The Supreme Court Strikes Down Race-Based College Admissions in Landmark Harvard/UNC Decision

Description

By Madeline M. Ursini, Elizabeth O. Manchester, and Alicia J. Samolis

On June 29, 2023, the Supreme Court of the United States determined the constitutionality of the race-based admissions policies employed by Harvard College and the University of North Carolina in the landmark cases *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. vs. University of North Carolina*. Both cases call into question whether the colleges' practices of using race as a factor during application screening violates the Equal Protection Clause of the Fourteenth Amendment. In 6-2 and 6-3 vote for *Harvard* and *UNC*, respectively, the Court struck down the use of race as a factor in college admissions, effectively changing the implementation of affirmative action programs across all United States universities.

The term "affirmative action" means different things depending on the context. In the academic context relating to student admissions into higher education, it can mean a practice or policy of favoring individuals belonging to groups historically regarded as disadvantaged or subject to discrimination. The Court has ruled on the matter of affirmative action in an academic context in a line of cases, the most recent of which was *Grutter v. Bollinger*, a 2003 case involving the use of race in University of Michigan's Law School admissions. In *Grutter*, the Court held that race could be considered as a factor in the admissions process because universities have a compelling interest in maintaining diverse practices. The Court effectively overturned this precedent in *Harvard.* In the majority opinion, Chief Justice John Roberts underscored the limits to achieving the goal of diversity articulated in *Grutter.* According to the opinion, *Grutter* made clear that limits to affirmative action policies are intended to guard against the danger of illegitimate stereotyping and of stereotyping against those racial groups that are not beneficiaries of the race-based performance. Moreover, while *Grutter* allowed for race-based admissions programs, it imposed the critical requirement that at some point, they must end because "enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle".

In applying this precedent to the Harvard and UNC policies, Justice Roberts explained that the programs fail to fall within the limits established in *Grutter* by utilizing race as a stereotype or negative, and by having no end point. The compelling interests identified by the colleges – i.e., producing knowledge stemming from diverse outlooks, promoting the robust exchange of ideas, and broadening and refining understanding – are not sufficiently coherent or measurable to view under the lens of strict scrutiny that is appropriate for a fundamental rights analysis. Further, the colleges failed to articulate a meaningful connection between the means they employ and the goals that they pursue, as they "lacked sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points".

Despite striking down the consideration of race in admissions practices, the majority opinion made a point to distinguish between the provision of beneficial treatment purely based on the factor of race, and the beneficial treatment that is tied to that individual's experiences in overcoming racial discrimination. Justice Roberts emphasized that the Court does not intend to prohibit universities from "considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise."

In their respective dissents, both Justice Sonia Sotomayor and Justice Ketanji Brown Jackson emphasized the counterproductivity of overturning a practice that has brought racial diversity to the classroom and the devastating impact of the decision given the history of discrimination in the United States. Justice Sotomayor

referenced *Brown v. Board of Education*'s "vision of a Nation with more inclusive schools" to support her argument that race-conscious admissions, while slow and imperfect, have advanced the Constitution's guarantee of equality. Further, both Justice Sotomayor and Justice Jackson agreed that America has never been colorblind, and that the decision made by the Court cemented a superficial rule of colorblindness by the majority's vision of race neutrality.

In response to this decision, Harvard issued a statement communicating that while the university will comply with the new ruling, it will need to determine how to preserve its essential values consistent with the Court's new precedent. Many other universities have expressed the uncertainty and confusion regarding admissions procedures going forward. Ultimately, the *Harvard* and *UNC* Supreme Court's rulings will require a change in the nation's public and private universities standards for admission.

The decision has no legal effect on employment decisions. In the employment context, employers were always prohibited from favoring employees based upon race, gender, or other protected classes (with the exception that employers can favor disabled employees, older employees, and veterans). "Affirmative action" in the employment context does not allow race or other protected classes to be used as a plus factor, but rather refers to certain efforts to increase the diversity of applicant pools.

Despite the lack of direct legal effect, employers are still well-advised to make sure their diversity initiatives are compliant with all federal and state restrictions governing the same. Employees themselves are often confused as to the rules and prior to this decision, many employees may have believed it was legal to favor certain minorities in employment decisions. Given the breadth of media coverage and public discourse on the topic, more employees will be aware favoritism is illegal, even when well-intentioned. This is particularly true given the $25,600,000 verdict rendered against Starbucks in favor of a white manager in a New Jersey federal court reverse discrimination case, *Phillips v. Starbucks Corporation,* 1:19-cv-19432, made national news in June. To the extent an employer has failed to involve their legal counsel in their diversity efforts, they are urged to do so now.

Public and private institutions of higher learning should review all race-based programs and the disbursement of funding related to such programs. Institutions can still have "race-neutral" (and other policies neutral toward protected classes) that may still increase diversity. Such policies may include recruiting from geographic areas with diverse populations, increased scrutiny on practices that might result in a barrier for certain applicants, closely reviewing socio-economic status of applicants, or launching programs that may attract first-generation students on campus. Some institutions are entering into partnerships or joint ventures to create skills development in various initiatives as students approach admissions. However, institutions should still review agreements, policies and procedures related to admission, financial aid, and any sort of diversity with their legal counsel.

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Date Created
July 7, 2023