Race-Based Admissions: An End or Change?

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Quick Refresher

- What is affirmative action?
- What is race-based admissions?
- What is diversity, equity and inclusion?
- What is ESG?

The Supreme Court and Affirmative Action

SCT and Race-Based Admissions

- *Regents of the University of California v. Bakke* (1978)
- *Gratz v. Bollinger and Grutter v. Bollinger* (2003)
- *Fisher v. University of Texas* (2016)

Students for Fair Admissions v. University of North Carolina and Students for Fair Admissions v. Harvard University (2023)

- SFFA, a non-profit founded by Edward Blum (who also financed the Fisher/UT case), alleges that both schools discriminated against Asian Americans in violation of Title VI and the Equal Protection Clause;
  - Harvard maintained a "soft quota" that discriminated against Asian American applicants who, on balance, had higher GPA and test scores than its white applicants, yet were admitted at a lower rate than these white applicants based on lower "personal scores."
  - UNC actively recruited first-generation and lower-income students to diversify their student body, yet it hurt their Asian American recruitment. Asian Americans account for 17% of the UNC admitted class in 2019.
  - Asian Americans account for 7% of the U.S. population. Asian Americans were ~20% of the Harvard admitted class and 17% of the UNC admitted class. SFFA argued the percentages should be higher.
- Case History: DCT upheld limited use of race as a factor in admissions; 1st Circuit (Harvard case): Affirmed; 4th Circuit (UNC Case): Abeyance pending SCT review; SCT: Reversed.

SFFA Decision

- Strict Scrutiny: The admissions policies are constitutional only if (1) narrowly tailored measures that further (2) compelling governmental interests.
- SCT Decision:
  - Governmental Interest
    - The goals articulated by Harvard and UNC—which include training future leaders, promoting a robust exchange of ideas, preparing productive citizens and leaders, promoting cross-racial understanding and breaking down barriers—are not sufficiently compelling because they are incapable of measurement and a reviewing court would have no way of determining when the goals had been reached.
  - Narrowly Tailored
    - Harvard's and UNC's use of race as a plus factor in college admissions is not "narrowly tailored" to achieve their articulated interests. The narrow tailoring requirement guards against several potential harms, including: (i) illegitimate stereotyping, such as the assumption that all minorities share the same viewpoint on an issue; (ii) race being used not only as a plus, but also as a negative factor to discriminate against those who are not the beneficiaries of the preference; and (iii) indefinite or permanent racial preferences that do not have an ascertainable endpoint.

SFFA Decision

- Racial Influences – Importantly and generally overlooked, the Court did not say that pursuing racial diversity in higher education is not a compelling interest in all circumstances and noted that institutions may consider an applicant's discussion of how race influenced their life, provided it was directly tied to a unique quality or ability that the applicant could contribute to the university.
- Military – the Court provided that its decision does not address whether race-based admissions advance a compelling interest at the Nation's military academies.

The Concurring Opinions

- Justice Thomas: Justice Thomas asserted that the Constitution advocates for color-blindness. Justice Thomas argued that any form of racial discrimination, irrespective of its intent, is prohibited by the Fourteenth Amendment, including affirmative action. While the majority opinion did not explicitly state this, Justice Thomas contended that this decision effectively overruled *Grutter*.
- Justice Gorsuch: Justice Gorsuch joined by Justice Thomas, reiterated the majority's stance by highlighting that Title VI of the Civil Rights Act of 1964 strictly prohibits any form of racial discrimination in higher education admissions for institutions receiving federal funding. Prohibition holds true regardless of the institution's reasons or motivations for engaging in such discrimination. Additionally, Justice Gorsuch noted that the majority opinion restored the application of strict scrutiny to the consideration of race in higher education admissions, aligning it with the scrutiny applied to race in general under the Fourteenth Amendment.
- Justice Kavanaugh: Justice Kavanaugh focused on *Grutter*'s 25-year limit on race-based affirmative action in higher education. He stated that racial classifications, even when otherwise permitted, must be temporary and limited in time.

The Dissenting Opinions

- Justice Sotomayor: Justice Sotomayor, joined by Justices Kagan and Jackson, defended the longstanding Court precedent that the Equal Protection Clause allows for the use of race-based measures to enforce racial equality in a society that is not colorblind. She emphasized the Court's historical stance that diversity in higher education is a compelling interest, allowing a limited use of race in admissions to achieve a diverse student body and the educational benefits it brings. She stated that the majority opinion obstructs decades of precedent and substantial progress. Additionally, she acknowledged the majority's preservation of holistic admissions processes that avoid racial classifications and highlighted the encouragement for considering other factors like socioeconomic background, first-generation status, and multilingual proficiency.
- Justice Jackson: Justice Jackson, joined by Justices Sotomayor and Kagan, acknowledged the historical and ongoing racial disparities in the nation that hinder the fulfillment of equal protection under the law for all individuals. She emphasized the advantages of allowing applicants to voluntarily disclose their race in the holistic review of higher education admissions, seeing it as a means to uphold the core principle of the Fourteenth Amendment.

Reactions and Potential Impact of the SFFA Decision

Reactions to the SFFA Decision

- On June 29, 2023, **President Biden** announced actions to promote educational opportunity and diversity in colleges and universities. Provided guidance about race-neutral alternatives in admissions.
- **Attorneys general from thirteen states** sent a letter to Fortune 100 CEOs on July 13, 2023, cautioning against race-based preferences, irrespective of how they are labeled, as potentially breaching federal and state antidiscrimination laws. Urged companies to promptly discontinue any illegal race-based quotas or preferences, emphasizing the possibility of being held accountable for continuing differential treatment based on skin color.
- **Attorneys general from twenty-one states** swiftly responded on July 19, 2023, seeking to reassure companies that corporate efforts to cultivate diverse workforces and foster inclusive work environments are legal, reducing corporate risk regarding discrimination claims.

Reactions to the SFFA Decision

- **The EEOC Chair Burrows** issued a statement reiterating that the SFFA decision has no impact on employer DEI initiatives or EEO policies. The EEOC highlighted how diversity assists in attracting top talent, fostering innovation, enhancing employee satisfaction, and enabling better service to customers.
- **The U.S. Department of Education** initiated a formal investigation in July 2023 into certain donor and legacy-admissions policies. This investigation stemmed from complaints alleging that such policies, which grant preferences or advantages to applicants with family ties or financial donations, contravene Title VI's prohibition on racial discrimination.

State Legislation

- Nine states that have banned race in admissions in higher education - Idaho, Arizona, Florida, Nebraska, New Hampshire, Oklahoma, Washington, California, and Michigan.
- As of July 2023, 40 bills have been introduced in 23 states that would place restrictions on DEI initiatives at public colleges.
- DEI Bills in 11 states were vetoed, tabled, or did not pass: Arizona, Arkansas, Georgia, Indiana, Iowa, Kansas, Missouri, Montana, Oklahoma, Utah, and West Virginia.
- DEI Legislation has officially passed in six states: Florida, North Carolina, North Dakota, South Dakota, Tennessee and Texas.
- The DEI bills aim to prohibit the following: using federal or state funding to support DEI offices or staff at public colleges, mandating diversity training, restricting teachings on issues of diversity, using diversity statements in hiring and promotion, or using identity-based preferences in hiring and admissions.

Race-Neutral Alternatives

- Socioeconomic Status: Universities may account for an applicant's socioeconomic background to address economic disparities often correlated with racial gaps.
- First-Generation Status: Recognizing applicants as first-generation college students acknowledges the significance of creating opportunities for those without a family history of higher education, which disproportionately includes underrepresented racial and ethnic groups.
- Geographic Diversity: Universities can favor applicants from underrepresented regions, whether rural or urban, to foster a diverse campus environment. This can extend to international applicants.
- Personal Experiences Informed by Racial Background: While direct consideration of race is not allowed, universities can evaluate personal experiences influenced by racial background to acknowledge diverse perspectives and contributions to the campus community.

Race-Neutral Alternatives

- Review/Eliminate Admissions Preferences: Universities may revisit and potentially eliminate preferences, like legacy admissions, that inadvertently perpetuate or reinforce racial disparities.
- Admissions Bonuses for Service to Historically Underrepresented Communities: Incentives for applicants committed to serving historically underrepresented communities highlight the value of addressing social and racial disparities.
- Enhanced Outreach to Historically Underrepresented Communities: Proactive engagement and outreach to historically underrepresented communities encourage a broader pool of diverse applicants, ensuring a more inclusive admissions process.

Race-Neutral Alternatives

- Use of “Top Ten Percent” Analogues: Similar to the "Top Ten Percent" plan, considering students graduating in the top percentage of their high school class indirectly promotes diversity by accounting for varied demographics across different high schools.
- Admissions Bonuses for Certain Extracurricular Activities/Achievements: Recognizing an applicant’s involvement and achievements in various areas beyond academics, such as sports, arts, or community service, underscores the broader spectrum of diversity beyond race.
- Admissions Bonuses for Academic/Intellectual Diversity: Prioritizing diverse academic interests, disciplines, and intellectual pursuits promotes a dynamic learning environment, allowing students from varied academic backgrounds to enrich the educational experience.

SFFA Decision's Impact on Employers?

- The SFFA decision does not apply to private employers.
  - Most private employers do not receive federal funding and are not governed by Title VI or the affirmation action programs subject to the SFFA opinion.
  - The 14th Amendment does not apply to private employers and Title VII, not Title VI, covers employment.
  - Employer DEI initiatives and affirmative action efforts have always operated under a different framework than the affirmative action process used by educational institutions.
  - The SFFA decision does not impact federal contractors' and subcontractors' obligations to annually develop and maintain affirmative action programs ("AAPs") pursuant to Executive Order 11246 and regulations issued by the OFCCP because the regulations make clear to not employ quotas or otherwise discriminate in their affirmative action efforts.

SFFA Decision's Impact on Employers?

- However, Justice Gorsuch, concurring in the SFFA decision, emphasized that Title VI and Title VII have "essentially identical terms." Notably, Title VII does not permit the use of race in employment decision-making in the same fashion as universities have used race in admissions decisions. Relying on quotas has always been unlawful.
- Plaintiffs can be expected to point to Justice Gorsuch's concurring opinion to claim "reverse discrimination." It is fair to say that the SFFA decision will almost surely lead to greater scrutiny of employer DEI initiatives.

SFFA Decision's Impact on Employers

- Edward Blum's American Alliance for Equal Rights, sued law firms, Morrison & Foerster and Perkins Coie in August, seeking declaratory judgements that the firms' diversity fellowships are unlawful under Section 1981. Morrison Foerster subsequently removed all references to race from online descriptions of the fellowship, opening the program to students of all backgrounds and AAER dismissed its lawsuit against the firm.
- Another law firm, Gibson, Dunn & Crutcher modified the criteria for its diversity and inclusion scholarship from "students who identify with an underrepresented group" to students "who have demonstrated resilience and excellence on their path toward a career in law.
- The American Alliance for Equal Rights also sued Fearless Feud, an Atlanta-based venture capital firm founded by three Black women over its grant program for Black women. On Oct. 2, 2023, 11th Circuit granted injunction from considering applications for grants to only Black women businesses.

SFFA Decision's Impact on Employers

- Do No Harm (DNH), an advocacy group that opposes diversity initiatives in medicine, sued Pfizer Inc., alleging Breakthrough Fellowship program discriminates against whites and Asian-Americans. DCT ruled DNH had no standing – organization did not name one injured individual; DNH said several of its members are ready to apply. DNH has appealed to the 2nd Circuit. Starting with the 2023's class of fellows, Pfizer now states that anyone of any race can apply as long as they are juniors in college and meet other non-race-based criteria.
- In August 2023, the America First Legal Foundation (AFLF), led by former Trump Administration advisor Stephen Miller, asserted claims against Target Corporation and The Kellogg Company. Alleged Target misled investors of the risk of marketing LGBTQ merchandise. Alleges Kellogg DEI/ESG programs constitute "mismanagement threatening the waste of Company assets and breaches of fiduciary duty."

SFFA Decision's Impact on Employers

- Recent legal developments do not mandate the complete elimination of voluntary affirmative action or DEI initiatives. Instead, employers should carefully evaluate the rationale behind these efforts to ensure compliance with the appropriate legal frameworks when assessing associated risks.
- Ensure a clear explanation of the rationale for DEI programs and how they serve the interests of the company and that employment decisions are well-documented.
- Review DEI communications and ensure that such communications are not misread to suggest the use of quotas or numerical targets.
- Provide training for all managers on communications, employment decisions and policies.

SFFA Decision's Impact on Employers

- Ensure that all employment, ESG- and DEI-related policies, disclosures, webpages and efforts are in compliance with Title VII and other applicable employment anti-discrimination laws.
- Consider strategies that encompass various aspects of diversity beyond race, such as socioeconomic background, education, gender, disability, and other underrepresented identities.
- Keep up-to-date on developments in the law and anticipate challenges.

Thank You!

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