

Dr. O'Connor: Welcome. You're listening to the Health Disparities Podcast. I'm Dr. Mary O'Connor, Chair of the Board of Directors of Movement Is Life, and I'm co-founder and Chief Medical Officer of Vori Health. The next series of podcasts comes to you live and in person from the annual Movement Is Life Caucus, which is convened in Washington DC. We're in the company of several hundred health equity advocates.

Affirmative Action seeks to increase opportunity for those groups of individuals who have historically been underrepresented in a given field. Medicine has historically been such a profession, namely a profession dominated by white males. Diversity in the medical profession combats disparities in healthcare on so many levels, including increased patient engagement through gender, racial, ethnic concordance between the patient and the healthcare professional. Affirmative Action policies aimed at improving diversity in medical schools, however, have come under recent challenge, some have even been reversed. So, it is my great pleasure to introduce today's guest, our opening speaker at the Caucus, Cara McClellan, JD. Ms. McClellan is the founding director and associate practice professor of the Advocacy for Racial and Civil ARC Justice Clinic at the University of Pennsylvania Law School. ARC provides students with hands-on experience working in civil rights litigation and policy advocacy around systemic racism and discrimination. The ARC Justice Clinic is inspired in part by the famous words of Dr. Martin Luther King Jr. The arc of the moral universe is long, but it bends towards justice. Welcome, Cara. Thank you for joining us today.

Prof. McClellan: Thank you so much. It's such a pleasure to be here.

Dr. O'Connor: So, Cara, the title of your presentation today was, "*Racism and Healthcare Affirmative Health Action*". You are taking attendees through the journey of Affirmative Action from the creation of the Freedmen's Bureau in 1865 to support newly freed African Americans to basically today's legal arguments related to diversity-based admissions. So, could you summarize for our listeners basically the main points of your excellent presentation this morning and why this matters so much as we are pushing and advocating for greater diversity to promote health equity?

Prof. McClellan: Sure. So, we started with really the historical context that the 14th Amendment comes out of. So, the 14th Amendment was one of the reconstruction amendment. It was passed or adopted by Congress right after the Civil War ended Emancipation Proclamation and Reconstruction begins. And the purpose of the amendment was to really ensure equal citizenship for newly freed slaves. And so, it

provides for the first time the right to birthright citizenship, privileges and immunities and equal protection under the law. This is the first time that the national government is really recognizing the need to protect individuals against state government and discrimination. And so, we started with that framing to also think about the work of the Freedmen's Bureau as related to that. The Freedmen's Bureau was designed to provide for social services to address the ways that there were inequities in all aspects of American life that would prevent equal citizenship. And so, that was in voting, that was in education, but it was also in healthcare. It was the first time that the federal government stepped in and provided healthcare to newly freed slaves who had not had any provision of healthcare access to private doctors in the past. All of this was a recognition that we can't just act as if there's no history of slavery, but rather we have to affirmatively address the inequities that exist. And it lasted in a meaningful way for about three years in terms of the Freedmen's Bureau before it was slowly defunded and no longer providing services. So, a short-lived history. And in many ways, the advances that were created to protect equal citizenship during Reconstruction were short-lived in general, because there were pretty soon after Emancipation, there were what were called black codes adopted by the states and the Supreme Court really did not step in, in a series of decisions, including *Plessy v. Ferguson*. They said you can actually attack the concept of equal citizenship, for example, through laws that required segregation of the races, that denied access to public accommodations and in other ways ensured that there was not actually, you know, the right to vote, the right to education, the right to work and receive money for working in a way that other citizens do. So, in many ways, it took us right back to circumstances that existed before the Freedmen's Bureau and the progress that was made through reconstruction. So, we started there to think about what is the meaning of the 14th Amendment today? What was the purpose behind the 14th Amendment? And what is the work that's still needed in today's age? And in thinking about Affirmative Action, the 14th Amendment is the law that that structures how we decide how race can be considered today.

So, we started off talking about the *Bakke* case, which is the first time that admissions in higher education and the consideration of race and admissions comes before the Supreme Court. So, in 1978 the Supreme Court considers this challenge to the admissions program at the University of California Medical School. The case was brought by Alan Bakke, who was a white applicant who applied twice to UC Davis Medical School and didn't get

in twice. And he argues that he didn't get in because of his race. And the court considers his argument, and it results in multiple opinions that don't actually reach the same rationale, but Justice Powell's opinion becomes really the influential one going forward in terms of determining the standard for considering race and admissions. It was a very interesting discussion I thought this morning to pose the question to everyone in attendance at the conference of what should be the rationale for considering race and admissions, especially when it comes to medical schools.

So, I really appreciate it during our discussion that people who are at the conference who work in the healthcare field, were able to speak about what they see as the benefits of diversity, including actually impacting patients and patient outcomes by having diversity that comes from medical school diversity. So, in Gruder, the court emphasized the need to have a path of leadership that is visibly open to talented and qualified individuals of every race, particularly in light of the need to cultivate a diverse set of leaders, and this is true in the medical field as well. So, although the Supreme Court has said that the consideration of race has to be narrowly tailored to serve the compelling interests in diversity, which comes from the educational benefits of diversity, a medical school could define its mission and what it deems as the educational benefits of diversity in the way that it wants. Medical schools are the experts in determining what their educational goals are. So, for example, a medical school could have an educational mission for pursuing diversity that is related to enhancing cultural sensitivity and competence among medical students. That is related to improving access to healthcare for folks who might otherwise be vulnerable populations that is related to reducing racial and ethnic disparities in healthcare treatment and outcomes. And by defining its educational mission in that way the university could then determine, or the medical school could determine what it sees as the educational benefits that flow from diversity and how race is necessary to be considered to establish those educational goals that flow from diversity. The Supreme Court has limited us to this diversity rationale and said that you can consider race as one of many factors in admissions. You can't have a quota, you can't have a set aside, but you can consider it as one of many factors, so long as your consideration is what's called narrowly tailored. And that means that you first have to rule out that no race neutral alternatives will achieve the compelling interests and the educational benefits that flow from diversity. So that's the standard

we're operating with. The question is, within the classroom, what diversity is compelling to serve the educational benefits of discussion and learning in the classroom, rather than, you know, addressing the pipeline issues in the medical profession or the need to remedy segregation.

Dr. O'Connor: So, let me go back just one question prior. So, the courts and the Supreme Court have recognized that there is value to diversity in the educational environment, and they're saying, at least to date, right, that you can consider these as race, ethnicity, etcetera, as other factors in an admission process because they've recognized the value of a diverse learning environment. So, when it comes to the delivery of healthcare, my question is that narrow definition thus excludes a diverse medical profession to deliver culturally competent healthcare. In other words, the definition of diversity in the education space is not automatically translated into diversity of the medical workforce.

Prof. McClellan: That's correct. The Supreme Court has not said that it's specifically compelling to think about the pipeline from higher education to the workforce. That's not the rationale that they've adopted. Instead, what they've recognized is a First Amendment right for a university to pursue diversity as part of its educational purpose in the classroom of having diverse perspectives to aid discussion and to aid learning. There could be some connection between the two, right, because in the classroom, people who are being trained could benefit from the racial diversity and apply that to their practice. But in terms of specifically making the connection between diversity in medical schools and creating diversity in the professional world, that was not the rationale that the Supreme Court explicitly recognized.

Dr. O'Connor: And so now there's a new challenge to affirmative action. And you spoke about that this morning. So please bring our listeners up to speed on where that challenge stands.

Prof. McClellan: Sure. So, there are two cases that are now before the Supreme Court, and they were argued on October 31st of this year.

Dr. O'Connor: That's because they're terribly spooky to many of us that believe in equity. So, kind of amazing that it was on Halloween. I'm sorry, go ahead.

Prof. McClellan: Scary stuff at issue.

Dr. O'Connor: Yeah, scary stuff.

Prof. McClellan: Definitely, definitely. So, the first case is brought by Students for Fair Admissions, which is an organization that was founded by Ed Bloom who was actually the architect behind Shelby County, the Holder

Decision, which gutted the Voting Rights Act. So, he seems to be on a mission to end race consciousness in multiple areas of society. So now he's focused on higher education and not just voting. And the other person who founded this organization, Students for Fair Admissions is Abigail Fisher. And she was actually, you may recognize her name, the named plaintiff and the last challenge to Affirmative Action. So, Abigail Fisher was the student who applied to University of Texas and said that the reason she didn't get in was because she's white and then brought a case challenging the University of Texas Admission System. And that went before the Supreme Court and the Supreme Court ruled against her. After she lost in that case, she teamed up with Ed Bloom and founded this organization. So, the plaintiffs are Students for Fair Admission, and they brought a case against Harvard University and University of North Carolina, both of which are before the Supreme Court, now. They were not officially consolidated at this point. They were separated because Justice Jackson recused herself from hearing the Harvard case. And so, now they actually were argued separately and are being considered by the court separately.

Dr. O'Connor: But what is fundamentally different since there have been other challenges to the concept of Affirmative Action or some application of permitting a higher educational institution to take into account multiple factors in an admission process. Some of those factors could be race, gender, ethnicity, unique experiences of an individual's background. So, I mean, these challenges have occurred. What is different now? Is their argument fundamentally different?

Prof. McClellan: So, some would say nothing is different, just more of the same. It's a rinse and repeat of university of the University of Texas case that Fisher brought. Formally, what's different is that they've brought an additional claim, not just challenging precedent and not just saying that the system that Harvard and UNC have is not narrowly tailored to serve a compelling interest. but they've brought an additional claim in the Harvard lawsuit that says that Harvard's admissions program discriminates against Asian American applicants. One thing to know is that students for Fair Admission is not an organization that historically has advocated for Asian American applicants. You know, there's a question about whether they're really concerned about that or whether they're just trying to challenge Affirmative Action by bringing a new kind of claim. Regardless, it's clear that the issue of discrimination against Asian Americans and the issue of whether race should be considered in an admission are not the same issue. They're separate issues that

wrongfully get conflated sometimes. Another thing that's important to remember is that the relief in terms of an actual remedy from the court that Students for Fair Admissions has asked for does not address discrimination against Asian American applicants. So, they don't ask for any type of racial bias training or any attempt to correct bias and racism against Asian American applicants. Instead, they only ask for one thing, and that is in their complaint, they ask for an injunction or an order preventing Harvard from finding out the race of an applicant.

Dr. O'Connor: I don't even know how that would be.

Prof. McClellan: Exactly. I mean, it's really not clear exactly what an injunction like that would look like. But on their complaint, they say they want everything to have to be race blind, such that a college or university can't know the race of an applicant. So that could extend pretty far, right? Because there's many ways that race is correlated with other things and that you could figure out or signal to an admissions officer, what your race is. I mean, it could be your affinity groups that you're involved in, right? If you're involved in the Black Student Association or the Latinx Student Association, it could literally just be your zip code, right? Because our country is still so segregated that an admission officer could probably know in some cases just based on what school you went to or what zip code you live in, what your race is.

Dr. O'Connor: Well, I would also think that just on the basis of the individual's name, I mean, you can look at my name Mary O'Connor and say, well, that's an Irish name and that's correct. You know, that's my ethnic background. So even that applicants supposed to then apply with a false name or some kind of blinded name because you could take a name that would be aligned with a certain culture that would then be aligned with a certain racial group or ethnic group. And the admissions people could infer from just the name of the person, their background.

Prof. McClellan: And Students for Fair Admissions has taken different positions that at different points in terms of describing how far they want their injunction to go. You know, most recently they've said, no, it doesn't go as far as not, you know, not being able to find out the name of an applicant, but it's unclear what the standard is because you know, for example, at the district court level, they advocated for a much more extreme position. You know, in other situations they've said, for example that you wouldn't be able to consider that someone is the descendant of slaves. And there's many ways that that could be potentially figured out too. So, it's unclear how extreme they're willing to go, but what is clear is that they're advocating for this race blind approach.

Dr. O'Connor: You mentioned this morning that the hearing on these two cases that have been, that are linked in the oral arguments to the Supreme Court was five hours in duration, much, much longer than the traditional one-hour hearing. Why do you think that was? And what do you see as the significance of the length of time that the justices heard oral arguments?

Prof. McClellan: So, these are really complicated issues that impact so many areas of American life. So, on a basic level, I think the arguments were long because of that and because the justices had a lot of questions about, as we've been talking about what it would look like to not consider race, which would try to be colorblind. So, the questioning went on for a very long time. The United States did present argument through the Solicitor General. And so that was another factor was that there were multiple rounds of advocates to hear. There were attorneys for Students for Fair Admissions. There were attorneys for the universities. There was the United States presenting their position, which was very clear in support of race conscious admissions continuing and being necessary to many areas of American life, including the military was one that they talked about in particular and advocated for the ways that it's a matter of national security for us to have diversity in many areas of the federal government. So that, that was one reason. But the vast majority of the questions that the justices in particular the conservative justices asked were not about the facts in the record in terms of the district court and the appellate court and the case of Harvard's decision. But rather about what comes next, assuming that we're going to overturn Affirmative Action, what else can we do? So, this was a very concerning, you know, set of questions instead of arguments because it seemed to really signal that they were not in favor of upholding the precedent 40 years of case law that says you can consider race as one of many factors. And the other set of questions that they asked that were pretty concerning was about how long should Gruder, which is the case that makes clear that you can consider race as one of many factors be allowed to continue, and when should we say enough, we're done. We've addressed racial inequity as much as we can and it's over.

Dr. O'Connor: And so, were there any kind of indications as to possible paths forward that the court could deem as appropriate if in fact, they reverse the current standing on allowing race ethnicity to be one of many factors that can be considered for admission.

Prof. McClellan: So, this, this brings us to the conversation about race neutral alternatives. Like what are other ways that you could try to use proxies for race to create racial diversity, but not actually consider the individual

race of an applicant. And so, some things that that could potentially be on the table are looking at socioeconomic status as a factor in weighting that. It's already considered by many universities as part of the holistic process. But the question is how much more and how else would we consider it looking at things like legacy preferences that tend to disproportionately benefit white applicants. If we didn't have legacy practices, would that increase diversity on campus? Looking at things like scholarship aid, would that increase diversity looking at other preferences and even other standards that build in racial bias in the admissions process. So, for example, we've known for decades that standardized tests, undervalue in particular black, Latinx and Native American applicants and some groups of Asian American applicants that students who have done really well academically and are going to do well academically in college tend to have lower SAT scores or ACT scores, if they come from a background in particular that's low SES status or where their parents have lower level of education, that that's most correlated with SAT scores as opposed to how the student is going to perform. So that could be another way is not considering SAT scores and standardized tests as much, but instead look at other indicators of how students can perform and create a more equitable system that way. But I have to really emphasize that that's what was at issue in trial, in both the Harvard and UNC case, the main question is under the narrow tailoring analysis, are there race neutral alternatives that could achieve a level of diversity that would serve the compelling interests in the educational benefits of diversity? And in both cases, the district courts found no, that all of these race neutral alternatives would not achieve the same level of diversity. And in the Harvard case, the court found based on all of the evidence that both experts presented, that even if you used all of the race neutral alternatives that the parties had put forward, you would have a reduction in black students on campus by about 30%. And that was the best-case scenario.

Dr. O'Connor: So then why did the Supreme Court agree to hear this case in your opinion?

Prof. McClellan: You know, I think we've seen that we have a supreme court that really is putting into question the meaning of stare decisis and precedent. They're willing to overrule existing case law regardless of whether it was recently decided, regardless of whether our society is relying on having some clarity in what the case law is to structure you know, all of our systems but instead really motivated by ideology. And that there is now a majority on the Supreme Court who questions whether race

consciousness still has a role in American life. So even by taking this case, I think they've indicated a willingness to revisit precedent and potentially to overrule over 40 years of case law saying you can consider race as one of many factors.

Dr. O'Connor: Yes, it's interesting times that we live in.

Prof. McClellan: Yeah, absolutely. And you would think, you know, in terms of just coming out of a term in which the court overruled Dobbs, overruled Roe v Wade that there would be some concern for the legitimacy of the court and for Americans being able to rely on precedent. But it seems like the court is instead just gearing up to look at other areas where they may be willing to overrule existing law.

Dr. O'Connor: Well, it's certainly a concern because we know that in the medical space, as you well know, that diversity of our healthcare professionals is extremely important. And it's not just in the education space, that narrow definition of, you know, a university being permitted to look at the need for diversity in the classroom as a way of promoting a better education, because in healthcare we also need to look at the diversity of the healthcare professional workforce relative to cultural competency, relative to our patients going to trust their healthcare provider, relative to access, relative to conscious and unconscious bias. So, improving the diversity of our workforce, I think has never been more important, particularly as the demographics of the nation are changing and we are becoming more and more diverse.

Prof. McClellan: Absolutely. And you know, it's not, there's no legal rule against considering the realities of our country's history or the social realities on the ground. Now, those are things that courts can take into account, but unfortunately, you know, I think we saw during arguments a court that was not as willing to engage with these practical realities, but instead, you know, willing to kind of close their eyes to race as if that's a way that courts have to operate. And the truth is they don't, you know, you don't have to be colorblind or otherwise blind to reality.

Dr. O'Connor: Well, certainly we would hope not that the recognition of the need for our society to continue to advance equity remains critical if we're going to, in particular in healthcare, to address the disparities that we know are present and are harming people every day. So, let's turn to a little bit of a lighter question, which is, what have you enjoyed about the Movement Is Life Healthcare Caucus so far?

Prof. McClellan: I've really enjoyed, as I was saying earlier, the willingness of practitioners to just engage with these practical questions. I think I learned a lot from, you know, different folks who stood up and talked

about what the impact would be on patients, on outcomes, on their own practice. And, you know, that really shows why it's such an interdisciplinary type of convening, like this is so critical. So, I enjoy that part and I also, this is a fun convening to come to because people are not only intellectually curious and wanting to have these conversations, but really wanting to build relationships and engage socially too. So, I've enjoyed it a lot.

Dr. O'Connor: So, Cara, I'm going to ask one last question and that is basically asking you to share with our audience a call to action that you would suggest our listeners keep in mind in 2023. I mean, what can we as individuals do to help continue to address the need for diversity in our spaces?

Prof. McClellan: One thing I would say is that if the last few years have showed us anything, it's that elections matter. That the Supreme Court can be made into an anti-democratic institution when we don't have a reflection of what the people want on the court. And so, it's really important to think about Congress's role in putting judges at all levels of court, at the district court, at the federal court, but also at the Supreme Court and making sure that there are justices who are not going to act as an anti-democratic force and who are not going to make promises about overruling existing rights, but will be responsive to what the people think is and have come to rely on as constitutional rights. And then also elections matter in terms of Congress' ability to ensure that our value of diversity and race consciousness can be enacted through regulations. And obviously the Constitution trumps everything. But Congress, for example, under Title Six, they can make clear, for example under statutory laws that to consider race for the purposes of serving diversity or addressing other inequities is permissible. Ultimately, you know, that will be reviewed by the Supreme Court, but they can make very clear what their purpose and intent is in adopting statutes.

Dr. O'Connor: Well, we're sad to have to come to an end of our time today. Thank you so much, Cara McClellan for joining us today. We'll hope we'll talk with you again soon on the podcast and see you back at the Caucus in the future. And a quick note to our listeners, you'll be able to access Cara's full presentation on Affirmative Action on our website very soon at www.movementislifecaucus.com. And if you like the episode today, please let your friends and colleagues know about it. Until next time on the Health Disparities Podcast, this is Dr. Mary O'Connor saying, thank you for listening. Be safe and be well.

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