BY JAMES A. JOHNSON & JEANETTE L. ESBROOK

Race Conscious Admissions in Colleges

In June 2023, the U.S. Supreme Court issued an opinion that upended the admissions policies of two institutions of higher education, Harvard College and the University of North Carolina. The authors discuss the Court's use of precedent in reaching its determination regarding race conscious admission policies and highlight a few equity efforts that remain for college and university admissions programs.

Access to education is recognized as an important component of improving one's success in employment and economic status. The problem is how to achieve those objectives, especially for marginalized populations. In higher education and employment, the use of affirmative action and preferential treatment to determine inclusion or exclusion involves getting somebody in and keeping somebody out. Is affirmative action reverse discrimination? Possibly. Or, is affirmative action a way to eliminate the barriers of racial discrimination to bring about equality of educational opportunity that meets constitutional standards for all applicants for higher education?

The Supreme Court Decides

In *Students for Fair Admissions Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions Inc. v. University of North* Carolina,[1] the U.S. Supreme Court responded to these questions in 2023. In the majority opinion written by Chief Justice Roberts and joined by Justice Thomas, Justice Alito, Justice Gorsuch, Justice Kavanaugh, and Justice Barrett, the Court found that the use of race in the undergraduate admissions programs of Harvard and the University of North Carolina (UNC) cannot be reconciled with the guarantees of the Equal Protection Clause of the Fourteenth Amendment. The majority decision overturned years of what courts carved out for the permissible and limited use of race. Turning away from case precedents, the Court held that Harvard's and UNC's admissions programs violate the Equal Protection Clause of the Fourteenth Amendment.

Equal Educational Opportunity

To explain their determination, the Supreme Court turned first to the seminal public education case, *Brown v. Board of Education,* to confirm that the right to a public education "must be made available to all on equal terms," and "no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." The Court observed that *Brown* "declar[ed] the fundamental principle that racial discrimination in public education is unconstitutional."[2]

Case Precedents and *Stare Decisis*

The Supreme Court first considered race in university admissions in 1978 in *Regents of the University of California v. Bakke.*[3] The admissions program guaranteed 16 out of 100 places for students of color at the University of California at Davis School of Medicine. The Court held that the admissions program was unconstitutional and a violation of Bakke's equal protection rights under the Fourteenth Amendment. However, the Court upheld the right of universities to use race as one factor in their admissions programs — but could not have racial quotas. Forty-five years later, in 2023, the Supreme Court no longer supports this use of race. "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[4]

The Court in 1995 explained that any exception to the Constitution's demand for equal protection must meet a two-step examination initially identified in *Adarand Constructors Inc. v. Pena*[5] as "strict scrutiny." Under the two-step strict scrutiny analysis, the use of race must be for a purpose that furthers a compelling governmental interest. Next, if the identified purpose meets a compelling governmental interest, then the use of race must be narrowly tailored or necessary to meet that interest.

Diversity as a Compelling State Interest

In a 2003 challenge to affirmative action, Barbara Grutter, a white Michigan resident, sued the University of Michigan Law School when she was denied admission, alleging the school discriminated against her on the basis of race in violation of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. The Supreme Court held in *Grutter v. Bollinger* that the use of an applicant's race as one factor in an admissions policy of a public educational institution did not violate the Equal Protection Clause of the Fourteenth Amendment as the policy was narrowly tailored to achieve the law school's compelling interest of promoting a diverse student body. The Court supported the University of Michigan Law School's claim that this use of race for diversity was a "compelling state interest" as it added to the student bodies' robust discussions and enhanced the education of all their students. The law school further explained that educational experiences in a diverse environment would lead to a better understanding and improved participation in an increasingly pluralistic society and business world.[6] The *Grutter* Court anticipated that at some point race-based action must end and that "race-based governmental action should remain subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." Justice Sandra Day O'Connor stated, "we expect that 25 years from now use of racial preferences will no longer be necessary to create a diverse student body."[7]

Nothing prohibits universities from considering in an applicant's personal essay a discussion of how race affected the applicant's life, by discrimination, inspiration, or other experiences.

With their determination that the race conscious admissions programs at Harvard and UNC "however well-intentioned and implemented in good faith" violate the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court has limited the reliance on diversity in the strict scrutiny rationale to justify the use of race and effectively overruled *Grutter v. Bollinger*.[8] This historic ruling will result in changes to postsecondary institutions' and possibly elite high schools' admissions procedures. Many of these results were noted in the dissenting opinions.

Economic Basis for Admissions Decisions

In *Fisher v. University of Texas* (*Fisher I*), a 2013 affirmative action case, the Supreme Court determined that the Fifth Circuit Court of Appeals' finding in favor of the University of Texas (UT) was flawed when the appellate court deferred to the university in its use of racial classifications. The Supreme Court remanded the case for further proceedings to apply the more appropriate strict scrutiny analysis to the university's admissions policy rather than deferring to the university's judgment.[9] After a year-long study, the UT in 2014 adopted an undergraduate admissions system containing two components. First, as required by the Texas Legislature's Top Ten Percent Law, the top 10% of students in every high school in the state of Texas was guaranteed admission to the UT. The Top Ten Percent Law admissions

Jeanette L. Esbrook is a civil rights attorney in civil rights policy, litigation, and administration. As a career federal government official in the Office for Civil Rights and Department of Justice, she was responsible for policy and litigation in Title IX, Title VI, and Section 504 matters.

Jeanette.esbrook@comcast.net

James A. Johnson is a trial lawyer and social activist concentrating on serious personal injury, insurance coverages under commercial general liability policies, sports, entertainment law, and federal criminal defense. He is a member of the Michigan, Massachusetts, Texas, and Federal Court bars. He also assists lawyers as co-counsel in litigation.

www.JamesAJohnsonEsq.com

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policy accounted for 75% of UT admissions. Second, an applicant's "Academic Index" was considered for the remaining 25% of the admissions, consisting of SAT score and high school academic performance along with the applicants' "Personal Achievement Index," a holistic review containing numerous factors including race.

Abigail Fisher again sued UT on behalf of herself and other Caucasian applicants, alleging that the university's use of race in the admissions process violated the Equal Protection Clause. Ms. Fisher was not in the top 10% of her high school class and was denied admission to the university's 2008 freshman class. The Supreme Court in *Fisher v. University of Texas* (*Fisher II*) determined in 2016 that the Equal Protection Clause was not violated with the university's two-part admission process comprised of the Top Ten Percent rule and the Academic Index and permitted the use of race as the use was narrowly tailored to further their diversity goal.[10]

Narrowing the Use of Race

In both the Harvard and UNC cases, the plaintiffs asked the U.S. Supreme Court to overrule *Grutter v. Bollinger* and hold that universities cannot use race as a factor in admissions. In *Grutter*, the court ruled that the constitutional standard that a narrowly tailored use of race that furthered the compelling interest of obtaining a diverse student body met the Equal Protection Clause standard. The Supreme Court's majority opinion in the Harvard and UNC 2023 affirmative action case determined that both admissions programs failed the Equal Protection Clause standard.[11]

The Court found that the Harvard and UNC admissions programs failed to operate in a manner that is sufficiently measurable to permit judicial review under the rubric of strict scrutiny required by *Fisher I*. Universal among many universities' goals to meet strict scrutiny have been goals for providing diversity in the student population to enhance training future leaders based on acquiring new knowledge from diverse outlooks, promoting a robust classroom discussion of ideas. The ultimate result would be better educated, engaged and productive citizens. In the Harvard and UNC cases, the Court found these goals are not sufficiently coherent as they cannot be subjected to meaningful judicial review and are subject to furthering stereotypes, as the *Grutter* court cautioned. The Court criticized the use of racial categories as an additional problem with affirmative action. Racial categories used in affirmative action are opaque and imprecise in many ways. Some are overbroad such as grouping all Asian students, whether from South Asia or East Asia and deciding who are in racial categories of Hispanic or Latino. Other racial categories may be underinclusive such as how applicants from Middle Eastern countries are classified.[12]

What Remains for Affirmative Action

After the Supreme Court essentially eliminated the use of race in affirmative action in the Harvard and UNC affirmative action cases, some equity efforts remain for university admission programs.

First, the Court acknowledged that nothing prohibits universities from considering in an applicant's personal essay a discussion of how race affected the applicant's life, by discrimination, inspiration, or other experiences. These personal experiences must be tied to that student's courage and determination or to a benefit acquired by the applicant whose heritage or culture motivated the student to assume a leadership role, attain a particular goal, or gain a particular skill which the student can contribute to the university. This permissible use of race provides universities the ability to consider

an applicant's discussion of how race specifically affected the applicant's life, so long as that discussion is concretely tied to a quality of character such as leadership or a unique ability that the particular applicant can contribute to the university.[13]

Second, rather than racial classifications, universities can use socioeconomic status as a way to recognize that education resources are not provided equally to all economic classes of students. The Texas Legislature recognized the disparity in schools' resources and the resultant effect on graduating students when they enacted the Top Ten Percent Law guaranteeing admission to the University of Texas at Austin to the top 10% of all high school graduates in Texas. Other socioeconomic criteria that colleges and universities may rely on in applicants' personal profiles are whether the applicant would be a first-generation college attendee in the applicant's family or whether the applicant was raised in a multiple language family environment.

Finally, universities must engage in a continuous review of their admissions program, recognizing in conducting such a review that their current admissions program does not necessarily mean the university may rely on the same policy going forward.[14]

Three concurring opinions to that of Chief Justice Roberts' were provided by Justice Thomas, Justice Gorsuch, and Justice Kavanaugh. Two dissenting opinions were provided by Justice Sotomayor and Justice Jackson.

Justice Sotomayor Dissents

Justice Sotomayor's dissenting opinion cited numerous studies and reports demonstrating the destructive consequences of the majority's decision. "Superficial color blindness … will cause a sharp decline in the rates at which underrepresented minority students enroll in our Nation's colleges and universities…" and "eliminating the use of race in college admissions will take Black student enrollment at elite universities back to levels this country saw in the early 1960s."[15]

Justice Jackson Dissents

Justice Jackson, agreeing with Justice Sotomayor, stated, "nothing in the Constitution or Title VI prohibits institutions from taking race into account to ensure the racial diversity of admits in higher education" and "[o]ur country has never been colorblind. Given the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented 'intergenerational transmission of inequality' that still plagues our citizenry."[16] **WL**

ENDNOTES

[1]The U.S. Supreme Court granted certiorari in the separate cases and consolidated them for purposes of issuing a decision, which is at 600 U.S. 181 (2023). *Students for Fair Admissions Inc. v. President & Fellows of Harvard Coll.*, 261 F. Supp. 3d 99 (D. Mass. 2017), *aff'd*, 980 F.3d 157 (1st Cir. 2020); *Students for Fair Admissions Inc. v. University of North Carolina*, 567 F. Supp. 3d 580 (M.D.N.C. 2021).

[2]*Students for Fair Admissions Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 204 (2023) (quoting *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (*Brown I*); Tr. of Oral Arg. in *Brown I; Brown v. Board of Educ.*, 349 U.S. 294, 298 (1955)).

[3]*Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978).

[4]*Id.* at 289-90.

[5]*Adarand Constructors Inc. v. Pena*, 515 U.S. 200, 227 (1995).

[6]*Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

[7]*Id.* at 342-43.

[8]600 U. S. 181.

[9]*Fisher v. University of Texas*, 570 U.S. 297 (2013) (*Fisher I*).

[10]*Fisher v. University of Texas*, 579 U.S. 365 (2016) (*Fisher II*).

[11]600 U.S. 181.

[12]*Id.* at 216.

[13]*Id.* at 230-31.

[14]*Id.* at 225 (citing *Grutter*, 539 U.S. 342).

[15]*Id.* at 377-78 (Sotomayor, J., dissenting).

[16]*Id.* at 385 (Jackson, J., dissenting). **WL**