race, color, culture or heritage, but the individual applicants. Even there, however, as the majority itself recognized, at issue, undeniably, is a ***race-based"*** **or "*race-conscious*" decision for the institutions to make**, not the applicants – based, moreover, on criteria the university itself expressly acknowledged as pertinent to its goals. Again**, and it must be repeated, in the majority's own words: "*Nothing in this opinion* should be construed as prohibiting *universities from considering* an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration or otherwise" (emphasis added).**

How, then, given the Chief Justice's own express and pointed acknowledgement of the pertinence of these criteria, could he (speaking for the majority) – or anyone interpreting *these very criteria* – reconcile the majority's dismissal of their acceptability as "standardless," "not sufficiently coherent," "[in]sufficiently measurable" for purposes of "judicial review," or "inescapably imponderable"? Alternatively stated, can we at least agree, no matter what our vested interests, that the thrust of the majority opinion is, in its most vital respects, predicated upon its own inherent and irreconcilable contradictions and uncertainties that cannot be ignored, minimized or explained?

Q: "D.E.I.": "A Rose by Any Other Name Is Still…?"

Years ago, I joined the NYSBA Committee on Minorities in the Profession, later renamed the Committee on Diversity, Equity and Inclusion (DEI). The import of that name change in the context of the affirmative action issues now before us cannot be overemphasized. Quite the contrary, the very definitions of the terms "diversity," "equity" and "inclusion" have been the focal point of much confusion and debate, and even a "relaunching" or "rebranding" of the terms in recent efforts to justify their relevance or application.

Just recently, The New York Times, in a front-page article,[29] bore witness to these developments: *"State Bans on D.E.I. Prompt Universities to Rebrand Their Efforts"; "Bans Are Prompting Universities to Rename Their D.E.I. Programs."* As there indicated, such changes included the renaming of the programs, job titles or job requirements/descriptions to address the issue, or in some cases, it suggested, "head fake" to placate opponents of DEI. By way of emphasis, it noted:

"According to The Chronicle of Higher Education, at least 82 bills opposing D.E.I. in higher education have been filed in more than 20 states since 2023. Of those, 12 have become law, including in Idaho, Indiana, Florida and Texas.

"This has led to layoffs and closures. The University of Florida recently announced that it would lay off more than a dozen diversity employees. At the University of Texas at Austin, the Multicultural Engagement Center closed. And about 60 administrators received notices that they would lose their jobs, according to the state chapters of the N.A.A.C.P. and American Association of University Professors. Some Texas campuses shut down their L.G.B.T.Q. centers.

"But some schools, even in states with D.E.I. crackdowns, have reacted more moderately.

"Florida State University, in Tallahassee, seems to be taking a 'damage mitigation approach,' Will Hanley, a history professor at F.S.U., said in an interview:

The school has reshuffled jobs and turned the Equity, Diversity and Inclusion Office into the Office of Equal Opportunity Compliance and Engagement.'"

How to read these developments? As impacted by the Court's decision?

Q: END POINT To AFFIRMATIVE ACTION or … ONLY A *NEW BEGINNING (or TWIST) TO THE NEXT CHAPTER OF AFFIRMATIVE ACTION?*

End Point? If one were to accept the majority's assessment at face value, we soon will be at the "End Point" – the "sunset" – of this dilemma. For those who agree with or otherwise simply accept this notion, I must ask how they, let alone the Supreme Court, might define the term "End Point," or understand the rationale for the majority's conclusion other than the desire to just sunset the problem? Equally important, I would ask, what is their understanding of the import going forward, post-End Point, assuming it in some way means an abandonment – if not the complete demise – of affirmative action? Of our *voluntary* approach to affirmative action? Is there anyone who would assume not a problem because by then we will have *eliminated discrimination* from our concerns? That there no longer will be any need or basis for *a preemptive voluntary approach* to such issues?

Given the frailties of humankind and the centuries we have been combatting discrimination, let alone the continuing evolution and uncertainty of its very definitions and applications, these are not idle questions. Justice Sandra Day O'Connor's reference to such an end point, offered in 2003, was, in her words, only an "***expect[ation]"*** that "*in 25 years*" there no longer would be a need for such a solution *and* was unaccompanied by any statistical or other analysis to support her expectation.[30] This observer cannot help but think of Justice Ruth Bader Ginsberg's response, joined by Justice Breyer, in a concurring opinion,[31] when addressing Justice O'Connor's then stated "expect[ation]." As expressed by Justice Ginsberg:

'conscious and unconscious race bias,

even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideals"; "from today's vantage point, *one may hope, but not firmly foreclose*, that over the next generation's span, progress toward nondiscrimination and genuine equal opportunity will make it safe to sunset affirmative action.'"[32]

Q: Why *Not* an End Point to Affirmative Action but Rather a New Beginning/Refinement (or Twist) to the Next Chapter of What Already Is: Our continuing, good faith voluntary affirmative action efforts to combat discrimination?

Even if not quite there yet, might we presume we just may be in the early stages of a new beginning/refinement to what we know as affirmative action? A new beginning in the sense of the next chapter of our ongoing approaches to voluntary affirmative action?

As to whether we are closer to such a new beginning/refinement/twist of the next chapter of our voluntary approach to affirmative action, as opposed to the sunset of affirmative action, consider the import of the evolution of the terms **"Diversity, "Equity," and "Inclusion" (DEI)** in this analysis. While not exactly a "new step," if I may mix my metaphors, the still-evolving definitions of these terms, coupled with their latest and ongoing rebranding, renaming and inherent inconsistencies in application, more and more begin to feel like that proverbial "new step" in the very same dance we have yet to master in all these years.

Q: Meaning what?

Central to any analysis of voluntary affirmative action necessarily must be both the concepts of "diversity," "equity" and "inclusion" and the very definitions of these terms. If so, the question here and now, at this point in the evolution of the issues before the Court in the *Harvard/ North Carolina University* decision, is: Where are we in the spectrum of that analysis, given the Court's "pointed" reference to an "End Point"?

The Legal Framework:

CONCLUSION? Or *CONFUSION?*

Fundamental to its decision, the majority needed to establish with as much clarity as possible the legal framework – the "standards" – that, going forward, would govern our approach to affirmative action and, in particular, to voluntary affirmative action. The dire predictions leading up to the oral argument surely made that plain enough.

In seeking to establish that framework the majority opinion, quite properly, cited, as *impermissible*, racial or other such determinations based upon, e.g., ***stereotypical* assumptions**, ***formulaic racial or other such quotas***, or ***racial or other such class balancing***.[33] On the other hand the majority expressly, and unequivocally, indicated in its opinion a university and its admissions officers **"could"** rely upon an applicant's **"diversity" of *"experiences,"* including as the result of "race" or other such protected class "discrimination," or "inspiration," albeit specifically tied to one's race, heritage, or culture, e.g., where indicative of qualities and/or "goals" the university and its admissions officers are seeking, such as "courage," "determination," "leadership," "motivation," or "achievements."**[34] **Of that there could be no mistake, as evidenced by its declaration." Nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise,"** inclusive of the above examples encompassed in its reference to "otherwise."

That said, however, the majority, without explanation, inexplicably "relabeled" these very criteria its decision had told the Institutions their admissions officers **"could" apply** – now ***rejecting*** them as "**standardless," "inescapably imponderable," "not sufficiently coherent," and "immeasurable," such that "no court could resolve" these issues on such bases as a matter of "judicial review."**[35] Viewed in the context of a framework we all had hoped would *at least* provide a much-needed clarity, the reconcilable, I fear, has for now become the irreconcilable.

Endnotes

1 600 U.S. 181 (2023).
2 *"The Best of Times, The Worst of Times? Where Are We Now?"* (August 10, 2023).
3 Michael I. Bernstein, *Affirmative Action: To Be or No Longer To Be: That Is The Question. A Play On Words, or A Vital Concern?* Hofstra Labor & Employment Law Journal, Vol. 41 (forthcoming).
4 *Students for Fair Admissions*, 600 U.S. at 214–15, 253 (emphasis added).
5 *Id.* at 215.
6 *Id.* at 211.
7 539 U.S. 306, 325 (2003).
8 438 U.S. 265 (1978).
9 *Id.*(emphasis added).
10 *Students for Fair Admissions*, 600 U.S. at 208 *(*quoting *Grutter,* 539 U.S. 306, 323).
11 *State Bans on D.E.I. Prompt Universities to Rebrand Their Efforts*, New York Times, April 13, 2024, at A1, A17.
12 *Grutter v. Bollinger*, 539 U.S. 306 (2003).
13 *Students for Fair Admissions*, 600 U.S. at 221.
14 *Id*. at 205–13.
15 Richard N. Appel, Allison L. Gray, & Nilufer Loy, *Affirmative Action in The Workplace: Forty Years Later,* 22 Hofstra Law & Emp. L.J., 549 (2005).
16 *Students for Fair Admissions,* 600 U.S. at 215.
17 (*Id.* (citing *Students for Fair Admissions, Inc. v. U.N.C.*, 567 F. Supp. 3d 580, 591 (M.D.N.C. 2021); 980 F.3d at 173–74).
18 *Students for Fair Admissions,* 600 U.S. at 214–17 (emphasis added).
19 *Id.* at 215.
20 *Id.*
21 *Id.* at 214.
22 *Id.* at 217 (emphasis added).
23 *Id.* at 230.
24 *Id.*
25 *Id.* at 231.
26 *Id.* at 231 (emphasis added).
27 *Id*. at 230 (emphasis added).
28 *Id*. at 231 (emphasis added).
29 *See* NYT, *supra* note 3.
30 *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).
31 *Id.* at 344.
32 *Id.* (emphasis added).
33 *Students for Fair Admissions,* 600 U.S. at 215.
34 *Id.* at 230.
35 *Id.* at 217.

HIGHLIGHTS OF INTEREST

By Claudia O. Torrey*

GREETINGS! Irrespective of your racial, ethnic, religious or any other distinguishing background factor, respect for your fellow man or woman creates a recipe for peace among fellow human beings. In the words of South African Attorney and Human Rights Leader Nelson Mandela, "Peace is not just the absence of conflict; peace is the creation of an environment where all can flourish, regardless of race, color, creed, religion, gender, class, caste, or any other social markers of difference. Religion, ethnicity, language, social and cultural practices are elements which enrich human civilization, adding to the wealth of our diversity. Why should they be allowed to become a cause of division and violence? We demean our common humanity by allowing that to happen."[1] Paraphrasing Amos 5:24 of the Holy Bible: let justice roll down like a mighty waterfall, and righteousness like a mighty river.

The "foundational cradle" for such concepts as inclusion, diversity, equity, accessibility and belonging is part of the freedoms for which our country's founding fathers argued and fought. Signing off on the Constitution during the Philadelphia Constitutional Convention in September of 1787, with all the varied opinions of the signers, was not easy, but it got done. When Dr. Benjamin Franklin left that Convention, history claims he was approached by one of Philadelphia's leading citizens and asked whether we have a republic or a monarchy. Dr. Franklin replied, "a republic if we can keep it!"[2] Now, here we are, some 237 years later, confronting almost the same issues again in our country.

This author hopes these highlights give the reader some information they did not know. Additionally, this contribution is being written close to Easter, so for whom it applies: I send Easter blessings, a holy and meaningful Ramadan and Passover and hope that your Holi was colorful! I trust the New Year (2024) is going well for everyone thus far. As for the Chinese New Year, 2024 is the Year of the Dragon. Hispanic and Latinx Heritage Month was in the fall of 2023 (September 15–October 15), and World AIDS Day was December 1, 2023 (a worldwide inclusive day to unite against HIV/ AIDS).

Since 1976, the month of February is deemed Negro History Month (the term Black, Afro-American or African American is a more common usage), which started as Negro History Week in 1926 by Dr. Carter G. Woodson. Dr. Woodson selected the second week of February as the week for celebration because that captured the birthdays of both President Lincoln and Abolitionist Frederick Douglass[3] (the 12th and the 14th respectively). The month of March is designated as Women's History Month, and the theme for 2024 is "Women Who Advocate for Equity, Diversity, and Inclusion."[4]

The month of April is National Minority Health Month (NMHM). This year finds both the federal Offices of Minority Health and the Department of Health and Human Services focusing on the important role organizations and individuals can be in helping to improve the health of racial and ethnic minority communities, as well as reduce health disparities.[5] In 1915, Mr. Booker T. Washington created National Negro Health Week; in 2002, National Minority Health Month was sanctioned by Congress.[6] The 2024 theme is "Be the Source for Better Health: Improving Health Outcomes Through Our Cultures, Communities, and Connections."[7]

The month of May was selected to be the celebration of Asian/Pacific Islander American Heritage Month in order to commemorate the immigration of the first Japanese people to the United States on May 7, 1843.[8] The month of May also acknowledges the completion of the transcontinental railroad on May 10, 1869, since the majority of the workers who laid the tracks were Chinese immigrants.[9] June is Pride Month for the LGBTQ+ (Lesbian, Gay, Bisexual, Transgender and Queer) Community primarily because of the riot that occurred in New York City on June 28, 1969 in the Greenwich Village community due to a police raid (aka the Stonewall Uprising) at the Stonewall Inn (a popular gathering place for LGBTQ+ individuals).[10]

Seventy-six years have passed since the United Nations General Assembly adopted the Universal Declaration of Human Rights on December 10, 1948 (December 10th is National Human Rights Day).[11] Ironically, on July 4, 2026, we as a country will celebrate

the 250th Anniversary/Birthday of the Declaration of Independence: "We hold these truths to be self-evident, that all men (per se includes women in this day and time) are created equal. . . ."[12]

Sixty-four years ago, during the 1960 Olympic Games in Rome, a young Wilma Rudolph won three gold medals in track and field and allegedly broke at least three world records (per the National Women's History Museum).[13] After overcoming polio and scarlet fever as a child, Ms. Rudolph became the first American woman to win three gold medals in track and field at the same Olympics. In 1961, she won the Associated Press Female Athlete of the Year award and continued her studies at the HBCU (Historically Black Colleges & Universities) Tennessee State University in Nashville, Tennessee.[14] Her fame did not make her oblivious to civil rights issues; upon returning home to Tennessee from the Olympics, Ms. Rudolph refused to be a part of her championship parade unless it was integrated.[15]

Sixty-one years have passed since the historic March on Washington, D.C. (culminating at the Lincoln Memorial) on August 28, 1963. At that time, it was believed to have been the largest gathering for civil rights (estimated to have been over a quarter of a million people, per the NAACP/National Association for the Advancement of Colored People).[16] People came to the March from around the country by trains, planes, buses and cars. The particular theme of the March was focused on freedom and jobs; although issues regarding employment discrimination were intertwined.[17] The March on Washington, coupled with the bombing of the 16th Street Baptist Church in Birmingham, Alabama that killed four children (18 days

after the March), helped to speed up the passage of the 1964 Civil Rights Act, which is 60 years old this year.[18] The March on Washington preceded the Selma Voting Rights Movement, which led to the passage of the 1965 Voting Rights Act. Next year marks 60 years since its passage.[19]

Two legendary women in history are cornerstones of the Civil Rights Movement: Harriet Tubman (sometimes referred to as the "Moses of her people", around 1850, she led over 70 enslaved people to freedom along the Underground Railroad)[20] and Rosa Parks (often referred to as the "mother" of the Civil Rights Movement, when she refused to give up her seat on a bus to a Caucasian passenger, in 1955 Montgomery, Alabama – bus boycotts followed all over the United States).[21] These two women, in their own inimitable way, set forth a foundation of equity and equality for all, which later birthed the Civil Rights Movement. If one were to look at the divine providence of history, 111 years ago, Ms. Tubman died in March 1913 and Ms. Parks was born in February 1913.

Ms. Tubman's "railroad" was not railroad tracks and cars, of course, but a human chain of abolitionists and other sympathetic individuals who aided Ms. Tubman in guiding and housing slaves from the South to the North.[22] Coincidentally, about eight or nine months prior to Ms. Parks' legendary "sit down," a 15-year-old Claudette Colvin did the same thing on a Montgomery bus.[23] Approximately one year later, Ms. Colvin became one of four female plaintiffs in the United States Supreme Court case *Browder v. Gayle*[24] (Gayle was the Montgomery mayor) that held segregation on Alabama intrastate buses to be unconstitutional and therefore illegal,[25] referencing the 1954 case of *Brown v. Board of Education*.[26]

In this era of "book banning" in a country like ours that has reached out to so many people, and helped them make a home in this country, it is shameful that there are children, as well as adults, who may lose the opportunity to expand their minds and increase their knowledge of items in books that are "deemed unacceptable" by a self-appointed few. For instance, there is a Pulitzer Prize-winning author/historian, retired from Columbia University in New York City, who in 2015 published a very interesting book about the Underground Railroad entitled *Gateway to Freedom: The Hidden History of the Underground Railroad*. Dr. Eric Foner educates the reader about Vigilance Committees – groups of people, primarily in New York City, who helped folks navigate the Underground Railroad along the northeastern corridor and within New York City.[27]

Another interesting read, published in 2014 by author Katherine C. Mooney, is *Race Horse Men: How Slavery and Freedom were Made at the Racetrack*. Both Kentucky Derby enthusiasts and horse owners alike with an open mind would probably find this book eye-opening - it literally turns diversity and inclusion on its head, according to reviewers.[28] Harkening back to the days of slavery, many Caucasian horse owners who raced horses depended on their trusted Negro: jockey, trainer, and/or horse groomer. However, despite the appearance of privilege, inclusion and astute horsemanship, that learned slave could never forget their station in society.[29]

The assault on Diversity, Equity, and Inclusion (DEI): public programs and statewide and federal offices, banning mandatory diversity-oriented training and/or employment-oriented DEI training, higher education efforts, and controlling the DEI efforts of non-public offices is yet another example of our country proverbially "going backwards." At this writing, there are approximately nine states that have intentionally passed legislation targeting DEI: language, offices, efforts in thought, word and deed.[30] DEI policies, programs, language and legislation are designed to promote and reflect diversity and inclusion, particularly for women, minorities, people of various ethnic origins, people of the LGBTQ+ Community and the disabled. The overall goal for DEI concerns is for ALL human beings to have a fair, honest, and unambiguous opportunity for such things as a job, an interview, promotion-hiring, healthcare, school admission, and housing[31] – a tapestry of our country.

While our current Congress could probably take the prize for being the **NEW** "Do-Nothing Congress,"[32] the current House of Representatives has not been able to find time to help create and pass a decent budget for the country, but the House did find time to eliminate its Office of Diversity and Inclusion, replacing it with the Office of Talent Management under the Office of the Chief Administrative Officer.[33]

The highlights mentioned above give a glimpse of the many strides our country has made, whether you believe we have a republic, a democracy or both. In the words of the inimitable author, poet and playwright Oscar Wilde, "the truth is rarely pure and never simple."

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1 https://www.un.org/en/events/mandeladay (New Delhi, India on January 31, 2004). In November 2009, the UN General Assembly declared July 18 as "Nelson Mandela International Day" in recognition of his contributions to such universal core values as: social justice, freedom, peace, race relations, reconciliation, gender equality, the fight against poverty and hunger, as well as the struggle for global/international democracy (https://www.un.org/pga/73/wp-content/uploads/sites/53/2019/07/A-RES-64-13.pdf).
2 https://blogs.loc.gov/teachers/2016/09/a-republic-if-you-can-keep-it.
3 *See* https://fcit.usf.edu/frederick-douglass-a-voice-for-our-time.
4 National Women's History Alliance, www.nationalwomenshistoryalliance.org.
5 https://www.hhs.gov/national-minority-health-month/index.html.
6 Id.
7 www.hhs.gov/national-minority-health-month.
8 www.asianpacificheritage.gov.
9 *Id*. According to the Federal Asian Pacific American Council, the 2024 theme is "Advancing Leaders Through Innovation" (www.fapac.org).
10 www.torontopflag.org. The 2024 theme for the Pride celebration in New York City is "Reflect, Empower, Unite," in order to celebrate the 40th anniversary of such; it will also be the 55th anniversary of the Stonewall Uprising (*see* https://www.nydailynews.com/2024/02/27/nyc-pride-2024-theme-reflect-empower-unite).
11 United Nations Human Rights, Office of the High Commissioner for Human Rights (Geneva, Switzerland), www.ohchr.org.
12 www.America250.org.
13 National Women's History Museum, Wilma Rudolph, https://www.womenshistory.org/education-resources/biographies/wilma-rudolph.
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31 *Id*.
32 Chris Lehmann, *The New Do-Nothing Congress*, The Nation, Jan. 25, 2024, https://www.thenation.com/article/politics/do-nothing-congress (a term coined by the late Pres. Harry Truman).
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