

U.S. Supreme Court Strikes Down Race-Conscious Admissions — What Does it Mean for Employers?

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U.S. Supreme Court Strikes Down Race-Conscious Admissions – What Does it Mean for Employers?

By Jim Thelen, Alyesha Asghar Dotson, Kelli Fuqua, and Lysette Roman on June 30, 2023

- On June 29, 2023, the U.S. Supreme Court found that Harvard's and UNC's race-conscious admissions practices are unconstitutional.
- The *Harvard/UNC* decision does not *directly* impact employment law—including federal contractors with mandatory Affirmative Action programs (AAPs) and private employers with voluntary Inclusion, Equity & Diversity (IE&D) initiatives—but may impact the way the public, employees, the judiciary, government agencies, and the plaintiff's bar evaluate such programs.

On June 29, 2023, the United States Supreme Court ruled that race-conscious admissions practices at Harvard College and the University of North Carolina, which are generally similar to how numerous other higher education institutions around the country have considered an individual's race in the college admissions process, violate the Fourteenth Amendment's Equal Protection Clause of the U.S. Constitution.

The Court did not explicitly overturn its two-decades'-old precedent finding that a narrow consideration of race among other factors in the admissions process could pass "strict scrutiny" constitutional muster. But for all practical purposes, the Court's ruling effectively makes unlawful any ongoing direct consideration of a college applicant's race in achieving student diversity in higher education.

The cases before the Court were filed by “Students for Fair Admission,” a nonprofit organization which believes racial preferences in college admissions are unconstitutional. Although both cases involved the same general question – is *any* consideration of an applicant’s race in the college admissions process legally permissible? – some legal commentators speculated that Harvard’s private status and UNC’s public status may have given the Supreme Court a basis to consider whether the public versus private distinction matters insofar as affirmative action in admissions is concerned. (As a private college, Harvard is not subject to the U.S. Constitution’s 14th Amendment prohibition against race discrimination; as a federal grant recipient, however, Harvard is subject to what the Supreme Court has previously held to be essentially the same prohibition found in Title VI of the federal Civil Rights Act of 1964. UNC, a public university, is subject to both.)

Harvard and UNC each defended against the claims by saying they consider race as only one of many factors, alongside other considerations such as extracurricular activities, socioeconomic background, and military veteran status – all within the constitutional parameters established by previous Supreme Court decisions. The institutions had also said that their attempts to use race-neutral ways of diversifying their student bodies have been unsuccessful.

Although the Court’s decision is limited to the universe of college admissions, federal, state, and local government contractors that are subject to affirmative action requirements as well as employers with voluntary inclusion, equity, and diversity (IE&D) initiatives in place will have questions regarding the impact of the Court’s holdings on their continuing obligations and programs.

This article will identify and offer some predictions regarding the implications of the *Harvard/UNC* decision for employers in higher education, private employers with voluntary IE&D programs, and government contractors subject to affirmative action requirements.

Brief Historical Background

The Supreme Court created the constitutional framework for the use of race-conscious admissions in higher education in 2003 in a pair of decisions involving the University of Michigan: *Gratz v. Bollinger* and *Grutter v. Bollinger*. Those decisions established the affirmative action standards used widely by colleges and universities since—namely, that race, when considered, should be considered on an individualized, narrowly tailored basis. Part of the foundation for the Court’s decision back then was its deference to the

university's judgment that it had a compelling interest in fostering diverse student bodies. This standard was largely upheld only seven years ago in *Fisher v. University of Texas*.

In a the majority opinion from the Court's 2003 *Grutter* decision, then-Justice Sandra Day O'Connor foretold "that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." Only 20 years on from *Grutter*, the Court's decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* indicates that a majority of the current Court finds consideration of race as an individual factor in the admissions process to be constitutionally problematic, notwithstanding the question of whether considering race as part of a holistic application review is necessary to achieve diversity, particularly in light of the unclear "end point" for such considerations in the future.

Implications in Higher Education Institutions

Stated plainly, race-conscious admissions programs at colleges and universities, both public and private, "must [now] comply with strict scrutiny, may never use race as a stereotype or negative, and must – at some point – end." The Court noted, however, that "nothing prohibits universities from considering an applicant's discussion of how race affected the applicant's life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university." To this end, colleges and universities may consider ways in which to incorporate such prompts in the admissions process without running afoul of the law.

Related to the admissions issue is whether the Court's analysis in the *Harvard/UNC* decision of Title VI in the admissions process will extend to employment decisions in higher education. Title VI is limited to prohibiting intentional discrimination in a federally funded program, which, insofar as employment practices are concerned, applies only to programs "where a primary objective of the Federal financial assistance is to provide employment." Higher education employers receiving federal funding could be vulnerable to additional discrimination challenges—aside from the standard Title VII claims—seeking to extend the reasoning set forth in the *Harvard/UNC* decision. They should be careful to note, then, when federal financial assistance is used for employment and, consequently, when race-conscious employment efforts may be analyzed under the same logic applied by the Supreme Court to admissions programs.

Implications in Other Employment Contexts

During oral arguments on October 31, 2022, Justice Elena Kagan highlighted the potential impact of these cases on the workplace. In the *Harvard* hearing, she asked the plaintiff whether judges can consider the benefits of diversity when choosing whom to hire for judicial clerkships. More pointedly, Justice Kagan added, “businesses ...find it necessary... in order to achieve their economic objectives to have racially diverse workforces...[a]nd the question is, when race-neutral means can’t get you there, don’t get you there, when you’ve tried and tried and they still won’t get you there, can you go race-conscious?” Although Justice Kagan’s inquiry goes explicitly unanswered in the *Harvard/UNC* decision, the reality is that employers—both public and private, academic and non-academic—are already facing other challenges, sometimes legislative, to their own IE&D initiatives.

As explained in Littler’s last [article](#) on this issue, the legal framework for affirmative action programs and IE&D initiatives differs across academic and employment contexts. The Supreme Court’s rulings under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act apply *only* to student-admission decisions in the higher education context. Distinct from the statutes and case law applicable to higher education providers, non-higher education employers are governed by Title VII of the Civil Rights Act and similar state and local civil rights laws. Additionally, while higher education could previously use race as a factor in admissions decision making in certain cases, Title VII has *invariably* prohibited the use of race and other protected characteristics in employment decision making. Specifically, under Title VII, as interpreted by the courts and the EEOC, employers may *only* consider race as a factor in making selections:

1. On a voluntary basis where an employer can show:

- (a) a manifest imbalance between groups in underrepresented job categories as evidenced by structured statistical analysis,

- (b) narrowly tailored measures to address specific imbalances; and

- (c) such programs are temporary/limited duration; **or**

2. When legally mandated. This exception does not apply to affirmative action programs implemented by government contractors pursuant to OFCCP’s rules or similar state or local requirements. While the equal employment-related requirements that apply to federal contractors are generally referred to under the rubric “affirmative action,” these requirements do not involve, or even permit

employers to consider race or ethnicity in making employment-related decisions. For this reason, such requirements do not raise the types of concerns that were at issue in the *Harvard* and *UNC* cases. On the other hand, there are some state or local governments that purport to require their vendors to establish goals and timetables for the utilization of protected classes in a manner that may be unconstitutional in light of the Supreme Court's decision in these cases. State and local contractors should exercise caution when faced with such demands.

For all practical purposes, the exception for legally mandated preferences has no continuing relevance and employers are very unlikely to be able to satisfy the conditions required to justify voluntary preferences. Therefore, as cautioned below, the implementation of voluntary IE&D initiatives requires considerable tact and legal vetting to avoid actual, or perceived, diversity quotas and impermissible employment decisions based on a protected category.

Moving Forward

Over the last few years, the global trend towards prioritizing IE&D launched affirmative action—in both the education and non-education context—into the spotlight. In recent years, for example, employers have faced challenges to their hiring, promotion, or termination practices under the lens of “reverse racism” and “reverse discrimination.” Considering the impact of the *Harvard/UNC* decision on college admissions, challenges to race-based employment practices—or perceived employment practices based on any protected category—may increase or change shape in an effort to force a national standard for employers similar to college admissions.

Moreover, some states are already increasing their legislative efforts to curtail IE&D programs in the workplace. Texas, for example, recently passed Senate Bill 17, which prohibits higher education institutions from establishing or maintaining IE&D offices, requiring diversity training for students and employees, or making employment decisions that take race into account. In states where such legislation has already taken effect or will soon take effect, employers should be mindful to ensure that any IE&D initiatives they previously established do not run afoul of the law as modified.

Considering this, employers should be careful to vet IE&D initiatives with legal counsel prior to implementation. As to existing IE&D initiatives, employers could analyze them under privilege considering the Court's decision and evaluate their relative risk considering the company's IE&D values or qualitative goals.

The following guardrails should be placed at the front and center of every IE&D initiative:

1. Employers should make employment decisions – including, but not limited to hiring and promotion – based on *business-related criteria* and not based on protected characteristics.
2. Employers should not interview or hire individuals from historically marginalized communities simply to meet a *quota* or quantitative goal.
3. Decision makers such as hiring managers, interviewers, talent acquisition team members, Human Resource professionals, and IE&D professionals should be trained on federal and state equal employment and anti-discrimination laws so they understand the legal framework governing their employment decisions.
4. Employers may consider incorporating unconscious bias training to further prevent unlawful (albeit inadvertent) employment decisions based on protected characteristics. However, employers should consult with counsel to ensure that any such training is constructed so that it does not run afoul of “anti-Woke” laws in certain jurisdictions.
5. Remember that in successful IE&D programs, *one size does not fit all*.
6. In response to Justice Kagan’s concern – described above – employers may consider what they can do to supplement the perceived gap in pipeline building exacerbated by the *UNC* and *Harvard* decision. Such creative IE&D initiatives may include career/industry focused mentorship programs for local middle school and high school students, youth career shadowing programs, and other long-term investments in the talent pipeline.

While the *UNC* and *Harvard* decision controls the higher-education admissions process, employers in every industry should anticipate a meaningful shift in the way the public, employees, the judiciary, government agencies, and the plaintiff’s bar evaluate affirmative action efforts in employment and voluntary IE&D initiatives. As the consequences of these decisions continue to reveal themselves, employers should keep a close eye on legislative and regulatory developments across the country to ensure that their affirmative action and IE&D initiatives comply with continually evolving federal and state anti-discrimination laws.

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