PACIFIC LEGAL FOUNDATION

Racial Preferences in Education:
Frequently Asked Questions

The Supreme Court's landmark decision regarding the use of racial preferences in student admissions has transformed the landscape of race politics in education. Below are answers to some of the most pressing questions about the Court's opinion and what it may mean moving forward.

What did the Supreme Court rule in *Students for Fair Admissions v. Harvard (SFFA)*?

"Eliminating racial discrimination means eliminating all of it." The admissions systems used by Harvard College and the University of North Carolina unlawfully discriminate on the basis of race, in violation of Title VI of the Civil Rights Act of 1964 (in both cases) and the Equal Protection Clause of the Fourteenth Amendment (in UNC's case).

In a majority opinion joined by six Justices, Chief Justice John Roberts held that Harvard and UNC had not satisfied strict scrutiny, the demanding standard required to justify discrimination on the basis of race. Strict scrutiny required the universities to show that their racial preferences were narrowly tailored to achieve a compelling government interest. The Court rejected the universities' asserted interest in the educational benefits of a racially diverse student body and held that the extensive use of race by the universities was not narrowly tailored.

The Chief Justice's conclusion sums up the opinion well: Each "student must be treated based on his or her experiences as an individual—not on the basis of race. Many universities have for too long done just the opposite. And in doing so, they have concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice."

What was at stake in the Harvard and UNC cases?

The question in these cases is simple: May universities use skin color as one factor in determining who gets to attend?

In most other areas, government must treat individuals as individuals and may not discriminate based on their race, ethnicity, gender, or color. The Fourteenth Amendment's Equal Protection Clause and the Fifth Amendment's Due Process Clause enshrine this guarantee of equal treatment in the Constitution and Title VI of the Civil Rights Act of 1964 prohibits

recipients of federal funding from discriminating on the basis of race and similar immutable characteristics. Public universities are bound by the Equal Protection Clause. Public and private universities that receive funds from the federal government—today, that means very nearly all colleges and universities in the United States—are bound by Title VI.

The Supreme Court first grappled with this question with regard to university admission in *University of California Regents v. Bakke* in 1978. At the time, the University of California's medical school maintained a two-tier system of admissions, where a specific number of seats were set aside for students from certain racial and ethnic groups. In a fractured 4-1-4 opinion, the Court held that this system was unconstitutional. But in a concurrence necessary to secure a controlling majority, Justice Lewis Powell—writing only for himself—ruled that the University of California system was unconstitutional specifically because of its explicit set-asides, in contrast to Harvard University's more-shrouded system of racial discrimination. According to Powell, Harvard used race, but only as one among many non-academic factors in a holistic admissions process. Such "flexible" use of race, he argued, would be constitutional. Bakke also held that the scope of prohibited discrimination under both Title VI and the Equal Protection Clause is the same.

In another pair of admissions discrimination cases in 2003, *Grutter v. Bollinger* and *Gratz v. Bollinger*, the Court endorsed and expanded upon Powell's concurrence and held that universities may lawfully discriminate based on race in admissions when such discrimination is narrowly tailored to a compelling interest in student body diversity. Later, in two different opinions in the *Fisher v. University of Texas case*, the Court clarified that reviewing courts should defer to a university regarding its compelling interest in diversity, but not on the narrow tailoring prong. In practice, though, that clarification made little difference to universities' implementation of preferences. Universities viewed it as a green light to continue discriminating.

The two most recent Court cases—*Students for Fair Admissions v. Harvard* and *Students for Fair Admissions v. University of North Carolina*—were a full frontal attack on this line of cases beginning with *Bakke*. The University of North Carolina case challenged the constitutionality of race preferences at public schools, and the Harvard lawsuit asked the Court to reconsider their legality at private schools under Title VI. Instead of trying to chip away at *Grutter*, as Fisher attempted, this time the Court was asked to consider whether *Grutter* was rightly decided.

What is the strict scrutiny test and why did the Supreme Court apply it?

When a court analyzes a racial classification using strict scrutiny, it asks if the challenged policy is narrowly tailored to achieve a compelling interest. Strict scrutiny is used to analyze governmental racial and ethnic classifications because such discrimination is presumed to be unlawful, and the history of wrongful use of race justifies a high level of skepticism that race should ever be used by government.

As the Supreme Court has previously explained, "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality" (*Hirabayashi, 320 U.S., at 100*). This test is rooted in the fact that there are no inherent differences in the intellectual or other capabilities or character of individuals of different races, ethnicities, and national origins, which heightens the suspicion that any racial classification is pernicious and based on wrongful stereotypes. A particularly tough test is needed to sniff out impermissible uses of race.

Is strict scrutiny used for "benign" uses of race?

Yes. "Eliminating racial discrimination means eliminating all of it," Chief Justice Roberts observed in the SFFA majority opinion. Therefore, the Court has always applied the Equal Protection Clause "without regard to any differences of race, color, or of nationality." It is "universal in its application." As the Supreme Court said in *Bakke*, although the Fourteenth Amendment was originally intended mainly to bridge the vast distance between formerly enslaved blacks and the white majority, the Amendment itself used universal language and did not reference race, color, national origin, or previous condition of servitude.

What looks benign often actually is not when placed under scrutiny. "Indeed, if our history has taught us anything, it has taught us to beware of elites bearing racial theories," Justice Clarence Thomas has observed. Some discrimination that is now regarded as obviously odious was seen as benign by paternalistic Southern elites in the Jim Crow era. Harvard itself asserted benign justifications for its discrimination against Jewish applicants in the 1920s that look abhorrent to modern eyes, as Justice Thomas noted in his concurrence.

Purportedly benign discrimination can also inadvertently reinforce negative stereotypes that members of historically disadvantaged groups are incapable of succeeding without special help. Finally, race preferences also unfairly disadvantage individuals who had no hand in perpetuating the discrimination of the past. As Judge Claude Hilton observed when ruling from the bench in *Coalition for TJ v. Fairfax County School Board*, a proxy discrimination case: "You can say all sorts of beautiful things while you are doing others."

Did the Supreme Court overrule *Grutter v. Bollinger*?

Despite ruling that Harvard and UNC's racial preferences in admissions violated the law, the *SFFA* majority opinion never expressly overruled Grutter v. Bollinger, the core precedent allowing universities to consider race in admissions. Nonetheless, the majority opinion by its reasoning effectively buries *Grutter*.

Grutter held that universities had a "compelling interest" in the educational benefits stemming from a racially diverse student body. While not directly overturning *Grutter*, the Supreme Court in *SFFA* rejected Harvard and UNC's diversity rationales, all of which are drawn directly from *Grutter* itself. For example, UNC claimed that racial diversity promoted "the robust exchange of ideas." The Court rejected this goal as "not sufficiently coherent for purposes of strict scrutiny." Yet *Grutter* expressly approved the "robust exchange of ideas" as a compelling interest justifying racial preferences. Likewise, the *SFFA* majority rejected UNC's claimed interest in "cross-racial understanding, and breaking down stereotypes." Yet again, however, *Grutter* directly recognized a compelling interest in achieving "cross-racial understanding" because it "helps to break down racial stereotypes." The fact that the majority rejected interests that Harvard and UNC lifted verbatim from *Grutter* indicates that *Grutter* is no longer good law.

This conclusion is buttressed by the separate opinion writers in *SFFA*. Justice Thomas, in his concurrence, said: "The Court's opinion rightly makes clear that *Grutter* is, for all intents and purposes, overruled." Justice Sonia Sotomayor in her principal dissent agreed with Justice Thomas that the majority overruled *Grutter* and criticized the majority for failing to perform a stare decisis analysis. If Chief Justice Roberts disagreed, one would have expected him to defend his opinion against those claiming he was overruling precedent. He did not.

Universities and courts may claim in the future that they can continue to discriminate in admissions because the majority did not overrule *Grutter*. We have seen that other precedents that are implicitly overruled can continue to cause mischief like, in Justice Antonin Scalia's memorable words, a "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." Litigants and commentators, however, can point to clear signs in the majority opinion that *Grutter* is not the law of the land.

What's the difference between a racial quota and a racial preference?

Before SFFA, the Supreme Court distinguished between racial quotas—which are always unlawful—and racial preferences—which can sometimes satisfy strict scrutiny. Following SFFA, both are unlawful, but universities may continue to claim there is a meaningful distinction.

A racial quota is when a certain percentage of opportunities are awarded only to individuals of a particular race. A racial preference is when one's racial background is viewed as a plus factor, but there is no specific number of opportunities set aside only for individuals of a certain race.

In practice, there is little difference between these concepts. Often, school admissions officials use race as a plus factor in a manner designed to achieve a numerical target. In the *SFFA* cases, for example, record evidence showed that Harvard and North Carolina consistently monitored the racial demographics of the admitted classes. If the numbers started to drop too low at either school, admissions officers would make special pushes to admit minority students to get closer to the target.

In dissent in *Bakke*, Justice William Brennan argued that the difference between quotas and preferences is semantic. The 1970s Harvard program praised by Justice Powell, according to Justice Brennan, gave a certain amount of preference with the goal of enrolling a certain number of minority students. The only difference between Harvard's program and the UC Davis two-track system was that UC Davis was more transparent about what it was doing. Justice Brennan saw "no sensible, and certainly no constitutional" distinction between the two approaches. Following *SFFA*, any legal distinction between the two is gone.

Many anticipate that universities will continue to use "proxy discrimination" even though the petitioners in *SFFA* won. What is proxy discrimination?

While racial preferences have now suffered the fate of racial quotas, universities still have other means available to them for discrimination. Just as universities were driven from concrete quotas into the less-transparent world of preferences, *SFFA* will drive universities from a system of preferences into more opaque and disguised methods known as "proxy discrimination."

Proxy discrimination means that a decision-maker intentionally uses a non-racial characteristic as a proxy for race to achieve a desired racial result. The policy is "facially neutral," but the supposedly neutral factors employed are not really neutral, because they are designed and intended to achieve a particular racial outcome. Although many facially race-neutral policies are unobjectionable, if they were in fact adopted to discriminate, they are—and ought to be—unconstitutional.

"The Supreme Court has repeatedly ruled against racial discrimination by proxy," Vanderbilt Law professor Brian Fitzpatrick noted in *The Wall Street Journal*. "If the purpose of an apparently race-neutral decision is to cause racial effects, and the decision in fact causes racial effects, then the decision is as illegal as using race itself would be."

Generally, proxy discrimination entails use of a factor that is not traditionally or logically related to the decision-maker's ostensible goal, except insofar as it is useful for meeting a racial goal. During the Jim Crow era and in the wake of courts' dismantling of Jim Crow policies, Southern states and local governments commonly used proxy discrimination to do indirectly what they were prohibited from doing directly. "Grandfather clauses," poll taxes (now prohibited in federal elections by constitutional amendment), and literacy tests are notorious examples of proxy discrimination from this historical period. "Neighborhood school plans" adopted during the massive resistance to *Brown v. Board of Education* are another example from the educational context.

Village of Arlington Heights v. Metropolitan Housing Corp is the leading Supreme Court case setting forth a list of factors typically present in proxy discrimination cases. In that case, a developer accused local authorities of using residential zoning as a tool for proxy discrimination. *Arlington Heights* requires courts to examine the "totality of the relevant facts" and conduct "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." The ultimate purpose of this holistic inquiry is to identify whether a race-neutral policy can be "traced to a discriminatory purpose." The Court explained that many things may be relevant to the inquiry, including the "impact of the official action—whether it bears more heavily on one race than another"; the "historical background of the decision"; the "specific sequence of events leading up to the challenged decision"; and "contemporary statements by members of the decision-making body."

The majority opinion in *SFFA* anticipates some use of proxy discrimination and makes clear it is unlawful. Addressing a hypothetical brought up during oral argument, the majority opinion clarifies that universities may lawfully consider an applicant's discussion of how race affects her life, "so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can bring to the university." But in the very next sentence, the opinion cautions that "universities may not simply establish through application essays or other means the regime that we hold unlawful today" and, citing *Cummings v. Missouri*, "[W]hat cannot be done directly cannot be done indirectly."

What is disparate impact analysis and when is it properly used?

Proxy discrimination should be distinguished from the concept of disparate impact liability. Disparate impact generally refers to practices that have an unintended impact on certain racial groups and is prohibited by several statutes. The federal law that prohibits racial discrimination in employment, for instance—Title VII of the Civil Rights Act of 1964—prohibits employment practices that have a disparate impact, or that have an incidental adverse effect on a particular racial group and are not justified by business necessity. Disparate impact liability was originally born as an EEOC interpretation of Title VII's general prohibition on race discrimination in employment. In the 1991 Civil Rights Act, Congress codified disparate impact liability as part of Title VII. Some other federal anti-discrimination laws also include similar disparate impact provisions or have been interpreted to authorize disparate impact liability.

Title VII disparate impact has been controversial almost since the EEOC first promulgated this approach. University of San Diego School of Law professor Gail Heriot, a leading critic of disparate impact liability, has noted that nearly every job

requirement will have a disparate impact on some group covered by Title VII. Disparate impact therefore makes just about every job qualification presumptively illegal.

Disparate impact liability is also constitutionally questionable. In his concurring opinion in *Ricci v. DeStefano,* Justice Scalia observed: "The difficulty is this: Whether or not Title VII's disparate-treatment provisions forbid 'remedial' race-based actions when a disparate-impact violation would *not* otherwise result—the question resolved by the Court today—it is clear that Title VII not only permits but affirmatively *requires* such actions when a disparate-impact violation *would* otherwise result.... But if the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties—*e.g.*, employers, whether private, State, or municipal—discriminate on the basis of race."

Arlington Heights proxy discrimination differs in crucial ways from disparate impact discrimination. The *Arlington Heights* framework applies in cases where the official decision-maker is motivated by race but uses a facially race-neutral proxy to achieve that racial goal. In a disparate impact case, the decision-maker need not be racially motivated or even aware of the disparate impact caused by their actions. Mere numerical disparity is enough to establish a violation.

While *Arlington Heights* proxy discrimination cases and disparate impact cases both include statistical analysis of disparities, the analysis serves different goals. In an *Arlington Heights* case, statistics about disparities are used typically as one of several factors showing discriminatory intent. But in disparate impact cases, a numerical disparity standing alone, without evidence of intent, establishes a violation unless business necessity can be proven.

Are there current examples of proxy discrimination?

Proxy discrimination in K-12 education may offer a taste of what is to come in the university context. While the Supreme Court authorized limited use of race preferences in college admission in *Grutter*, it has never done the same in the K-12 setting. Some selective public schools that would prefer higher numbers of black and Hispanic students and lower numbers of Asian American students have resorted to proxy discrimination measures to achieve indirectly what they cannot directly.

Pacific Legal Foundation is currently litigating four proxy discrimination cases on behalf of Asian American students. While the details of how proxy discrimination worked in each case vary, all have facts following the same general pattern. First, school administrators note that the school's racial demographics do not match the overall district's demographics and decry the level of Asian American success in school admissions. To change the demographics of future classes, school officials de-emphasize or eliminate traditional factors that are known to predict success at competitive schools, such as grade-point average or standardized test scores. New factors that are not related to academic success—like ZIP Code or neighborhood preferences—are instead chosen because of how they affect admissions by race. In some cases, there are direct statements from school officials about the new plan's racial goals and sometimes even animus against Asian American students.

In Fairfax County, Virginia, for example, in the wake of George Floyd's death and resulting protests, the Fairfax County School Board decided to revamp the admissions process at elite science magnet Thomas Jefferson High School to change the school's racial demographics. The Board scrapped the longstanding admissions exam and replaced it with a new system that filled most slots by automatically admitting the top 1.5% of each Fairfax County middle school. Because

Asian American students are disproportionately concentrated in some Fairfax County middle schools, Asian American representation in the TJ admitted class dropped from 73% to 54%.

Just across the Potomac River, Montgomery County, Maryland, adopted a similar scheme to transform the demographics of its magnet middle schools. First, it adopted "socioeconomic norming," in which a student's standardized test score was normed according to the socioeconomic status of the student's elementary school. It also adopted a policy that students who have a group of "academic peers" at their home middle schools are disadvantaged in magnet middle school admissions. Again, because Asian American students are disproportionately concentrated in particular middle schools, that policy lowered Asian American representation in magnet middle schools.

In Boston, admissions to Boston Latin and other magnet high schools was traditionally determined by exam score. In 2019, the school board adopted a plan that allocated 20% of magnet seats to students with top GPAs and the rest based on ZIP Code. Boston's school board was forthright about its racial motivations; a working group member said the admission changes targeted "historic racial inequities," and the School Committee chair was caught on a hot mic mocking Chinese American surnames. Because Asian American and white students tend to live in certain ZIP Codes, the changes meant that these groups went from receiving 61% of the seats available to a bit over half of them.

New York City is home to some of the most prestigious magnet schools in the country, including the famous Stuyvesant High School. These schools admit most students based on Specialized High Schools Admissions Test (SHSAT) scores, although the Discovery program granted a limited number of offers to low-income students across the city whose scores just missed the cutoff. But starting in 2020, former Mayor Bill de Blasio limited the Discovery program to schools with a 60% or higher poverty rate. The number of seats allocated through the Discovery program also rose from 5% to 20%. Although about three quarters of Asian American students are low income, they are clustered in schools with lower than 60% poverty rates, and so the combined changes materially lowered their chances of magnet school admission. The record leading up to the changes indicates that the process was altered because of, not in spite of, these demographic effects. For example, then-New York City Schools Chancellor Richard Carranza said in a television interview, "I just don't buy into the narrative that any one ethnic group owns admission to these schools."

The decision-makers' intentional discrimination is the heart of each of these four PLF cases. The statistics showing the disparate impact of the challenged policies are just one piece of evidence, among many others, proving an intent to discriminate based on race.

How do racially discriminatory admissions impact minority students that are the supposed beneficiaries of such practices?

As Justice Thomas discusses in his concurring opinion, race preferential admissions do not affect the overall number of minority students who can receive college degrees. But they do shift students around in the hierarchy, nudging some students to higher-ranked schools than they might have attended otherwise. A central question is: Does shifting students around to more prestigious schools open up opportunities? Or are students better off entering a school where their credentials are closer to those of the median student?

California's experience is instructive: After the California Civil Rights Initiative (Prop 209) was enacted into law in 1996, California public universities had to stop using race preferences. While the numbers showed fewer black students admitted

to the state's very top schools, black students were thriving at schools just a notch down in the hierarchy. The numbers of black students who were in academic jeopardy dropped substantially, while the numbers eligible for academic honors went up significantly. This is because when students are admitted to universities based on their individual skills, talents, and interests—not race or ethnicity—they're more likely to find the right fit.

What happened in California is consistent with the growing body of "mismatch" evidence discussed in Justice Thomas's concurrence, which indicates that race preferences often do not actually make minority students better off. Most of us learn best in settings where we have about the same level of preparation as the average student. We learn less if we are too far ahead or behind the rest of the group. Large preferences in admissions shift racial and ethnic minority students toward schools where they have lower academic credentials than their peers who did not receive preferences.

According to the mismatch researchers, the problem is not that there are no racial or ethnic minority students capable of succeeding at elective colleges and universities. There are many such students. The problem is that because of race preferential admissions, many wind up at schools more selective than they would have attended if preferences did not exist, and where their preparation puts them behind other students admitted without preferences. Because of these preparation gaps, students who receive large preferences in admissions are less likely to complete challenging majors in science, technology, engineering, or mathematics than they would if they had not received preferential treatment. They are also less likely to pursue PhDs and enter academia. Law students are less likely to pass the bar.

Mismatch also affects legacy students—students who receive a preference in admissions because their parent or grandparent attended that same university. Peter Arcidiacono's study of admissions preferences at Duke University, which included legacy preferences, showed that they abandoned science majors in patterns similar to racial minorities.

Reasonable minds can and do differ on what educational and family policies best set up all children for high academic achievement. Progressives tend to favor additional funding for public education, while conservatives are more concerned about family structure and increasing the numbers of minority children who grow up with both parents in the home. Libertarians and classical liberals often focus on school choice programs that help poor and minority children escape failing public schools. There will continue to be vigorous debate about which of these strategies best help grow the pool of racial and ethnic minority children equipped to succeed at selective educational institutions. But whatever the best tactics for expanding the pool, the evidence available indicates that channeling students to schools that are a poor match for their preparation has not worked well.

Isn't diversity a good thing? Why shouldn't schools be allowed to pursue diverse student bodies?

Schools may constitutionally pursue diversity along many dimensions, such as socioeconomic status or life experience, as long as they are not discriminating on the basis of race. The problem is that many schools that claimed to be pursuing diversity were actually engaged in getting particular demographic results for their own sake. Many selective schools, including Harvard and UNC, routinely gave large preferences in admission to racial and ethnic minority students but did not give equivalently large preferences to students who offered diversity along some non-racial dimension. Diversity of perspective related to race and ethnicity is most valuable in the humanities and social sciences and least so in objective, technical fields like science and engineering. Yet many selective schools actually give larger racial preferences to aspiring scientists and engineers than to sociologists. The incongruence between admissions as actually practiced at most

selective schools and what admissions would be like if diversity was the real goal strongly suggests that most schools are not actually pursuing diversity, but instead racial parity for its own sake.

Because the Supreme Court says schools can no longer use racial preferences, and proxy discrimination also violates students' right to equal protection, then what are some ways that *should* be used to decide who gets in?

Schools may constitutionally use a wide range of admissions criteria, as long as they are not discriminating based on race (or other forbidden characteristics) or using proxies for race to discriminate. For example, schools may use or not use standardized tests, essays, interviews, or auditions, as long as their reasons for using or not using them are not racial.