Race as a Factor in Employment Decisions: the Risks in Light of Students for Fair Admissions v. Harvard/UNC

Presenters

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Today's Agenda

- Prior SCOTUS college admissions cases
- The 2023 Students for Fair Admissions cases
- Impact on Private Employers
- Public Announcements re: Impact
- New Challenges Brewing?

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Prior SCOTUS Decisions Re: College Admissions

Bakke v. Regents of the Univ. of California (1978)

- No single majority opinion; six separate opinions. No racial quotas, but some consideration of race is okay.

Grutter v. Bollinger (2003) (5-4)

- School consideration of race in admissions permissible
- "narrowly tailored" - used a highly individualized review of each individual, no "automatic" rejections based on race
- Furthered **a "compelling interest" – the educational benefits that flow from a diverse student body"**

- **"**25 years from now, the use of racial preferences will no longer be necessary." O'Connor, J.

Fisher v. University of Texas at Austin

"Fisher II" (2016) (4-3 upheld holistic review policy) (Kennedy, J.)

- "Strict scrutiny requires the university to demonstrate with clarity that its purpose or interest is both constitutionally permissible and substantial, and that its use of the racial classification is necessary to the accomplishment of that purpose"

➔ UT's policy satisfied strict scrutiny

- Diversity itself could be the compelling state interest.

  "Enrolling a diverse student body promotes, cross-racial understanding, helps break down racial stereotypes, and enables students to better understand persons of different races[,]. .. promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society,."

- Quotas prohibited.
- Because UT showed that other non-race conscious initiatives to increase diversity were not successful, the program was narrowly tailored.
- The court noted the need to continually assess whether changing demographics have undermined the need for the policy.

Students for Fair Admissions Cases - 2023

SFFA v. Harvard	vs.	SFFA v. UNC
Alleged discrimination against Asians		Alleged discrimination against Whites and Asian Americans
Claim under **Title VI of the Civil Rights Act of 1964**		Claims under **Title VI** and **the Equal Protection Clause**
School allowed race/ethnicity to be considered as part of a candidate's "personal rating" in their application for admission		School allowed race/ethnicity to be considered a "plus" factor in an overall "holistic" admissions process
Goal of admissions policy was to prevent a "dramatic drop-off" in minority admissions compared to the prior class		Goal of admissions policy was to ensure that the minority enrollment percentage was not lower than the minority representation in NC's general population

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Students for Fair Admissions Cases

- Both schools claimed their programs were consistent with precedent: race was just one “plus” factor in a comprehensive holistic admissions process.
- The schools argued that schools should have discretion to decide whether to use race based on their experience/expertise regarding the educational benefits of student diversity
- Lower courts agreed.

➔Issues framed by the Supreme Court:

1. Is the racial classification used “further compelling government interests?”
2. If so, is the use of race “narrowly tailored” to achieve that interest?

2023 SFFA SCOTUS Ruling (Roberts, J)

Majority overruled the lower courts 6-2 (Harvard) and 6-3 (UNC) and held:

- The programs which permitted the schools to consider an applicant's race when making admissions decisions, violate the Equal Protection Clause of the 14th Amendment and Title VI of the Civil Rights Act.

- The "programs cannot be reconciled with the guarantees for the Equal Protection Clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve stereotyping and lack meaningful end points."

SFFA v Harvard/UNC

- The admissions policies were challenged under the Equal Protection Clause of the Fourteenth Amendment (UNC) and Title VI of the Civil Rights Act of 1964 (Harvard/UNC)
  - The Equal Protection Clause provides that no State, “shall deny to any person .. . equal protection under the law.”
  - Title VI says: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”
  - Court used the same strict scrutiny analysis for both theories.
  - Both schools’ policies failed under strict scrutiny review.

SFFA v Harvard/UNC

- The schools' goals - training future leaders, promoting a robust exchange of ideas, preparing citizens and leaders, promoting cross-racial understanding and breaking down barriers – were not sufficiently compelling because they were incapable of measurement and court review.
- Neither college said that their programs were justified by their own past discrimination.
- The goal of remedying the general effects of societal discrimination is not a compelling state interest.

SFFA v Harvard/UNC

- Narrowly tailored means
  - ➢ Avoiding possible illegitimate stereotyping
  - ➢ Avoiding discrimination against the non-minorities
  - ➢ Having a reasonable endpoint
- The policies were not narrowly tailored to support the articulated goals because there was no showing (i) that the program would achieve the goal in a reasonable time and (ii) that the program doesn't unduly harm the interests of the non-minorities.
- Also the race categories (EEO-1) were arbitrary and under-inclusive

➔ "Courts may not license separating students on the basis of race without an exceedingly persuasive justification that is measureable and concrete enough for judicial review."

Justice Thomas, concurring

- Writes separately, to “clarify that all forms of discrimination based on race – including so-called affirmative action – are prohibited by the constitution.”
- “Three aspects of today’s decision warrant comment. First, to satisfy strict scrutiny, universities must be able to establish an actual link between racial discrimination and educational benefits. Second, those engaged in racial discrimination do not deserve deference with respect to their reasons for discriminating. Third, attempts to remedy past governmental discrimination must be closely tailored to address that particular past governmental discrimination.”
- “Given the strictures set out by the Court, I highly doubt any will be able to do so.

Justice Gorsuch, concurring

- “Today the Court holds that the Equal Protection Clause of the Fourteenth Amendment does not tolerate this practice [race-based decision making]. I write to emphasize that Title VI of the Civil Rights Act of 1964 does not either.”
- “If this exposition of Title VI sounds familiar, it should. Just next door, in Title VII, Congress made it “unlawful … for an employer… to discriminate against any individual … because of such individual’s race, color religion, sex or national origin.”
- “[W]hen Congress uses the same terms in the same statute, we should presume they have the same meaning. … both Title VI and Title VII codify a categorical rule of individual equality without regard to race.”
- Equal protection requires different degrees of judicial scrutiny for different kinds of classifications. Strict scrutiny for race, color and national origin. Immediate scrutiny for sex. Rational-based review for others.
- “Under Title VI, it is *always* unlawful to discrimination among persons even in part, because of race, color or national origin.”

Justice Kavanaugh, concurring

- Writes separately to further explain why the Court's decision today is consistent with and follows from the Court's equal protection precedents, in response to dissent's arguments that the majority added new requirements for a measurable state interest and an endpoint.

Justice Sotomayer, dissenting

- The majority's decision is at odds with long-standing Court precedent that the Equal Protection Clause's guarantee of racial equality, "can be enforced through race-conscious means in a society that is not, and has never been colorblind."
- FN3. "At the risk of stating the blindingly obvious, and as *Brown* recognized, the Fourteenth Amendment was intended to undo the effects of a world where laws systematically subordinated Black people and created a racial caste system.
- "Equality requires acknowledgement of inequality."

Justice Jackson, dissenting

- “The only way out of this morass – for all of us – is to stare at racial disparity unblinkingly, and then do what evidence and experts tell us is required to level the playing field and march together forward, collectively striving to achieve true equality for all Americans. It is no small irony that the judgment the majority hands down today will forestall the end of race-based disparities in this country, making the colorblind world the majority wistfully touts must more difficult to accomplish.”
- FN 103: “The take away is that those who demand that no one think about race (a classic pink elephant paradox) refuse to see, much less solve for, the elephant in the room – the race-linked disparities that continue to impede achievement of our great Nation’ full potential. Worse still, by insisting that obvious truths be ignored, they prevent our problem-solving institutions from directly addressing the real import and impact of social racism and government-imposed racism. Thereby deterring our collective progression toward becoming a society where race no longer matters. ”

But,

- *Majority* – "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 though discrimination, inspiration or otherwise."
- *Thomas, J.* – *"*Again, universities may offer admissions preferences to students from disadvantaged backgrounds, and they need not withhold those preferences from students who happen to be members of racial minorities. Universities, may not however, assume that all members of certain racial minorities are disadvantaged." FN. 11.
- *Kavanaugh, J*. – "[G]overnments and universities still can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race."
- *Sotomayer, J.* – "To be clear, today's decision leaves intact holistic college admissions and recruitment efforts that seek to enroll diverse classes without using racial classifications. Universities should continue to use those tools as best they can to recruit and admit students from different backgrounds based on all the other factors the Court's opinion does not and cannot touch. Colleges and universities can continue to consider socioeconomic diversity and to recruit and enroll students who are first generation college applicants or who speak multiple languages, for example."

Impact on Private Employers

Impact on Private Employers

- The Equal Protection Clause (government entities)
- Title VI (recipients of federal education dollars)
- Title VII (employers with more 15 or more employees)
- 42 U.S.C. § 1981 (all private employers)
- Executive Order 11246 (federal contractors)

➔All the above prohibit the use of race in making employment decisions

Title VII Prohibits Race-Based Decisions

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. §2000e-2(a).

Title VII Does Not Require Preferential Treatment

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer … to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group *on account of an imbalance which may exist with respect to the total number or percentage* of persons of any race, color, religion, sex, or national origin employed by any employer, … with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area. 42 U.S.C. §2000e-2(j).

Does Title VII Permit Affirmative Action?

The EEOC issued guidelines on voluntary affirmative action in **1979**!! 29 C.F.R. §1608.3.

- When the employer's practices, procedures or policies have had an adverse impact;
- To correct the effects of the prior discriminatory practices
- And where "because of historic restrictions by employers, labor organizations and others, … the available pool of qualified minorities and women, for employment or promotional opportunities is artificially limited."

EEOC Guidelines on Voluntary Affirmative Action

Voluntary plans must contain:

1. A reasonable self-analysis
2. A reasonable basis for concluding that action is appropriate
3. Reasonable action

The EEOC suggests that plans (and the underlying analyses) should be kept in writing.

United Steelworkers of America v. Weber (1979)

SCOTUS found that a private employer's voluntary, race-based affirmative action training program was permissible under Title VII because (1) its purpose mirrored that of the CRA – to open employment opportunities for minorities which had been traditionally closed to them and (2) the program did not unnecessarily trample the interests of whites, because it was a temporary program.

1. ER documented a history of hiring skilled workers which led to an overwhelming white majority in the skilled workforce.
2. ER and U designed training programs and limited white trainees to 50% of the available slots in any training program until such time as the workforce more closely resembled the available labor market.

OFCCP & EO 11246 Prohibit Race-Based Decisions

- ***Require*** certain federal contractors to maintain Affirmative Action Plans
- ***Prohibit*** discrimination against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity or national origin,
- Contractors must “take affirmative action to ensure that applicants … and employees are treated … without regard to their race, color, religion, sex, sexual orientation, gender identity or national origin”

Government Contracting

- Always prohibited race-based decision making
- Always prohibited quotas
- SFFA does not eliminate the obligation for government contractors to prepare annual AAPs

Public Announcements Re: Enforcement

Dueling EEOC

Andrea Lucas, EEOC Commissioner

"Today is a time – the best time for lawyers to really take a look at the lawfulness of their corporate diversity programs. Even though many employers don't use the word affirmative action, it's rampant today, from ESG, to focuses on equity, pretty much everywhere, there's a ton of pressure at the corporate 100 across corporate America to take race-conscious decision-making – race-conscious actions in employment law, and that's been illegal and it's still illegal."

Charlotte Burrows, EEOC Chair

"[T]he decision . . . does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."

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Conflicting Attorneys General Letters

July 13, 2023, Attorneys General Letter from 13 states (Alabama, Arkansas, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, South Carolina, Tennessee, and West Virginia)

- Threatening “serious legal consequences” over race-based employment preferences and diversity policies
- States “explicit racial hiring quota[s]” and preferences to contractors with diverse staff or minority leadership is discriminatory
- Criticizes company pledges to foster diversity and support minority-owned businesses during racial justice protests in 2020

Conflicting Attorneys General Letters

July 19, 2023, Attorneys General Letter from 21 jurisdictions (Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington)

- Corporate diversity, equity, and inclusion (DEI) programs "are lawful and serve important public and business purposes"
- *SFFA* decision doesn't prohibit or impose new limits on DEI initiatives
- "[V]igorously oppose any attempts to intimidate or harass businesses who . . . advance [DEI]"

Biden Administration Guidance to Educational Institutions on SCOTUS decision

- *Guidance states educational institutions can:*
  - Expand outreach
  - Focus on inclusion
  - Focus on retention, belonging
  - Consider economic factors and need-based support
  - Start earlier and consider broader qualifications
  - Remove barriers unrelated to qualifications
  - Data collection

New Challenges Brewing

Activist

- American First Legal and Wisconsin Institute for Law and Liberty

Reverse Race Discrimination

- *Ricci v. DeStefano*, 557 U.S. 557 (2009), a city used examinations to promote firefighters to the rank of lieutenant and captain. White candidates outperformed minority candidates by a large margin, and the city was concerned that it might face liability under a disparate-impact theory. Therefore, the city refused to certify the examination results. The court found this to be discrimination.

New Focus on Section 1981

American Alliance for Equal Rights v. Fearless Fund Management, LLC, Case No. 1:23-cv-03424-TWT (N.D. Ga. Aug. 2, 2023)

This complaint alleges that a private program that awards grants only to black women-owned businesses violates 42 U.S.C. § 1981 (Section 1981).

- Section 1981 prohibits racial preferences in making contracts
- “Contracts” can be broadly interpreted
- Suits from vendors, suppliers, etc.?

SBA Programs

Ultima Services Corp v US Dept of Agriculture, (ED Tenn 2023)

- SBA program for minority and disadvantaged business owners declared unconstitutional
- The Section 8(a) programs certifies some businesses as disadvantaged. Anyone can become certified, but a presumption allowed members of certain races to skip the step of proving they were disadvantaged. 13 CFR § 124.103.

Litigation

- Nordstrom EEOC Complaint, June 23, 2023 - goals to increase the representation of Black and Latino people in manager roles by at least 50% is discriminatory
- *American Alliance for Equal Rights v. Perkins Coie* LLP, 3:23-cv-01877 - Race based 1l and 2l programs. The complaint specifically cites to SFFA several times
- *American Alliance for Equal Rights v. Morrison & Foerster LLP*, 1:23-cv-23189
- *Diemert v. City of Seattle*, No. 2:22-cv-1640, 2023 U.S. Dist. LEXIS 151683 (W.D. Wash. Aug. 28, 2023)
- *In re Diversity, Equity, Inclusion, & Access Training for Continuing Legal Educ*., No. 22-01, 2023 Wisc. LEXIS 167 (July 13, 2023)

Additional Litigation

- *Strive Letter to McDonald's* - "Just three weeks ago, the Supreme Court issued its opinion in *Students for Fair Admissions v. Harvard*, No. 20-1199, in which it held that all racial discrimination—including affirmative action—is illegal under both the Fourteenth Amendment's Equal Protection Clause and the Civil Rights Act. As the Court explained, "ending racial discrimination means ending all of it." For that reason, "it is never permissible to say 'yes' to one person but to say 'no' to another person even in part because of the color of his skin." Nor is it permissible to even "desire some specified percentage of a particular group merely because of its race or ethnic origin."
- *Comcast*
- *Amazon*

State Legislation

- Enacted law regarding public universities and DEI
- Enjoined law in Florida regarding DEI in private industry
- Pending legislation in other states
- *Richard Lowery v. Texas A&M University*, 4:22-cv-03091 - Dismissed 9/29/2023 (failure to hire based on race)(granted on ripeness, mootness, and standing)
  - "Its beyond reasonable argument that Texas A&M must review its hiring practices and revise them where necessary to bring them into accord with SB 17 and Students for Fair Admissions."

Targets for Lawsuits/Challenge

- Representation goals with timelines
- Representation goals with compensation/reviews tied to them
- Contracting preferences based on race (supply chain, vendor, etc.)
- Employment practices that can be viewed as quotas, exclusions, or preferences

Dueling Shareholder/ESG Stakeholders

- Shareholder inquiries into legality of DEI programs, specifically DEI goals as unlawful "quotas"

- Shareholder inquiries pressuring more quantifiable goals in DEI programs

➢ *Starbucks*

Thank you!

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