What May Shape The Scope Of Affirmative Action Ruling

By **Seth Orkand, Joshua Coker and Mallori Thompson** (November 6, 2022)

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After oral arguments in affirmative action cases Students for Fair Admissions v. University of North Carolina[1] and Students for Fair Admissions v. President and Fellows of Harvard College,[2] the fate of race-conscious admissions in higher education is no longer in any real doubt.

The three dissenting justices in the U.S. Supreme Court's most recent consideration of affirmative action in Fisher v. University of Texas[3] — Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito — remain on the court, while the sole remaining member of the Fisher II majority, Justice Sonia Sotomayor, is likely to be joined by liberal Justices Elena Kagan and Ketanji Brown Jackson.

As such, the decisions of the three appointees of former President Donald Trump — Justices Brett Kavanaugh, Neil Gorsuch and Amy Coney Barrett — will be decisive.[4] Questions from these three justices suggest that the future of affirmative action will be short-lived.

However, there appear to be divisions within the court's conservative bloc that may shape the breadth of holdings for the cases' common petitioner.

Broad decisions holding that race-conscious admissions violate the equal protection clause and Title VI of the Civil Rights Act — as preferred by Justice Thomas, and possibly Justice Barrett — would affect hiring decisions in numerous industries and could spell an end to government preference and set-aside programs in public works projects.

Narrower decisions, as may be preferred by Justices Kavanaugh and Gorsuch, may have more limited collateral effects.

The Harvard and UNC cases are nearly play-by-play repeats of the previous attempt in Fisher II to prohibit university admissions from considering race. There, the court's majority found that the consideration of racial minority status for a small group of University of Texas applicants was constitutional because the educational benefit of diversity in collegiate environments was a sufficiently measurable compelling interest and there was no workable race-neutral alternative to achieve diversity.

Fisher II's analysis followed the framework established by the Supreme Court's decisions in Regents of the University of California v. Bakke in 1978[5] and Grutter v. Bollinger in 2003.[6]

Bakke held that affirmative action was constitutional if intended to improve educational diversity, but not for other purposes, such as remedying past injustices. Grutter upheld the constitutionality of using race as a "plus factor" in holistic admissions decisions to achieve educational diversity while prohibiting explicit racial quotas.

This Bakke-Grutter framework was directly challenged by the Fisher II petitioner, who sought to overturn Grutter with a holding that any consideration of race in university

admissions violates the 14th Amendment's equal protection clause.

Conservative Justices Continue to Appear Divided About Overturning Grutter

In Fisher II, the court's conservative justices were divided about whether to overturn the Bakke-Grutter framework. Justice Alito wrote a dissenting opinion in that case that evaluated the petitioner's claims within the framework, rather than advocating overturning Grutter and its progeny.

Justice Alito argued that the holistic admissions process used by the University of Texas failed to satisfy strict scrutiny because (1) it failed to define the university's compelling interest in diversity "with any clarity"; and (2) even if the university's compelling interest in diversity was sufficiently clear, affirmative action was not a narrowly tailored remedy given race-neutral alternatives.

Justice Alito argued that the university's interest in diversity evaded judicial review because there was no clear measure for the success or failure of the university's stated goal of achieving a critical mass of diversity in its student body, and because "[t]here is no logical stopping point short of patently unconstitutional racial balancing."

He also dismissed concerns that proposed race-neutral alternatives would reduce underrepresented minority presence among the student body as impossible to evaluate without reliance on numerical quotas or racial balancing prohibited by Grutter.

Given the ambiguity of the diversity goal and the fact that underrepresented minority admission, while diminished, would still be substantial should affirmative action be prohibited in the University of Texas system, Justice Alito argued that the remedy was not narrowly tailored to a clearly defined compelling interest.

In contrast with Justice Alito's Fisher II dissent, Justice Thomas wrote a separate dissent arguing that the Bakke-Grutter framework itself should be overturned, arguing, "I would overrule Grutter" because "a State's use of race in higher education admissions is categorically prohibited by the Equal Protection Clause."

Although Justice Thomas' joining of Justice Alito's dissent indicates that he also believed that the University of Texas' use of affirmative action violated the Bakke-Grutter framework, his dissent went far further to argue that any use of race violates the equal protection clause — an opinion that, if adopted, would require reversing Bakke and its progeny.

There continue to be divisions among the court's conservative bloc, including among the three Trump appointees. Their questions during oral argument suggested that some of the justices may lean toward overturning Grutter, as Justice Thomas advocated in Fisher II, while others appear to be considering the cases within the Bakke-Grutter framework.

For example, the Trump appointees questioned whether there are race-neutral alternatives that can nonetheless satisfy the universities' compelling interest in diversity recognized by the Bakke-Grutter framework.

In particular, Justice Kavanaugh may be poised to employ this framework as opposed to abandoning it, based on his questions concerning the definition of diversity and whether it includes socioeconomic status or religion; the permissibility of proxies for race, such as immigration status or having enslaved ancestors; and how much a university must be willing to sacrifice before a race-neutral alternative becomes unfeasible.

Justices Kavanaugh and Gorsuch both queried whether eliminating preferential admissions for athletes, legacy, donors and children of faculty or staff, a group of admission preferences that tends to benefit white applicants, would be required if it increased campus diversity without considering race.

Uniquely among the members of the court, Justice Barrett appeared concerned about the use of a holistic admissions process, as approved by Grutter, regardless of whether it directly considers race. Justice Barrett asked if, under the petitioner's desired remedy, it would be permissible for a student to submit "an essay describing some of the experiences [they faced such as] economic diversity, racial prejudice, things that shape who I am ... without offending the Equal Protection Clause?"

The UNC petitioner's counsel responded that it would be permissible because "the act of overcoming discrimination is separate and apart ... from race."

During questioning of the petitioner's counsel in the Harvard case, Justice Barrett expressed discomfort with this distinction, suggesting it would be difficult to disentangle race from ethnicity, culture or personal history. She questioned whether a university's compelling interest in diversity would extend to other kinds of diversity, such as religion, gender, or "different viewpoints in the classroom."

She stated, "I guess what I'm concerned about is if it puts a lot of pressure on the essay writing and the holistic review process. You could have viewpoint discrimination issues, I would think, depending on how admissions officers treat essays."

Justice Barrett's questions suggest she is concerned about the discretion afforded to admissions officers and potential discrimination on religious or ideological grounds.

Given her concerns about a lack of a clear end date for affirmative action policies and whether the goal of campus diversity is impossible, it is unlikely that Justice Barrett's skepticism of race-neutral diversity statements as an alternative to affirmative action will translate into a pro-respondent opinion.

Rather, her skepticism about the ability of admissions officers to impartially evaluate admissions essays suggests she may gravitate toward a stricter position that overrules Bakke and Grutter by prohibiting consideration of race in admissions.

It's All a Matter of Time

Former Justice Sandra Day O'Connor expressed the expectation in Grutter "that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." Of course, Justice O'Connor could not have foreseen the numerous events that have occurred since Grutter that have laid bare how far society still has to go in its racial reckoning. Nonetheless, Justice O'Connor's 25-year prediction permeated the oral arguments in the UNC and Harvard cases.

Concern over the lack of a clear endpoint for affirmative action was a substantial focus of the justices' questioning during the oral arguments. Each of the Trump appointees expressed concern about when consideration of race in university admission will no longer be necessary.

Justice Kavanaugh asked "how to think about the 25-year sentence in Grutter?" The

petitioner's counsel argued that Justice O'Connor's time prediction meant that if diversity goals have not been achieved in 25 years, "we then declare racial preferences to be a failure and call it off and go with race neutrality and try that instead."

More pointedly, Justice Barrett asked, "When does it end? When is your sunset? When will you know? Because Grutter very clearly says this is so dangerous. Grutter doesn't say this is great, we embrace this. Grutter says this is dangerous and it has to have an end point." She continued, "what if Grutter was grossly optimistic in what it thought was achievable and ... there's no end point?"

Justice Gorsuch echoed these concerns, asking, "When does Harvard anticipate this will end?"

Overturning Grutter Would Have Wide-Reaching Implications

As in Fisher II, the Harvard and UNC cases appear likely to produce a conservative consensus within the Bakke-Grutter framework. Statements by Justices Gorsuch and Kavanaugh, along with the prior opinions of the dissenting justices in Fisher II, suggest at least a five-member majority that would hold against the respondents due to:

- Concerns about the ambiguity or difficulty of measuring progress toward the respondents' compelling interest in a critical mass of racial diversity on university campuses;

- Concerns about the lack of a definite timeline for winding down or ending affirmative action; and

- Openness to considering proposed race-neutral alternatives as constitutionally sufficient.

The opinions of Justices Kagan and Sotomayor, and Justice Jackson in the UNC case, are unlikely to affect the outcome.

However, it is plausible that Justice Thomas will draft a separate concurrence consistent with his dissent in Fisher II that advocates for a broader ruling reversing the Bakke-Grutter framework and prohibiting racial classification in university admissions altogether.

Such a broad reading does not appear to have enough support from the other conservative justices to become law, given that Justices Alito and Roberts declined to join Justice Thomas' Fisher II opinion, and Justices Gorsuch and Kavanaugh expressed interest in a framework-compliant opinion that the universities have failed to adopt available race-neutral alternatives.

However, Justice Barrett's concern over viewpoint discrimination by admissions officers renders her vote less predictable and may lead her to join a broader concurrence with Justice Thomas.

The more likely holding, one that is limited to declaring that Harvard and UNC are no longer compliant with the Bakke-Grutter framework, might not have significant collateral effects outside higher education. However, a categorical prohibition on considering race in admissions could produce dramatic consequences for racial preferences in hiring decisions and various government preference programs, such as set-asides and preference programs

in government contracting.

Federal, state and municipal set-aside programs intended to increase participation in public contracting of minority-owned businesses implicate the equal protection clause for the same reasons as affirmative action in university admissions.

Programs that survived the Supreme Court's 1989 decision in City of Richmond v. J.A. Croson Co.[7] — a case relied on by the petitioner during oral argument — could once again be at risk if the court strictly proscribes race-conscious policies. Based on the positive impact of these programs on the success of minority business owners, the elimination of set-asides and preference programs might be detrimental to their beneficiaries.

Additionally, because Title VI applies to any entity that receives federal funds, several private employers that receive federal funds could be bound to any Title VI holding the court reaches in this case. For example, health care providers participating in Medicare and Medicaid, hospitals and nursing homes, and even private insurers that participate in the Affordable Care Act's health insurance marketplace are considered to receive federal assistance from the U.S. Department of Health and Human Services.

An opinion in favor of the petitioner in the Harvard case may pose a challenge to diversity, equity and inclusion hiring programs. Even if the court hands down a narrow ruling, hiring programs at heath care institutions will likely fall within its bounds, threatening to stunt diversity in an industry already struggling to ensure that medical professionals represent the communities they serve.

Although it is unlikely the court will issue a broad opinion that affects numerous industries, it seems certain that it intends to adopt Justice Roberts' now-infamous blunt sentiment that "the way to stop discrimination on the basis of race is to stop discriminating on the basis of race." However, as UNC's counsel, Ryan Park, noted during arguments, programs take society as they find it.

And although much progress has been made toward eliminating the effects of Jim Crow laws and racially discriminatory mass incarceration efforts, there is still much work to be done within society before consideration of race in college admissions and hiring decisions is no longer necessary.

Thus, if institutions are unable to develop race-neutral alternatives to achieving diversity goals, colorblind policies may be ineffective in addressing the headwinds faced by racial minorities today that were created by past and present discrimination.

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Disclosure: Seth Orkand filed an amicus brief for a number of schools in support of appellee Harvard when that case was before the First Circuit.

[1] Students for Fair Admissions v. University of North Carolina (No. 21-707).

[2] Students for Fair Admissions v. President and Fellows of Harvard College (No. 20-1199).

[3] Fisher v. University of Texas, 579 U.S. 365 (2016).

[4] As Justice Jackson is recused from the Harvard case, the balance of power is even more strongly shifted towards the Court's conservatives in that case.

[5] Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

[6] Grutter v. Bollinger, 539 U.S. 306 (2003).

[7] City of Richmond v. J.A. Croson Co., 488 U.S. 489 (1989).