LEGAL UPDATE

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UNITED STATES SUPREME COURT DECISION — COLLEGE AND UNIVERSITY RACE-CONSCIOUS ADMISSIONS PROGRAMS

Purpose. *Legal updates are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update is intended to provide legislators, legislative staff, and other persons interested in legislative matters with summaries of recent meetings, court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although an update may identify issues for consideration by the General Assembly, it should not be interpreted as advocating any particular course of action.*

Students for Fair Admissions, Inc. v. Presidents & Fellows of Harvard College (together with No. 21-707, Students for Fair Admissions, Inc. v. University of North Carolina, et. al.)
Filed by the United States Supreme Court
June 29, 2023
Nos. 20-1199 and 21-707
www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf

Factual and Procedural Background. Both Harvard College and the University of North Carolina (UNC) take an applicant's race into account during multiple points in their holistic college admissions processes, including during the initial review of applications and when determining the final class that will be admitted.

In November 2014, Students for Fair Admissions (SFFA) filed lawsuits against Harvard and UNC, arguing the schools' race-conscious admissions programs violated, respectively, Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. The district court in the Harvard case held that Harvard's admissions program comported with United States Supreme Court (Court) precedent. The Court of Appeals for the First Circuit affirmed the district court's determination. The district court in the UNC case held that UNC's admissions program was permissible under the Equal Protection Clause. The Court granted certiorari in the Harvard case and certiorari before judgment in the UNC case.

Issue. Whether Harvard's and UNC's admissions programs violate the Equal Protection Clause of the United States Constitution.

Holding. The Court, in a 6-3 decision, reversed the judgments of the Court of Appeals for the First Circuit and the District Court for the Middle District of North Carolina. Harvard's and UNC's race-conscious admissions programs violate the Equal Protection Clause.

Analysis. The Equal Protection Clause provides that no state shall "deny to any person . . . the equal protection of the laws." U.S. Const. amend. xiv. The Court stated that the nation and the Court failed to live up to the commitments contained within the Equal Protection Clause as evidenced by state-mandated segregation and the separate-but-equal regime the Court upheld in *Plessy v. Ferguson*, 163 U.S. 537 (1896). The Court noted that *Brown v. Board of Education*, which overruled *Plessy*, was the beginning of the restoration of the commitments contained within the Equal Protection Clause. 347 U.S. 483 (1954). In later cases, the Court relied on the reasoning in *Brown* to invalidate other forms of race-based state action, vindicating the Equal Protection Clause's pledge of racial equality. The Court commented these decisions reflect the core purpose of the Equal Protection Clause: "do[ing] away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). The Court acknowledged there are limited exceptions to the Equal Protection Clause's prohibition

on governmentally imposed discrimination based on race. These exceptions were subjected to "strict scrutiny" analysis, which examines whether the racial classification is used to further a compelling governmental interest and, if so, whether the government's use of the racial classification is necessary to achieve that interest.

The Court reviewed two Court opinions involving race-conscious university admissions, *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). In a splintered decision in *Bakke*, the Court analyzed a medical school's admissions policy that held 16 of 100 seats open for members of minority groups and placed applicants for those open seats on a special admissions track. Justice Powell's opinion in *Bakke*—which came to serve as the basis for the constitutional analysis of race-conscious admissions policies—found that the university's interest in obtaining the educational benefits associated with a diverse student body was a compelling interest under strict scrutiny analysis. Justice Powell stated universities could not use special admissions tracks or quota systems that reserve a specified number of seats for individuals from the preferred ethnic groups. Under Justice Powell's opinion, the use of race in the admissions process could only operate as a "plus" in an applicant's file and an applicant's race was to be weighed in a flexible manner. In *Grutter*, the Court endorsed Justice Powell's opinion in *Bakke* and held that a diverse student body is a compelling interest under strict scrutiny analysis that can justify taking race into account in university admissions programs. The *Grutter* Court indicated universities could not establish quotas for members of certain racial groups, put members of certain racial groups on separate admissions tracks, or insulate applicants belonging to certain racial groups from the competition for admission. Additionally, the *Grutter* Court stated "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." 539 U.S., at 343.

Conclusion. The Court stated race-conscious admissions programs may only be permitted within narrow restrictions: "[u]niversity programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end." The Court determined Harvard's and UNC's race-conscious admissions programs cannot be reconciled with the Equal Protection Clause because the 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."

Beginning with the objectives of the race-conscious admissions programs, the Court stated it has required schools to operate such programs in a manner that is "sufficiently measurable to permit judicial [review]" under strict scrutiny analysis. *Fisher v. University of Texas at Austin*, 579 U.S. 365, 381 (2016). The Court concluded neither Harvard nor UNC could satisfy that burden because the interests the schools viewed as compelling—better educating students through diversity and promoting the robust exchange of ideas, for example—could not be subjected to meaningful judicial review because they were not sufficiently measurable. The Court concluded there was a lack of a connection between Harvard's and UNC's practices of assigning applicants to specific racial categories and making admissions decisions based on those categories and the educational benefits the schools purported to pursue. This was because the racial categories themselves were either overbroad or arbitrary and undefined.

Next, the Court concluded Harvard's and UNC's race-conscious admissions programs employ race in a negative manner because college admissions are zero-sum. "A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." The Court concluded Harvard's and UNC's admissions programs involve racial stereotyping because when a school admits students "on the basis of race, [the school] engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike . . . ." *Miller v. Johnson*, 515 U.S. 900, 911-912 (1995) (internal quotation marks omitted).

The Court then determined Harvard's and UNC's race-conscious admissions programs lack logical endpoints. Both schools conceded sunset dates had not been set for the race-conscious admissions programs.

The Court indicated nothing in its opinion should be construed to prohibit "universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." However, the Court noted schools could not "simply establish through application essays or other means the regime we hold unlawful today."

Concurrences. Justice Thomas concurred with the majority opinion in full but wrote separately to "offer an originalist defense of the colorblind Constitution . . . ." Justice Thomas argued that there were several flaws in the Court's *Grutter* jurisprudence. Justice Thomas also argued that race-conscious admissions programs can cause numerous types of societal harm. Justice Gorsuch wrote a concurring opinion to which Justice Thomas

joined. Justice Gorsuch provided background information related to Title VI of the Civil Rights Act of 1964 and discussed how Title VI intersects with the Equal Protection Clause. Justice Gorsuch argued that Harvard's and UNC's race-conscious admissions programs are unlawful under Title VI. Justice Kavanaugh concurred with the majority opinion in full but wrote separately to provide further detail related to the Court's Equal Protection Clause cases and to explain why the majority opinion is consistent with those cases. Justice Kavanaugh emphasized the importance of adhering to the 25-year limit to race-conscious admissions programs established in *Grutter*.

Dissents. Justice Sotomayor wrote a dissenting opinion joined by Justice Kagan and, with respect to UNC's admissions programs, Justice Jackson. Justice Sotomayor characterized the majority as "upend[ing] the status quo based on their policy preferences about what race in America should be like, but is not, and their preferences for a veneer of colorblindness in a society where race has always mattered . . . ." Justice Sotomayor argued that, based on the text of the Equal Protection Clause, Congress' rejection of alternative text that would have made the Constitution explicitly colorblind, and race-conscious laws that were enacted simultaneously with the passage of the Fourteenth Amendment, there is no doubt that the Equal Protection Clause "permits consideration of race to achieve its goal." Justice Sotomayor noted that the majority opinion's requirement related to a race-conscious admissions program's measurable objectives puts schools in an impossible position because "[a]ny increased level of precision runs the risk of violating the Court's admonition that colleges and universities operate their race-conscious admissions policies" without any specified percentages in mind. Justice Sotomayor rejected the majority opinion's determination that race-conscious admissions programs employ race in a negative manner, explaining "[i]n a society where opportunity is dispensed along racial lines, racial equality cannot be achieved without making room for underrepresented groups that for far too long were denied admission through the force of law . . . ." Justice Sotomayor rejected the majority opinion's determination that race-conscious admissions programs involve racial stereotyping, stating "[i]t is not a stereotype to acknowledge the basic truth that young people's experiences are shaded by a societal structure where race matters." Justice Sotomayor rejected the majority opinion's determination that *Grutter* requires race-conscious admissions programs to have specific expiration dates, stating that the mention of "25 years" in *Grutter* was an aspirational statement.

Justice Jackson wrote a dissenting opinion, with respect to UNC's admissions programs, that was joined by Justice Sotomayor and Justice Kagan. Justice Jackson argued that the Equal Protection Clause does not require the result reached in the majority opinion. "Permitting (not requiring) colleges like UNC to assess merit fully . . . plainly advances (not thwarts) the Fourteenth Amendment's core promise." Justice Jackson noted that holistic admissions programs that take race into account "reflect the reality that Black students have only relatively recently been permitted to get into the admissions game at all." Justice Jackson argued that allowing UNC to consider race as one of many factors to assess during the admissions process allows UNC to best assess the "entire unique import of [a student's] individual li[fe] and inheritance [] *on an equal basis*." Justice Jackson asserted that the majority opinion attempts to end racism by preventing the consideration of race and warned that such an approach will widen the race-linked opportunity gap and prolong racism in this country.

Impact on Iowa. The Equal Protection Clause prohibits institutions of higher education under the control of the State Board of Regents, and colleges and universities in this state that accept federal funds, from using admissions programs that take race into account.

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