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’ 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 admissions, that opinion seems to be overturned in fact.

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 obstinacy 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.”

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, any plan that could remotely sound like their intent is to achieve goals tied to race still matters in American life. Indeed, those students have had greater success in securing admission to TJ under the policy than students from any other age 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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