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# Supreme Court Severely Limits Consideration of Race in Higher Education Admissions

June 29, 2023

On June 29, 2023, the U.S. Supreme Court issued its **long-awaited decision** in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*. In an opinion authored by Chief Justice John Roberts, the Court struck down the admissions systems used by Harvard and UNC, in which race was one of the factors considered during the admissions process, as violating the Fourteenth Amendment's Equal Protection Clause. Both admissions programs had been upheld by the lower courts based on extensive findings of fact.

Initially, the Court summarized the legal test for race-conscious admissions programs: "University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end."[1] The Court then held that Harvard's and UNC's admissions programs did not comply with the Court's precedents on affirmative action—particularly, *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), for several reasons.

First, the Court found that the "compelling interests" offered by the universities—training future leaders, preparing graduates to adapt to a pluralistic society, producing new knowledge and improving education through diversity, promoting the robust exchange of ideas, broadening and refining understanding, fostering innovation, preparing engaged citizens and leaders, and enhancing cross-racial understanding and breaking down stereotypes—were "not sufficiently coherent for purposes of strict scrutiny," as there is no clear way for a court "to measure any of these goals."[2] The Court compared those "elusive" goals to the more specific justifications it had recognized as permissible for race-based decision-making in other contexts, for example, back pay to remedy workplace discrimination.[3]

Second, the Court held that the universities had not demonstrated a sufficient connection between their limited use of race in admissions and the goals they sought to achieve. The Court was concerned, in part, about the imprecision in the racial categories used by the universities, noting that certain categories (*e.g.*, "Asian") appeared "overbroad" while others seemed "underinclusive."[4]

Next, the Court held that the admissions programs violated the Equal Protection Clause because race being used as a "plus" factor for some students necessarily meant that it was "used as a 'negative'" for other students, since "[c]ollege admissions are zero-sum."[5] The Court further found that the universities' admissions programs impermissibly relied on racial stereotypes by granting "preferences on the basis of race alone."[6]

Finally, the Court held that the admissions programs were unconstitutional because they did not have a defined end date or "logical end point."[7] The Court tied this issue, in part, to what it considered the nebulousness of the goals the programs sought to achieve.[8]

The Court went on to briefly respond to the dissents by expressly rejecting the argument that "ameliorating societal discrimination" could constitute a compelling interest sufficient to justify race-conscious admissions programs.[9]

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The Court opted not to expressly overrule *Grutter* or its more recent affirmative action decision in *Fisher v. University of Texas at Austin*, 579 U.S. 365 (2016), but, as the dissenting opinions point out, the practical effect of the opinion is likely to do just that. Thus, although the Court appears to have left open the possibility that a college or university could implement a race-conscious admissions system that satisfies strict scrutiny, the contours of such a program are murky, given the limitations in the opinion. Future efforts may need to focus more on building up pipelines of qualified candidates from underrepresented communities and outreach efforts to improve the enrollment rates of accepted applicants from such communities.

In its conclusion, the Court also noted that "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," *e.g.*, within the context of a college admission essay.[10] However, the Court immediately cautioned against using such measures as a substitute for the type of race-conscious admissions programs the Court struck down.

Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett joined the Court's opinion in full.

If you would like to discuss how the Supreme Court's decision will impact your organization, please call your Miller Canfield attorney, a member of the Miller Canfield Higher Education Team, or one of the authors of this alert.

[1] Slip Op. at 22.

[2] Slip Op. at 23.

[3] Slip Op. at 23–24.

[4] Slip Op. at 24–25.

[5] Slip Op. at 27.

[6] Slip Op. at 29.

[7] Slip Op. at 30.

[8] Slip Op. at 33.

[9] Slip Op. at 35–36.

[10] Slip Op. at 39.