COLLEGE WISE

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RACE-BASED AFFIRMATIVE ACTION IN COLLEGE ADMISSIONS:

UNDERSTANDING THE DECISION IN *STUDENTS FOR FAIR ADMISSIONS, INC. V. PRESIDENT AND FELLOWS OF HARVARD COLLEGE*

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Who we are

With more than 24 years of college counseling & tutoring experience, Collegewise has been at the forefront of providing families, schools, and non-profits with up-to-date, honest admissions advice. We believe that applying to university should be an exciting time, not a stressful, anxiety-ridden rite of passage. We know that providing expert-written, researched information is one way to do so! Since we opened our doors in 1999, our expert advisors and tutors have guided more than 28,000 students to successful admissions and testing outcomes. We take great care in our work, from our paid counseling programs to our complimentary resources. Our team of 70+ experts pool their 500+ years of admissions expertise to drive student success. Our resources have been downloaded by over 100,000 readers, and we thank you for downloading this one. Happy Reading!

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The Supreme Court has spoken

"Harvard's and UNC's admissions programs violate the Equal Protection Clause of the Fourteenth Amendment."[1]

On June 29, 2023, the Supreme Court of The United States (SCOTUS) issued a ruling for *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College.* This ruling invokes the Equal Protection Clause of the 14th Amendment to restrict—**but not entirely outlaw**—the use of race as a factor in college admissions decisions.[2] The scope and implications of the decision are much more nuanced, however, and that distinction, restricting rather than outlawing, is the linchpin to understanding what this actually means for the future of college admissions. ***Note: Chief Justice Roberts stated directly that the Military Service Academies are exempt from the stipulations in the ruling.***

Put simply, the Court's opinion restricts universities from considering race as a standalone factor in admissions. The justification for that decision comes in three pieces:

1. Harvard and UNC have argued that there is inherent educational value to having more diverse perspectives represented on campus, but SCOTUS holds that Admissions programs cannot operate on the "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue." *Grutter, 539 U. S., at 333*.[3]
    a. The Court invokes the Equal Protection Clause of the 14th Amendment here, arguing that using race for the sake of diversifying perspective requires the universities to "[engage] in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike." On this ground, the court ruled that admissions programs that participate in this practice go against the core of the 14th Amendment, which seeks to prohibit institutions from using "race as a stereotype or negative."
2. Harvard and UNC argue that race was only used as a positive factor in admissions for underrepresented students, but the court argues that "College admissions are zero-sum, and a benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter."
    a. Again, the court invokes the Equal Protection Clause of the 14th Amendment, claiming that considering race as a positive for some applicants automatically—even if not directly—makes race a negative factor for other students who do not have a way of attaining that same benefit. The Court's ruling claims that using race as a factor in admissions "unduly harms nonminority applicants."
3. The Court further argues that the claim for using race to increase diversity of perspective is undermined by the way race is categorized in the application process. The justices argue then that the discrepancy between the reported goals and the means by which those goals are pursued is cause for an end to the practice.

a. SCOTUS points out that Harvard and UNC "measure the racial composition of their classes using racial categories that are plainly overbroad (expressing, for example, no concern whether South Asian or East Asian students are adequately represented as "Asian"); arbitrary or undefined (the use of the category "Hispanic"); or underinclusive (no category at all for Middle Eastern students)."

All that said, there is one very important line tucked away near the end of the syllabus in the Slip Opinion that makes a massive difference in the way the Court's decision will actually impact admissions. In subsection (f) of the Syllabus, the Court reiterates its opinion that the outright consideration of race as a standalone factor violates the 14th Amendment, but it makes a major concession:

> "At the same time, 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."

That concession makes all the difference.

In essence, that concession, slipped in near the very end of the ruling before the roughly 230 pages of opinion-writing, gives colleges and admissions officers a great deal of freedom with regard to how they can use roundabout methods of meeting the same goals with regard to diversity and racial representation in admissions.

The long version is much more interesting and detailed, but the short version is this: race itself cannot affect an admissions decision, **but experiences and perspectives that are related to race can be taken fully into consideration.**

Read on to understand more.

How are colleges likely to respond?

Put simply, we expect colleges to follow existing models of how other universities have responded to similar restrictions.

In spite of this increased scrutiny, colleges that are looking to continue pursuing their goals around diversity and representation are likely to continue factoring identity into the equation. That may come as a bit of a surprise to some, but there are already a few recent examples of colleges finding alternate methods of focusing on diversity in the admissions process after race-based considerations in college admissions were outlawed at the state level. With so much time to prepare for this decision, it's likely that most colleges have already looked to these models and put together their own alternative plans for considering diversity in admissions.

For a clearer picture of what these alternative methods might look like, we can look to the public university systems in Texas and Michigan, each of which has found interesting ways to prioritize diversity in admissions while still following state restrictions and avoiding scrutiny.

Understanding the model in Texas

In Texas, the 1996 case *Hopwood v. Texas* explicitly banned race-based considerations in college admissions.[4] The UT system was intent on trying to increase diversity in the system, however, so the "Top 10 Percent Law" was introduced in 1997.[5] The policy guarantees Texas public school students who graduate in the top ten percent of their class automatic admission to all state-funded universities (though that was revised to include only the top 7% and later the top 6% for UT Austin starting in 2017 and 2022, respectively). On its surface, this policy seems to have no inherent focus on diversity, but guaranteeing space in the university system to a group of students at every public school in the state means that the state's most under-resourced high schools, which—for a variety of reasons—tend to have predominately Black and Latinx populations, will also have a group of students who are automatically admitted. This prevents those students from being unfairly penalized for factors outside their control and unrelated to their academic ability. In essence, it allows the university system to reward students who demonstrate the greatest ***potential*** by automatically calibrating based on the resources available to each student.

Ironically enough, the University of Texas circumvented targeted restrictions on Affirmative Action by following the original model by which Affirmative Action was introduced, to begin with: broadening the scope of the policy so that the affected group just happens to include people of color but with specific benefits to that subgroup.

Race-based admissions were legalized again in 2003 as a result of the decision in Grutter v. Bollinger, which abrogated Hopwood and upheld the use of race-based admissions at the University of Michigan Law School, but most of the UT System (with the exception of UT Austin*) decided not to reimplement specific race-based admissions considerations.[6] This may be because campus diversity saw a marked increase after the introduction of the Top 10 Percent Law or it may be because the UT system was warned off by Michigan's efforts to pursue a states'-rights course of banning affirmative action after *Grutter v. Bollinger* decision.

- UT Austin reintroduced race as one of seven elements considered as part of a multifactor holistic review process used to fill the slots left open after those claimed by students benefitting from the Top 10 Percent Law. The university has offered no official explanation for the decision, but this change came not long after the publication of an internal study which found that approximately 90% of UT Austin's discussion and seminar courses had either at most one Black student; many of them had none.[7]
- This decision at UT Austin was challenged just over a decade later in Fisher v. University of Texas, but the Supreme Court ruled in favor of the university and upheld UT Austin's right to include race and ethnicity as part of its holistic admissions process.[8]

Understanding the model in Michigan

Michigan's ban on affirmative action came by way of Proposal 2 in 2006, which introduced Section 26 as an amendment to Article 1 of the Michigan Constitution.[1] Section 26 explicitly states that "The University of Michigan, Michigan State University, Wayne State University, and any other public college or university, community college, or school district shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[9] Judge R. Guy Cole of the U.S. Sixth Circuit Court of Appeals overturned the decision, claiming "Proposal 2 unconstitutionally alters Michigan's political structure by impermissibly burdening racial minorities"[10] and Attorney General Bill Schuette appealed the case to the Supreme Court. In 2014, SCOTUS upheld Proposal 2 (reversing the Sixth Circuit's decision) on the grounds that this was a matter for states to resolve and that a U.S. Circuit Court lacked the authority to overturn the Michigan Law.[11]

The strictness of the Michigan law and the obvious concern with race is critical to understanding how and why the university system's response suggests a great deal of flexibility for college admissions even after the Court's decision.

Because admissions officers are barred from using race, sex, national origin, or other details commonly found in the demographics section of a college application, public colleges and universities in Michigan do not ask those questions on their applications or do not show that page on the application PDF that is shared with admissions officers. For those schools who participate in the Common Application, the demographics page all students fill out as part of that application is specifically withheld from the PDF the Common App sends along when a student applies to any public institution in Michigan – and in any other cases where a school either cannot or does not want to include that information in the admissions process.[12] That does not, however, mean that there is no way for students to communicate this information to admissions officers or for admissions officers to make note of that information in some way. After all, many colleges – especially the more selective ones – require students to submit much more than just their grades, test scores, and resumes as part of the application. In short, the essays are where a student has free rein to share anything and everything they want a college admissions officer to know about them that hasn't already been included elsewhere, and the officers can make note of that, if sometimes rather indirectly. To be clear, however, this function of the essays is not unique to instances in which a student is trying to share information about their identity that might provide useful context to the admissions officer. All students should see those essays as their opportunities to add more context to their profile.

The following examples illustrate how a U-Mich admissions officer could and could not make use of this type of information in the admissions process based on the current controlling law in Michigan.

- If a student explicitly states in her essay that she is a woman pursuing an engineering degree:
  - The admissions officer ***could*** note in the admissions file that admitting this student might contribute to the overall diversity of the population at the engineering school.
    - The admissions officer is not technically claiming that the applicant's sex is being considered as a factor. Instead, that officer is simply stating that some unnamed component of this student's profile could contribute to an existing university goal.
    - The letter of the law is being followed.
  - The admissions officer ***could not*** note that admitting the applicant would increase the number of women at the engineering school.
    - This would be an explicit use of the applicant's sex in the admissions process.
    - This would violate the law.
- If a student states in his application that he is president of his school's Black Student Union without explicitly stating anything about his own race or ethnicity:
  - The admissions officer could not note in the admissions file that admitting this student might contribute to the overall diversity of the campus.
    - This conclusion could only be drawn by extrapolating information about a student's identity: ie, making a reasonable assumption about the student's race or ethnicity because of the information shared.
    - This additional step on the admissions officer's part would violate the law because it is a deliberate and active focus on identity by the admissions officer.
  - The admissions officer ***could*** note in the admissions file that admitting this student might help foster a campus community that is more welcoming and attractive to diverse perspectives and free-flowing cultural exchange.
    - The admissions officer is basing this claim on information the student has provided and is simply aligning it with an existing campus mission.
    - This does not violate the law in Michigan.

In either case, it must be noted that the University of Michigan is never directly asking the student to share anything about their identity. The information can be used if it is explicitly and voluntarily self-identified, but it cannot be directly requested by the institution. The self-identification requirement also means that identity details shared in letters of recommendation are not available to the admissions officer for use if they are not also shared by the student. This distinction is vital to understanding what changes might come at other schools in the wake of the Court's decision, especially given the clause in subsection (f) of the Slip Opinion Syllabus that directly states 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."

- This decision is only concerned with race, but the model for sex and national origin in Michigan are roughly identical in framework, so the methods for legally circumventing those rules will be the same.

It is worth noting that neither sexual orientation nor gender identity were explicitly included in Michigan's legal framework, nor have they been in most similar state amendments. That omission is largely considered incidental rather than deliberate: neither issue was a commonly discussed topic in conversations of diversity and affirmative action in the late 90s and early 2000s, so they were below the threshold of notice in most legal cases. Either way, that omission is consistent with this most recent ruling, which only deals with race.

Using those models to guide future behavior

Essentially, what we expect is more of what we have already seen. It is likely that the demographic questions about race, sex, ethnicity, and the other factors named in the Court's decision will be removed from the parts of the application that are allowed into the admissions room – though they may still be allowed on the application for use in post-decision demographic statistics. The Common Application already has the capability to "block" the demographics page from an application, so that practice will simply be more broadly applied to its member colleges. Put simply, colleges around the nation are likely to respond by launching modified versions of the diversity-driven approaches Michigan and Texas have already implemented.

For better or for worse, the vagaries of the American admissions process leave colleges with a good deal of flexibility in this regard. Because university admissions has always been an opaque and somewhat eldritch process, it's all too simple for colleges to make only the tiniest changes to their existing practices in order follow the letter of the law without any concern for the spirit: an ironic twist in this particular situation. The Michigan approach is the easiest to mimic: an applicant file that may once have included a note about a student increasing representation of a specific identity on campus could be processed in the exact same fashion if the admissions office were simply to change that note to one about the student having lived experiences that could contribute a unique lens to classroom discussions that is currently lacking.

Still, there are a few important notes to be made about this type of shift. For one, colleges would be restricted in the same ways that Michigan has already been restricted: an admissions officer would be hard-pressed to justify considering any information not explicitly provided by the student. At the same time, universities are most likely going to do away with the application questions that directly encourage students to share information about their identity. Students will instead be invited to share information about themselves in ways that clearly imply that information about identity would be welcome. Some colleges may simply make their questions a bit more open-ended to give students room to share whatever they see fit, and some may be more deliberate in their approach to nudging students to share information on certain topics. Either way, though, it's very unlikely that colleges who have decided that this information matters will stop looking for or assessing it.

The Texas example is another that may easily be applied at the state level for public institutions but can also be extrapolated upon by creative private institutions. Colleges that want to focus on establishing greater equity in the admissions process without violating the letter of the law need only find or design some grouping mechanism similar to the way Texas' Top 10 Percent Law subdivides the states' population by high school. These colleges could then practice their admissions processes in uniform fashion across these groups. Theoretically, for example, Harvard could sort applicants based on the per-capita funding of their high schools and then divide its approximately 2,000 annual acceptances to an equal proportion of each group.[13] In that same vein, Yale could divide its entire applicant pool into any number of brackets based on family income and then proportionally distribute its approximately 2,200 annual acceptances.[14] This type of malicious compliance is unlikely, particularly for the more selective schools that have the resources to rely on carefully crafted application questions instead, but it is in line with the types of irreproachable adherence to the equal protection clause of the 14th Amendment invoked in the SCOTUS decision that might come from some schools.[15]

In fact, models that fit into this latter framework are more likely to be adopted by colleges that want to maintain their emphasis on diversity but lack the resources or application review bandwidth employed at some of the most selective colleges. It was noted earlier in this report that many colleges require students to submit more than just their grades, test scores, and resumés, but that is not true of all colleges. There are a great many schools in the country that neither collect nor review essays as part of the regular admissions process. For those schools, removing the demographics question from their applications will make a bigger impact. Some of these schools may respond by adding written responses to their applications, but it's likely that a great many of them will lack the resources to add more work to the admissions review process. From this second group, we are likely to see more models like the Top 10 Percent Law spring up. That said, it is most likely that a goodly number of these schools with primarily data-based admissions processes will be unable to implement such sweeping changes in the immediate future if at all.

So what does all this mean for you?

1 ***Focus on the essays – information about identity can/should be shared there.***

Pay close attention to what you're being asked. There may be fewer open references to identity in the prompts, but it's likely that there will be just as many, if not more, areas where identity is perfectly in line with the information students are being asked to share.

That said, it is still very important for all students to remember that identity has never been the linchpin of admissions. It has at most only ever been used as one additional piece of context that helps admissions readers understand how to interpret and assess the lived experiences shared on an application. Students should neither overemphasize their identity in the hopes that they can "use it" for admissions purposes nor should they worry that being part of the majority in any way disadvantages them in the admissions process.

Every student should continue to see the essays as their opportunity to share information about themselves that is otherwise unavailable to the admissions office. This is where students can share tidbits of information that show how interesting, passionate, talented, or caring they are in ways that do not appear in the rest of the application. The essays are where students get to put their character on display, which brings us to the second point related specifically to this SCOTUS decision.

2 ***Be more conscious of your own efforts to increase diversity and inclusion.***

Colleges that practice holistic admissions—especially the more selective of them—have long confirmed that their admissions decisions are based on much more than a simple analysis of a student's grades, test scores, and other talent-based factors. For these schools, the decision is based on what the admissions officers are able to put together as a semi-comprehensive understanding of the student as a complete person and how that person might contribute in some way to existing institutional needs and priorities.

Many schools are dedicated to increasing Diversity, Equity, and Inclusion—as evidenced by efforts in Michigan and Texas after their Supreme Court decisions and by diversity-driven mission plans shared by **Michigan**[16], **UVA**[17], the **UC System**[18], and a great many other schools in both liberal and conservative-leaning states. These schools are meeting their goals in part by admitting more students of diverse backgrounds, but another one of their focuses is on creating environments that are more welcoming, inclusive, and conducive to the success of those diverse students. The thought is that focusing on that kind of environment will encourage a greater pool of diverse students to apply and will encourage more of those admitted to matriculate at the campuses. This all means that your own engagement with issues of diversity, equity, and inclusion can be beneficial.

So what does all this mean for you?

3 ***Continue operating as usual.***

Again, identity was never a magic key that unlocked the doors to admissions. It was simply one of many variables taken into consideration during a complicated calculus. While this decision does mean that many historically underrepresented and underprivileged students—especially those applying to universities without the resources to enact immediate countermeasures—will have to fight a bit harder to overcome the unfair obstacles that affirmative action sought to remove, it does not change the fact that all students have always needed to be qualified in order to get in.

The meat and bones of the admissions process is going to be almost exactly the same as it was before SCOTUS announced their decision. Activities will be reviewed, letters of recommendation will be assessed, personal statements will be picked over for information, and admissions officers will do what they can to build a whole person from a few pages of application materials. They will be doing much of what they did before, and you should follow suit.

References

[1] Supreme Court of the United States. STUDENTS FOR FAIR ADMISSIONS, INC. v. PRESIDENT AND FELLOWS OF HARVARD
COLLEGE. no. No. 20–1199, 29 June 2023.

[2] The House Joint Resolution Proposing the 14th Amendment to the Constitution, June 16, 1866; Enrolled Acts and Resolutions of Congress, 1789-1999; General Records of the United States Government; Record Group 11; National Archives.

[3] O'Connor, Sandra Day, and Supreme Court Of The United States. U.S. Reports: Grutter v. Bollinger et al., 539 U.S. 306. 2002. Periodical. Retrieved from the Library of Congress, <www.loc.gov/item/usrep539306/>.

[4] Therese M. Goldsmith, Hopwood v. Texas: the Fifth Circuit Further Limits Affirmative Action Educational Opportunities, 56 Md. L. Rev. 273 (1997)
http://digitalcommons.law.umaryland.edu/mlr/vol56/iss1/8

[5] "Top 10 Percent Law." UT News, news.utexas.edu/topics-in-the-news/top-10-percent-law/. Accessed 13 Jun. 2023.

[6] O'Connor, Sandra Day, and Supreme Court Of The United States. U.S. Reports: Grutter v. Bollinger et al., 539 U.S. 306. 2002. Periodical. Retrieved from the Library of Congress, <www.loc.gov/item/usrep539306/>.

[7] Lempert, Richard. "Fisher V. University of Texas at Austin: History, Issues, and Expectations." Brookings, 9 Dec. 2015, www.brookings.edu/articles/fisher-v-university-of-texas-at-austin-history-issues-and-expectations/. Accessed 15 Jun. 2023.

[8] Fenves, Gregory L. "University of Texas at Austin President Responds to Supreme Court Ruling." UT News, 23 Jun. 2016, news.utexas.edu/2016/06/23/ut-president-responds-to-supreme-court-ruling/. Accessed 15 Jun. 2023.

[9] Article I, Section 26 - Michigan Legislature." Michigan Legislature, http://www.legislature.mi.gov/(S(g2cyka55gcmddvbrdvmwjgb4))/mileg.aspx?page=GetObject&objectname=mcl-Article-I-26.

[10] Boggs, Squire Patton. "Breaking News: Sixth Circuit Strikes Down Michigan Constitutional Amendment on College Admissions." Sixth Circuit Appellate Blog, 1 July 2011, https://www.sixthcircuitappellateblog.com/news-and-analysis/breaking-news-sixth-circuit-strikes-down-michigan-constitutional-amendment-on-college-admissions/.

[11] Supreme Court Upholds Michigan Affirmative Action Ban." NBC News, 22 Apr. 2014, https://www.nbcnews.com/news/us-news/supreme-court-upholds-michigan-affirmative-action-ban-n86626.

References

[12] "Race and Equity in Common App." Common App, www.commonapp.org/race-in-admissions. Accessed 23 Jun. 2023.

[13] Harvard University Office of Institutional Research and Assessment. "Common Data Set." Office of Institutional Research and Assessment, Harvard University, n.d., https://oira.harvard.edu/common-data-set/

[14] Yale University Office of Institutional Research. "Common Data Set 2022-2023." Office of Institutional Research, Yale University, 26 May 2023, oir.yale.edu/sites/default/files/cds_yale_2022-2023_vf_05262023.pdf.

[15] Lempert, Richard. "The Supreme Court Is Poised to Reverse Affirmative Action: Here's What You Need to Know." Brookings Institution, 5 June 2023, www.brookings.edu/articles/the-supreme-court-is-poised-to-reverse-affirmative-action-heres-what-you-need-to-know/.

[16] "Rackham DEI Strategic Plan." Rackham Graduate School, University of Michigan, n.d., www.rackham.umich.edu/downloads/rackham-dei-strategic-plan.pdf.

[17] MAE Plans Foundational Changes to Improve Diversity and Inclusion." University of Virginia School of Engineering, n.d., engineering.virginia.edu/MAE-plans-foundational-changes-improve-diversity-and-inclusion.

[18] Freeling, Nicole. "Serving the New California: 9 Ways UC is Working to Cultivate a University as Diverse as the State Itself." University of California, 23 Jan. 2023, www.universityofcalifornia.edu/news/serving-new-california-9-ways-uc-working-cultivate-university-diverse-state-itself.

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