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# Supreme Court Reverses Affirmative Action

**WRITTEN BY**

Misha Tseytlin | Kevin M. LeRoy | Moses M. Tincher | Justice Harold Melton | Jessica Ring

***What the Court's ruling on race-conscious admissions means for higher education***

On June 29, 2023, the U.S. Supreme Court held in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* that higher-education affirmative action admission programs aimed at achieving the educational benefits of diversity are unconstitutional. In the landmark 6-3 decision, the Court reaffirmed that race-conscious decisions by government actors, like public universities (or private universities subject to the same standards as qualifying federal contractors), are subject to strict scrutiny—the most demanding inquiry in constitutional law—in the same way as other race-based decisions. The Court then held that the race-conscious admissions policies of the universities at issue failed that strict-scrutiny test for four reasons, each of which appeared to be independently fatal.

First, the Court held that advancing diversity in the student bodies of higher-education institutions is no longer a "compelling interest" sufficient to satisfy strict scrutiny, given the courts' inability to meaningfully measure that goal. Second, the Court held that the universities failed to articulate a sufficiently robust connection between their race-conscious admissions policies and the goals they sought to pursue, including because of the imprecision of the racial categories that the universities used. Third, the Court held that the universities' race-conscious policies impermissibly used race as a negative and as a stereotype. Fourth and finally, the Court held that any race-conscious policy must be time-limited, yet the policies before the Court had no definitive end dates.

This landmark decision has immediate effects on the admissions process as well as far-reaching implications in other areas of higher education.

**Summary and Key Takeaways**

- The Supreme Court held that higher-education institutions considering an applicant's race when making admissions decisions must satisfy at least four demanding criteria: the consideration must further a compelling interest; must do so in a narrowly tailored way; must not use race as a negative or as a stereotype; and must be time-limited. It is unclear whether, as a practical matter, any higher-education institution could satisfy these four criteria for a race-based affirmative action program.[1]

- Many universities will have to change their admissions processes to ensure they are compliant with the Court's holding. Schools that currently use race as a factor in the admissions process should immediately review and retool their admissions processes to ensure that they are not running afoul of the Court's decision.

- Affected schools may want to consider non-race-based admissions alternatives, such as so-called "10 percent"

plans, elimination of legacy preferences, or decisions based on socioeconomic status.

- Race-based scholarships and financial aid decisions may be impacted as well, depending on how they are structured. Universities should immediately audit and review all restricted use of scholarships and grants to ensure they are compliant with the Court's ruling.

- Higher-education institutions must consider the impact the decision will have in the hiring process. Schools should review their affirmative action plans for hiring and promotion to ensure that they are compliant with the Court's ruling.

## I. BACKGROUND

Under the Supreme Court's caselaw, racial and ethnic distinctions imposed by government actors are inherently suspect and subject to strict scrutiny—that is, they are only permissible if they are narrowly tailored to further a compelling government interest and no less restrictive alternative is available.[2] In *Regents of the University of California v. Bakke,* 438 U.S. 265, 316 (1978), Justice Lewis Powell concluded that obtaining education benefits that flow from a racially diverse student body was a compelling government interest, but found that race-based quotas were not the least restrictive means to achieve that interest. The Court pointed to programs like those then used at Harvard College, which Harvard had told the Court in an amicus brief, take "race into account" as one of many factors when making admissions decisions, as a less-restrictive and constitutionally permissible alternative to the quota system.

In 2003, the Court's decision in *Grutter v. Bollinger*, 539 U.S. 306, confirmed the constitutionality of race-conscious admissions policies where race was among a number of factors for applicants evaluated on an individual basis, largely tracking Justice Powell's opinion in *Bakke*. Specifically, the Court ruled that such policies satisfied the strict scrutiny standard, holding that student body diversity was a compelling government interest that may justify the use of race in university admissions, and that the university's interest in obtaining a "critical mass" of diverse students was a "tailored use." Justice Sandra Day O'Connor, writing for the majority, also stated that "race-conscious admissions policies must be limited in time." Further, Justice O'Connor wrote that "[t]he Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

In 2022, the Court agreed to hear two cases on university affirmative action: *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, No. 20-1199, and *Students for Fair Admissions, Inc. v. University of North Carolina,* No. 21-707.[3] Although Harvard, a private college, is bound by Title VI of the Civil Rights Act of 1964 as a federal contractor receiving federal funds, while UNC, a public university, must comply with Title VI and with the Fourteenth Amendment's Equal Protection Clause, the same legal standards apply to both cases.

As the Court described, Harvard and UNC employ "highly selective" admissions processes that can depend on a student's grades, recommendation letters, extracurricular involvement, and race. For example, Harvard employed a "first reader" to initially screen each application, assigning a numerical score in each of six categories: "academic, extracurricular, athletic, school support, personal, and overall." This "overall" category, which is a composite of the other five categories, allowed a first reader to consider the race of the applicant. The admissions

subcommittees at Harvard then reviewed each applicant from a designated geographical area, where they may take an applicant's race into account. After the regional subcommittees' review, they made recommendations to the 40-member full admissions committee. The deliberations of the full admissions committee involved a discussion of the relative breakdown of applicants by race.

Harvard claimed the goal in this process is to ensure there is no "dramatic drop-off" from the level of minorities in the previous class. If an applicant received the majority of the full committee's votes, they were tentatively accepted for admission. Once each applicant had been voted on, the committee was informed of the racial composition of the tentative applicant pool. The admissions process ended with the "lop," or a finalization process to determine the class of admitted students. The "lop list" comprises applicants Harvard is considering cutting. This list is informed by four categories: legacy status; recruited athlete status; financial aid eligibility; and race. Harvard's admissions process involved "race [as] a determinative tip for a significant percentage of all admitted African-American and Hispanic applicants." UNC's admissions process was similar to Harvard's in crucial respects, according to the Court.

On June 29, the Supreme Court issued its 6-3 opinion, with Chief Justice John Roberts writing for the majority, siding with the challengers to these programs. The Court held that Harvard's and UNC's admissions programs are both subject to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment because the universities made decisions based on racial groups and these programs failed to survive such demanding scrutiny. Interpreting Justice Powell's opinion in *Bakke* and the *Grutter* decision, the Court announced that race-conscious university admissions policies must satisfy four requirements to overcome the strict scrutiny required by the Equal Protection Clause. First, they must further a compelling interest. Second, they must further that interest in a narrowly tailored way. Third, they must never use race as a stereotype or a negative. And finally, "at some point," they must end.

The Court then concluded that Harvard's and UNC's race-conscious admissions policies violated each of these four requirements.

First, the Court explained that the interests these universities pursued with their race-conscious admissions were not compelling. The universities had proffered numerous diversity-focused interests for their policies, such as training future leaders in the public and private sector, preparing graduates to adopt to an increasingly pluralistic society, better educating students through diversity, and producing new knowledge stemming from diverse outlooks. However, the Court explained that each of these interests, while laudable, were not sufficiently coherent to be measured by a court under the demanding strict scrutiny standard.

Second, the Court held that the universities failed to articulate a sufficiently robust connection between the race-conscious admissions policies and the various goals that the universities had put forward. In particular, the Court explained, the universities used racial/ethnic categories in the admissions process that were imprecise in many ways and so could not reliably further the universities' aims.

Third, the Court held that the schools' race-conscious admissions systems impermissibly used race used as a negative and operated as a stereotype. College admissions are a "zero-sum" game, so a benefit to some applicants based on their race necessarily operates as a negative to other applicants based on their race. Further, the Court concluded that the universities' programs tolerated impermissible stereotyping because students could

obtain preferences in admissions on the basis of race alone—meaning that they recognized "an inherent benefit in race *qua* race."

Finally, the Court also condemned the universities' race-conscious admissions programs because they lacked a logical and concrete end point. The Court explained that, while *Grutter* had expected that race-conscious programs would end 25 years after that decision—that is, in 2028—this was an "expectation" only, not a safe harbor allowing universities to continue such programs for another five years.

## II. EFFECTS

The Supreme Court's landmark decision will significantly affect multiple areas of interest for higher-education institutions, as discussed below.

### A. Admissions and Alternatives

Most immediately, the Supreme Court's decision will require higher-education institutions with race-conscious, affirmative action admissions policies built around *Bakke* and *Grutter* to retool those policies to conform with the Court's holding.

Under the Court's ruling, race-conscious holistic admissions models no longer satisfy strict scrutiny for the four independent reasons articulated above. Therefore, unless schools that consider an applicant's race under the *Bakke/Grutter* framework can design a system that complies with all four of the Court's criteria, they will have to revise their admissions processes to ensure students are considered on race-neutral factors only.

Higher-education institutions are not without viable alternatives as they seek to advance diversity interests beyond racial diversity. As the Court explained, universities may, for example, "consider[] an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." Importantly, any benefit offered to a student who overcame racial discrimination "must be tied to *that student's courage and determination* . . . [or their] 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." This means that, for example, "universities may not simply establish through application essays or other means" admissions practices that the Court held unlawful in its opinion.

Further, while the majority opinion did not specifically expound on alternatives, Justice Neil Gorsuch in his concurring opinion (joined by Justice Clarence Thomas) echoed the challengers' argument that Harvard and UNC could still achieve racial diversity without using race-based admissions practices by "reducing legacy preferences, increasing financial aid, and the like."

For Harvard specifically, Justice Gorsuch relied on evidence submitted by the challengers demonstrating a way for Harvard to maintain diversity without considering race by: "(1) provid[ing] socioeconomically disadvantaged applicants just *half* the tip it gives recruited athletes; and (2) eliminat[ing] tips for the children of donors, alumni, and faculty," claiming such considerations would have minimal effects on the academic credentials of incoming students. Additionally, Justice Brett Kavanaugh suggested in his concurring opinion that universities could undo discrimination "in many permissible ways that do not involve classification by race," although he did not detail

specific alternatives.

Finally, various race-neutral alternatives also may survive the Court's strict scrutiny test, as long as they are not seen as efforts to evade the Supreme Court's ruling. For example, certain race-neutral programs that may ultimately promote racial/ethnic diversity without considering race explicitly as a factor may withstand the Court's test altogether, as these programs do not make distinctions based on race. Listed below are some examples of race-neutral programs:

- A so-called "top 10" program, under which higher-education institutions grant the top 10 percent or so of a graduating class automatic admission;[4]
- Programs that give preferences based on socioeconomic status;
- Programs that give consideration through personal essays describing racial discrimination among other hardships, consistent with the limitations that the Court discussed, as noted immediately above;
- Programs that eliminate preferences for children of major donors and alumni;
- Programs that increase scholarships and grants for students of lower socioeconomic status;
- Programs that eliminate or lower SAT or ACT score requirements;
- Programs that increase outreach in socioeconomically disadvantaged zip codes; and
- Programs that increase transfers from two-year community colleges.

That said, race-conscious programs used by higher-education institutions after *Bakke* and *Grutter* presumably would no longer survive the Court's four-part test announced in its June 29 opinion.

**B. Race-Specific Financial Aid and Recruitment**

Before the Court's ruling, part of many higher-education institutions' admissions processes included race-based public and private scholarships (including conditional awards from donors).

Although the Supreme Court has not addressed race-conscious scholarship programs, the Court's ruling may influence the considerations and potentially the future of these programs—and it is uncertain whether race-exclusive scholarship programs could satisfy the Court's four criteria, if challenged.

First, while the Court would review each scholarship program for the compelling interests that the higher-education institution claims to be forwarding, the interest in a diverse-student-body for such scholarships would not qualify as compelling under the Court's opinion. Moreover, Justice Powell's opinion in *Bakke* already appears to foreclose justifying such programs with the desire to remedy past societal discrimination—a rejection ratified by the Court's June 29 ruling. Second, while such scholarships may increase admissions of minority students in a straightforward

manner, it is possible that the Court would conclude that other methods are nevertheless more narrowly tailored and that the racial categories used are too imprecise. Third, a reviewing court could also hold that, based on a particular scholarship program's structure and features, the programs may use race as a negative by excluding nonqualifying applications or use race as a stereotype by concluding that all applicants of a given race further the universities' diversity-based interests. Finally, it is unclear how the Court's requirement of a defined end date for race-conscious admissions programs would apply to a scholarship program; however, it is possible that the Court would link that consideration to the interests that the higher-education institution claims to be forwarding with the given program.

Higher-education institutions with race-conscious scholarships may now face substantial legal risk following the Court's ruling, depending on how those scholarships are structured. Accordingly, these institutions should consider whether any race-conscious scholarship program could satisfy the Court's four criteria announced in its opinion. Alternatively, schools may wish to adopt a race-neutral approach to scholarships in anticipation of future constitutionality challenges, focusing on attracting applicants from particular socioeconomic backgrounds or disadvantaged zip codes in order to attract diverse applicants. That said, a higher-education institution should bear in mind that the adoption of such a race-neutral method should not be done as an attempt to disingenuously evade the Supreme Court's decision.

**C. The Effect on Higher-Education Hiring**

Many higher-education institutions have also adopted race-conscious, affirmative action programs for hiring and promotion decisions.

Although the Court's ruling does not directly impact higher-education affirmative action hiring and promotion decisions, the Court's four-part test may well apply to—and invalidate—some of these practices as well, to the extent that they explicitly take race into account.

First, while the Court would carefully evaluate each race-conscious hiring practice for the asserted compelling interests that the higher-education institution is forwarding, a purpose of promoting diversity is likely not compelling, given the Court's rejection of student-body diversity as a compelling interest. Second, while a reviewing court would carefully consider each race-conscious hiring practice's structure and design, the court could well conclude that a practice's use of racial or ethnic categories are too imprecise to further a university's goals. Third, a review court could hold that such race-conscious practices have used race as a negative by excluding nonminority applicants, or as a stereotype by applying to all minority applicants—although, again, that analysis would depend on a careful review of the particular practice's features. Finally, while it is uncertain how the Court's requirement that race-conscious admissions programs be term-limited would apply to any particular race-conscious hiring practice, a practice with no such limit may well violate that requirement, if that requirement did apply in this context.

As with the race-specific scholarships discussed above, higher-education institutions with race-conscious hiring practices may now have legal exposure from the Court's ruling. Thus, these institutions should evaluate whether their specific race-conscious hiring and promotion practices could satisfy the Court's four criteria announced in its opinion. As an alternative, universities may choose to replace these race-conscious hiring practices with race-neutral approaches that attract diverse applicants—such as attracting job applicants from particular socioeconomic

backgrounds or from disadvantaged zip codes—to avoid or limit future constitutionality challenges. As above, however, higher-education institutions should not adopt such race-neutral methods solely as a means to *evade* the Supreme Court's decision.

### D. Liability Concerns

Higher-education institutions face serious liability risks from a variety of civil rights statutes following the *Harvard/UNC* decision. Both private and public universities are bound by Title VI of the Civil Rights Act of 1964, with public universities additionally constrained by the Equal Protection Clause of the Fourteenth Amendment.

Schools with admissions policies that no longer meet the strict scrutiny standard may find themselves facing multiyear lawsuits with cumbersome discovery processes, expensive attorneys' fees, and potentially even larger monetary verdicts against them—including potentially the payment of opposing counsel's fees under 42 U.S.C. § 1988. In addition, schools are also likely to face similar lawsuits for race-based scholarships and hiring decisions.

Finally, universities that violate Section 1981 of the Civil Rights Act of 1866 (which prohibits discrimination in the making and enforcement of contracts) may also find themselves liable for compensatory damages, punitive damages, owed front and/or back pay, or nominal damages.

## III. TAKEAWAYS

- Schools that currently use race as a factor in the admissions process should immediately review and retool their admissions processes to ensure that they are not running afoul of the Supreme Court's recent landmark ruling in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College.*

- Universities should immediately audit and review all restricted use of scholarships and grants to ensure they are compliant with the principles the Court announced in the decision.

- Schools should also review their affirmative action plans for hiring and promotion to ensure that they are compliant with the Court's June 29 ruling.

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[1] The Court did not consider these issues in the context of military academies, which may have "potentially distinct interests." *Students for Fair Admissions, Inc.*, No. 21-1199, slip op. at 22 n.4.

[2] *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (requiring compelling government interest); *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311-12 (2013) (establishing the no less restrictive alternative standard).

[3] The Court originally consolidated the cases but then split them so that Justice Ketanji Brown Jackson could recuse herself from the case involving Harvard College, due to a conflict of interest.

[4] *See* Statewide Guarantee, University of California Admissions, https://admission.universityofcalifornia.edu/admission-requirements/freshman-requirements/california-residents/statewide-guarantee/.

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