

THE SFFA V. HARVARD AND UNC RACE IN ADMISSIONS CASES: REACTIONS TO THE U.S. SUPREME COURT'S RULING

“University programs must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end. Respondents’ admissions systems—however well intentioned and implemented in good faith—fail each of these criteria. They must therefore be invalidated under the Equal Protection Clause of the Fourteenth Amendment.”

—Chief Justice John Roberts, June 29, 2023

The U.S. Supreme Court’s ruling in the consolidated cases *SFFA v. Harvard University* and *SFFA v. University of North Carolina (SFFA v. Harvard and UNC)* has implications for the autonomy of our country’s colleges and universities and their ongoing efforts to construct mission-aligning diverse and inclusive campuses. In 2019 and 2020, federal judges in Massachusetts and North Carolina heard days of trial testimony from dozens of witnesses and reviewed reams of documents before issuing meticulous, detailed decisions against Students for Fair Admissions, Inc. (SFFA), which had challenged the admissions practices at Harvard University and the University of North Carolina–Chapel Hill.

Those decisions applied decades of Supreme Court precedent. On June 29, the Supreme Court essentially reversed itself. While paying grudging lip service to the educational benefits of a diverse student body, which the Court had for decades unequivocally and repeatedly embraced as a compelling governmental interest, a 6–3 majority essentially foreclosed justifying the narrowly tailored consideration of race or ethnicity as one factor in a holistic admissions process.

During the coming weeks and months, the chief justice’s majority opinion and the various concurring and dissenting opinions will be dissected, debated, and, importantly, assessed in terms of their practical application to individual colleges and universities. In the immediate aftermath of the ruling, American Council on Education (ACE) Vice President and General Counsel [Peter McDonough](#) posed some top-of-mind questions to [Jessica L. Ellsworth](#), partner at Hogan Lovells; [Jonathan R. Alger](#), president of James Madison University; [Theodore M. Shaw](#), the Julius L. Chambers Distinguished Professor of Law at the University of North Carolina–Chapel Hill School of Law and director of the UNC Center for Civil Rights; [Stephen S. Dunham](#), Pennsylvania State University’s vice president and general counsel emeritus; and [Art Coleman](#), managing partner and co-founder of EducationCounsel LLC.

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Peter: Jess, you've presented dozens of oral arguments and drafted hundreds of briefs, including the *amicus* brief that ACE submitted to the Supreme Court in this case on behalf of nearly 40 other higher education associations, and as an appellate law clerk you helped draft countless opinions. From your read of the majority opinion's 47 pages—and the additional 190 pages of concurring and dissenting opinions—what are the headlines here?

Jess: First and foremost, the Court holds along ideological lines that the Equal Protection Clause of the Fourteenth Amendment does not permit universities to “make admissions decisions that turn on an applicant’s race.” The Court reasons that the compelling interest endorsed in Justice O’Connor’s majority opinion in 2003 in the *Grutter* case—“the educational benefits of a diverse student body”—is now simply too vague and not measurable or concrete enough to be subject to meaningful judicial review. In the words of Justice Roberts’s majority opinion, these sorts of benefits are “commendable” but “not sufficiently coherent for purposes of strict scrutiny,” which requires a compelling interest and narrow tailoring of any use of race to that interest. They also lack a clear termination point, which the Court sees as a fatal fault. And finally, the Court is deeply troubled over the fact that race is a negative for certain students in the “zero-sum” process of college admissions.

Second, there are a few caveats to the reach of the decision. One is that the Court recognized that military academies may present a different question of compelling interest (*see* footnote 4 in the *decision*). Another is the Court’s statement that it is not prohibiting a university from “considering an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise.” The Court is quick to note, however, that “universities may not simply establish through application essays or other means the regime we hold unlawful today.” That said, even Justice Thomas and Justice Gorsuch agree in their separate concurrences that universities may turn to race-neutral policies to seek to achieve the same benefits, and I think that is where we will see many universities go—they will look to socioeconomic identification and recruitment efforts and reevaluate legacy, donor, and faculty-based admissions.

And third, the Court’s decision is limited to admissions decisions, leaving as open questions other ways that universities account for race, whether it be in financial aid, mentoring programs, or otherwise.

Peter: Ted, you have devoted decades to civil rights for historically discriminated groups, including as a U.S. Department of Justice lawyer and heading up the NAACP Legal Defense Fund. You were in the Supreme Court on the day *Bakke* was decided in 1978 and have often said that you left the Court devastated, having sensed that for African Americans, *Bakke* was a loss because it turned the legal focus in this area to enrolling diverse classes of students and away from affirmative action for underrepresented minorities. As a faculty member at Michigan Law School, you were also involved in crafting the admissions policy that was upheld in *Grutter v. Bollinger*. How are you beginning to process this *SFFA* decision?

Ted: The Supreme Court announced its decision in the *SFFA* cases exactly one day after the 45th anniversary of its decision in *Bakke*. My views of what was lost to Black and brown people on that day so long ago never changed. Yet, it turned out that Justice Powell’s diversity rationale snatched victory from the jaws of defeat. It changed our country, and it changed the world. Diversity became a core value across the globe. Still, even while the Supreme Court strengthened its jurisprudence upholding diversity, opponents of conscious efforts to keep the doors of opportunity open in higher education never ceased. For almost half a century, overturning *Bakke* and its progeny remained one of conservatives’ top priorities.

This decision takes no one by surprise. This Supreme Court was built for this moment, as it was for last term's *Dobbs* decision. Whatever his reputation as an institutionalist and his comparatively moderate views compared to a Court that has increasingly moved to the right during his years as a justice, John Roberts has been a lifetime opponent of most of the corpus of civil rights law and jurisprudence. The Court he now leads is the most conservative in our lifetime.

I am struck by the fact that while the *SFFA* cases were pending in the Supreme Court, the jurisprudential and public discourse has returned to elevate the term "affirmative action" over "diversity." While the two rationales for race-conscious admissions overlap, they are distinct. Yet even members of the Supreme Court conflate and confuse the two.

There is a powerful redundancy in the majority *SFFA* opinion. Chief Justice Roberts repeatedly hammers away on the theme that race-consciousness must end. I am reminded of an exchange I had with Justice Kennedy during oral argument in the Court's last mandatory school desegregation case. Kennedy asked whether the whole purpose of the case was to return the school district to local control. I responded, "I agree but only after the violation has been remedied." The one abiding priority—in the Kansas City school desegregation case; in the *SFFA* cases; as it was in Chief Justice Roberts's 2013 majority opinion gutting a key provision of the Voting Rights Act; and throughout the jurisprudence of conservatives—has been to end efforts to remedy discrimination and inequality. Roberts's *SFFA* majority opinion echoes the simplistic and reductionist equation of necessary race-consciousness in the remedial or diversity context with invidious discrimination. In *Shelby County v. Holder*, he wrote that "the way to end discrimination is to end discrimination." In similarly reductionist language in *SFFA v. Harvard University and UNC*, Roberts wrote, "Eliminating racial discrimination means eliminating all of it."

This is not a good moment in our nation's history. Only time will tell whether the conservative supermajority's efforts to end affirmative action and diversity will take its place among the Supreme Court's anti-canonical cases that have served the cause of regression on issues of race. How much the slim reed of hope that Roberts offers ("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") remains to be seen. Meanwhile, the powerful dissents of Justices Jackson, Sotomayor, and Kagan offer comfort to those of us who are tempted to despair, for dissents are written for another day. I remind myself that, in another time, another chief justice wrote for another majority of the Supreme Court that Dred and Harriet Scott should remain enslaved and that the Founding Fathers had never intended that any person of African descent, whether free or enslaved, could be a citizen of the United States; that was a moment of supreme despair. Yet, eight years later, the Thirteenth Amendment was ratified, and slavery was dead in its grave. A little more than a decade after *Dred Scott v. Sanford*, the Fourteenth Amendment was ratified, and African Americans were citizens of the United States.

Despite this moment and this Court—and all the reasons to despair—I believe that the people and institutions of our country will remain committed to an inclusive society.

Peter: Jon, while you were in-house counsel at the University of Michigan during *Grutter*, you played a crucial role in successfully pressing for the Court's unbridled recognition of the educational benefits of a diverse student body. During the last decade as a college president, you have been unequivocal about its profound benefits for all students—majority and minority alike. Having read the *SFFA* majority opinion, do you feel any differently about this now? Do you worry that others might?

Jon: I have studied and witnessed firsthand the educational benefits of a diverse student body both in and outside the classroom and have heard from many students and faculty members who have experienced those benefits. That diversity has many different facets beyond race. In the *Michigan* cases, we talked about seeking a critical mass of students from historically underrepresented groups—not a precise number or proportional representation and not mere tokenism either—enough so that all students could see the differences within groups and similarities across racial lines. When that face-to-face interaction happens, it can break down stereotypes because students see that not all White, Black, Asian, or Hispanic/Latino students think alike or have similar life experiences.

The Supreme Court’s majority opinion in *SFFA v. Harvard and UNC* does not change that educational reality. In fact, the Court acknowledges that diversity-related goals in higher education are “commendable” and “plainly worthy”—just not sufficiently precise or measurable enough to justify broad racial classifications under its current strict scrutiny. Our diverse human capital is our greatest strategic resource as a nation, and employers have recognized the need for college graduates who know how to work and interact with diverse colleagues. Diversity and excellence go hand in hand in higher education and are not opposing concepts, and I believe that colleges and universities will continue to pursue these goals in a manner consistent with the Court’s latest guidance.

Peter: Steve, you’ve been deeply involved in these issues going back to *Bakke* and have served as general counsel for three universities. Art, you have similarly worked on these issues for decades, and a lot of your time during the last several months has been devoted to helping institutions prepare for this ruling. Now that we have it, what would you advise a college president’s leadership team to focus on this summer?

Steve: First, at a general level—and not focused on admissions—I think institutions should consider whether to reaffirm their commitment to DEI and racial justice on their campuses. Nothing in the opinion prevents that, and while—even outside the admissions context—there may be future legal challenges to diversity as a code word for race, institutions should not be scared off from restating their core values and standing up for what they think is right. This could include strengthening mission and policy statements, involving leadership—including boards—in these efforts, and communicating their positions to their communities.

Second—and specific to admissions—colleges and universities that have used race as a factor in admissions will need to take specific steps to rewrite their admissions policies and practices to be consistent with the Court’s opinion. The Court’s opinion is anything but clear, except that race by itself cannot be a factor in admissions. With advice from lawyers and other experts, institutions need to scrub their policies and practices to delete words and processes that the Court has effectively prohibited.

Third, institutions should consider what new and revised admissions practices and policies they can adopt and implement that may relate at least in part to race but that do so in ways the court majority has suggested are legal. This will be challenging because the Court opinion lacks clarity and sends mixed signals, but at a minimum, the Court majority has invited schools to consider whether and how race may have affected an individual applicant’s life experiences and character—for example, by overcoming discrimination or through inspiration. This would not be without future litigation risks, but it could include questions to applicants, essay topics, or an expanded view of extracurricular and community activities that may relate to race. It could also include new or expanded pipeline and outreach initiatives, recognizing that these activities also need to be reviewed carefully for consistency with the Court’s new restrictions on the use of race in decision making. And it could include an expanded view of admissions factors that do not expressly refer to race (and which are not just race under a different label—a tricky and uncertain analysis), such as socio-economic status and geography.

Fourth, related to both points two and three, schools should engage in extensive training of their admissions staff. There are fine lines, substantial ambiguity, and uncertainty between what is allowed and what isn't, but for schools to achieve their goals—and also for defensive purposes—it will be important for admissions office employees to have a common and clear understanding of their revised admissions policies and practices and what the admissions office can and cannot say and do.

Finally, colleges and universities should begin the process of reviewing other policies and practices beyond admissions, informed by the Court's opinion. The Court did not address anything except admissions, but other programs where race may play a role require careful analysis. This includes scholarships and financial aid, mentorship programs, student and employee clubs, outreach, certain DEI activities, and the like.

Art: From a broad strategic vantage—and building on Steve's points—I'd recommend three things.

First, I would encourage institutional leaders with clear missions and leadership on equity and diversity to take this moment to reassert their commitment—individually and collectively. In particular, focus on the communities you serve, particularly those students, faculty, staff, and alumni of color for whom the rhetoric and practical impact of the opinions of those in the Court majority may hit hard. I've been so gratified to see so many post-decision statements by institutional leaders reaffirm their commitment to racial equity and diversity goals and say with clarity that as diversity and institutional excellence are inescapably intertwined, “you belong.”

Second, despite the pressures to jump to the question of what needs to change immediately (an important question to be sure), use this moment of challenge as a moment of opportunity to take some time to reassess institutional goals and objectives associated with diversity, recognizing the importance of institutional positioning not only for the short term but for the longer term.

Third, on the issues of policy, I agree with Steve's points and would add that we should undertake our review of policies and practices with a dual lens—not just with respect to the now more complicated legal terrain that we're compelled to navigate but also with respect to the way in which we might recalibrate past institutional choices and decisions on a range of issues that bear directly on our diversity and equity goals. It's a new day, and a new day calls for leadership and innovation to meet this moment of challenge. Can we re-think the full array of bridges and barriers associated with diversity and equity goals (investments in recruitment, test use policies, transfer policies, and so much more) to assure that an adverse decision will not inhibit our march forward to the fulfillment of mission aims associated with diversity and equity?

Peter: Jess, we emphasized to the Supreme Court in ACE's *amicus* brief that an “[a]pplicants’ race and ethnicity often influence their lived experiences and sense of self,” and they must maintain the unbridled right to describe how race and ethnicity have influenced who they are and what they can contribute to the educational environment on campus. Justice Roberts wraps up his majority opinion by saying 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,” so long as the school assesses this aspect of the applicant “based on his or her experiences as an individual—not on the basis of race.” Were we heard? Does this unequivocally permit applicants to present and admissions officers to consider one’s racially or ethnically informed sense of who they are and what they may offer as part of an admitted class?

Jess: Yes, the short answer is that we were heard. But there is a longer answer, too. Justice Roberts makes clear that student-applicants are not prohibited from talking about their lived experiences, leadership development, and extracurricular activities just because doing so will involve describing how race and ethnicity influenced

them or what they intend to pursue as part of the campus community. But in the very next sentence, Justice Roberts says that “universities may not simply establish through application essays or other means the regime we hold unlawful today.” I read that to be cautioning universities against adopting policies that seek to achieve diversity goals through a side door of using essays to give the same sort of “plus factor” the Court has now outlawed. Justice Sotomayor does too, saying in dissent that this part of the majority opinion is just “an attempt to put lipstick on a pig” and a “false promise.”

It remains completely murky to me what this part of the opinion means. At face value, it means that universities may look to a student’s essay, even when it deals with racial experience, adversity, or leadership, as part of considering the individual student’s courage, abilities, or determination, just as it would when reviewing the application of another student who wrote about a non-racial dimension of their life. But that is not too far off from the holistic review that many institutions have utilized over the decades. One final point—the Court does not adopt *SFFA*’s suggestion that college admissions should be a function of academic metrics alone, which really would have fundamentally altered how universities look to comprise a class of students and a campus community. Ultimately, I anticipate there will be extensive continued debate—and likely litigation—over what this final paragraph in Justice Roberts’s opinion means, but we do know it is intended to give continued discretion of some degree to a university’s ability to evaluate each student, their experiences, and their likely campus contributions.

Peter: Art, does the *SFFA* decision say or imply anything about other programs or activities at colleges and universities?

Art: The Supreme Court’s opinion is limited to a discussion of the undergraduate admission programs at Harvard and UNC; there is no discussion of any other kinds of policy or practice (such as financial aid or recruitment) in the Court’s opinion. That said, we are continuing to pour over hundreds of pages of concurring and dissenting opinions; I think it is clear that it would be a mistake to read the decision as only limited to admission issues.

Most notably, the court rejected the educational diversity interests asserted by Harvard and UNC as not sufficiently “compelling” (a threshold requirement for any race-conscious practice), concluding that they were insufficiently coherent and measurable to permit judicial review. What’s striking about that conclusion is that those very interests mirrored the interests it had previously found to be compelling in *Grutter*, *Gratz*, and *Fisher II* (in certain particulars, verbatim). So, while purporting to adhere to 45 years of precedent, the Court actually eviscerated it—here, effectively eliminating the kinds of interests institutions around the country have developed in reliance on past Court teachings. This likely has direct implications for other higher education policies, such as race-conscious financial aid. In short, there are clear implications of the Court’s decision that extend beyond admissions.

Turning back to enrollment policy and practice for a moment, the Court’s rejection of Harvard’s and UNC’s educational diversity interests does not mean that colleges and universities will have no avenues for advancing diversity and equity goals moving forward. But the design issues associated with sustaining such programs with those aims just got a lot more complicated. For instance, are there other diversity or equity interests that might be sufficiently concrete and precise to qualify as a “compelling interest” that could justify any consideration of race in admissions? The Court opened the door with respect to military academies. Are there other examples? And we shouldn’t forget the importance of evaluating ways to navigate the Court’s express approval of consideration of “an applicant’s discussion of how race affected his or her life” without resorting to making judgments on racial status. Finally, this is a moment of need and opportunity for higher education leaders more broadly to consider the array of actions institutions can take that would likely not be considered

“race-conscious” but could greatly advance equity and diversity goals—from outreach and recruitment to pathway and bridge programs to campus climate and student support.

Peter: Jon, as expected, the *SFFA* decision does not require an institution to deviate one bit from its own mission and goals. But how do college leaders begin to digest the court’s majority opinion as a new input into ongoing hard work of actually enabling student access and creating a robustly diverse educational environment?

Jon: The Supreme Court’s decision is focused specifically on the consideration of race as a factor in admissions. It does not prohibit considerations of factors such as geography or socioeconomic status, which are not subject to the “strict scrutiny” constitutional standard that applies to racial considerations. Accordingly, it will be more important than ever for colleges and universities to develop partnerships with pre-K–12 schools to build educational pipelines to ensure that students from all backgrounds are prepared for college. In the 20 years since *Grutter*, many of these promising programs have been developed or expanded, including in states where considerations of race have previously been prohibited. At the national level, it will be imperative for institutions to share information about these promising practices and to seek funding and support to replicate and scale up these efforts.

The Court’s decision also underscores the importance of treating applicants as unique individuals rather than as members of imprecisely defined racial groups. The Court leaves open the ability of institutions to consider the unique circumstances and experiences of an individual applicant so long as such considerations do not become a mere proxy for a broad racial classification.

Institutions are still free to define their educational missions, and educational judgment will continue to be critical to admissions policies and practices so long as it does not involve the adoption of broad racial classifications or considerations.

Peter: Steve, how concerned should schools be about this *SFFA v. Harvard and UNC* ruling encouraging complaints about diversity-enhancing initiatives outside of the admissions offices or policymakers pointing to it to buttress anti-DEI positions?

Steve: By its terms, the Court’s ruling is limited to race in admissions, and in some ways, it is more limited than many feared. But for several reasons, intentionally or not, I think that realistically the opinion will be viewed by some as an invitation to challenge and in some instances file litigation related to other college and university programs.

First, the opinion cannot be divorced from the widespread political divisiveness related to race and DEI. If you didn’t like affirmative action in admissions, you probably don’t like race-restricted scholarships, outreach, and educational programs. And litigation has become a tool for advocates on all sides in our cultural divide.

Second, the Court’s bottom-line focus on a “color blind” interpretation can certainly be argued to apply beyond admissions. As a purely legal matter, it may be somewhere between difficult and impossible to limit the impact of the Court’s ruling to admissions.

Third, DEI activities do have a racial component. While there is a major distinction between decisions like admissions, which the Court held to be a zero sum game, and DEI educational and training programs where the argument about harm to other individuals does not seem to fit, advocates can nevertheless be expected to argue on campus— as well as legally in court and politically—that DEI has exclusionary effects, is not color-blind, and may run afoul of the Supreme Court’s opinion.

Having identified the risks, which are very real, and recognizing the absolute importance of institutions complying with the law, including this decision, it is critical for colleges and universities to stand their ground on matters of principle and not be so risk averse that they drop or change programs, such as many DEI initiatives, which are central to their educational missions and that the institutions believe in.

Peter: Ted, you are a faculty member at UNC. What would you say to the high school student who is part of an underrepresented minority and, after hearing about this decision, is wondering whether it is going to make UNC, Harvard, and other colleges and universities less accessible, less welcoming, and less inclusive places for them?

Ted: I believe that colleges and universities are not going to change their values and their commitment to inclusiveness. In the days, weeks, and months ahead, they will review this decision and their admissions processes to determine how they can continue to pursue fair admissions policies and practices. Your task remains the same—continue to be the best student, the best person, and the most well-rounded individual you can be. Be your best self. When you apply to college, tell your story—all of it—including who you are, your life experiences, and the obstacles you have overcome. Do your part. There are others who are working to ensure that opportunity and fairness will remain available to you. More than anything, do not despair. Be hopeful for yourself and for our country.