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Legal Sidebar

The Supreme Court Strikes Down Affirmative Action at Harvard and the University of North Carolina

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On June 29, 2023, the U.S. Supreme Court issued a decision upending precedent permitting limited use of race in higher education admissions. In an opinion deciding a pair of cases, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*, the Court held that the schools' use of race in admissions violated the Constitution's equal protection principles. Many commentators had been expecting this outcome.

This Sidebar considers the Court's history with racial classifications in higher education admissions, examines the majority opinion in the two cases, and addresses considerations for Congress.

Precedent for Affirmative Action in Higher Education

In 2003, building on its splintered 1978 decision in *University of California Regents v. Bakke*, the Supreme Court in *Grutter v. Bollinger* held that the Fourteenth Amendment's Equal Protection Clause allows limited consideration of race in higher education admissions. In general, equal protection requires that government entities—including state-run universities—avoid distributing benefits or burdens based on race, unless those classifications meet a high bar. To justify race-based action, the government must identify a compelling government interest and show that its policy is narrowly tailored to pursue that interest. This test is known as "strict scrutiny." Judges and commentators regularly observe that government classifications using race usually fail strict scrutiny and are held unconstitutional.

(In the *Students for Fair Admissions* cases, and in the Court's prior affirmative action precedent, the parties did not dispute that they engaged in race-based decisionmaking. This Sidebar therefore does not address the legal meaning of race or when a classification is based on race.)

In *Grutter*, the Court held that colleges and universities can have a compelling interest in building student body diversity, justifying some use of race in higher-education admissions, at least as a plus factor in a holistic consideration of applicants. To justify the use of race, however, a university must first establish its interest in diversity and, second, show its policies consider race no more than needed.

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The *Grutter* Court approved schools seeking "the educational benefits that flow from a diverse student body" and to enroll a "critical mass of underrepresented minority students" so that those students felt "encourage[d] ... to participate in the classroom."

The Court in *Grutter* also held that a school's race-based admissions preference can be narrowly tailored when it does not use numerical targets or a quota system. Rather, the Court required schools to use an admissions plan "flexible enough to ensure that each applicant is evaluated as an individual." In a companion case, *Gratz v. Bollinger*, the Court rejected a state university admissions program that "automatically" awarded admissions points to minority applicants. The Court also assumed that schools would continue to pursue race-neutral options and contemplated that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

Post-*Grutter*, the Supreme Court has returned to the issue of affirmative action in higher education and addressed these standards further, in two cases both named *Fisher v. University of Texas*. In the first *Fisher*, decided in 2013 (*Fisher I*), the Court required universities to describe concretely the diversity-related educational goals their policies serve. In *Fisher II*, decided in 2016, the Court upheld the University of Texas's race-conscious admissions policy against the challenger's arguments that the university must instead, as a race-neutral alternative, expand its policy of admitting the top ten percent of students from the state's high schools. The Court stated that the ten-percent plan did not meet the university's diversity goal and would require the university to give up other admissions criteria.

While *Grutter* and the *Fisher* cases considered constitutional constraints on public institutions, the same rules apply to private schools (like Harvard) that accept federal funds, as they are bound by the antidiscrimination requirements of Title VI of the Civil Rights Act of 1964 (Title VI). Thus far, the Court has held that Title VI shares the Constitution's same equal protection guarantees.

The Court's Decision in *Students for Fair Admissions*

Students for Fair Admissions (SFFA), petitioner in both cases decided this term, includes university applicants who allege that they were denied admission to UNC or Harvard because of their race. The Court issued one majority opinion in both cases. Chief Justice John Roberts, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett, concluded that the two schools' affirmative action admissions policies, in seeking student-body diversity, "lack sufficiently focused and measurable objectives warranting the use of race," among other things. Citing *Grutter*'s requirement that race-based decisions must "end" at "some point," the Court held that the admissions policies violated equal protection.

In both cases, Justices Thomas, Gorsuch, and Kavanaugh wrote concurring opinions. Justice Sotomayor filed a dissenting opinion. Justice Jackson issued a dissent in the UNC case; she is recused in the Harvard case. This Sidebar focuses on the majority opinion and its implications.

A "Color-Blind" Interpretation of the Fourteenth Amendment and *Brown v. Board of Education*

Although the Court majority in the *Students for Fair Admissions* cases acknowledged that strict scrutiny affords a narrow pathway to allow the government to make decisions based on race, the opinion emphasized a "color-blind" approach to equal protection jurisprudence. In other words, the majority reasoned that the Constitution required it to apply the same level of scrutiny to classifications that purport to benefit racial minorities as it applies to classifications seeking to harm them—all racial classifications are equally suspect. The Court pointed to lawmakers' statements from around the time of passage of the Fourteenth Amendment describing "absolute equality of all citizens" and the law's application "without regard to color." The Court also cited the United States' brief in *Brown v. Board of Education*, the case that ended segregation in public schools, which argued that the Constitution "should not permit any

distinctions of law based on race or color." In the Court's view, *Brown* requires that public education "be made available to all on equal terms" (quoting *Brown*), and the Fourteenth Amendment means that a state cannot "use race as a factor in affording educational opportunities among its citizens" (quoting oral argument in *Brown*). "Eliminating racial discrimination," the Court stated, "means eliminating all of it."

Measurable Objectives, Race as a Disadvantage, and Time Limits

The Court observed that *Grutter* "expressed marked discomfort with the use of race in college admissions," characterizing racial classifications as "dangerous." As a result, the *Grutter* Court deemed permissible race-based government action "subject to continuing oversight." In *Students for Fair Admissions*, the Court concluded that the schools' admissions programs utilizing race did not survive that oversight for three primary reasons: the schools' plans (1) lacked measurable objectives; (2) used race to disadvantage and to stereotype students; and (3) had no end date or other goal to mark a stopping point.

To begin with, the Court stated that it could not "license separating students on the basis of race without an exceedingly persuasive justification that is measurable and concrete enough to permit judicial review." The Court viewed the diversity goals proffered by Harvard and the University of North Carolina lacking in this respect, as they proved too "amorphous" and not "sufficiently measurable" to allow meaningful judicial review. The schools argued that they aimed to promote diverse viewpoints, prepare productive citizens and leaders, and foster cross-racial understanding. The Court concluded that courts cannot measure these "elusive" and "standardless," if "worthy," goals. In the Supreme Court's view, even if courts could quantify these objectives in some way, they could not declare them accomplished with sufficient certainty to know when affirmative action should end. Student-body racial diversity is hard to measure even in demographic terms, the majority concluded, since the schools omit some categories (such as Middle Easterners) and lump others together (including South Asians and East Asians and all Hispanics). In contrast, the Court observed that other interests the Court has recognized as sufficiently compelling to justify race-based action can be reliably assessed: courts can evaluate whether the potential for racial violence so threatens prison security as to justify inmate segregation and can gauge when race-based remedies have alleviated the effects of de jure segregation.

In addition, the Supreme Court majority determined that the schools' use of race in admissions operated to some students' disadvantage. While *Grutter* and *Bakke* allowed race be used as a "plus" factor for specific applicants, the Court in the *Students for Fair Admissions* cases determined that the schools' admissions programs reduced Asian and white admissions rates. The Court observed that since admissions are "zero-sum," providing a benefit "to some applicants but not to others necessarily advantages the former group at the expense of the latter."

The Court also held that the schools' admissions programs violated equal protection principles barring racial stereotyping by establishing an "inherent benefit" in "race for race's sake." Quoting *Grutter*, the Court said that "universities may not operate their admissions programs on the 'belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue.'" In the Court's view, the schools' admissions programs based on fostering diversity evinced such a belief, assuming students "of a particular race, because of their race, think alike"—"at the very least alike in the sense of being different from nonminority students."

Finally, the Court emphasized *Grutter*'s requirement that race-based admissions programs be temporary. "This requirement was critical," the majority stated, "and *Grutter* emphasized it repeatedly." A time limit was "the reason the Court was willing to dispense temporarily with the Constitution's unambiguous guarantee of equal protection," in the Court's view. Yet with respect to Harvard's and the University of North Carolina's admissions plans, the Court pointed out that some twenty years after *Grutter*, the schools admitted they had no timeline in mind for ending consideration of race. In addition to avoiding any specific timeline, the Court concluded, the institutions offered no demographic "benchmark" or goal that

could, if achieved, mark the end of the schools' need for affirmative action. The Court condemned what it termed the plans' "numerical commitment" to diversity, evidenced in consistent rates of minority admissions year-to-year. The results, the Court said, resembled the "racial balancing" forbidden by precedent and portended that consideration of race would continue. The parties' assertion of an intention to employ affirmative action until racial "stereotypes have broken down" also promised no identifiable end point, in the Court's view.

The Decision and *Grutter*

Although the Supreme Court in the *Students for Fair Admissions* cases invalidated Harvard's and the University of North Carolina's affirmative action admissions programs, it did not explicitly overrule *Grutter.* The Court held that the schools' programs were unconstitutional because they did not use measurable objectives, used race to disadvantage some students, relied on stereotyping, and lacked "meaningful end points." The Court viewed these characteristics as contravening the boundaries of race-based decisionmaking in the Court's equal protection jurisprudence. In so holding, the Court based its ruling, at least in part, on a conclusion that the schools' policies did not comply with *Grutter*.

Nevertheless, *Students for Fair Admissions* leaves in doubt how much room exists under equal protection principles for any form of race-based admissions program. The majority in the case emphasized *Grutter*'s requirement that race-based action be temporary, observing that the Court did not "bless[] such programs indefinitely." While the Court in *Students for Fair Admissions* did not explicitly address *Grutter*'s application to other institutions' plans, it stated that "universities may not" use "the regime we hold unlawful today." The Court also enumerated the ways the universities' admissions programs failed strict scrutiny but did not appear to offer guidance or suggestions as to how a school *could* constitutionally use racial preferences to further campus diversity.

The Court expressly avoided addressing one area where *Grutter* may still apply: military service academies. Explaining that the Solicitor General had argued that race-based admissions programs further compelling government interests in diversity at the nation's military academies, the Court stated that these institutions were not parties and that its opinion did "not address the issues, in light of the potentially distinct interest that military academies may present." Overall, the majority left unclear how much room, if any, exists for affirmative action in admissions programs going forward.

The Decision's Effects on Race-Based Government Action

While the Court struck down Harvard's and the University of North Carolina's race-based admissions preferences, it did not bar all use or mention of race in higher education admissions. For one thing, the Court acknowledged that nothing barred schools from "considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise," in written submissions such as admissions essays. The majority cautioned, however, that schools could "not simply establish through application essays or other means the regime we hold unlawful today." Rather, consideration would have to be based on each applicant's "experiences as an individual—not on the basis of race."

Additionally, under other Supreme Court precedent, equal protection allows race-conscious policies in service of a compelling government interest unrelated to fostering student-body diversity: remedying educational institutions' past racial discrimination. Remedying general, societal discrimination, however, is not a sufficient compelling government interest. In the *Students for Fair Admissions* cases, the schools did not claim to be remedying past discrimination.

The Court's ruling in the *Students for Fair Admissions* cases will require changes in college and university affirmative action programs that rely on race. Private institutions that accept federal funds are subject to federal antidiscrimination requirements under Title VI, and will also be expected to comply

with the Court's ruling. Nationwide, only a minority of institutions—mostly highly selective institutions—use such programs. Some states have banned affirmative action in their institutions.

More broadly, the Court has recognized achieving diversity as a compelling government interest only in higher education admissions. While the decision in the *Students for Fair Admissions* cases shows the Court's reluctance to approve race-based action, it does not control other areas such as employment, grants, or contracts—areas in which the constitutionality of affirmative action programs is already more restricted.

Considerations for Congress

Congress cannot change the Supreme Court's interpretation of the Equal Protection Clause. Congress could, however, amend Title VI so that it is no longer interpreted congruently with that provision.

Congress could expressly encourage or require diversity-enhancing measures under Title VI. Congress could not require unconstitutional action, such as mandating racial quotas or the kinds of admissions programs struck down by the Court in *Students for Fair Admissions*. It could require or encourage schools to take other measures, such as tracking minority recruiting, admission, and retention; developing plans to enhance minority recruiting or retention; or appointment of diversity coordinators, Title VI coordinators, or advisory committees. Congress could also consider encouraging or requiring colleges to employ non-racial admissions criteria that may enhance diversity, although it is not clear how the Court might rule on such measures.

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