The Road Ahead: Fostering Diversity After the Supreme Court's Decision Overturning Affirmative Action in University Admissions

The Supreme Court earlier this week departed from nearly 50 years of precedent permitting colleges and universities to consider race as one factor among many in admissions to further their pedagogical missions, foster a diverse learning environment, and prepare graduates to succeed in an increasingly diverse world. Although the watershed decision invalidating the admissions policies of Harvard University and the University of North Carolina ("UNC") was predicted after the oral argument, it nonetheless sent shockwaves through higher education, leaving many higher education officials grappling with the changes they must make to their admissions policies and practices and the strategies they can implement to achieve diverse campuses moving forward. Although the decision affects only colleges and universities, it may galvanize opponents of diversity, equity, and inclusion initiatives to push against pro-diversity reforms in the private sector and spawn collateral lawsuits.

At the heart of the intense division between the majority and dissenting Justices are two very different views of the Constitution and of the status of racial and ethnic minorities in America. The majority opinion written by Chief Justice John Roberts Jr.—in which five other Justices joined—requires a largely "colorblind" approach to university admissions, positing that affirmative action perpetuates racial stereotyping and negatively impacts certain racial and ethnic groups in a "zero-sum" admissions process. As Chief Justice Roberts stated: "Many universities have for too long … concluded, wrongly, that the touchstone of an individual's identify is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice." (Opinion of the Court ("Op."), 40.)

In contrast, Justice Sonia Sotomayor's dissent (in which Justice Elena Kagan joined and Justice Ketanji Brown Jackson joined as to UNC) assailed the majority's "colorblind" approach as naïve and ahistorical in a society rooted in slavery and Jim Crow laws that is still plagued by ongoing and systemic racial discrimination. In Justice Sotomayor's words: "The Court cements a superficial rule of colorblindness as a constitutional principle in an endemically segregated society . . . . In a society where race continues to matter, there is no constitutional requirement that institutions attempting to remedy their legacies of racial exclusion must operate with a blindfold." (Sotomayor Dissent, 2, 68.)

Justices Clarence Thomas, Neil Gorsuch, and Brett Kavanaugh wrote concurring opinions while Justice Jackson wrote a separate dissenting opinion in the UNC case. Outlined below is a summary of the majority and dissenting opinions as well as guidance for universities on lawful strategies universities can take to promote diversity consistent with the Court's decision.

I. The Majority Opinion

In the consolidated appeals *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina et al.* ("*SFFA*"), a six-justice majority held that university admissions processes that consider race violate Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment (respectively). In so ruling, Chief Justice Roberts, joined by five other Justices, departed from precedent that permitted universities to consider applicants' racial identities alongside other factors in admissions decisions. This precedent includes *Grutter v. Bollinger*, a case in which the Court held that the University of Michigan Law School's use of racial preferences in student admissions did not violate either the Equal Protection Clause of the Fourteenth Amendment (which bars racial discrimination by government

entities, including public schools like UNC) or Title VI of the Civil Rights Act of 1964 (which bars entities that receive federal funding, including institutions like Harvard, from discriminating based on race).

Chief Justice Roberts noted that, in Harvard's admissions process, an application evaluator "can and does consider the applicant's race" to ensure that Harvard does not have a "'dramatic drop-off' in minority admissions from the prior class." (Op., 3.) At UNC, admissions officers are "required to consider race and ethnicity as one factor" in review of applications, and a subsequent committee is also permitted to consider the applicant's race. (Op., 4-5.)

The Court held that both schools' admissions processes failed to satisfy the strict scrutiny test that applies to racial discrimination by the state or recipients of federal funds. (Op., 15-22.) To survive this standard of review, racial classification must be used to "further compelling governmental interests," and the use of race must be "narrowly tailored" to achieving the compelling interest. (Op., 15.) Although previous decisions (including *Regents of University of California v. Bakke* in 1978 and its progeny) held that schools' use of race as a "plus factor" to obtain the educational benefits that flow from a racially diverse student body satisfied strict scrutiny, *SFFA* held that the challenged admissions programs failed to satisfy strict scrutiny in four ways:

First, the Court held that Harvard and UNC failed to operate their race-based admissions programs in a manner that is "sufficiently measurable to permit judicial review." (Op, 22.) That is, the interests that the schools offered in defense of their programs—"training future leaders, acquiring new knowledge based on diverse outlooks, promoting a robust marketplace of ideas, and preparing engaged citizens and productive citizens" (Syllabus, 6)—while "commendable," were "not sufficiently coherent" and could not be measured. (Op., 23-24.)

Second, the Court held that the admissions programs did not have "a meaningful connection" between the means they employ (race-consciousness) and the goals they pursue (improved educational environment and outcomes). (Op., 24-25.) The Court reasoned that the imprecision of the racial categories used by the schools undermines the goals they asserted. (Op., 25.)

Third, the Court ruled that the admissions programs impermissibly used race as a "negative"—in zero-sum college admissions decisions, "a benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." (Op., 27, 28.)

Fourth, the Court held that admissions programs impermissibly use race as a stereotype. That is, the programs are predicated on the belief that minority students express a characteristic minority point of view or perspective. (Op., 28-30.) Notably, the Court leveraged its broad spectrum of civil rights precedents that outlawed race-based state action, including the seminal *Brown v. Board of Education* decision barring "separate but equal" educational systems (Op., 12-14), to support the majority's position that "[e]liminating racial discrimination means eliminating all of it." (Op., 15.)

Prior Supreme Court decisions that permitted the consideration of race as a factor in admissions noted that such programs could not continue forever. (Op., 21.) In 2003, Justice Sandra Day O'Connor, writing for the Court in *Grutter v. Bollinger*, expressed an expectation that the use of racial preferences would be unnecessary 25 years in the future (i.e., by 2028). The *SFFA* decision regarded *Grutter*'s temporal expectation to be "oversold" (Op., 33), and found Harvard and UNC's inability to commit to an end point for their race-conscious admissions programs problematic (Op., 34). The schools had committed to using race-conscious admissions until there was "meaningful representation and meaningful diversity" on campus (Op., 22, 30); the Court held that their stable undergraduate student body racial demographics and refusal to end race-conscious admissions until

an unspecified percentage had been achieved was evidence of impermissible "racial balancing." (Op., 30-32.)

While the *SFFA* majority opinion rejected the consideration of race as exercised in the Harvard and UNC programs, it also expressly permitted universities to consider "an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." (Op., 39.) At the same time, the Court cautioned that "essays or other means" would not be a permissible indirect way to consider race and thus evade the prohibition on race-conscious admissions processes. (Op., 39.) The Court suggested that a more individualized analysis, in which any consideration of race would be tied to the particular applicant, would solve the constitutional infirmity from which Harvard and UNC's processes suffered. (Op., 40.)

II. Dissenting Opinions

Justice Sotomayor began her dissent by stating that the Court long ago concluded that the guarantees provided under the Fourteenth Amendment's Equal Protection Clause can be enforced through race-conscious means in a society that is not colorblind. The Court in *Brown v. Board of Education* recognized the constitutional necessity of racially integrated schools, especially in the light of the harm inflicted by segregation, and noted that education is essential to have progress in a democratic society. (Sotomayor, J., dissenting, 4.) Justice Sotomayor noted that, for four-and-a-half decades, the Court has extended *Brown*'s legacy to higher education by allowing colleges and universities to consider race in a "limited way" with the purpose of promoting the important benefits of racial diversity. (Sotomayor, J., dissenting, 2.) This has helped equalize educational opportunities for all students and increased diversity in college classrooms. As a result, race-conscious admissions policies have advanced the Constitutional guarantee of equality and created more inclusive higher learning environments. (Sotomayor, J., dissenting, 2.)

The dissent criticized the Court for rolling back precedent and progress in precluding limited consideration of race in admissions. Justice Sotomayor emphasized that diversity is a fundamental American value and that universities should be able to use all available tools, including race, to achieve diversity in education. This diversity, she argued, is important for three reasons: (i) it promotes cross-racial understanding and helps break down racial stereotypes; (ii) it prepares students for a diverse workforce; and (iii) it promotes social cohesion and advances the goals of equal protection. (Sotomayor, J., dissenting, 16.)

Justice Sotomayor criticized the majority opinion for disregarding the Court's own precedents, particularly since universities have long relied on these precedents in developing their admissions policies. (Sotomayor, J., dissenting, 37). Moreover, in contrast to the majority, Justice Sotomayor argued that the civil rights cases affirm that the Equal Protection Clause permits race-conscious measures; "the desegregation cases that followed Brown confirm that the ultimate goal of that seminal decision was to achieve a system of integrated schools that ensured racial equality of opportunity, not to impose a formalistic rule of race-blindness." (Sotomayor. J., dissenting, 12.)

Although the majority opinion did not evaluate admissions to military institutions, Justice Sotomayor rejected the Court's "attempts to justify its carveout" based on the fact that military academies were not a party, noting that the same could be said of other non-parties, "including the religious universities supporting respondents, which the Court did not exempt from its sweeping

opinion." (Sotomayor, J., dissenting, 40, citing Brief for Georgetown University et. al. as *Amici Curaie* 18-29 (prepared by Quinn Emanuel.)

Justice Jackson, who participated only in the UNC case, focused her dissent on the majority's dismissal of measurable race-based gaps in health, wealth, and well-being in America. (For instance, Justice Jackson noted that, in 2019, Black families' median wealth was approximately $24,000, while White families' median wealth was approximately eight times that (about $188,000). (Jackson, J., dissenting, 11.)) "With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces 'colorblindness for all' by legal fiat. But deeming race irrelevant in law does not make it so in life." (Jackson, J., dissenting, 25.) In Justice Jackson's view, race-conscious admissions policies level the playing field and provide opportunities for individuals who have historically been disadvantaged.

III. Strategies to Promote Continued Diversity in Higher Education

Although many universities have long been preparing for the possibility that the Court would outlaw affirmative action in admissions, the decision has now made such planning essential. The decision leaves open the door for universities to lawfully engage in several diversity-enhancing strategies, and Justice Sotomayor's dissent calls upon universities to "continue to use all available tools to meet society's needs for diversity in education." (Sotomayor, J., dissenting, 69.) Seven such approaches are outlined below. Any such strategy, however, should bear carefully in mind the Court's caution that universities may not use "essays or other means" as an end-run around its prohibition on race-based admissions. (Op., 39.)

First, the Court stressed that universities may consider an individual applicant's discussion of the impact of race on his or her life. As the Court wrote: "[N]othing 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." (Op., 39.) Thus, universities may lawfully solicit on college applications supplemental information about the individual challenges applicants have experienced, including challenges related to racial identity, so long as the university does not use that information as a means of circumventing the Court's prohibition. Similarly, universities can solicit information as to the unique geographic, socio-economic conditions, or family backgrounds students have experienced, or the organizations in which they have displayed leadership, leaving room for students, including members of underrepresented groups, to discuss "*that student's* unique ability to contribute to the university." (Op. 40.)

Second, universities may consider expanding the recruitment of low-income and first-generation college students, including by assuring them that they still have opportunities to gain admission at top schools despite the Court's decision. They may also lawfully give increased weight to students who grew up and were educated in communities that score lower on the social mobility index. For instance, Harvard economist and McArthur "genius award" winner Raj Chetty and several other economists have mapped the social mobility index for communities across the United States, using IRS data for over 40 million families. *See* www.opportunityinsights.org. Colleges and universities can use such socio-economic data to help evaluate the challenges students have overcome. And many of the urban communities with low mobility scores such as Memphis, Charlotte, and Atlanta have large populations of Black students, while some rural communities in South Dakota and Arizona have large Native American populations. *See* "Economic Mobility: Measuring the American Dream," www.huduser.gov. Colleges and universities may develop partner "feeder" schools in these regions with which they could invest resources to improve outcomes, as well as give "plus" factors to

promising students who have overcome enormous socio-economic and educational obstacles to be competitive in admissions.

Third, universities could expand partnerships with organizations such as "A Better Chance," "Questbridge," "Posse," and other programs that mentor and support high-achieving students from underrepresented backgrounds who may be overlooked in the normal admissions process but who can succeed in the nation's top schools. Scaling up these programs and others could boost the pool of diverse applicants applying to colleges and universities. According to researchers Caroline M. Hoxby of Stanford and Christopher Avery of Harvard, low-income students with SAT and ACT scores and grades that place them in the top 10 percent of all students number between 25,000 and 35,000. See https://www.brookings.edu/articles/the-missing-one-offs-the-hidden-supply-of-high-achieving-low-income-students/#:~:text=Abstract-,Caroline%20M.,between%2025%2C000%2D35%2 C000%20of%20them.

Fourth, increasing the number of transfer students from community colleges and recruiting students from the military could provide a pathway to heighten racial and ethnic diversity on college campuses since many members of underrepresented groups often begin their academic or professional careers at such institutions. According to NPR, 56% of Native Americans, 52% of Latinos, and 43% of Black undergraduates are enrolled in community colleges. *See* https://www.npr.org/2018/12/04/667381514/top-colleges-seeking-diversity-from-a-new-source-transfer-students. High-performing students from these institutions could enhance diversity in higher education: for example, nearly one-third of students in the University of California system transfer from community colleges. *See* https://www.forbes.com/sites/nancyleesanchez/2021/08/10/an-answer-to-increasing-diversity-at-selective-schools-community-college-transfer/?sh=694f12ce4cf3.

Fifth, making "test-optional" policies permanent may give students from underrepresented groups greater flexibility in presenting their strengths to admissions officers.

Sixth, public universities might consider adopting "10% plans" that require admission of students in the top ten percent of their graduating high school class. Texas' Top 10% Plan, for example, was developed in 1997 after a 5th U.S. Circuit Court of Appeals ruling banned the use of race in admissions in the three states within its jurisdiction, including Texas. California and Florida also have similar plans. Although the results have been mixed, proponents say that it has increased the overall racial diversity of student bodies by recruiting.

Finally, over the long-term, elite colleges and universities may consider how they can expand the raw number of students admitted to their institutions to create more opportunities to recruit and admit students from non-traditional backgrounds.

Although none of these strategies can alone provide a direct route to fostering diversity on college campuses, they may allow institutions of higher education to continue to pursue their educational missions of educating and preparing diverse citizen leaders for our increasingly challenging world.

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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