Affirmative Action and the U.S. Supreme Court

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On June 29, 2023 the U.S. Supreme Court handed down a decision that effectively ends the consideration of race as a factor in public and private university admissions. It was a 6-3 decision split along ideological lines with six conservative judges appointed by Republican presidents voting to end the practice and three liberal judges appointed by Democratic presidents voting in dissent to uphold it. The case, *Students for Fair Admissions, Inc. v. The University of North Carolina et al*, involved admission practices at two highly selective elite universities, one private—Harvard University—and one public—The University of North Carolina (with Justice Jackson recusing from the portion of the decision relating to Harvard University where the vote was then 6-2). Chief Justice Roberts, writing for the majority, maintained that using race as a "plus factor" in consideration of admission violates the equal protection clause of the 14th amendment which the majority contends is "colorblind." The decision overturned four decades of Supreme Court precedent that had allowed consideration of race as a factor for college admissions. Prior decisions and subsequent challenges had upheld the principle that race conscious admissions practices provided an educational benefit to institutions of higher learning in helping to create diverse student bodies. In overturning long-standing legal precedent, the majority argued that the potential educational value of a racially diverse student body was too "amorphous," "unmeasurable," and "imponderable" to justify its continued practice.

The majority conceded that America is not a color-blind society but stipulated that the Constitution is "colorblind" in its application and therefore must disregard race as a consideration. In dissenting opinions, the liberal justices vehemently disagreed with the majority's assertion that the law is "colorblind," pointing out the long history of race-conscious federal laws and regulations that directly take race into account, including provisions of the Civil Rights Act of 1964 and Voting Rights Acts of 1965. As Justice Sotomayor, writing in dissent for the minority, notes, the majority concedes that racial classifications are "constitutionally permissible if they advance a compelling interest in a narrowly tailored way" but not in the case of racially conscious university admissions policies. Justice Sotomayor further states that, "Instead, what the Court actually lands on is an understanding of the Constitution that is "colorblind" *sometimes* [sic], when the Court so chooses. Behind those choices lie the Court's own value judgments about what type of interests are sufficiently compelling to justify race-conscious measures." Or as Justice Jackson, writing separately, in dissent put it, "With let-them-eat- 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."

In a prior decision that upheld the use of race as a consideration in admissions, *Grutter v. Bollinger* (2003), Justice Sandra O'Conner writing for the 5-4 majority wrote that, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest [in student body diversity] approved today." Twenty years later, the majority rejected that reasoning on the grounds that the interest or benefits of student diversity cannot be precisely measured and that the endpoint for its use could therefore not be established. Again, the minority vigorously disagreed stating that many other aspects of the law including such lofty goals as "public confidence in judicial integrity" do not require such precision and are not held to such a

standard. The minority further contended that because a date certain for the need for such a provision could not be firmly established does not invalidate its necessity, arguing in essence that race conscious admissions should remain in place as long as it takes to establish genuine equality of opportunity for all races.

Another key distinction in the framing of the argument on affirmative action (Carter and Lippard 2020) between conservative and liberal judges concerned the categorical versus individual meaning of race. The majority rejected any categorical, across-the-board consideration of race as either a legitimate classification or as a foundation for remedy. The majority did, however, indicate that universities could consider how race impacted the lives of individual applicants. Writing for the majority, Chief Justice Roberts noted that "…nothing 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," but the Court also warned that "universities many not simply establish through application essays or other means the regime we hold unlawful today." In dissent, Justice Sotomayor referred to this caveat as "but an attempt to put lipstick on a pig," noting that, "because the Court cannot escape the inevitable truth that race matters in students' lives, it announces a false promise to save face and appear attuned to reality. No one is fooled."

Another caveat to the majority's ruling appears in a footnote in which the majority provides a carve-out for military academies. The Court ruled that military academies were not party to the cases reviewed and that "this opinion also does not address the issue, in light of potentially distinct interests that military academies may represent." These interests presumably involve national security and military preparedness which might be adversely affected by a disconnect between an officer corps that is predominately white and enlisted personnel who are

disproportionately persons of color. With this caveat, the Court permitted the continued use of race conscious admissions for military academies, which the Court otherwise emphatically rejected on principle for all other institutions of higher learning. How the interests of the military academies are any different than in society as a whole or overrides all the principled objections to race conscious policy the Court identified for all other educational institutions is not specified, including, for instance, for over 1,700 public and private universities with Reserve Officer Training Corps (ROTC) programs.

The long-term effects of this ruling are unclear. Additional court challenges will likely result over the implementation of the Court's ruling. Without counter measures, the immediate consequence is likely to result in a decline in the percent of minorities enrolled in universities, particularly elite universities. Here, there is already data from universities that have previously eliminated race-conscious affirmative action where the percentage of admissions of people of color sharply declined as a result. These declines are partly due to the elimination of race as a potential plus factor as well as fewer minorities applying to those same schools as a result.

Anticipating the elimination of race-conscious admissions, The Georgetown University Center on Education has done an analysis of the likely effects of this outcome (Carnevale et al 2023). It concludes that it might be possible to restore the effects of race-conscious admissions policies through other means. Specifically, these means might include various class-based considerations. Class based policies would disproportionately advantage minorities that are typically less affluent than White students. These policies might include giving additional consideration for admission to low income and low wealth applications (especially wealth differences which are greater) and first-generation college applicants (since minorities are far more likely than White students to be the first in their families to attend college) and eliminating

or reducing tuition and fees for economically disadvantaged applicants. Another way to create more racially diverse student populations is to grant automatic admission to applicants graduating in the top percentiles of their high school classes (usually top 10%), which is most effective for increasing minority enrollments in geographic areas that have the highest rates of racial residential segregation. This practice has been adopted by some high-profile universities, most notably The University of Texas at Austin. Universities might also engage in or expand outreach efforts designed to encourage minorities to apply. In addition to these measures, colleges and universities would need to eliminate other preferences that tend to favor White applicants including legacy applicants, children of wealthy university donors, and student athletics.

While minority athletes are often overrepresented in some college sports such as basketball and football, they are often underrepresented in specialty sports that are especially popular at elite institutions such as squash, lacrosse, fencing, golf, rowing, swimming and diving, and others. Eliminating special consideration in admissions for athletes would be controversial since college athletics is highly valued, especially at top schools with high profile athletic programs. Alternately, colleges and universities could return to an era of more genuinely amateur athletic programs by fielding teams through walk-on try outs among students already admitted based on competitive academic criteria.

Affirmative action has long been a highly contentious issue that has divided American public opinion as it has divided the Court. Most of the public's objection to affirmative action rests on the contention that under these practices, students with lesser academic qualifications can be admitted over those with higher academic qualifications resulting in what critics characterize as "reverse discrimination." However, additional consideration for admission based

on non-academic criteria has long been part of the college admission process, including giving preference to sons and daughters of alumni, applicants with athletic or artistic ability, leadership or extracurricular participation, or personal character.

Geographic consideration, for instance, is another non-academic consideration. This includes admitting students from many states or different regions within a state in the interest of creating a diverse student body. In the other direction, most state universities also impose limits on the number of out-of-state students admitted. For instance, in the University of North Carolina system, which was a party to the recent affirmative action case, there is a system requirement that out-of-state students should not exceed 18% of incoming classes. If individual state schools within the system exceed this limit, they are punished by a reduction in state funding per student. What this means in practice is that out-of-state applications are more competitive for admission than in-state applicants; that is, it usually takes higher grades and test scores to be admitted as an out-of-state student. Although this means that more academically qualified out-of-state applicants are denied admission than would otherwise be the case, this cap makes sense in several other ways. It makes sense that the state university includes students predominately from that state, because the budget of the state universities is supported in part by state tax dollars. Out-of-state students do not pay in-state taxes. Even though out-of-state tuition is higher as a result, there is still a state subsidy for all students. These are all considerations beyond strict academic qualifications.

Relying strictly on academic qualifications can be an exercise in hair splitting. Elite institutions such as Harvard University, for instance, typically have many more applicants with perfect GPA and test scores than they have slots to fill, so consideration of other non-academic criteria becomes necessary. Another way to increase diversity in universities would be for

universities to set a minimum academic threshold for admission where the thresholds for elite universities could be higher than other institutions. Once an applicant pool with the minimum acceptable academic qualifications was assembled, a lottery system among those applicants could be initiated until an incoming class is filled. In this way, all non-academic considerations would be eliminated. However, such a system has not been seriously proposed, in part because schools like to consider factors other than just academics to assemble their student body.

Another objection to affirmative action programs is the assumption that such programs result in academically unqualified students being admitted. Affirmative action programs, however, were never designed to admit academically unqualified students. The programs were designed to give additional consideration *among* qualified applicants as is the case for several other non-academic qualifications described above; however, the consideration of race, which is used to address historical inequities and to create racially-diverse educational settings, has met stiff public resistance, especially among conservatives. One result of this recent court decision is that the elimination of race as a consideration in admissions is likely to put more scrutiny on other non-academic criteria, especially legacy admissions which strike most as fundamentally unfair. For instance, four days after the Supreme Court's decision on affirmative action, a group of litigants filed a federal civil rights complaint against Harvard University challenging its "discriminatory practice of giving preferential treatment in the admissions process to applicants with familial ties to wealthy donors and alumni." In short, this recent Court decision on affirmative is unlikely to settle controversies over college admissions programs and will likely result in a steady stream of further litigation.

References

Carnevale, Anthony P., Zachary Mabel, and Kathryn Peltier Campbell. 1923. *Race-Conscious*

Affirmative Action: What's Next. Washington DC. Georgetown University Center on Education and the Workforce.

Carter, J. Scott, and Cameron D. Lippard. 2020 *The Death of Affirmative Action?: Racialized Framing and the Fight Against Racial Preferences in College Admissions*. Bristol, United Kingdom: Bristol University Press.