High Court Decision in College Admissions Case Has K–12 Implications

Considering race in school assignment will become even harder after Harvard, UNC lose

By JOSHUA DUNN

In 2007, CHIEF JUSTICE JOHN ROBERTS famously declared in *Parents Involved in Community Schools v. Seattle* that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." In *Students for Fair Admissions* (SFFA) *v. Harvard* and *Students for Fair Admissions v. University of North Carolina,* the Supreme Court moves much closer to Roberts's position on racial discrimination. The court's ruling, announced June 29, 2023, will have significant effects on college admissions policies and on K–12 education.

SFFA, an organization created by Edward Blum, had contended that Harvard's use of race in college admissions violates Title VI of the Civil Rights Act of 1964, which forbids racial discrimination by any entity receiving federal money. UNC, SFFA argued, violated not only Title VI but also, as a state institution, the Equal Protection Clause of the 14th Amendment. The Supreme Court agreed with both claims. The court combined both cases under *SFFA v. Harvard* but focused its analysis solely on the 14th Amendment. Previously it had held that a violation of the Equal Protection Clause would also constitute a violation of Title VI for institutions receiving federal funds; hence, the court's equal protection analysis was sufficient to decide both cases.

Echoing his opinion in *Parents Involved,* Roberts concluded in his majority opinion that "eliminating racial discrimination means eliminating all of it." Joined by Justices Clarence Thomas, Samuel Alito, Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, he offered three primary reasons for ruling against Harvard and UNC: their programs 1) "lack sufficiently focused and measurable objectives warranting the use of race," 2) "unavoidably employ race in a negative manner, involve racial stereotyping," and 3) "lack meaningful end points."

With the first, since racial classifications are inherently suspect and must be given strict scrutiny, the compelling interest claimed by the institutions and the means of accomplishing them must be measurable. Harvard's and UNC's goals, Roberts said, were "commendable" but inherently "elusive" and "imprecise."

On the second, Roberts said that the court had previously ruled that race could never be used as a negative factor in evaluating a student for admission. Both Harvard's and UNC's admissions programs did so, according to the court, effectively penalizing students who were not Black or Hispanic. Perhaps most important, though, it's difficult to see how any use of race in admissions could survive, as admissions is, as Roberts pointed out, a "zero-sum" game. If it's used as a plus factor that leads to one student being admitted, someone else who is not admitted because they do not have that plus factor inevitably suffers. Even though the court did not explicitly declare that it was overturning 2003's *Grutter v. Bollinger,* which said that diversity was, temporarily, a compelling interest justifying the use of race in admissions, that opinion seems to be overturned in fact.

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Demonstrators rally at the steps of the U.S. Supreme Court to protest affirmative action and racial discrimination against Asian American students.

The court's third reason, though, might have been the most important. Roberts pointed out that the court had clearly indicated in *Grutter* that affirmative action must have an end point. Justice Sandra Day O'Connor, in fact, said, "We expect that 25 years from now, the use of racial preferences will no longer be necessary." Even if for some reason that 25-year mark could not have been met, it would have been smart for Harvard and UNC to at least offer a tentative date. Their refusal to do so at any point in the litigation looks like a catastrophic miscalculation. At oral argument a couple of the conservative justices appeared sympathetic to the idea that universities should have some flexibility to bring the use of racial preferences to a close on their

own if they could point to reasonable time frame for doing so. But the message the majority took from Harvard and UNC's obstinance was that universities could not be trusted to work toward eliminating racial preferences on their own. "There is no reason to believe," Roberts said, "that respondents will—even acting in good faith—comply with the Equal Protection Clause any time soon."

The majority also appeared concerned that colleges and universities deeply committed to racial preferences would try to evade their ruling by adopting facially neutral admissions policies that nevertheless had a discriminatory effect. Much of the court's reasoning seemed designed to warn universities that engaging in various evasions would only put them in more legal jeopardy. Roberts said, "universities may not simply establish through application essays or other means the regime we hold unlawful today." He said further that the ruling does not prohibit "universities from considering an applicant's discussion of how race affected his or her life" but then gave specific examples of how that must be done. "A benefit to a student who overcame racial discrimination, for example, must be tied to *that student's* courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to *that student's* unique ability to contribute to the university."

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For universities, this likely means that admissions programs tightly constructed to increase socioeconomic diversity would survive legal scrutiny. However, if socioeconomic plans ended up leading to consistent percentages across racial groups across multiple admissions cycles, the court would be inclined to rule against them. In short, anything that looks like it is giving a systematic advantage based on race would be suspect. As well, if a school were to announce publicly that it was switching to a socioeconomic plan for the purpose of maintaining racial diversity, that would also be unconstitutional under the court's decision. Facially neutral programs that nevertheless have a discriminatory effect or were intended to have a discriminatory effect have long been considered unlawful.

The three members of the court's current liberal bloc, Justices Sonia Sotomayor, Elena Kagan, and Ketanji Brown Jackson, dissented. Jackson offered a separate dissent since she had recused herself from the Harvard case in light of her recent service on Harvard's board of overseers. Sotomayor, joined by Kagan and Jackson, accused the majority of "roll[ing] back decades of precedent and momentous progress." In a biting dissent, Jackson said the majority's opinion suffered from a "let-them-eat-cake obliviousness" that disregarded the ways race still matters in American life.

For K–12 education, the court's rulings should settle once and for all whether school districts can use race in policies assigning students to schools. In *Parents Involved,* the majority had ruled that race could not be used. However, in a famously inscrutable controlling concurring opinion, Justice Anthony Kennedy had said that while the policies struck down by the court were unconstitutional, he was unwilling to foreclose the possibility of a school district fashioning a constitutionally acceptable policy. This led some, including the Obama administration's Department of Education, to treat the four dissenters in the case along with Kennedy's concurrence as a majority opinion. The June 2023 opinion clearly eliminates that as a possibility.

The opinion will also affect ongoing litigation around magnet schools such as Thomas Jefferson High School for Science and Technology in Fairfax County, Virginia. In the wake of the George Floyd protests in 2020, the school district changed the admissions plan for the school. The previous admissions policy required students to take a rigorous entrance exam to gain admission to the school, which has been consistently ranked as one of the best high schools in the country. However, the board desired to racially balance the school to make it more closely reflect the demographics of the school district. To do so, it adopted a facially neutral "holistic" admissions policy. In the last year under the old system based on grades and a standardized test, Asian-American students comprised 73 percent of the admitted students. Under the first year under the new system, that percentage dropped to 54 percent.

The new policy was challenged in federal court by the Coalition for TJ, a group of district parents. The district court ruled in their favor, but that decision was overturned by a Fourth Circuit panel this May.

The author of the appellate decision, Judge Robert King, had ruled that the new policy did not harm Asian students and "visits no racially disparate impact on Asian American students. Indeed, those students have had greater success in securing admission to TJ under the policy than students from any other racial or ethnic group." The assertion that a drop of 19 percentage points doesn't have a disparate impact on you because there are still more of you than others is not something that will survive in light of the Supreme Court's June 2023 ruling.

Moving forward, this certainly does not mean the end of litigation either at the college or K–12 level. However, if a university wants to adopt a "holistic" admissions policy, it would be well-advised to make sure that no one in its administration or admissions department ever said anything that could remotely sound like their intent is to achieve goals related to racial representation. And should a school district want to adopt an admissions policy similar to Fairfax's, it would be well-advised to make sure that members of its board or administration had never made comments about the need to engage in anything resembling racial balancing.

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