



SUPREME COURT CASE ANALYSIS | Higher Education Reform Initiative

STUDENTS FOR FAIR ADMISSIONS V. PRESIDENT & FELLOWS OF HARVARD COLLEGE

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MAIN POINTS

- The Supreme Court appears poised to overturn *Grutter v. Bollinger*, which allows race preferences in college admissions on the rationale that achieving a diverse student body is a compelling state interest.
- The *Grutter* decision unleashed a mania for diversity on college campuses 20 years ago that has severely disfigured the academic and intellectual environment in ways the Court could not have foreseen.
- Race-conscious admissions policies have had unintended consequences that injure some of those they were designed to benefit. New forms of race segregation are increasingly common on college campuses today. Beneficiaries of race preferences can be set up to fail when they are admitted to programs with peers who have much stronger academic preparations.

On October 31, 2022, the U.S. Supreme Court heard oral arguments in two cases about the use of racial preferences in college admissions: *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and a similar case involving a state institution, the University of North Carolina. For more than five hours of questioning—almost

unprecedented in the modern era—the justices raised probing questions about the legality of Harvard's practices in particular and the constitutionality of using race as a plus factor in college admissions generally. Nine states already forbid affirmative action in college admissions at public universities. The outcome of the Students for Fair Admissions (SFFA) cases could end the practice at public universities nationwide as well as at private institutions that accept federal funding.

STUDENTS FOR FAIR ADMISSIONS BELIEVES HARVARD'S USE OF RACE PREFERENCES IN ADMISSIONS IS ILLEGAL

In a 2003 [decision](#), *Grutter v. Bollinger*, the U.S. Supreme Court held that promoting diversity on U.S. college campuses is a “compelling interest that can justify the use of race” in college admissions. While the Court forbade the use of racial quotas or set-asides, it did allow schools to consider race as part of a holistic college application to achieve “the educational benefits that flow from a diverse student body.” On the rationale that diversity in the student body enriches the campus as an academic and intellectual environment, the opinion reaffirmed reasoning from an earlier decision recognizing a school’s “right to select those students who will contribute the most to the ‘robust exchange of ideas.’” Justice Sandra Day O’Connor, writing for the 5–4 majority, expected her ruling in *Grutter* to be a temporary fix: “25 years from now,” she wrote, “the use of racial preferences will no longer be necessary to further the interest approved today.”

Almost twenty years later, it is clear *Grutter* has had unintended and pernicious consequences. “Diversity” is [today](#) the dominant concern of university administrators—often to the detriment of pursuing truth and wide-ranging campus deliberation (Abott). Diversity initiatives, meanwhile, often lead to discrimination against Asian-American applicants, as well as to “neo-segregationist” [policies](#) on college campuses (Pierre and Wood, 16). SFFA is [asking](#) the Supreme Court to hold that Harvard’s use of race in



admissions violates Title VI of the Civil Rights Act, which forbids race discrimination at colleges and universities that accept federal funding. SFFA argues that Harvard’s use of race “is an anvil on the scale that dominates the entire process” and, thus, violates the holding in *Grutter*. *Grutter* only allows schools to consider race or ethnicity in a narrowly tailored way—that is, “only as a ‘plus’” under a system that is “flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.” In the North Carolina case, the question is whether the 14th Amendment’s equal protection clause, which bans race discrimination by government entities, should extend to the use of race preferences in admissions decisions at public colleges and universities.

The Court will likely overturn *Grutter* now that the composition of the Court has changed to a more originalist body. The consensus among originalist jurists is that *Grutter* was wrongly decided. The decision violated the original public meaning of the 14th Amendment’s Equal Protection Clause. In fact, the primary purpose of the 14th Amendment was to “abolish all legal distinctions based on race or color” (Landsberg, 136). In Justice John Marshall Harlan’s dissent in *Plessy v. Ferguson*, he announced that “[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens” (1896). His dissent would later sound in the majority decision in *Brown v. Board of Education*, where the Court held that segregation of public school children on the basis of race violated the 14th Amendment (1954). The logic will likely permeate the Court’s decision in this case. As a result, the interest identified by the *Grutter* Court to allow the use of racial classifications in university admissions—a school’s interest in a diverse student body—will not be judged sufficiently compelling to overcome a return to the 14th Amendment’s original meaning.



HARVARD APPEARS TO DISCRIMINATE AGAINST ASIAN APPLICANTS CITING CONCERNS ABOUT DIVERSITY

Asian applicants to Harvard tend to have stronger academic credentials in the aggregate than applicants from other racial backgrounds, as evidenced by SAT scores and high school grades. SFFA is alleging discrimination because Harvard admits a much lower proportion of Asian applicants with high academic scores than students from other ethnic backgrounds with comparable academic credentials (SFFA 2021). It also admits higher proportions of Black and Hispanic students with lower academic scores. This is a result of a “holistic” approach to admissions according to which admissions officers assign a “personal rating” to each applicant focusing on non-academic characteristics including “leadership ability,” self-confidence,” “likeability,” “grit,” “kindness,” etc. (Ibid., 7). In other words, Harvard has systematically penalized Asian students in the admissions process by assigning them generally lower likeability, kindness, and leadership scores. Putting aside the manifest racism of such findings, Harvard’s own Office of Institutional Research has found that being Asian American is “negatively correlated” with admission (Ibid., 13).

The use of subjective admissions criteria to shape the racial composition of the entering class has a long, dubious [history](#) at Harvard (Shapira). When Jewish admissions reached 27.6% of the entering class in 1925, the university jettisoned an application system based almost exclusively on objective assessments (grades and an entrance exam) in favor of subjective admissions criteria, including assessments of “character and personality.” As then-President Lowell [explained](#) to the Admissions Committee, “To prevent a dangerous increase in the proportion of Jews, I know at present only one way which is at the same time straightforward and effective, and that is a selection by a personal estimate of character” (Heriot, 165).



A detailed statistical [analysis](#) of Harvard's admissions practices conducted by Dr. Peter Arcidiacono illustrates the extent to which Asian applicants are at a disadvantage today.

- Admit rates for students with academic index scores in the top 10% of applicants vary dramatically based on a student's race. SFA's analysis of students admitted to the classes of 2017–19 showed that Harvard admitted 49.5% of Black students in the top decile, compared to 13.6% of White students and 9.4% of Asian students.
- The racial disparity is even more pronounced for students with lower academic scores. For example, Harvard admitted 50.9% of Black students in the ninth academic decile, compared to 6.3% of Asian students and 9.3% of White applicants.
- According to the SFFA model, if Harvard admitted students randomly from the top decile of academic performers, 51.5% of its matriculants would be Asian students (compared to 24.9% of the 2017–19 classes).

FOUR REASONS DIVERSITY INITIATIVES HAVE FAILED ON U.S. CAMPUSES

When the U.S. Supreme Court rejected racial quotas and set-asides but permitted universities to consider applicants' race to advance the goal of diversifying campus, it inadvertently set off a mania that has transformed American campuses—and, arguably, American society. Today, universities make achieving diversity a paramount objective in student admissions, faculty recruitment, research funding, and extra-curricular programming. It even features prominently in mission statements and strategic plans. Unfortunately, diversity initiatives do little to bring a true diversity of viewpoints or backgrounds onto campus. Too often, they instead reinforce a viewpoint monoculture that is stifling debate and impoverishing the campus intellectual environment (Abbot). Many schools have begun creating spaces, residence halls, and activities that exclude students based on race—in effect, a new form of segregation in the name of diversity. In some cases, racial preferences even harm the very students they were designed to help, as



Justice Clarence Thomas argued in his *Grutter* dissent: “These overmatched students take the bait, only to find that they cannot succeed in the cauldron of competition.”

1. Race-conscious admissions policies at elite universities do little to increase economic or political viewpoint diversity.

The Supreme Court’s rationale for allowing universities to consider race in admissions suggests an expectation that diversity initiatives would result in a student body that is diverse in many ways, including economic background, political viewpoint, and geographically. In fact, the students who benefit from Harvard’s holistic admissions scheme come disproportionately from wealthy suburban households. According to a 2017 [analysis](#) reported in *Harvard Magazine*, 15.4% of the students Harvard admits are from families with incomes in the top 1%—roughly equivalent to the number of students (16.4%) admitted from families in the bottom 60% of the income distribution (Bolotnikova). More than two-thirds (70.3%) of Harvard admits come from families in the top income quintile. In other words, Harvard’s race-conscious admissions do little to increase diversity understood in terms of economic background, which would arguably do more to enrich the intellectual climate than the presence of wealthy students from the same neighborhoods who happen to have different racial backgrounds. Nor is the program doing much to promote economic mobility, given that the vast majority of Harvard matriculants are coming from wealthy households.

Harvard’s admissions policies also fail to curate a student body with a high degree of political viewpoint diversity. When the *Harvard Crimson* [surveyed](#) the incoming class of 2021 freshmen, it found that nearly 70% “reported left-of-center political views.” 2.5% identified as “very conservative,” and 9.3% said “somewhat conservative” (Florence and Steinback). Similarly, a 2022 [survey](#) of graduating seniors found that only 6.4% of Harvard students identified as conservative after four years on campus (Burstein).

Geographic diversity is not a priority for admissions officers either, with [only](#) 10.4% of



incoming 2022 freshmen hailing from rural areas ([compared](#) to 19% of the U.S. population according to the U.S. Census; Chaidez and Zwickel).

2. Diversity programs coincide with the increasing segregation of students on campus.

One rationale provided by the *Grutter* court for allowing race preferences in admissions was the hope that racial diversity would “break down racial stereotypes.” In the name of diversity today, colleges are instead entrenching them by offering race-segregated programming and accommodations for underrepresented minority students. A [study](#) of 173 four-year colleges and universities conducted by the National Association of Scholars found that 46% “segregate student orientation programs,” 43% offer race-segregated residence halls, and 72% offer (optional) race-segregated graduation ceremonies (Pierre and Wood, 16). All but one school in the sample had at least one race-segregated student club. Colleges that teach students—by their example and programming—that race separation is normal and appropriate do an immense disservice to American society. By normalizing what some have called “neo-segregation,” they are deepening societal divisions instead of fostering mutual respect and attitudes of inclusion. These practices are often so egregious that universities have been forced to [abandon](#) them in the wake of complaints to the federal Office of Civil Rights under Title VI of the Civil Rights Act, which forbids universities that receive public money from discriminating based on race (Perry).

3. Racial preferences in admissions can set up academically underprepared students for failure.

SFFA observes in their brief that Harvard actively recruits White and Asian students with PSAT scores above 1350. For African American and Hispanic high schoolers, the cutoff is much lower, at 1100. For decades, commentators have raised concerns that the resulting “mismatch” will harm the students receiving race preferences in admissions by



putting them in competitive academic environments where they are at a disadvantage. This harm is not restricted to elite institutions. Researchers have [documented](#) that students who are admitted in spite of weaker academic records do rank lower academically in their class or cohort, which can be demoralizing (Lutz et al.). They have also [established](#) that less well-prepared minority students switch out of science, technology, engineering, and mathematics (STEM) majors at higher rates than White students and gravitate toward less demanding (non-STEM) majors (Riegle-Crumb et al.). A [study](#) that looked at Duke University students specifically found that “of those who expressed an initial interest in the sciences, 54% of African American males finished in the humanities or social sciences compared to 8% of White males” (Arcidiacono and Lovenheim 51). In contrast, minority students are more [likely](#) to persist in STEM majors when they attend schools where peers have similar levels of academic preparation (Smyth and McArdle).

Other findings are more controversial due to limited access to relevant data. But Richard Sander has raised the possibility that significantly higher rates of failure on the bar exam for African American candidates could be [associated](#) in important part with preferential admission to elite law schools, where mismatched students fall behind and learn less than they would at a less selective institution that places more emphasis on preparing graduates to pass the bar exam (Sander). His analysis raises a provocative possibility that turns the *Grutter* rationale on its head: American society might benefit from a higher number of practicing African American attorneys if law schools did not engage in preferential admissions.

4. Diversity has morphed into a political ideology that now threatens the academic truth-seeking and knowledge-dissemination functions of the university.

In their efforts to promote Diversity, Equity, and Inclusion (DEI), universities are increasingly adopting policies that establish viewpoint monocultures and suppress the



expression of heterodox viewpoints. For example, the use of DEI statements as screening devices in faculty searches effectively creates a political viewpoint litmus test. The message to applicants: only those on the political Left, whose research and teaching record includes highly politicized work, need apply. At the University of California-Berkeley, fully 76% of applicants were [rejected](#) from consideration in a 2018–19 Life Sciences department search based on a review of diversity statements—before the faculty committee even had a chance to look at their credentials (Eden & Yenor, 2022). As one commentator has [observed](#), a school using DEI screens would almost surely pass on the opportunity to hire Albert Einstein today (Poliakoff).

University faculties have probably never been more Left-leaning than they are today. A [study](#) conducted by the University of California, Los Angeles’s Higher Education Research Institute found that 60% of college faculty members across all disciplines identify as “far Left” or “liberal,” compared to 12% who call themselves “conservative” or “far Right” (Stolzenberg et al., 17). In disciplines like History, Economics, Psychology, Journalism, and Law, the ratio is often even more lopsided. One [study](#) of voter registrations in those disciplines at 40 leading universities found institutional Democrat-to-Republican ratios as high as 60 to 1 (Langbert et al., 424). At Harvard, the [ratio](#) of liberal to conservative faculty was 56 to 1 in a 2022 survey (Xu).

DEI concerns have also led schools to establish overbroad speech policies that forbid, and in some cases threaten to punish offensive speech—much of it constitutionally protected. Today, [more](#) than 450 colleges operate bias response teams, including 249 public schools, even though federal appeals courts have said they can exert an unconstitutional chilling effect (Speech First, 3). As a result, students have reported high levels of self-censorship in several studies. Most recently, a 2022 Foundation for Individual Rights and Expression (FIRE) [survey](#) of 45,000 students on 203 campuses found that only 13% of



students are “very comfortable” expressing their views on a controversial topic “during an in-class discussion.”

Conclusion

It is clear today that campus diversity efforts are not enriching the campus marketplace of ideas as *Grutter* hoped. If anything, the law of unintended consequences has prevailed, whereby concerns for diversity have had the effect of establishing a domineering viewpoint monoculture on campuses around the country. Inasmuch as diversity proponents are also advocating new forms of racial segregation, the Court’s hope that preferential admissions practices would help break down racial stereotypes has also been disappointed. In other words, race preferences have done little to advance the compelling state interest identified by the Court almost 20 years ago.

If the U.S. Supreme Court overturns *Grutter* in *Students for Fair Admissions v. President and Fellows of Harvard College*, elite universities are sure to mount a spirited resistance campaign. Some will even develop creative ways to advance their diversity agenda in new and surreptitious ways. Additional lawsuits and continued policy debate are virtual certainties. But such a ruling would nonetheless constitute an important first step toward restoring a genuinely diverse marketplace of ideas, along with free and open debate and race-neutral norms and attitudes, to U.S. colleges and universities—and ultimately, to American society writ large.



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