

*Hot Topics: The Future of Race in Admissions*  
AALS Annual Meeting, San Diego, Thursday, January 5, 2023, 8:00-9:40 am

Mitch Crusto, Loyola University New Orleans College of Law,  
Organizer/Moderator

**Program Title:** The Future of Race in Admissions

**Program Description:** We await a Supreme Court decision that might radically change the racial composition of colleges and professional schools. Recently, in *Students for Fair Admissions v. President and Fellows at Harvard College* and *v. University of North Carolina*, the Court heard claims that “race-based” admission policies deprive some Asian and white applicants’ entry, notwithstanding their alleged superior credentials. Consistent with several state mandates, the Court is predicted to ban such admission policies, overturning years of precedent favoring affirmative action and racial diversity. This open discussion will explore such a ban’s impact on diversity, equity, and inclusion.

**Program Format:** Traditional Panel with 4-5 Presenter, for 30 minutes, followed by a 30 minutes interactive discussion in which the audience is encourage to share their perspectives and 15 minutes for questions and answers.

**Overall Goal of the Program:** To inform on current developments relative to “race-conscious” college and professional school admissions, hear various viewpoints on the subject, including interactive discussion with the audience, and suggest alternative approaches to achieve diversity.

**Crusto’s Summary and Discussions Questions:**

1. Thank you for inviting us here today to share some of thoughts on the most important civil rights cases that the Supreme Court will decided since *Brown v Board of Education*. <https://www.scotusblog.com/case-files/cases/students-for-fair-admissions-inc-v-university-of-north-carolina/> (**Issues:** (1) Whether the Supreme Court should overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions; and (2) whether a university can reject a race-neutral alternative because it would change the composition of the student body, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity.)

2. Brief background on the issue at hand: A right-wing, ultra conservative group has sued Harvard and the University of North Carolina, demanding a ban on the use of “race-conscious” criteria in college and professional school admissions. They claim that this criterion favors less qualified Black applicants over more qualified white and Asia candidates. <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-707.html>, <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-1199.html>

3. Race-conscious admissions practices allow universities to consider a student's race as one factor in the admissions process in order to help create a diverse student body that enriches the educational experiences of all students. It has been found to be constitutional in past Supreme Court decisions, recognizing that diversity is a legitimate state law goal and race conscious as one factor is a reasonable means to achieve diversity. Since the 1978 case of Regents of the University of California vs. Bakke, the court has held that colleges and universities may consider race as a "plus factor" for Black and Latino applicants to create a more diverse class. <https://www.latimes.com/politics/story/2022-09-29/supreme-courts-major-cases-to-be-heard-this-fall>

4. The current law permits states to decide whether they wish to use race as a criterion for admissions as well as for other public purposes including employment, contracting, and elections, to name a few. See *Grutter v. Bollinger* (2003) where the Court held that the use of an applicant's race as one factor in an admissions policy of a public educational institution does not violate the Equal Protection Clause of the Fourteenth Amendment if the policy is narrowly tailored to the compelling interest of promoting a diverse student body, and if it uses a holistic process to evaluate each applicant, as opposed to a quota system. <https://www.oyez.org/cases/2002/02-241>, <https://www.npr.org/2022/11/01/1132935433/supreme-court-affirmative-action-history-harvard-admissions-university-carolina>.

5. A majority of states and a large number of private colleges embrace the use of race as one of many criteria in admissions, although nine states including California and Michigan have banned the use of race in admissions. <https://www.nytimes.com/2022/10/31/us/politics/affirmative-action-ban-states.html>

6. The Supreme Court is currently composed of a radical, ultraconservative majority, as evidenced by its anti-abortion decision in *Dodds v. Jackson* where the majority held that abortion is not a constitutional right as the Constitution does not mention it and its substantive right was not "deeply rooted" in the country's history, meaning that individual states have the authority to regulate access to abortion. [https://www.supremecourt.gov/opinions/21pdf/19-1392\\_6j37.pdf](https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf)

7. In *Dobbs*, the Court showed a blatant disregard for precedent, as it overruled *Roe v. Wade*. Most importantly, the Court rationalization lays the foundation to overrule many fundamental civil and human rights decisions. [https://www.supremecourt.gov/opinions/21pdf/19-1392\\_6j37.pdf](https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf)

8. Back to the Court's race-conscious cases, it is predicted that the Court will ban the use of race in admissions and most importantly will gut the equal protection, substantive, and privacy rights that are grounded in the 14th Amendment. <https://www.reuters.com/legal/us-supreme-court-tackles-harvard-unc-race-conscious-admissions-2022-10-31/>

9. How important is the use of race in admissions? It resulted from years of federal affirmative action laws meant to redress historic, systematic racial inequality due to the enslavement of Black people, followed by the economic and social negative impacts of racial segregation and unequal, inequitable treatment of Black people. It has resulted in many benefits for Black applicants and has transformed formerly white-only colleges and professional schools. <https://www.lawyerscommittee.org/the-law-and-facts-are-clear-race-conscious-admissions-is-meaningful-necessary-and-constitutional/>

10. These current cases before the Court raise two line of analysis/concerns which I invite your comments. The first is the immediate impact of a national, Court-ordered ban of race-conscious admissions in college and professional school admissions on education, particularly on that of Black people. The second is the seismic impact of removing race consciousness from our laws, on our culture of diversity, equity, and inclusion.

## **20 Discussion Questions:**

1. Who are the winners and losers if race-conscious admission is banned?
2. What impact will such a ban have on Black enrollment in colleges and professional schools? <https://www.washingtonpost.com/education/2022/11/27/uc-berkeley-admissions-race-diversity/>
3. What legal actions, if any, might be taken to counteract the negative effects of a ban?
4. Is there anything that can be done in advance to impact the Court's decision?
5. How important is it to inform the public of these developments, particularly those who will be adversely affected?
6. How will such a ban impact historically Black educational institutions?
7. Is there an opportunity for HBCUs to develop collaborative relationships with elite, formerly white-only schools?
8. What is the long-term impact of race consciousness if it is removed from all laws?
9. Can a different criterion be introduced to achieve the same outcome as race, such as applicants from predominantly Black school, neighborhood? See the Texas model, top grads from every high school and recent lawsuit against the University of Texas, Austin, <https://www.google.com/amp/s/www.texastribune.org/2021/07/27/ut-austin-affirmative-action/amp/>.
10. Is there a role for law professors in this matter? See lawsuit by a white male law professor against Texas A & M after it announced a hiring policy that would move "the structural composition of our faculty toward parity with that of the State of Texas." <https://www.chronicle.com/article/what-colleges-can-learn-from-the-affirmative-action-lawsuit-against-texas-a-m>.
11. Are there international implications for such a ban?
12. Are there any positive aspects of a Court-ordered ban on race-conscious admission?
13. How will the public perception of the issue impact the dialogue on this issue?
14. Is this issue intrinsically tied to the issues relating to a woman's right of choice?
15. Should the ban apply to HBCUs or faith-based schools?
16. What role might other branches of government play on this issue?

17. How do we teach students to assess policy development in addition to learning the current law?
18. If the Court bans affirmative action in admissions, should HBCU seek greater funding to accommodate the projected influx of Black and Latinx applicants?
19. What reforms of the Supreme Court might be considered following an activist, ultraconservative agenda?
20. Is there a role for the Biden Administration to weigh in on these developments and if so how?

### **Organizer and Moderator:**

**Mitch Crusto** is the Henry F. Bonura Jr. Endowed Professor of Law at Loyola University New Orleans College of Law. See Newsweek, OpEd, “How Affirmative Action Really Works | Opinion,” 10/31/22 at 7:30 am EDT, <https://www.newsweek.com/how-affirmative-action-really-works-opinion-1755497>; *A Plea for Affirmative Action*, 136 Harv. L. Rev. F. (forthcoming 2023). He graduated from Yale College (1971); Oxford University (Marshall Scholar, 1980); and Yale Law (1981). He acknowledges that he is a proud beneficiary of race-conscious admissions policies and views such policies as a debt owed to Black Americans for centuries of being victims of white supremacy, segregation, and inequity.

### **Panelists:**

**Nicola “Nicky” Boothe** is a tenured full professor and dean of the University of Illinois – Chicago School of Law. Dean Boothe practiced law for almost a decade before entering legal academia. She was a tenured full professor at Florida A&M University College of Law where she also served as associate dean for academic affairs and interim dean. Dean Boothe also taught at Boston University School of Law and Barry University Law School. A member of the Order of Barristers, she is a certified speaker by the Florida Department of Insurance, holds certifications for interviewing and counseling in the legal field, and was a Fellow for the National Institute for Teaching Ethics & Professionalism. She has taught a number of law school courses including Civil Procedure, Torts, Professional Responsibility, the Guardian Ad Litem Clinic, Florida Criminal & Civil Practice, Ethics & Professionalism and Mindfulness in Life & Law. Dean Boothe’s scholarship has been published in several law reviews and journals and addresses issues of legal professionalism and ethics, cultural competency, social media, and human trafficking. Her op-eds have also appeared in local and national publications. She has served as a speaker, panelist and commentator on media outlets, and at a number of national conferences, and has won several awards from the Florida Supreme Court for her Pro Bono participation in the Juvenile Dependency System.

**Kevin Brown**, Mitch Willoughby Distinguished Professor, University of South Carolina School of Law; Richard S. Melvin Emeritus Professor Indiana University Maurer School of Law. Professor Brown was on the faculty of Indiana University Maurer School of Law from 1987 to June 30, 2022. On July 1, 2022 he joined the faculty of the University of South Carolina Law School as the Mitch Willoughby Distinguished Professor. He graduated with his BS degree in 1978 from the Indiana University Kelley School of

Business where he majored in Accounting. After spending his first year of law school at Indiana University McKinney School of Law in Indianapolis, Professor Brown transferred to and graduated from Yale Law School in 1982. Brown has been a visiting professor at the University of Texas School of Law, University of Alabama School of Law, and University of San Diego School of Law. He was a Fulbright Scholar in 1997 at the National Law School in Bangalore and the Indian Law Institute in New Delhi. In addition, Brown has been affiliated with or taught at foreign universities including the Law Faculty of the University of Witwatersrand in Johannesburg, South Africa; the Law Faculty of the University of Cape Town in Cape Town, South Africa; the University of Central America in Managua, Nicaragua; Adilet Law School in Almaty, Kazakhstan; and School of Transnational Law of Peking University in Shenzhen, China. Brown also spent the Spring Semester of 2014 teaching in the London Law School Consortium Program. From 2004 to 2008, Professor Brown was the Director of the Hudson Holland Scholars Program, a minority scholarship program for the high achieving underrepresented minority students. An original participant in the first Critical Race Theory Workshop held in Madison, Wisconsin in 1989 (as well as four of the next six annual workshops), for nearly 35 years his primary research interests are in the areas of race, law and education and the global impact of the African-American struggle. Brown has published two books, *Race Law and Education in a Post-Desegregation Era* (2005) and *Because of Our Success: The Changing Racial and Ethnic Ancestry of Blacks on Affirmative Action* (2014) and over 90 articles or comments on issues such as critical race theory, school desegregation, affirmative action, African-American Immersion Schools, and school choice. A frequent speaker at scholarly conferences, Brown has spoken of issues of race, education, diversity or the global impact of African-Americans over 300 times.

**Lia Epperson** Lia Epperson, Professor of Law at American University Washington College of Law, is a nationally recognized expert in the areas of civil rights, constitutional law, and education policy, her scholarship centers on the constitutional dialogue between federal courts and the political branches, and its implications for educational equity. Her scholarship, published in leading journals, also explores the role of public schools, colleges, and universities in creating equal opportunity. From 2014-2018, Epperson served as Senior Associate Dean for Faculty and Academic Affairs at the law school. In 2018, she was awarded an Institute for Advanced Studies fellowship with the Collegium de Lyon in Lyon, France, working with scholars at the University of Lyon and from around the world on issues of constitutional law, freedom of expression, and equality.

Prior to her appointment at American University, she served on the law faculties of the University of Maryland and Santa Clara University. She has also served as a Senior Fellow at the Center for American Progress, focusing on federal civil rights enforcement of educational policies and practices. Professor Epperson's research interests are informed by her experiences litigating education cases throughout the country, and lobbying for the maintenance and enforcement of civil rights protections.

Prior to becoming a law professor, Epperson directed the education law and policy group of the NAACP Legal Defense & Educational Fund (LDF). While there, she litigated in

federal and state courts, advocated for federal administrative and legislative reforms, and co-authored multiple amicus briefs to the United States Supreme Court in the areas of education and affirmative action. In addition, she represented LDF in several national civil rights leadership coalitions.

Prior to her time at LDF, Professor Epperson was an attorney with Morrison & Foerster in Palo Alto, CA, and a law clerk to the Honorable Timothy K. Lewis of the United States Court of Appeals for the Third Circuit. She received her law degree from Stanford University, where she served as an editor of the Stanford Law Review as well as the Stanford Law and Policy Review. She earned her bachelor's degree in sociology, magna cum laude, from Harvard University.

**Maimon Schwarzschild** is Professor of Law at the University of San Diego, where he has taught since 1982. He is an English barrister and an American lawyer: he was an attorney in the Civil Rights Division of the US Department of Justice from 1976 to 1981 and practised as a barrister in London in the 1980s. He was a visiting professor at the Sorbonne for several years, and has been a visiting professor at the Hebrew University in Jerusalem. He is a Director of the Institute of Law and Religion at the University of San Diego and a member of the editorial board of Law and Philosophy. He has published extensively on constitutional law, jurisprudence, law and religion, and civil rights. With Gail Heriot he recently co-edited a volume entitled "A Dubious Expediency: How Race Preferences Damage Higher Education", published by Encounter Books.

**John Valery White** is the Ralph Denton Professor of Law at the University of Nevada, Las Vegas (UNLV) William S. Boyd School of Law. After a decade as Dean of the Boyd School of Law, Executive Vice President and Provost of UNLV, and Acting Chancellor of the Nevada System of Higher Education, Professor White returned to the faculty. His current scholarly focus is on the role of civil and human rights law in addressing the demographic consequences of globalization. He earned his BA from Southern University and his JD from Yale Law School, where he was a Notes and Topics editor for the Yale Law Journal. Professor White began his academic career at Louisiana State University's Paul M. Hebert Law Center as an assistant professor of law, ultimately becoming the J. Dawson Gasquet Memorial Professor of Law while teaching and publishing on civil and human rights law. He directed LSU Law's summer program in Lyon, France and was a distinguished visiting professor at the University of Insubria in Como, Italy, where he explored the role of civil rights law and multicultural theories in response to globalism. Professor White currently serves as the Chair of the Board of Trustees of the Law School Admissions Council, on whose board he has served for many years.