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Practice Update

U.S. Supreme Court Ends Affirmative Action in College Admissions: The Potential Impact

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The U.S. Supreme Court (SCOTUS) has rendered its much-anticipated opinion on the constitutionality of the use of race in college admissions decisions. In a 6-3 decision in the *UNC* case and 6-2 decision in the *Harvard* case, the Court held that Harvard's and UNC's admissions programs violate the Equal Protection Clause of the 14th Amendment.

At the outset, it should be noted that while Harvard is a private institution, SCOTUS nonetheless applied the Equal Protection analysis to Harvard's admissions policy, holding that "discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI [of the Civil Rights Act of 1964]."

The History of Race-Conscious College Admissions in the Supreme Court

The Supreme Court has grappled with the legality of race-conscious college admissions for decades. In 1978, the Court affirmed the validity of affirmative action through its decision to allow race to be one of numerous factors in the college admissions process (*Regents of Univ. of California v. Bakke)*. Twenty-five years later, SCOTUS established the modern blueprint for how institutions can consider an

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applicant's race: so long as race is not the sole deciding admissions factor (*Grutter v. Bollinger).* In 2016, race-conscious admissions faced renewed legal scrutiny when a white student challenged the University of Texas's admission program. There, SCOTUS upheld the precedent, finding that the University's race-conscious admissions program was lawful under the Equal Protection Clause in part because race was one of several factors that the University of Texas considered in making admissions decisions (*Fisher v. University of Texas at Austin)*. Now, two cases involving Harvard University and the University of North Carolina place race-conscious college admissions back in the national spotlight.

Harvard and *UNC* Opinions

SCOTUS' most recent opinion echoed the well-established principle of the 14th Amendment: that all persons, no matter their race, shall stand equal before the laws of the States. Justice Roberts, who authored the opinion, expressed that both Harvard's and UNC's admissions programs "lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points," and therefore cannot be reconciled with the guarantees of the Equal Protection Clause.

The institutions argued that their interests in pursuing educational benefits that train future leaders in the public and private sectors; prepare graduates to "adapt to an increasingly pluralistic society"; provide better education through diversity; produce new knowledge stemming from diverse outlooks; promote the robust exchange of ideas; broaden and refine understanding; foster innovation and problem-solving; prepare engaged and productive citizens and leaders; and enhance appreciation, respect and empathy, cross-racial understanding, and the breaking down of stereotypes are sufficiently compelling for purposes

of considering race as one of many factors in admissions decisions.

SCOTUS dismissed this argument, finding such goals are "commendable" but "are not sufficiently coherent for purposes of strict scrutiny." SCOTUS found them to be immeasurable and without means of determining completion. SCOTUS further expressed that both institutions failed to articulate a meaningful connection between the admissions programs in question and the aforementioned goals. SCOTUS also reasoned that categorizing applicants by race does not further the educational benefits that the universities claim to pursue. Notably, the opinion did not address the consideration of race in military academies.

While the majority opinion stops short of overruling *Grutter*, both Justice Thomas and Justice Sotomayor acknowledged that for all intents and purposes in practical application, *Grutter* is effectively overruled. The dissenting liberal Justices expressed that affirmative action is necessary for remedying historic race discrimination and bringing our nation closer to equality for all. Justice Sotomayor also called into question how the majority opinion overruled decades of precedent without the extraordinary showing required by *stare decisis.* Notably, both Harvard's and UNC's admissions programs comport with the analysis in *Grutter*.

In looking forward, SCOTUS offered the following guidance regarding how institutions may consider an applicant's race under its new rule: "Universities can consider an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. But universities may not simply establish through application essays or other means the regime we hold unlawful today." Justice Kavanaugh, in a concurring opinion, said the ruling would apply first to those starting college in 2028.

What's Next?

While maintaining a diverse student population remains an important objective for many institutions, admissions offices now face more pressure than ever to pursue this mission through race-neutral admissions policies and procedures that comport with SCOTUS' decision. In doing so, the following are some important considerations to keep in mind:

1. The analysis of the overall design of an institution's admissions and enrollment processes;
2. The impact of this decision across all areas of campus;
3. Messaging to current and prospective students as well as the broader campus community;
4. Potential changes to the recruitment process;
5. How components of admission applications are structured, particularly admission essay questions; and
6. The impact on financial aid and scholarships programs.

The impact of SCOTUS' decision may also have far-reaching implications that go beyond higher education admissions. More to come on this front.

Akerman's Higher Education & Collegiate Athletics practice will continue to unpack SCOTUS' decision and provide updates and specific guidance on the application of the decision to admission policies and processes on institutions' campuses.

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without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.