Legal Update Article

U.S. Supreme Court Holds Use of Race In Admissions By College, University Is Unconstitutional

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The use of race in admissions by Harvard College and the University of North Carolina (UNC) is unconstitutional, the U.S. Supreme Court has held in a decision written by Chief Justice John Roberts. ***Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*** (6-2), No. 20-1199, together with *Students for Fair Admissions, Inc. v. Univ. of North Carolina* (6-3), No. 21-707 (June 29, 2023).

Despite finding the schools had violated the Equal Protection Clause of the Fourteenth Amendment, the Court did not expressly overturn its 2003 decision in *Grutter v. Bollinger,* 539 U.S. 306. In *Grutter,* the Court held that use of an applicant's race as one factor in an admissions policy of a public educational institution does not violate the Constitution.

What's Unconstitutional

Discussing its 2003 *Grutter* decision and its pronouncement then that consideration of race in admissions should end within 25 years, the Court emphasized in its latest decision that "twenty years later, no end is in sight." Irrespective of what the Court deemed as Harvard's and UNC's "well intentioned" and "good faith" efforts, the Court held the schools' programs violate the Equal Protection Clause of the Fourteenth Amendment.

The Court explained that Harvard and UNC "have fallen short of satisfying the burden" that their programs are "'sufficiently measurable to permit judicial review' under the rubric of strict scrutiny" and "'[c]lassifying and assigning' students based on their race 'requires more than … an amorphous end to justify it.'" (Citations omitted.)

The Court specifically rejected the educational benefits from Harvard's program — training future leaders in the public and private sectors, preparing graduates to adapt to an increasingly pluralistic society, better educating its students through diversity, and producing new knowledge stemming from diverse outlooks.

Likewise, the Court rejected UNC's efforts to promote the robust exchange of ideas; broaden and refine understanding; foster innovation and problem-solving; prepare engaging and productive citizens and leaders; enhance appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes.

The Court further described the interests sought as "plainly worthy" but "inescapably imponderable."

The Court stressed that the Equal Protection Clause imposes "twin commands" that race never be used as a negative or a stereotype. According to the Court, Harvard's consideration of race led to an 11 percent decrease in the number of Asian Americans admitted to Harvard.

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The Court also noted the schools' argument that race is not a negative factor because it does not affect many decisions is belied by their position that the demographics of admitted students would be different without considering race. The Court also was skeptical that minority students always or consistently express some characteristic minority viewpoint on any issue.

In addition, the Court asserted the admission programs promote stereotypes because they assume, for example, that a black student brings something to their campus that a white student does not.

The Court also concluded that the programs did engage in racial balancing. For example, the Court pointed out that UNC sets a metric on whether a group's percentage enrollment within the undergraduate student body is lower than the general population in North Carolina.

What's Constitutional

The Court expressly provided that nothing in its opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected the applicant's life, be it through discrimination, inspiration, or otherwise.

The Court further explained that students can receive credit for overcoming racial discrimination or benefitting from their racial heritage or culture, but the consideration should be focused on the "student's unique ability to contribute to the university" and "must be treated based on his or her experiences as an individual—not on the basis of race."

Thus, universities and colleges may consider and weigh categories other than race in the admissions process. These can include the makeup of socioeconomic applicants and the elimination of tips (or plusses) or other special consideration for children of donors, alumni, and faculty.

Noting that no military academy is a party to the cases, the Court specifically provided that its decision does not address whether race-based admissions advance a compelling interest at the Nation's military academies.

Justice Thomas Concurrence

Justice Clarence Thomas's concurring opinion focused on an originalist defense of the Constitution as color-blind and said U.S. Supreme Court precedents have largely adhered to the Fourteenth Amendment's apparent history and prescription for color-blind laws.

Justice Thomas explained that all forms of discrimination based on race, regardless of their intent, including affirmative action, are prohibited under the Fourteenth Amendment. Although the majority does not appear to have reached this conclusion, Justice Thomas stated, "The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled."

Justice Gorsuch Concurrence

Justice Neil Gorsuch issued a concurring opinion, in which Justice Thomas joined, echoing the holding of the majority opinion by emphasizing that Title VI of the Civil Rights Act of 1964 does not permit race-based discrimination, even in part, in admissions for higher education institutions that receive federal funding. Justice Gorsuch emphasized that this

applies regardless of the institution's discrimination in order to advance another intention or motivation. Justice Gorsuch also recognized that the Court's majority opinion returned the consideration of race in higher education admissions to the same strict scrutiny application and analysis received by race generally under the Fourteenth Amendment.

Justice Kavanaugh Concurrence

Justice Brett Kavanaugh focused on *Grutter*'s 25-year limit on race-based affirmative action in higher education. He stated that racial classifications, even when otherwise permitted, must be temporary and limited in time.

Justice Sotomayor Dissent

Justice Sonia Sotomayor issued a dissenting opinion, in which Justices Elena Kagan and Ketanji Brown Jackson joined. Justice Sotomayor defends the Court's precedent and argued that the "Court long ago concluded" the Equal Protection Clause's "guarantee of racial equality … can be enforced through race-conscious means in a society that is not, and has never been, colorblind." Justice Sotomayor explained that it has long been the Court's settled precedent that diversity in higher education is a compelling interest and that the Equal Protection Clause allows for "a limited use of race in college admissions in service of the educational benefits that flow from a diverse student body."

However, Justice Sotomayor continued, the majority opinion noted that holistic college admissions and recruitment efforts that do not employ racial classifications remain intact. To that end, Justice Sotomayor noted, the majority opinion encourages colleges and universities to continue to consider "factors the Court's opinion does not, and cannot, touch," such as socioeconomic diversity, first-generation status, and fluency in multiple languages.

Justice Jackson Dissent

Justice Jackson's dissenting opinion, in which Justices Sotomayor and Kagan joined, acknowledged the race-based gaps that have historically and continue to persist in the Nation and that, as a result, have fallen short of ensuring all individuals have been and are ensured equal protection under the law. Justice Jackson focused on the benefits of considering an applicant's voluntary disclosure of their race in the holistic review process of higher education admissions, which she believes advance the core promise of the Fourteenth Amendment.

White House Response

In response to the ruling, the White House issued guidance about race-neutral alternatives in admissions.

Implications Beyond Higher Education

The legal framework for affirmative action in the college admissions setting is different than in the employment setting. In the employment context, Title VII of the Civil Rights Act of 1964 protects against discrimination on the basis of all races. In addition, Executive Order 11246 applies to covered federal contractors and subcontractors and prohibits discrimination against employees on the basis of race. Although the Court does not directly address application of its ruling outside of the higher education admissions context, there may be implications on employer diversity, DEI (diversity, equity, and inclusion) initiatives. While the Court specifically noted that race-neutral programs are permissible under the law, the Court expressed concern that Harvard and UNC used

impermissible stereotypes, effectively making assumptions that students of color will bring different experiences to a campus than white students. The Court also notes that UNC compared student metrics to racial populations in North Carolina. While Title VII has long prohibited use of stereotypes, quotas, and labor pool analysis that are not sufficiently specific to particular position or location, the Court's discussion may provide information that employers should consider when assessing existing or prospective DEI initiatives, policies, practices and written materials describing the same.

The Jackson Lewis Higher Education Group is carefully analyzing the Court's decision. The team is prepared to assist institutions to adjust to the changes in the legal landscape and offer confidential full admissions audits and limited reviews of specific aspects of institutions' admission practices, along with guides to implementation in light of the Court's ruling. Please contact a Jackson Lewis attorney with any questions about serving racially diverse students and related admission practices.