Legal Sidebar

The Supreme Court Considers Affirmative Action: Arguments in the Cases Against Harvard and the University of North Carolina

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On October 31, 2022, the Supreme Court heard arguments in two cases addressing admissions in higher education: *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*. In each case, lower courts concluded that the universities made permissible, limited use of race to promote student body diversity, in line with Supreme Court precedent holding that institutions of higher education could, in some circumstances, consider race in admissions without running afoul of the Constitution's equal protection principles. The same petitioner asked the Court in each of the two cases to revisit and expressly overrule those previous holdings. In the alternative, the petitioner asked the Court to hold that the universities violated the constitutional rules established in existing precedent by allegedly overemphasizing race, disadvantaging Asian-American applicants, and rejecting viable race-neutral admissions procedures. This Sidebar considers the Court's history with racial classifications, the arguments presently before the Court, potential outcomes, and considerations for Congress.

Precedent for Affirmative Action in Higher Education

In 2003, building on a case decided in 1978, the Supreme Court in *Grutter v. Bollinger* held that the Constitution's equal protection principles allow limited consideration of race in higher education admissions. In general, equal protection requires that governments avoid distributing benefits or burdens based on race, unless those classifications meet a high bar. For justification, the government must identify a compelling government interest and show that its policy is narrowly tailored to pursue that interest. This test is known as "strict scrutiny." Judges and commentators regularly observe that government classifications using race usually fail strict scrutiny and are held unconstitutional. In the cases before the Court and in the precedent at issue here, the parties do not dispute the use of race. Accordingly, this Sidebar does not address the legal meaning of race or considerations of whether a given classification qualifies as a racial one.

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In *Grutter*, the Court held that seeking student body diversity can be a compelling interest justifying some use of race in higher-education admissions, at least as a plus factor in a holistic consideration of applicants. To justify the use of race, however, the university must first establish its interest in diversity and, second, show its policies take race into account no more than needed.

In considering the University of Michigan Law School's interest in diversity, the *Grutter* Court approved the school's goals to seek "the educational benefits that flow from a diverse student body" and to enroll a "critical mass of underrepresented minority students" so that those students felt "encourage[d] ... to participate in the classroom."

The Court in *Grutter* also held that the school's race-based admissions preference was narrowly tailored, explaining that it set no numerical target or quota system. Rather, the admissions plan was "flexible enough to ensure that each applicant is evaluated as an individual." In a companion case, *Gratz v. Bollinger*, in contrast, the Court rejected a state admissions program that "automatically" awarded admissions points to minority applicants. Also as part of its narrow tailoring analysis in *Grutter*, the Court determined that the university adequately considered race-neutral alternatives for reaching its diversity goals. The Court pointed out that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," "[n]or does it require a university to choose between maintaining a reputation for excellence" or diversity. The Court also assumed continued pursuit of race-neutral options and contemplated that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." Some might assume that any compelling government interest in diversity would have been achieved by that time; essentially, there would no longer be a compelling government interest. That said, durational requirements, where they come up in other affirmative action programs, have been considered as part of narrow tailoring. And objections to a program with no end date are essentially arguments that the remedy is overbroad.

Post-*Grutter*, the Supreme Court has returned to the issue of affirmative action in higher education and addressed these standards further, in two cases both named *Fisher v. University of Texas*. In the first *Fisher*, decided in 2013 (*Fisher I*), the Court required universities to describe concretely the diversity-related educational goals their policies serve. In *Fisher II*, decided in 2016, the Court upheld the University of Texas's race-conscious admissions policy against the challenger's arguments that the university must instead, as a race-neutral alternative, expand its policy of admitting the top 10% of students from the state's high schools. The Court stated that the 10% plan did not meet the university's diversity goal and would require the university to give up other admissions criteria. All in all, the Court held that an institution declining to use race-neutral alternatives must show that race-neutral approaches "would not promote its [compelling] interest 'about as well and at tolerable administrative expense.'"

While *Grutter* and the *Fisher* cases considered constitutional constraints on public institutions, the same rules apply to private schools (like Harvard) that accept federal funds on condition of abiding by the antidiscrimination requirements of Title VI of the Civil Rights Act of 1964 (Title VI). Thus far, the Court has held that Title VI shares the Constitution's same equal protection guarantees.

Arguments for and Against Overturning *Grutter*

Students for Fair Admissions (SFFA), petitioner in both of the cases presently before the Court, includes past and potential university applicants who allege that they were, or may be, denied admission because Harvard and the University of North Carolina at Chapel Hill (UNC) improperly use race in their highly selective admissions processes.

Many observers predict that the Court will overturn *Grutter*. At oral argument, SFFA described the Court's existing affirmative action standards as "a glaring exception" to the rule that "[r]acial classifications are wrong." SFFA reasoned that whenever race is counted, even as a factor among many,

"some people are going to be excluded based on race." By SFFA's calculation, in the UNC case, the use of race results in some 700 applications per application cycle where "race made the difference."

The parties and Justices also considered at oral argument whether *Grutter* was ever meant to be long-lasting. Justices repeatedly asked about *Grutter*'s 25-year timeline. Justice Kavanaugh suggested that a 25-year sunset on affirmative action was part of the Court's holding. SFFA proposed that if affirmative action had not achieved diversity after 25 years, it might be "declar[ed] ... a failure" and eliminated. SFFA also characterized the timeline as "aspirational" rather than a concrete deadline. But, in SFFA's view, the universities have not reduced their use of race over time or given assurances that they would. The Solicitor General also argued that the time limit showed an expectation but was not "inflexible."

Originalist Interpretations of the Fourteenth Amendment

SFFA contends that *Grutter* is not in keeping with the original intent of the Fourteenth Amendment, which, in SFFA's view, bars racial distinctions and "contains no exceptions." The Amendment, SFFA argues, aimed to "constitutionalize the Civil Rights Act of 1866" that banned various forms of racial discrimination. The Reconstruction Congress and contemporary state laws, SFFA says, set up remedial programs for freed slaves but did not make the sort of racial classifications *Grutter* permits. UNC, Harvard, and the Solicitor General, in contrast, argue that the Fourteenth Amendment's drafters did not anticipate absolute race neutrality. In the government's view, many state and federal laws took race into account at the time of the Fourteenth Amendment, aiming "to bring African American citizens to a point of equality in our society."

The Court's Precedent on Race-Based Classifications

The parties also disagree on the correct interpretation of the Court's precedent regarding racial classifications. SFFA contends that the Court's seminal decision in *Brown v. Board of Education* (1954), holding public school segregation unconstitutional, requires a "color-blind" approach. In answer, UNC states that race-based decisions that bring students together are distinguishable from those that segregate. UNC argues that the Court in *Brown* endorsed the value of "a diverse student body 'to engage in discussions and exchange views with other students.'" Harvard similarly distinguishes *Brown*, observing that the Court struck down state systems of "[s]eparating school children 'solely because of their race.'" This practice, the *Brown* Court stated, generated "'feeling[s] of inferiority' and undermined 'the motivation of a child to learn.'" Harvard argues that its affirmative action program, using race as one factor to promote diversity, is not comparable.

Looking beyond *Brown* to the Court's other jurisprudence evaluating racial classifications, each party contends that its approach better reflects the Court's precedent. UNC states that a requirement for "colorblindness" "defies [the] Court's longstanding jurisprudence" allowing those race-based actions that pass strict scrutiny. UNC describes *Grutter*'s strict scrutiny standard as "familiar," used in many constitutional decisions. The "color blind interpretation," the Solicitor General argues, "takes aim ... at the Court's entire structure here of applying strict scrutiny" to racial classifications. SFFA, in contrast, argues that even if race-based practices can sometimes be justified, accepting *diversity* as a compelling interest is out of step with how the Court has applied strict scrutiny to other important goals. SFFA notes in its brief that the Court has invalidated race-based actions justified as providing "role models" for minority students, prioritizing a child's best interest in a custody decision, and remedying general, societal discrimination. The assumption that racial diversity will enhance viewpoint diversity, SFFA states, relies on blanket assumptions about minority students' opinions and experiences that the Court has refused to countenance when confronted with other proffered government interests.

The Search for a Workable Standard

The parties dispute whether the Court can develop a standard that schools and courts can follow as well. SFFA argues that *Grutter* is unworkable. The facts in the Harvard and UNC cases, it admonishes, show the precedent "does not meaningfully limit universities' use of race." Neither university can identify when it has achieved the educational benefits of diversity or the critical mass of minority students it seeks, SFFA contends. The district court, SFFA argues, "conflated the educational benefits of diversity ... with raw representation on campus." Justice Gorsuch expressed a similar concern at oral argument, asking UNC's counsel how the schools could distinguish "diversity" from "a quota" given UNC's focus on minority acceptance rates. Justice Alito also asked how a court could tell whether a diversity goal had been reached, and Justice Barrett asked counsel about racial preferences' "logical end point."

UNC concedes that diversity is "a qualitative standard that is difficult to measure." Counsel suggested at oral argument that evaluation would consider "numbers" and an assessment of whether minority students felt isolated. The Solicitor General argues that measuring minority graduation rates, race-related incidents on campus, and surveys of student experiences could help determine whether a school had achieved its diversity goals, but numbers, if they showed "extreme disparities," might also be relevant.

Oral argument also suggested difficulties with circumscribing the use of race if *Grutter* were overturned. Chief Justice Roberts repeatedly asked counsel how a bar on the use of race would affect consideration of students' life experiences. Chief Justice Roberts and Justice Barrett asked if students could discuss experiences with racial discrimination or race-based cultural identity in admissions essays. Justice Barrett asked whether restricting universities' consideration of racial experiences described in application essays could amount to impermissible viewpoint discrimination. SFFA's counsel agreed that schools would be allowed to consider "experiences [applicants] have had because of their race" and race could play a role as a "context for" a student's "experience." Justice Kavanaugh expressed that SFFA's position "will put a lot of pressure going forward ... on what qualifies as race-neutral." Overall, in arguing that a ban on consideration of race is workable, SFFA notes that many selective state universities already forgo race-based preferences in admissions. Further, private universities may keep race-based admissions, SFFA claims, provided they forgo federal funds to avoid Title VI's strictures.

The Schools' Admissions Plans Under *Grutter*

SFFA also argues that, even if *Grutter* stands, the schools' admissions plans violate *Grutter*'s requirements. In the lower courts, the parties strongly contested how much each school used race and whether evidence showed intentional discrimination against Asian Americans. The Supreme Court does not ordinarily engage in fact-finding, and it is unusual for the Court to revisit factual disputes, although it may remand to lower courts for additional fact-finding. Nevertheless, many of the Justices' questions at oral argument focused on the facts. SFFA contends (despite the lower courts' contrary findings) that Harvard discriminates against Asian-American applicants. SFFA focuses on the fact that African-American applicants receive higher "personal" ratings (allegedly measuring leadership, kindness, and likeability) than members of other races, and Asian-American applicants receive somewhat lower ratings. At oral argument, Justice Alito remarked that "there has to be something wrong with this personal score." Justice Gorsuch asked Harvard's counsel about any use of "Asian quotas," which counsel denied, noting that the slightly lower rankings did not translate into unfavorable admissions outcomes.

SFFA also maintains that the schools' use of race is not narrowly tailored because they could employ race-neutral means to improve diversity. Harvard could, for example, eliminate preferences given to athletes and children of faculty, alumni, and donors. UNC, too, could expand race-neutral criteria, SFFA maintains, including increasing its preference for socioeconomically disadvantaged students and granting automatic admission to top-ranked students at each North Carolina high school. These proposals raise some of the same difficulties for measuring success as the schools' race-conscious plans. Justice

Kavanaugh repeatedly asked SFFA's counsel at oral argument how to assess when a race-neutral alternative is adequate or effective. Counsel suggested that both enrollment numbers and studies of campus cross-racial understanding might be relevant.

UNC counters that SFFA's proposed schemes, as a factual matter, could not be implemented. According to UNC, some proposed alternative plans, for example, assume that it could recruit all of the state's top high school students. SFFA's proposed alternatives would also, UNC argues, force UNC to abandon the individualized assessments it uses to ensure diversity not only along racial lines but also in other qualities the university values. At argument, UNC's counsel conceded that a university might have to give up certain preferences to improve diversity, but it need not makes changes that have "a material negative impact on the academic environment."

Harvard states that the lower court rightly found it has no effective race-neutral alternatives. Eliminating advantages for alumni, donor, and faculty children, the lower court found, would "not meaningfully improve diversity." At argument, Harvard's counsel referred to this finding when Justices repeatedly asked about justifying such preferences. In its brief, Harvard joins with UNC in arguing that narrow tailoring does not require universities to adopt race-neutral admissions procedures that would "'significant[ly]' diminish the strength of" their classes. Harvard argues that SFFA's proposed plans would do just that by excluding many applicants with the highest academic rankings. Also, Harvard claims, it does not need to accept a proposed admission plan that would significantly reduce African-American enrollment—perhaps by 32%. Thus, Harvard asserts, SFFA's proposed race-neutral alternative plans are not effective or workable alternatives, and they do not prove that Harvard's current procedures fail narrow tailoring requirements.

Potential Outcomes

The Court could resolve the issues presented in different ways. It could overturn *Grutter* and related cases, broadly affecting higher education admissions and perhaps race-conscious preferences in other contexts. It could also rule in a narrow way, tied to the facts presented, which may have limited impact beyond the two universities involved in the case. Many commentators surmise that the court will overturn *Grutter* and hold that enrolling a diverse student body is not a compelling government interest supporting race-based college and university admissions decisions. In doing so, the Court might conclude, building on *Grutter*'s reference to a 25-year limitation, that seeking racial diversity is *no longer* a compelling government interest, given social and demographic changes in the intervening years. Eliminating diversity as a justification would not necessarily preclude all use of race in higher education admissions. Under other precedent, equal protection allows race-conscious policies for another compelling government interest: remedying educational institutions' past racial discrimination. In this case, the schools have not said they are remedying past discrimination; UNC disclaimed that motive.

The Court may take another approach, continuing to allow universities to use race-conscious policies to further diversity while putting pressure on the second element of strict scrutiny: narrow tailoring. The Court could adopt the standard proposed by SFFA, which argues that narrow tailoring should require universities to employ available race-neutral alternatives unless they "would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity." This is a different standard than *Fisher II*'s requirement that schools choose race-neutral methods that work "about as well and at tolerable administrative expense."

The Court could rule against the universities without departing from *Grutter* and *Fisher II* if it chose to revisit the lower courts' factual findings. For example, disagreeing with the lower courts, the Court could hold that the schools' plans ignore race-neutral alternatives required to meet the precedents' narrow tailoring requirements. It could decide that the schools' plans consider race to a greater extent than constitutionally permitted under current law—*Fisher II* described the consideration of race it approved in

that case as "a factor of a factor of a factor." It could conclude that affirmative action policies with no end-date or other provisions for termination are not narrowly tailored.

The Court could also factually distinguish these universities' policies from other race-conscious admissions practices based on their impact on Asian-American applicants. The Court has stated, in other contexts, that narrow tailoring should consider "the impact ... on the rights of third parties." At oral argument, Justices repeatedly asked the universities, particularly Harvard, about whether their admissions processes disadvantaged Asian-American applicants. The Court could decide that these particular admissions policies unduly burdened Asian-American applicants and so are not narrowly tailored, or it could conclude that the universities engaged in intentional discrimination.

If the Court revisits its previous conclusion that Title VI and equal protection standards are the same, it could find a Title VI violation without deciding the constitutional issue. Neither party has sought this result.

The Court may also remand one or both cases; the Solicitor General suggested this course should the Court find that Harvard had, contrary to the district court's findings, engaged in "racial balancing" to maintain consistent, year-to-year racial demographics.

Finally, the Court could uphold one or both of the challenged policies, concluding, as did the lower courts, that they comply with existing precedent or with any new standard the Court announces.

Considerations for Congress

Legislation cannot change the Supreme Court's interpretation of the Equal Protection Clause. Congress can, however, amend Title VI so that it is no longer interpreted congruently with that provision.

Congress could expressly encourage or require diversity-enhancing measures under Title VI. Congress could not require unconstitutional action, such as mandating racial quotas. As such, if the Court holds that using race in admissions is always unconstitutional, Congress could not mandate affirmative action. Nevertheless, it could call for other measures, such as reporting requirements for minority recruiting, admission, and retention; development of plans to enhance minority recruiting or retention; or appointment of diversity coordinators, Title VI coordinators, or advisory committees. Congress could consider encouraging or requiring colleges to employ non-racial admissions criteria that may enhance diversity, although it is not clear how the Court might rule on such measures in the future.

Alternatively, Congress could prohibit recipients of federal funds from using voluntary race-conscious measures at all, even if the Court in the Harvard and UNC cases allows some such measures. For example, Congress could require that funding recipients adopt policies barring race-conscious admissions procedures like those at Harvard and UNC.

Congress could amend Title VI to clarify whether it prohibits or allows admission procedures that have an unjustified adverse effect on racial minorities, known as disparate impact discrimination. A provision addressing disparate impact liability—either its availability or foreclosure under Title VI—would resolve a significant ongoing debate on the issue. It would also be one way to clarify whether Congress does in fact intend for Title VI to be read coextensively with the Equal Protection Clause, which the Supreme Court has interpreted to prohibit only disparate treatment, not disparate impact discrimination.

Author Information

April J. Anderson
Legislative Attorney

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