



Education ADVISORY ■

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Sea Change: Diversity, Equity, and Inclusion in Higher Education After Supreme Court Strikes Down Affirmative Action

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The Supreme Court's decision striking down affirmative action in *Students for Fair Admissions Inc v. President and Fellows of Harvard College* and *Students for Fair Admissions Inc. v. University of North Carolina* constituted a monumental sea change in how colleges and universities may advance their diversity, equity, and inclusion efforts.

The Supreme Court considered race-conscious admissions policies in higher education and limited how and when race can be considered in admissions—and likely beyond. The *Students for Fair Admissions* (SFFA) cases necessitate a reassessment of best practices and compel the development of new strategies for furthering the core values of diversity, equity, and inclusion.

Status Quo Before the SFFA Cases

To understand the monumental shift caused by the Court's decision, it's important to understand the previous status quo.

The issue of contemplating race in higher education was first substantively considered in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In considering how affirmative action could be factored into the admissions process, a fractured Supreme Court held that while a quota system was unconstitutional, race could be *one factor among many* for schools and admissions staff to consider when reviewing an applicant within the larger goal of building a diverse student body. After *Bakke*, institutions of higher education could consider race during admissions to achieve racial diversity but not use race as a determinative factor for admission.

This issue was considered again over 20 years later in *Gratz v. Bollinger* (2003), 539 U.S. 244 and *Grutter v. Bollinger*, 539 U.S. 306 (2003). In *Gratz*, the Court ruled that Michigan's undergraduate program could not use a point system to assign extra points and extend a blanket advantage to some racial groups at the expense of others. In *Grutter*, the Court adopted Justice Powell's reasoning and held that an overarching goal of a diverse student body was a sufficiently "compelling interest" to justify using race as a factor in the holistic admissions process at Michigan's law school.

The consideration of race though had to be "narrowly tailored." Race could continue to be considered in reviewing an applicant's file but had to be considered in a "flexible" manner as part of a wider range of factors that determine

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how an applicant might contribute to the overall goal of a diverse student body. In *Grutter*, the Court also recognized that these kinds of admissions practices should have a logical future end when they would no longer be necessary.

Finally, in 2013 and 2016, the Supreme Court once again considered the validity of using race as a factor, even within a holistic admissions process, in a pair of cases filed against the University of Texas. In *Fisher v. University of Texas*, 570 U.S. 297 (2013) (Fisher I), the Court again affirmed that the overall goal of a diverse student body was something the university could pursue as part of its mission. However, it emphasized that the university must be able to demonstrate under strict scrutiny that using race in the admissions process is permissible under the Constitution *and* necessary to achieve an overall goal of diversity over an approach that does not use race.

In *Fisher v. University of Texas*, 579 U.S. 365 (2016) (Fisher II), the Court ruled that any institution using race-conscious admissions practices would have to continue to reassess the necessity of doing so. Any admissions process that factored in race and ethnicity was to remain subject to review, but higher education institutions were given some deference and trust in assessing the continuing need for the practice.

After *Fisher II*, the status quo was to maintain a delicate balance. Institutions were free to seek a diverse student body as part of their educational mission and to use race as a factor in the admissions process as a means to achieve that mission.

Diversity was considered a compelling interest, institutions were given some deference in pursuing diversity, and the Supreme Court did not look closely into the specific definitions of the racial classifications themselves used by the institutions. On the other hand, the institutions would need to demonstrate that race was only one of many factors considered, was not determinative, and was considered for diversity (not remedial) purposes; and that they had explored alternatives to creating a diverse student body that did not factor in race at all.

The SFFA Cases: A Sea Change

In the *SFFA* cases, the Court revisited *Bakke*, *Grutter*, *Fisher I*, and *Fisher II* and effectively overruled—or abrogated—these precedents. The Court examined the admissions practices of Harvard and the University of North Carolina (UNC) under Title VI of the Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment.

Both universities used a multi-stage review process for admissions and considered a diverse student body as essential to their educational mission. Critically, in line with then-existing precedent, both universities considered being a member of an underrepresented racial group as a potential positive factor within the context of a holistic review.

The schools argued that their assessments demonstrated that they could not meet their interest in a diverse student body by race-neutral means. In challenging these admissions programs, the SFFA claimed that this type of consideration of race had the effect of discriminating against Asian applicants because the universities effectively treated an applicant's classification as an Asian as a negative during their holistic admissions process.

Writing for the majority, Chief Justice John Roberts rejected the arguments submitted by Harvard and the University of North Carolina and found that their admissions programs violated Title VI and the Equal Protection Clause. The Court took a broad and universal view of the Equal Protection Clause, holding that: "Eliminating racial discrimination means eliminating all of it. And the Equal Protection Clause ... applies 'without regard to any differences of race, of color, or of nationality'—it is 'universal in [its] application.'"

The Court reaffirmed that the Equal Protection Clause does not allow consideration of race for remedial purposes. Instead, in assessing the admissions regimes, the Court held that for admissions practices to pass muster (1) they must “comply with strict scrutiny”; (2) they must not use race to stereotype or constitute a negative; and (3) they must have a constitutionally cognizable and logical endpoint.

Admissions Programs Failed Strict Scrutiny

The Court held that the universities’ admissions programs did not pass strict scrutiny for two reasons.

First, an institution must have sufficient and measurable goals to justify the use of race as a factor in the admissions process. The Court held that the universities did not. The Court examined both Harvard’s and UNC’s educational goals and found that the proffered benefits of educational diversity—such as “training future leaders in the public and private sectors”; preparing students to “adapt to an increasingly pluralistic society”; “better educating its students through diversity”; and “producing new knowledge stemming from diverse outlooks”—were too vague.

Instead, the benefits must be measurable via objective benchmarks showing “whether leaders have been adequately “train[ed]”; whether the exchange of ideas is “robust”; or whether “new knowledge” is being developed—and when those goals have been reached. Put differently, the Court required that *the benefits of diversity* (not the fact of diversity) must be amenable to rigorous measurement and benchmarking through objective data. However, the Court found the traditional benefits of diversity articulated by the universities as “inescapably imponderable.”

Second, the Court held that the universities’ admissions programs failed because they contained no “meaningful connection between the means ... and the goals.” As to the traditional racial categories used by the universities—Asian; Native Hawaiian or Pacific Islander; Hispanic; White; African-American; and Native American—the Court held that it is “far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits.”

The Court called these categories “imprecise,” “overbroad,” “arbitrary,” “undefined,” and “underinclusive.” The use of these “opaque racial categories undermines, instead of promotes, respondents’ goals,” the Court said. In other words, the Court effectively held that the traditional racial classifications by themselves were too inexact to ever pass muster.

Admissions Programs’ Consideration of Race Stereotyped Certain Groups

The Court also found that the admissions programs failed because they used consideration of race to negatively impact some groups and also used racial classifications to wrongly project qualities onto the members of those classifications.

The Court described the admissions process as a zero-sum game in which some are let in and others are denied. Racial categorization as a benefit to aid one group by necessity disadvantages another. This is especially true when “members of some racial groups would be admitted in greater numbers than they otherwise would have been.” The Court held that allowing consideration of race to proceed in this context would result in improperly considering race to determine winners and losers.

The Court also found that admitting members of a given racial classification for what they can bring to an institution *as members of* that classification amounted to unconstitutional stereotyping because the practice assumes that a member of a given group holds certain characteristics or qualities *because* of their race. The Court was strident in asserting that the “entire point of the Equal Protection Clause is that treating someone differently because of their skin color is not like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well.”

The Court did allow 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.” However, the Court emphasized that cannot be a backdoor to consider race itself, and instead “the student must be treated based on his or her experiences as an individual.”

Admissions Programs Set No Logical or Constitutional Endpoints

Lastly, the Court found that the universities set up a system with no acceptable endpoint. The Court rejected a goal of equivalent representation as a form of unconstitutional racial balancing, i.e., a system of implicit quotas. For example, the Court compared the percentage of students admitted to Harvard by race from 2009 to 2018 and found the percentage of students who were categorized as Asian, Hispanic, and African American during this period was substantively constant across each year.

The Court found that this demographic stability was evidence of unconstitutional racial balancing. The programs could not adopt an end goal of proportional admissions, and evidence of consideration of race and stability in demographic breakdowns over a period is evidence of unconstitutional conduct.

The New Landscape

Guardrails After the SFFA Cases

In determining their risk assessments and setting their risk tolerances as they adhere to their values of diversity, equity, and inclusion, institutions should keep the following key holdings of the *SFFA* cases in mind:

- The Court expressed deep skepticism of the coherence of the generally used classifications of Asian, Hispanic, White, African American and found them overbroad, underinclusive, and vague.
- The Court expressed hostility towards the utility of racial classifications, finding that not only are the classifications imprecise but using the classifications as a proxy for identifying characteristics belonging to any individual is a form of unlawful stereotyping.
- The Court found the consideration of race as a positive in a zero-sum game as unlawful because consideration of race will be a detriment to some racial groups.
- The Court allowed applicants to discuss their racial backgrounds in the admissions process as context to explain the development of their personal characteristics. The discussions of race must originate from the applicant, and the institution should focus on the non-racial characteristics submitted by the applicant. Applicants should be considered as individuals by institutions and not as members of racial groups.
- The Court set a high bar for institutions looking to establish diversity as a compelling interest. Diversity is not sufficient. Institutions need to identify a specific benefit flowing from diversity and rigorously show that the benefit can be measured, is causally impacted by a narrow application of a program, and is time limited.
- Keeping statistics of racial demographics creates risk, especially where the demographic breakdown is stable over time. While not by itself determinative, the *SFFA* cases treated such demographic stability over a period as evidence of the use of implicit racial quotas.

The Court specifically excluded the military academies from the holding of the *SFFA* cases because of their unique interests. Military academies will have the benefit of the framework set up by the *SFFA* cases in fashioning a defense if their admissions policies are challenged. Such litigation is worth monitoring because it would shed more light on how an institution may meet this burden.

Going Forward: A Reassessment of Policies to Further Diversity, Equity, and Inclusion

Now that institutions cannot rely on broad race-conscious admission policies, institutions must use race-neutral factors in combination with the consideration of individuals' assertions of how their racial background impacted their personal development. Even Justice Thomas, in his concurrence, wrote positively of the race-neutral means the University of California system and the University of Michigan adopted to foster diversity.

Such race-neutral but diverse-positive factors include, individually or in combination:

- Granting preferences based on the socio-economic status of individuals or their families and creating pipelines to develop socio-economic diverse applicants, with related financial aid and counseling services.
- Considering the educational level of parents/caregivers and the first-generation educational status of individuals.
- Granting preferences for United States-based geographic backgrounds of individuals;
- Considering other significant background or identity characteristics that may largely overlap with racial or ethnic groupings but do not completely overlap with traditional racial groupings (e.g., Justice Thomas's finding that the Freedmen's Bureau Acts "applied to freedmen (and refugees), a formally race-neutral category, not blacks writ large. And, because 'not all blacks in the United States were former slaves,' 'freedman' was a decidedly under-inclusive proxy for race."
- Considering the relative performance/qualifications of individuals as compared to their regional peers (such as, for example, the percentage plans for admissions used in Texas, Florida, and California guaranteeing admissions to applicants who finish in a certain percentile of their classes).
- Adopting, at least in part, selection based on chance (such as a lottery) once certain minimum requirements are met.

Relying on such race-neutral or color-blind policies to further diversity, equity, and inclusion would create less risk. However, the focus of litigation in the aftermath of the *SFFA* cases will expand to include challenges to race-neutral policies on the grounds that they have disparate impact and discriminatory intent.

The Fourth Circuit recently rejected a challenge to a Virginia public magnet school's race-blind admissions policies in a case in which the plaintiffs pursued a theory that the policies were crafted impermissibly with diversity concerns in mind. *Coal. for TJ v. Fairfax Cty. Sch. Bd.*, 68 F.4th 864 (4th Cir. 2023). This litigation and similar cases being litigated around the nation will determine the level of scrutiny such race-neutral or color-blind policies are judged under and set the standard for when evidence of disparate impact and racial balancing motives tips the balance against the lawfulness of the race-neutral and color-blind policies.

As this species of litigation develops, it is important to keep the process and purpose in mind when adopting race-neutral policies. The Court made clear that courts must carefully monitor attempts to circumvent the *SFFA* cases through a backdoor. Any evidence that the adoption of race-neutral and color-blind policies were specifically motivated to advantage or disadvantage a racial group and did so will be used to challenge the policies.

SFFA Cases Likely to Apply Broadly

The *SFFA* cases are unlikely to be limited to higher education admissions. Indeed, Justice Gorsuch emphasized in his concurrence that the kind of consideration of racial classification found to be unconstitutional is also forbidden under both Title VI and Title VII of the Civil Rights Act.

In the immediate aftermath of the *SFFA* cases, Justices Alito and Thomas already relied on the *SFFA* cases in their comments on the denial of certiorari petitions of cases dealing with issues outside the scope of university admissions. For example, in *Roberts v. McDonald*, a case involving using racial classifications to inform the prioritization of delivery of COVID-19 treatments, Justices Alito and Thomas stated that because “government actors may not provide or withhold services based on race or ethnicity as a response to generalized discrimination or as a convenient or rough proxy for another trait that the government believes to be ‘characteristic’ of a racial or ethnic group” and in “the event that any government again resorts to racial or ethnic classifications to ration medical treatment, there would be a very strong case for prompt review by this Court.”

In *Thompson v. Henderson*, a case involving the propriety of certain facially race-neutral but potentially implicitly biased arguments defense counsel made regarding an African American plaintiff, the same justices agreed that the case was not ripe for review but emphasized the application of the *SFFA* cases to the dispute.

While the *SFFA* cases concerned admissions decisions, the Court’s opinion has wider implications for institutions of higher education in their risk assessment. The *SFFA* cases should be contemplated when considering:

- **Financial Aid:** The award scholarships, grants, and other kinds of aid based on race and ethnicity.
- **Recruiting:** Any recruiting effort that may provide students with paid visits to campus and other incentives based on race and ethnicity.
- **Employment:** Employment positions that are written and recruited in a way that considers race or ethnicity.
- **Compensation and Benefits:** Compensation or benefit decisions that are informed by race or ethnicity.
- **Services and Medical Care:** The provision of services based on race or ethnicity.
- **Student Programming:** Any student programming and extracurriculars that fund or benefit students or groups based on race or ethnicity.
- **Internal Governance/Administrative Process:** Any internal governance and process policies which consider race or ethnicity.

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