Cullen | Dykman

SCOTUS Rules Against Harvard and U.N.C., Rejecting Affirmative Action

July 3, 2023

On June 29th, the Supreme Court of the United States ("SCOTUS") held that the admissions practices at Harvard College ("Harvard") and the University of North Carolina ("U.N.C") violate the Equal Protection Clause of the Fourteenth Amendment. With this landmark decision, SCOTUS has altered more than forty years of precedent that permitted the consideration of race as a factor in admissions decisions. Undoubtedly, this decision will have far-reaching implications for all institutions of higher education.

Prior to the decision, the last time SCOTUS addressed affirmative action in higher education admissions decisions was in *Fisher v. University of Texas at Austin* in 2016. ***[i]*** In *Fisher,* SCOTUS held the race-conscious admissions program used at the time of the petitioner-student's application was lawful under the Equal Protection Clause. In the concluding paragraphs of *Fisher*, Justice Kennedy wrote for the majority, "[a] university is in large part defined by those intangible qualities which are incapable of objective measurement, but which make for greatness. Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation's education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity."

In October 2022, SCOTUS heard oral arguments in two separate cases - *Students for Fair Admissions v. President and Fellows of Harvard* ("*Harvard*"), a private institution, and *Students for Fair Admissions v. University of North Carolina* ("*U.N.C.*"), a public institution - that both addressed the use of affirmative action[ii] in higher education. [iii]

Students for Fair Admissions ("SFFA")[iv] is a nonprofit group that, per its website, "believe[s] the racial classifications and preferences in college admissions are unfair, unnecessary, and unconstitutional."[v] SFFA alleged that both Harvard and U.N.C. "engaged in unfair, polarizing, and illegal discrimination in their admissions policies."[vi] Specifically, against Harvard, SFFA alleged that Harvard violated "Title VI of the Civil Rights Act by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives."[vii] Against U.N.C., SFFA claimed that "the university [violated] the U.S. Constitution and Title VI by illegally rejecting a race-neutral alternative to racial admissions preferences because the composition of its student body would change, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity."[viii]

As an overview, the majority opinion primarily focused on Harvard and U.N.C.'s (1) "failure to operate their race-based admissions programs in a manner that is 'sufficiently measurable to permit judicial [review]' under the rubric of strict scrutiny," (2) "failure to comply with the Equal Protection Clause's 'twin commands' that race may never be used as a 'negative' and that it may not operate as a stereotype," and (3) failure to "have a 'logical end point' to the use of race-based admissions programs." The Court did not explicitly overrule any precedents and did not directly address whether having a "diverse student body" remains a compelling interest.

In the Court's majority opinion,[ix] after providing an overview of the Court's key decisions involving affirmative action in education, namely *Regents of University of California v. Bakke*,[x] *Grutter v. Bollinger*,[xi] and *Fisher v. University of Texas at Austin,* Chief Justice Roberts wrote, "[T]he Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack 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. We have never permitted admissions programs to work in that way, and we will not do so today. At the same time, as all parties agree, nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise…But…universities may not simply establish through application essays or other means the regime we hold unlawful today." Further, Chief Justice Roberts wrote, "A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race. Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice."

Notably, in a footnote, Chief Justice Roberts stated, "The United States as *amicus curiae* contends that race-based admissions programs further compelling interests at our Nation's military academies. No military academy is a party to these cases, however, and none of the courts below addressed the propriety of race-based admissions systems in that context. This opinion also does not address the issue, in light of the potentially distinct interests that military academies may present." Justice Sotomayor's dissenting opinion directly called attention to this "carveout," and stated, "The Court's carveout only highlights the arbitrariness of its decision and further proves that the Fourteenth Amendment does not categorically prohibit the use of race in college admissions."

While the majority opinion did not address the continuing precedential value of the Court's prior decisions Justice Thomas stated in his concurring opinion, the "Court's majority opinion has, for all intents and purposes, overruled *Grutter v. Bollinger.*" In *Grutter*, SCOTUS held the University of Michigan Law School "narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause, Title VI, or the Fourteenth Amendment." Justice Thomas stated in his concurring opinion, "I wrote separately in *Grutter*, explaining that the use of race in higher education admissions decisions—regardless of whether intended to help or to hurt—violates the Fourteenth Amendment. In the decades since, I have repeatedly stated that *Grutter* was wrongly decided and should be overruled. Today, and despite a lengthy interregnum, the Constitution prevails." It should be noted that

only Justice Thomas remains from the *Grutter* Court. [xii]

In a nearly seventy-page dissent, Justice Sotomayor wrote, "Today, this Court stands in the way and rolls back decades of precedent and momentous progress. It holds that race can no longer be used in a limited way in college admissions to achieve such critical benefits. In so holding, the Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society where race has always mattered and continues to matter. The Court subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic government and pluralistic society." Her dissent emphasized that the "limited use of race has helped equalize educational opportunities for all students of every race and background and has improved racial diversity on college campuses," as was intended by the Court's groundbreaking decision in *Brown v. Board of Education of Topeka*, 347 U.S. (1954).

Justice Jackson also wrote a passionate dissent. Notably, Justice Jackson's dissenting opinion included a footnote in which she wrote, in part, "Justice Sotomayor has fully explained why the majority's analysis is legally erroneous and how UNC's holistic review program is entirely consistent with the Fourteenth Amendment. My goal here has been to highlight the interests at stake and to show that holistic admissions programs that factor in race are warranted, just, and universally beneficial. All told, the Court's myopic misunderstanding of what the Constitution permits will impede what experts and evidence tell us is required (as a matter of social science) to solve for pernicious race-based inequities that are themselves rooted in the persistent denial of equal protection."

Following the decision, Harvard and U.N.C. released statements saying they would comply with the Court's ruling. U.S. Department of Education Secretary Miguel Cardona also issued a statement expressing disappointment with the Court's ruling. Secretary Cardona stated, in part, "The Department of Education is a civil rights agency, committed to equal access and educational opportunity for all students."

The U.S. Department of Education announced in a Fact Sheet released in response to the decision that, in conjunction with the Department of Justice, it will provide resources to colleges and universities addressing lawful admissions practices prior to the next admissions cycle. The Fact Sheet also announced actions that the Biden-Harris Administration plans to take to promote educational opportunity and diversity in colleges and universities. Further, through the Fact Sheet, President Biden urged colleges and universities, when selecting among qualified applicants, to give "serious consideration to the adversities students have overcome," such as a prospective student's financial means, where the prospective student grew up and went to high school, and other personal experiences that may have involved overcoming personal hardship, including racial discrimination.

Both public and private higher education institutions should evaluate their admissions processes to comply with the Court's decision. Further, institutions should consider developing a communications plan to address questions or concerns from prospective students and community members on the institution's admissions decisions practices. Cullen and Dykman LLP will continue to monitor developments and provide additional guidance to assist in responding to this decision.

Should you have any questions, please feel free to contact Deirdre Mitacek (dmitacek@cullenllp.com), Dina Vespia (dvespia@cullenllp.com), or Ciara Villalona (cvillalona@cullenllp.com).

This advisory provides a brief overview of the most significant changes in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

Footnotes

[i] 579 U.S. 365, 388 (2016).

[ii] "Affirmative action" refers to the "practice of selecting people for jobs, college sports, and other important posts in part because some of their characteristics are consistent with those of a group that has been historically been treated unfairly by reason of race, sex, etc."[ii] The purpose and intention of affirmative action is to "eliminate existing or continuing discrimination, redress lingering effects of past discrimination, and to create systems and procedures to prevent future discrimination, all by taking into account individual membership in a minority group so as to achieve minority representation in a larger group." AFFIRMATIVE ACTION, Black's Law Dictionary (11th ed. 2019) *available at* Westlaw. Within the last twenty-five years, nine states have banned affirmative action in admission decisions at public colleges and universities: California (1996), Washington (1998), Florida (1999), Michigan (2006), Nebraska (2008), Arizona (2010), New Hampshire (2012), Oklahoma (2012), and Idaho (2020). Private institutions within those states had been able to continue to use race-based criteria in admissions decisions.

[iii] Both Harvard and U.N.C. won in federal trial courts, and the decision in Harvard's favor was affirmed by the First Circuit Court of Appeals in November 2020. In 2021, SFFA filed petitions for certiorari asking SCOTUS to review both cases. In January 2022, SCOTUS granted the requests and consolidated the cases. In July 2022; however, SCOTUS decoupled the cases. Interestingly, though the cases were decoupled, the SCOTUS issued a single decision for both institutions. Though not officially stated, many speculated the decision to separate the cases was to allow the Court's newest member, Justice Ketanji Brown Jackson, to participate in the *U.N.C.* case. Before joining the Court, Justice Jackson served on Harvard's Board of Overseers that "provides counsel to the University's leadership on priorities, plans, and strategic initiatives.

[iv] Though U.N.C. had challenged SFFA's standing to bring the cases, SCOTUS rejected this argument, stating "SFFA is indisputably a voluntary membership organization with identifiable members who support its mission and whom SFFA represents in good faith. SFFA is thus entitled to rely on the organizational standing doctrine as articulated in *Hunt v. Washington State Apple Advertising Comm'n*, [432 U.S. 333 (1977)]."

[v] https://studentsforfairadmissions.org/

[vi] https://studentsforfairadmissions.org/students-for-fair-admissions-files-opening-brief-at-u-s-supreme-court-in-students-for-fair-admissions-v-harvard-and-students-for-fair-admissions-v-university-of-north-carolina/

[vii] *Id.*

[viii] *Id.*

[ix] Chief Justice Roberts delivered the opinion of the Court, in which Justices Thomas, Alito, Gorsuch, Kavanaugh, and Barrett joined. Justices Thomas and Kavanaugh filed concurring opinions. Justice Gorsuch also filed a concurring opinion, in which Justice Thomas joined. Justice Sotomayor filed a dissenting opinion, in which Justice Kagan and Justice Jackson joined, but only with respect to the decision as it applies to U.N.C. Justice Jackson filed a dissenting opinion for the U.N.C matter, in which Justice Sotomayor and Justice Kagan joined. The breakdown of opinions in the Court's Syllabus states Justice Jackson "took no part in the consideration and decision of the case in No. 20-1199," which refers to the decision as it relates to Harvard.

[x] 438 U.S. 265 (1978)

[xi] 539 U.S. 306 (2003).

[xii] https://www.supremecourt.gov/about/members_text.aspx

Practices

- Higher Education

Attorneys

- Deirdre M. Mitacek
- Dina L. Vespia