Operation Protect & Defend – 2023-2024 Program

70 Years After *Brown v. Board of Education*

One of the primary goals of Operation Protect and Defend is to encourage robust civil dialogue about important issues of civic education and the Constitution. Respectful discussion of civic issues makes us stronger as a society. Representative government works best when it has the participation of informed citizens.

Brown v. Board of Education was decided on May 17, 1954. The case was momentous in that it outlawed the longstanding practice of "separate but equal" in education and many other public services. This curriculum examines the cases that both shaped and flowed from *Brown* and how the legacy of *Brown* has changed during the past 70 years.

Across the country, universities, both public and private, have worked to intentionally make their student bodies more racially and ethnically diverse for the past 70 years. In 1996, California voters passed Proposition 209 to prohibit the consideration of race, ethnicity, national origin, or sex as criteria in public education, public employment, and public contracting. In 2023, organizations in other states challenged the practice of considering race in college admissions. Those cases will be discussed in this curriculum.

The curriculum also poses this question: When is it time for the Supreme Court to change course and overturn earlier decisions? ***Stare Decisis is* a Latin term that means "let the decision stand" or "to stand by things decided"—and is a foundational concept in the American legal system. To put it simply, stare decisis holds that courts and judges should honor "precedent"—or the decisions, rulings, and opinions from prior cases.** In the last 18 months, the United States Supreme Court has issued major decisions in many other areas besides affirmative action/school admissions, including, but not limited to, the Second Amendment and voting rights. In many of these decisions, the Court has shown a willingness to depart from past precedent and issue new groundbreaking decisions. This has sometimes been done without acknowledging that the previous decisions are being overruled.

One thing that has changed significantly over the last seven years is the composition of the Supreme Court, which has nine justices. There have been four new justices appointed. President Trump appointed three new justices and President Biden appointed one. In their appointment hearings, the nominees were asked about stare decisis and whether they believed in being faithful to past precedent. Each of them said that they believed in the principle of stare decisis and that they would follow precedents of the United States Supreme Court.

This curriculum examines the progression of Supreme Court cases from *Plessy v. Ferguson* to *Brown v. Board of Education* to *Bakke v. University of California Regents* to *Students for Fair Admissions v. Harvard and University of North Carolina*. These cases provide examples of the ways that the doctrine of stare decisis and the goal of integration, diversity and equity have been interpreted and reinterpreted over the past 70+ years.

For this unit, students must be familiar with the following terms and the Reconstruction Amendments (13th, 14th, and 15th Amendments):

13th Amendment (1865)
Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

14th Amendment (1868)
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

15th Amendment (1870)
Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Stare decisis

Precedent

Strict scrutiny

Reaffirm

Holding

Rule of law

Equal protection clause or Equal protection under the law

Compelling interest

Remedy

Statutes

The Supreme Court Overturns Fifty Years of Precedent on Affirmative Action

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By Jeannie Suk Gersen. June 29, 2023. *The New Yorker*

Race-conscious affirmative action, in which schools consider applicants' race as a factor in admissions, has traditionally been treated as a form of "racial classification." The first time that the Supreme Court pronounced that the use of racial classifications must be subjected to "the most rigid scrutiny" was in 1944, in *Korematsu v. United States,* when the Court found that the internment of Japanese Americans during the Second World War to serve national security passed that test and was, therefore, lawful. On Thursday, the Court used the same test, referred to today as "strict scrutiny," to declare that affirmative action is impermissible.

In two cases, *Students for Fair Admissions (S.F.F.A.) v. Harvard* and S*tudents for Fair Admissions (S.F.F.A.) v. University of North Carolina*, Chief Justice John Roberts, joined by all five conservative Justices, held that race-based affirmative action violates the equal-protection clause of the Fourteenth Amendment and Title VI of the Civil Rights Act. According to the majority opinion, the use of affirmative action by colleges and universities to admit a diverse student body violates the guarantee of equal protection of the laws and the prohibition on discrimination based on race.

As the standard that the Court uses to determine whether the government's use of racial classification is permissible, strict scrutiny involves asking whether the practice furthers a "compelling interest" and is "narrowly tailored" to achieve that interest. In the S.F.F.A. cases, Roberts said that affirmative action fails both parts of the test.

For around fifty years, the Court has understood a university's pursuit of the educational benefits of a racially diverse student body as a compelling interest, but Roberts made clear, writing for the 6–3 majority on Thursday, that from now on it will not be treated that way. Although he acknowledged that schools' interests in diversity are "commendable," he said that "they are not sufficiently coherent," arguing that it was unclear how to measure when the goals have been reached and how to know when the use of race should end. He called schools' diversity interests "inescapably imponderable."

On the narrow-tailoring test, Roberts wrote that affirmative action fails because of what he asserted to be a lack of "a meaningful connection" between the use of applicants' race and the interest in diversity. Here, he focused on the fact that Black, Hispanic, and Asian American people are internally diverse. Roberts argued that "the use of these opaque racial categories undermines" the goal of diversity. He illustrated the point by suggesting that Harvard and U.N.C. would apparently prefer "a class with 15% of students from Mexico over a class with 10% of students from several Latin American countries, simply because the former contains more Hispanic students." Roberts's conclusion was that affirmative-action programs were unfocussed and "unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points."

Roberts called out Harvard, in particular, on a number of issues. He pointed out that, while Harvard claimed that the use of race as a "plus" in admissions is never a "negative factor" for any applicant, its consideration of race led to a substantial decrease in the admission of Asian Americans. Harvard's lawyers had compared its use of race as a factor in admissions to a preference given "to applicants likely to excel in the Harvard-Radcliffe Orchestra," but Roberts found this argument "hard to take seriously." Because "college admissions are zero-sum," he reasoned, "a benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." And the point of the equal-protection clause, he wrote, "is that treating someone differently because of their skin color is *not* like treating them differently because they are from a city or from a suburb, or because they play the violin poorly or well."

Since universities can no longer consider applicants' race in deciding whether to offer them admission, the immediate practical question is what information they *can* consider about applicants. In a key sentence, toward the end of his ruling, Roberts said, "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 through discrimination, inspiration, or otherwise." (Harvard cited the sentence in a message to its community after the Court's decision.) Roberts's point was that "the student must be treated based on his or her experiences as an individual—not on the basis of race."

It is not surprising that mandating that admissions processes become race-neutral does *not* require making them race-blind. But it may be tricky to sort out how to include in admissions decisions a consideration of an applicant's story of overcoming racial discrimination or of being motivated by one's heritage or culture, while taking care not to run afoul of the Court's warning that "universities may not simply establish through application essays or other means the regime we hold unlawful today." While some may perceive schools' continuing ability to consider applicants' accounts of their experiences with race to be a loophole that effectively maintains race-conscious admissions, only time will tell whether schools can make this nuanced shift—from a person's race to a person's story about their race—in evaluating applicants in ways that courts can live with.

Another crucial question is whether schools may continue to pursue their interest in racial diversity through means other than affirmative action—that is, through race-neutral methods. The Court leaves that discussion for another day, which may arrive quite soon, since there are many possible ways in which schools might still seek to affect the racial composition of a class, such as by eliminating the consideration of standardized-test scores, or by undertaking targeted recruiting efforts prior to admissions. For now, student-body diversity is no longer a compelling interest, but it has also not been declared an illegitimate one for schools to seek out.

The S.F.F.A. cases were brought on behalf of Asian Americans claiming racial discrimination, yet Roberts's opinion said very little about Asian Americans. As if playing parts of a well-orchestrated score, other Justices in the majority picked up on what Roberts left unsaid. In his concurrence, Justice Clarence Thomas raised the history of discrimination against Asian Americans and the fact that students of Asian descent were once excluded from "white" schools

because of their race; in light of this, he said, it was "incongruous" to try to remedy historical wrongs against Black Americans at "the expense of Asian American college applicants."

Justice Neil Gorsuch criticized Harvard for its lack of socioeconomic diversity and its preferences for legacies, athletes, children of donors, and children of faculty, who end up as roughly a third of the undergraduate class—practices that "undoubtedly benefit white and wealthy applicants." And Justice Brett Kavanaugh zeroed in on the idea that affirmative action was always seen as temporary, listing all the times that Justices have said so, including in Justice Sandra Day O'Connor's famous line, in the landmark affirmative-action case, *Grutter v. Bollinger* (2003): "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

Did the Court actually overrule *Grutter*? It did not say so explicitly. Roberts's explanations, in fact, seemed to make the case that Harvard and U.N.C. had violated limits on racial classification set forth in Grutter. But Thomas's concurrence correctly states "that *Grutter* is, for all intents and purposes, overruled." The interest that Grutter approved—the interest in pursuing the benefits of diversity—is no longer to be treated by courts as compelling. But even the liberal dissenters, in their strong defense of the need for race-conscious affirmative action, seemed not quite willing to tether their support of the policy to the goal of student-body diversity. That is because the dissenters, in two opinions, penned by Justice Sonia Sotomayor and by Justice Ketanji Brown Jackson, were focused on the continuing need to remedy the devastating, ongoing effects of the historical subjugation of Black Americans.
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<u>Critical Thinking Questions</u>

1. Do you think the government has a "compelling interest" in supporting racial diversity measures at universities? If so, why? If not, why not?

2. Justice Roberts argues that ethnic and racial minority groups are "internally diverse" and that should be a reason to *not* use race as a factor in admissions. What do you think of this argument? Agree or disagree and why or why not?

3. "Justice Neil Gorsuch criticized Harvard for its lack of socioeconomic diversity and its preferences for legacies, athletes, children of donors, and children of faculty, who end up as roughly a third of the undergraduate class—practices that 'undoubtedly benefit white and wealthy applicants.' " Should these advantages also be unconstitutional?

Critical Thinking Questions

1. What prior knowledge do you need to have to understand the cartoon?

2. What is the topic of the cartoon?

3. What is the cartoonist's message about this topic?

Plessy v. Ferguson**,** 163 U.S. 537 (1896)*

*Note: This decision from 1896 contains offensive language and reasoning that is repeated here to accurately summarize the decision.

Decided May 18, 1896, 7-1

Facts of the Case and Procedural History

At question is the constitutionality of a Louisiana law requiring passengers on trains to be seated in "equal but separate" accommodations based on the passenger's race (white or "colored"). The law further requires train employees to assign passengers to the compartment used for that race. A passenger who does not go into the compartment assigned to his or her race "shall be liable" to a $25 fine or imprisonment in jail of not more than 20 days.

Plessy was a passenger on a train traveling between two stations in Louisiana and sat in a compartment for white passengers. When Plessy refused to follow the conductor's order that he move to the compartment assigned to the "colored race," Plessy was ejected from the train and imprisoned in jail.

Plessy challenged the constitutionality of the Louisiana law as violating the Thirteenth Amendment and the Fourteenth Amendment of the United States Constitution. Plessy also argued that because he was 7/8 Caucasian and 1/8 "African blood," and because "the mixture of colored blood was not discernible in him," he was entitled to the rights of white citizens.

Majority opinion by Justice Brown

The Court held that the Louisiana law did not violate the Thirteenth Amendment, which abolished slavery and involuntary servitude. The Court reasoned that under the *Civil Rights Cases*, 109 U.S. 3, acts of discrimination (such as refusing accommodations to "colored" individuals) cannot be regarded as slavery. The Court further reasoned that "a statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude.

The Court further held that the Louisiana law did not violate the Fourteenth Amendment. The Court distinguished state laws that reasonably exercise the state's police power (such as laws that establish separate schools by race, or that forbid marriage between different races), from state laws that interfere with "political equality" (such as laws that limit jury service to white men). The Court reasoned that unlike laws exercising the state's police power, laws interfering with political equality were impermissible because they "implied a legal inferiority," "lessened the security of the right of the colored race, and [were] a step towards reducing them to a condition of servility."

The Court determined that Plessy's arguments regarding the proportion of colored versus white blood should be determined under state law and were not properly at issue in this case.

Dissent by Justice Harlan

The phrase "separate but equal" comes from the dissent by Justice Harlan, who predicted that the Supreme Court's majority decision would be "as pernicious as the decision made by this tribunal in the *Dred Scott* Case."

The dissent explained the history of and connection between the Thirteenth, Fourteenth, and Fifteenth Amendments:

> The Thirteenth Amendment does not permit the withholding or the deprivation of any right necessarily inhering in freedom. It not only struck down the institution of slavery as previously existing in the United States, but it prevents the imposition of any burdens or disabilities that constitute badges of slavery or servitude. It decreed universal civil freedom in this country. This court has so adjudged. But, that amendment having been found inadequate to the protection of the rights of those who had been in slavery, it was followed by the Fourteenth Amendment, which added greatly to the dignity and glory of American citizenship, and to the security of personal liberty … These two amendments, if enforced according to their true intent and meaning, will protect all the civil rights that pertain to freedom and citizenship. Finally, and to the end that no citizen should be denied, on account of his race, the privilege of participating in the political control of his country, it was declared by the Fifteenth Amendment that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude.'

The dissent reasoned that the Louisiana law defeated the purposes of these recently enacted amendments adopted by the people of the United States because the state law's purpose was to exclude Black people.

The dissent rejected the majority's reasoning that a state may regulate conduct if the regulation is reasonable. The dissent reasoned that if a state could prohibit citizens of different races from traveling together in the same train compartment, the state could also force Whites to stay on one side of the street, Blacks to the other; punish whites and Blacks who ride together in street cars or other vehicles; assign Whites to one side of the courtroom, and Blacks to the other; or prohibit the two races to sit together in legislative halls or public assemblies. Justice Harlan explained:

> But in view of the constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is therefore to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a state to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

The dissent also rejected the majority's reasoning that the state law was not a badge of inferiority. "The arbitrary separation of citizens, on the basis of race, while they are on a public highway, is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution. It cannot be justified upon any legal grounds."

It is important to acknowledge that Justice Harlan's dissent also included racist views.

Critical Thinking Question

1. In 1896, particularly in the deep south, new laws were imposed to sustain pre-civil war power for Whites. In his lone dissent that year, Justice Harlan argues "Our constitution is color-blind, and neither knows nor tolerates classes among citizens." Would you agree that our Constitution and state laws should be color blind, then and/or now? Why or why not?

Brown v. Board of Education 347 U.S. 483 (1954)

Decided May 17, 1954, 9-0

Facts of the Case and Procedural History

In 1951, Oliver Brown brought a class-action lawsuit against the Board of Education of Topeka, Kansas in the U.S. District Court in Kansas. Brown's daughter, and other Black children, were not allowed to attend all-white elementary schools based on segregation laws. Instead of attending schools near their homes, these children were required to travel to "Black schools" farther away.

In the lawsuit, Brown and the other plaintiffs argued that segregated schools for Black children were not equal to the all-white schools, and that segregation based on race violated equal protection under the Fourteenth Amendment of the U.S. Constitution.

While the U.S. District Court in Kansas found that segregation by race had a detrimental effect on Black children, the district court ruled against Brown and the other plaintiffs. The district court applied the law according to *Plessy v. Ferguson*, deciding that the segregated schools were equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. Therefore, the segregated schools were appropriately "separate but equal." Brown, represented by NAACP chief counsel Thurgood Marshall, appealed the district court's decision directly to the U.S. Supreme Court.

On appeal, the Supreme Court heard *Brown v. Board of Education* in consolidation with other cases that involved the racial segregation of schools: *Briggs v. Elliot* (South Carolina), *Davis v. County School Board* (Virginia), and *Gebhart v. Belton* (Delaware). In each of these cases, the local courts followed, to some extent, the "separate but equal" doctrine in *Plessy v. Ferguson*.

Majority Opinion by Chief Justice Warren

Approximately 58 years after the U.S. Supreme Court established the "separate but equal" doctrine in *Plessy v. Ferguson*, the Supreme Court overturned *Plessy*. The Court made a pivotal, unanimous decision in ruling that racial segregation in public schools violated the Fourteenth Amendment to the Constitution:

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.

The Court examined the history of the Fourteenth Amendment, but found it unsettled in terms of its intended effect on public education. It noted that public education at the time of the Fourteenth Amendment's adoption in 1868 was very different from public education in the 1950s:

> In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Ultimately, the Supreme Court had to decide whether segregation of children in public schools solely based on race, even though the physical facilities and other "tangible" factors may be equal, deprived the Black children of equal educational opportunities.

After reviewing cases that involved granting equal educational opportunities to Black students in higher education (law school and graduate school), the Court reasoned that Black children in grade and high schools should be granted even greater equality opportunities. The separation of children in grade and high schools because of their race could deprive Black children from educational and mental development. The segregation could cause Black children to feel inferior, and feelings of inferiority could affect their motivation to learn, as well as their "hearts and minds in a way unlikely ever to be undone." The Court supported its decision with modern psychological authority addressing discrimination, personality development, and the effects of segregation.

Brown v. Board of Education 349 U.S.294 (1955) (*Brown II*)

Decided May 31, 1955, 9-0

After the original *Brown* decision, the Supreme Court requested further argument on the issue of a remedy for the constitutional violation of states permitting or requiring racism in public education. The Court held that states must make "a prompt and reasonable start toward full compliance" with the original *Brown* ruling. The court accepted that lower courts may find that "additional time is necessary to carry out the ruling in an effective manner."

The Court held that "the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases."

Critical Thinking Questions

1. Does the decision in *Brown* adhere to the principle of stare decisis? Why or why not? If you believe it adheres to stare decisis, explain how stare decisis is applied.

2. What do you think "with all deliberate speed" means? How do you think it was interpreted by the defendants in the *Brown* cases?

Regents of University of California v. Bakke, 438 U.S. 265 (1978)

Decided June 28, 1978, 4-1-4

Facts of the Case and Procedural History

Allan Bakke, a white male, sued the UC Davis Medical School after he was not admitted for two consecutive years. He claimed a violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 (which bars discrimination by any program receiving federal financial assistance). He alleged that the Medical School's special admissions program was unconstitutional because only "economically and/or educationally disadvantaged members" or those belonging to a "minority group" which the Medical School defined as: " 'Blacks', 'Chicanos', 'Asians' and 'American Indians' " were considered for 16 of the 100 places in each year's class, whereas members of any race could qualify under the school's general admissions program for the other 84 places in the class. Bakke had been denied admission to the school under the general admissions program even though applicants with substantially lower entrance examination scores had been admitted under the special admissions program.

Finding that the special admissions program operated as a racial quota because minority applicants in the special program were rated only against one another and 16 places in the class of 100 were reserved for them, the California state trial court (1) declared that the school could not take race into account in making admissions decisions, (2) held that the challenged admissions program violated the federal and state constitutions and Title VI of the Civil Rights Act of 1964, but (3) refused to order the plaintiff's admission because he had failed to prove that he would have been admitted but for the existence of the special program.

On direct appeal, the California Supreme Court affirmed the trial court's judgment insofar as it determined that the special admissions program was invalid under the Equal Protection Clause, but reversed the lower court's requirement that Bakke had the burden to prove he would have been admitted to the medical school. The California Supreme Court ruled that the University had the burden of demonstrating that Bakke would not have been admitted even in the absence of the special admissions program, and the University had conceded its inability to carry that burden.

Majority Opinion by Justice Powell

In a delicate act of judicial balancing, Justice Powell joined 4 justices in part of his opinion, and the other 4 justices in the second part of his opinion. The justices held that the university's use of strict racial quotas was unconstitutional and ordered UC Davis to admit Bakke; however, the justices also agreed that race could be used as one factor in admissions decisions of colleges/universities.

Justice Powell first rejected the idea that Title VI enacted a "colorblind" standard separate from the Fourteenth Amendment. The Court was concerned that "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth" and that "there is a measure of inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making."

Justice Powell was particularly concerned that "[i]n expounding the Constitution, the Court's role is to discern 'principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place.'" (Quoting A. Cox, The Role of the Supreme Court in American Government.)

Because there was no determination by the legislature or a responsible administrative agency that the University had engaged in a discriminatory practice requiring remedial efforts, and since the special admissions program totally foreclosed some individuals from enjoying the state-provided benefit of admission to the medical school solely because of their race, the classification must be regarded as suspect. Thus, the classification was permissible only if supported by a substantial state purpose or interest, and only if the classification was necessary to the accomplishment of such purpose or the safeguarding of such interest.

The Court rejected as insufficient three purposes offered by the Medical School: (a) reducing the historic deficit of traditionally disfavored minorities in medical schools and the medical profession because this essentially amounted to a racial quota which in impermissible; (b) countering the effects of "societal discrimination," since the government has a substantial interest in correcting the effects of specific, identified discrimination only, and (c) increasing the number of physicians who would practice in communities currently underserved, there being virtually no evidence that the special admissions program was either needed or geared to promote such goal.

The Court accepted the purpose of obtaining the educational benefits that flowed from an ethnically diverse student body as a clearly constitutionally permissible goal in view of the First Amendment's special concern for academic freedom. He nevertheless found that UC-Davis's program--reserving a fixed number of seats in each class solely on the basis of race, whereas the admissions programs of other universities properly took race into account as only one of the factors for consideration in achieving educational diversity through programs involving individual, competitive comparison of all applicants--was not necessary to promote the interest of diversity; and thus, violated the Fourteenth Amendment. Justice Powell cited Harvard College's admission program, which reviews a number of criteria for each applicant and in which race could provide a "tip" justifying admission, as constitutionally permissible.

Finally, Justice Powell agreed with the California Supreme Court's ruling that the Medical School must prove that but for the existence of its unlawful admissions program, Bakke would not have been admitted anyway. The Medical School conceded that it could not meet that burden so Bakke was ordered admitted.

Partial Concurring Opinion and Partial Dissenting Opinion by Justices Brennan, White, Marshall, Blackmun, Stevens

The concurring justices would have found the UC-Davis admissions program constitutional in all respects. The justices agreed with Justice Powell that Title VI prohibited only the use of racial criteria that would violate the Fourteenth Amendment. They noted that Title VI did not define the meaning of discrimination and rejected the dissent's reliance on the plain text in favor of legislative history. "[T]he literal application of what is believed to be the plain language of the statute, assuming that it is so plain, would lead to results in direct conflict with Congress' unequivocally expressed legislative purpose."

The concurring justices felt that although the Medical School had not been found to have engaged in discriminatory practices, it does not seem logical that Title VI "*compels* race-conscious remedies where a recipient institution has engaged in past discrimination but *prohibits* such remedial action where racial minorities, as a result of the effects of past discrimination imposed by entities other than the recipient, are excluded from the benefit of federally funded programs", as claimed by the dissenting justices. The concurring justices argued that UC-Davis was free, under Title VI, to voluntarily remedy the effects of past discrimination.

The concurring justices found that the claim that "the Constitution is colorblind . . . has never been adopted by this Court as the proper meaning of the Equal Protection Clause. Indeed, we have expressly rejected this proposition on a number of occasions. Our cases have always implied that an 'overriding statutory purpose' [citations] could be found that would justify racial classifications."

The concurring justices turned to the validity of the program under the Equal Protection Clause. They stated that strict scrutiny is only justified in cases involving "fundamental rights" or "suspect classifications." In this case, the concurring justices found that a medical school education was not a fundamental right and classifications that burdened "whites" were not suspect classifications.

The concurring justices would apply a lower threshold used in gender discrimination cases. "[R]acial classifications designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" To justify any racial classification, an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program.

The concurring justices would have upheld UC-Davis's purpose of remedying the effects of past societal discrimination as constitutional even without a showing of past discrimination by the school. The justices found that "[f]rom the inception of our national life, [African-Americans] have been subjected to unique legal disabilities impairing access to equal educational opportunity."

Similarly, the concurring justices stated that UC-Davis's program did not stigmatize whites, it simply allowed a less than proportional number of slots to go to "underrepresented qualified minority applicants." "The use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that wherever they go or whatever they do there is a significant likelihood that they will be treated as second-class citizens because of their color."

The concurring justices found that UC-Davis's use of race-conscious measures was both reasonable and necessary to achieve its objective. Justice Marshall wrote separately and reviewed the history of discrimination against African-Americans:

> In light of the sorry history of discrimination and its devastating impact on the lives of [African-Americans], bringing [African-Americans] into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society. . . . I do not believe that the Fourteenth Amendment requires us to accept that fate. Neither its history nor our past cases lend any support to the conclusion that a university may not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of [African-American] doctors.

Partial Dissenting Opinion and Partial Concurring Opinion by Justice Stevens, Chief Justice Burger, and Justices Stewart and Rehnquist

The dissent would have limited the ruling solely to the unique admissions program of UC-Davis and to Bakke's specific facts. The dissent would not have reached the question of whether race can ever be used as a factor in an admissions decision.

Similarly, the dissent would not evaluate the program under the Equal Protection Clause if the case could be decided under Title VI. The dissent found it self-evident that UC-Davis's program discriminated against Bakke because of his race, in violation of Title VI. The dissent would find that Title VI "required a colorblind standard on the part of government" and that "[r]ace cannot be the basis of excluding anyone from participation in a federally funded program."

Critical Thinking Questions:

1. Do you agree with Justice Powell that the Court's role is to achieve principles that achieve "continuity over significant periods of time" and rise "above the level of the pragmatic political judgments of a particular time and place"? Do you believe the Supreme Court lives up to this role?

2. Do you agree with Justice Powell that a racially diverse student body promotes "speculation, experiment and creation"?

When Does This Supreme Court Care About Precedent? Ask Kavanaugh

Analysis by Noah Feldman | Bloomberg

June 11, 2023 at 8:04 a.m. EDT

When the Supreme Court ruled on Thursday that an Alabama redistricting map violated the Voting Rights Act — thus declining to strike down some remaining parts of the VRA — headlines branded the decision a "surprise" and "unexpected." In particular, some commentators expressed astonishment at the emphasis the majority placed on respect for judicial precedent, or stare decisis. Why would a majority of the justices, some of whom previously gutted other parts of the VRA, and who have overturned decades of precedent on issues from abortion to guns to religion, hold back here?

The answer is straightforward, at least according to Justice Brett Kavanaugh — who provided the decisive fifth vote to uphold precedent in the voting case, but who voted to overturn nearly 50 years of precedent on abortion last year…

As he explained in his concurrence in the voting case, Allen v. Milligan, Kavanaugh believes that stare decisis has special weight when the court is interpreting statutes passed by Congress, as opposed to interpreting the Constitution. The Allen case was about interpreting the Voting Rights Act. The abortion case, Dobbs v. Jackson Women's Health, was about the meaning of the Constitution — as will also be true of other major constitutional decisions coming this term, including the affirmative action case.

On the face of it, respecting precedent more when it applies to statutes than to the Constitution is counterintuitive. After all, the Constitution is older and more important than any statute. It sets the ground rules for which statutes are allowed and which are not. Members of the public are more familiar with the Constitution than specific statutes, and more people care about its meaning. If stare decisis is about respecting the historical weight of tradition, it would seem the Constitution should have a clear advantage over statutes passed by Congress.

Yet there is a long-standing doctrine that argues stare decisis is more important when applied to statutes. To understand why, you need to think like a lawyer. (Sorry.)

The basic idea is that it's a lot easier for Congress to change a statute than it is for the public to amend the Constitution. If Congress doesn't like a judge's ruling on a statute, Congress can change the law. When Congress goes along with a judicial interpretation, it implicitly endorses that interpretation — which gives future judges even more reason to respect it. This approach rests on a degree of deference to Congress.

By contrast, if the public doesn't agree with an earlier court's interpretation of the Constitution, there's little they can do about it. The only remedy might be a later court overturning the earlier, "wrong" decision.

Not everyone buys this logic. Justice Clarence Thomas dissented in the voting rights case. In a footnote, he called Kavanaugh's reliance on statutory stare decisis "puzzling." He said he could perceive "no conceptual basis" for it. According to Thomas, the judge's job is to apply the law to the facts of the case, "regardless of how easy it is to change the law."

Thomas overstates the case. His approach would leave us with no room at all for judges to respect precedent. And in fact, Thomas generally and genuinely doesn't think precedent should ever matter, whether in statutory or constitutional cases.

The true value of precedent is that it gives judicial decisions the capacity to function as rules of law that can guide our actions. If judges can change their minds anytime, then their decisions aren't truly part of the rule of law. They are simply case-by-case ad hoc decisions, not rules we can rely on. Thomas ignores that basic feature of the doctrine.

Retired Justice Anthony Kennedy, for whom Kavanaugh once clerked, was an exponent of a gradualist theory of stare decisis. He was one of the key voices in the 1992 Casey v. Planned Parenthood case, in which he was the likely author of a famous line, "liberty finds no refuge in a jurisprudence of doubt." In other words, unless you can rely on a precedent that says you are free, you aren't really free.

Even when Kennedy wanted to expand constitutional rights, as he did for gay people, he did it slowly, step by step, so as to evolve precedent gradually. He took 20 years to move from striking down laws targeting gay people to guaranteeing marriage equality.

Whatever the merits of Kavanaugh's view about statutory stare decisis, what it has going for it is the fact that it's… yes… based on precedent. Courts have repeated it for many years, albeit not, as Thomas suggests, all the way back to the founding. There is therefore a kind of meta-argument in favor of it: When Congress doesn't overrule a statutory interpretation by passing a new law, lawmakers can expect that precedent will apply.

The merits of giving special respect to statutory stare decisis are interesting to debate, at least to law professors like me. But in practice, what matters is that Kavanaugh was laying out an explanation for when he chooses to follow precedent and when he chooses to overturn it.
Back in April of 2020 … Kavanaugh wrote a 19-page concurrence in a minor criminal law case laying out his factors for respecting or overturning precedent. He didn't pin himself down, but he did seem to be thinking through how to vote on abortion.

Now Kavanaugh seems to be filling in his thinking. He's left himself room to overturn affirmative action, not to mention constitutional precedents in other hot-button areas like the separation of church and state.

…

***Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, and *Students for Fair Admissions, Inc. v. University of North Carolina, et al*, 600 U.S. 181 (2023)**

Decided June 29, 2023, Harvard 6-2 (Justice Jackson abstained), UNC 6-3

Facts of the Cases and Procedural History

Harvard College and the University of North Carolina both receive tens of thousands of applications per year. Students are initially rated by a reader on a variety of factors. These readers consider race in their review.

While each school considers a number of factors in deciding whether to admit any particular student, both give a "tip" or a "plus" to students based on race. (Note: The Court referenced this approach in the 1978 *Bakke* case).

The last stage of Harvard's admissions process is called the "lop" and reduces the tentative admission list to the final class. At this stage, Harvard only considers: legacy status, recruited athlete status, financial aid eligibility, and race. The goal is to ensure no dramatic drop off in minority admissions from the prior year. Race is a "determinative tip" for a significant percentage "of all admitted African-American and Hispanic applicants."

UNC has a similar admissions process. The last stage is a "school group review" of every reader decision by a committee of experienced staff members. In conducting the review, the committee may consider the applicant's race.

Students for Fair Admissions (SFFA) is a non-profit that brought suit, claiming both colleges' "race-based admissions programs" violate Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

After separate bench trials (judge only, no jury), both admissions programs were found permissible under the Equal Protection Clause. In the Harvard case, that decision was appealed to the First Circuit Court of Appeals, which affirmed based on precedent. The United States Supreme Court granted review (certiorari). In the UNC case, the Court granted certiorari before judgment.

Majority Opinion by Chief Justice Roberts

Chief Justice Roberts delivered the opinion of the Court holding that Harvard and UNC's admissions programs violated the Equal Protection Clause of the Fourteenth Amendment. The Court first outlined the history of the Equal Protection Clause of the Fourteenth Amendment. The Court noted the "ignoble history" of *Plessy v. Ferguson* and *Plessy's* demise in *Brown v. Board of Education*. The Court cited *Brown's* proposition that "[t]he mere act of separating 'children . . . because of their race' . . . itself generated a feeling of inferiority'" and outlined *Brown's* conclusion that "the right to a public education 'must be made available to all on equal terms.'" The Court went on to cite *Bakke* for the premise that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."

The Court recited its prior rulings that "[a]ny exception to the Constitution's demand for Equal Protection must survive a daunting two-step examination known in our cases as 'strict scrutiny'. Under that standard, we ask, first, whether the racial classification is used to 'further compelling government interests' (citing *Grutter v. Bollinger* (2003)) and second, if so, we ask whether the government's use of race is 'narrowly tailored' meaning 'necessary' to achieve that interest."

In *Grutter*, a majority of the Supreme Court adopted its precedent in *Bakke* that "student body diversity is a compelling state interest that can justify the use of race in university admissions". The *Grutter* Court held that schools could not establish quotas for members of certain racial groups, could not "insulate applicants who belong to certain racial or ethnic groups from the competition for admission" and could not seek "some specified percentage of a particular group merely because of race or ethnic origin." The *Grutter* Court (2003) also held that at some point, race-based admissions programs must end and that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

In *Students for Fair Admissions*, the Court pointed out that with respect to Harvard and UNC, "no end is in sight." The Court stated that prior cases had required that universities "operate their race-based admissions programs in a manner that is 'sufficiently measurable to permit judicial [review]' under the rubric of strict scrutiny." The Court indicated that "[n]othing like that is possible when it comes to evaluating the interests" advocated by Harvard and UNC.

The Court was troubled that the policies resulted in fewer Asian-American and white students being admitted and did not accept that the programs would end when, "in their absence, there is 'meaningful representation and meaningful diversity' on college campuses."

The majority rejected the dissent's position that "the Fourteenth Amendment permits state actors to remedy the effects of societal discrimination through explicitly race-based measures." The Court stated that "[i]n the years after *Bakke*, the Court repeatedly held that ameliorating societal discrimination does not constitute a compelling state interest."

The Court did concede that "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 through discrimination, inspiration or otherwise" as long as any benefit is tied to that student's "courage and determination" or "unique ability to contribute to the university."

Concurring Opinions by Justices Thomas, Gorsuch and Kavanaugh

Justice Thomas rejected an " 'antisubordination' view of the Fourteenth Amendment: that the Amendment forbids only laws that hurt, but not help, blacks." He expressed skepticism that "racial diversity yields educational benefits." He also questioned why Harvard and UNC did not strive for other forms of diversity such as religious diversity.

Like Justice Roberts, Justice Thomas found it "particularly incongruous to suggest that a past history of segregationist policies toward blacks should be remedied at the expense of Asian-American college applicants." He pointed out that the University of California, which prohibits race-based admission programs by state law, had recently admitted its "most diverse undergraduate class ever."

Finally, Justice Thomas made it clear that the majority opinion essentially overruled *Grutter*, even if it didn't say so.

Justice Gorsuch cited SFFA's claim that "Harvard could nearly replicate the current racial composition of its student body without resorting to race-based practices if it: (1) provided socioeconomically disadvantaged applicants just half of the tip it gives recruited athletes; and (2) eliminated tips for the children of donors, alumni, and faculty.

Justice Kavanaugh stressed that *Grutter* held that race-based admissions programs must end in 25 years. He stated that "although progress has been made since *Bakke* and *Grutter*, racial discrimination still occurs and the effects of past racial discrimination still persist." He pointed out that "federal and state civil rights laws serve to deter and provide remedies for current acts of racial discrimination."

Dissenting Opinion by Justice Sotomayor

Justice Sotomayor forcefully disagreed with the majority, stating "[t]he Equal Protection Clause of the Fourteenth Amendment enshrines a guarantee of racial equality. The Court long ago concluded that this guarantee can be enforced through race-conscious means in a society that is not, and has never been, colorblind."

Justice Sotomayor outlined the history of laws regarding education in the immediate aftermath of the passage of the Fourteenth Amendment. "[T]he same Reconstruction Congress that passed the Fourteenth Amendment eschewed the concept of colorblindness as sufficient to remedy inequality in education." Citing Justice Marshall's opinion in *Bakke*, she stated that "this history makes it 'inconceivable' that race-conscious college admissions are unconstitutional."

As an analogy to race-based admissions, Justice Sotomayor pointed to school busing cases, stating "[a]ffirmative steps, this Court held, are constitutionally necessary when mere formal neutrality cannot achieve *Brown's* promise of racial equality."

Justice Sotomayor pointed out that as recently as 2016, in *Fisher v. University of Texas*, the Court had upheld the admissions program at the University of Texas as being "narrowly tailored to obtain the educational benefits of diversity" and thus, constitutional under Fourteenth Amendment strict scrutiny. Justice Sotomayor argued that "ignoring race will not equalize a society that is racially unequal. What was true in the 1860's, and again in 1954, is true today: Equality requires acknowledgment of inequality."

Justice Sotomayor was frustrated that the majority, unlike Justice Thomas, did not admit that it was overruling *Grutter* and decades of precedent and was " 'content for now to disguise' its ruling as an application of 'established law' ".

She went on to state that "It is a disturbing feature of today's decision that the Court does not even attempt to make the extraordinary showing required by *stare decisis*. The Court simply moves the goalposts, upsetting settled expectations and throwing admissions programs nationwide into turmoil. In the end, however, it is clear why the Court is forced to change the rules of the game to reach its desired outcome: Under a faithful application of the Court's settled

legal framework, Harvard and UNC's admissions programs are constitutional and comply with Title VI of the Civil Rights Act of 1964."

After pointing out that the majority's arguments were all rejected in prior cases, Justice Sotomayor warned that: "Lost arguments are not grounds to overrule a case. When proponents of those arguments, greater now in number on the Court, return to fight old battles anew, it betrays an unrestrained disregard for precedent. It fosters the People's suspicions that 'bedrock principles are founded . . . in the proclivities of individuals' on this Court, not in the law, and it degrades 'the integrity of our constitutional system of government.' "

Justice Sotomayor rejected the notion that *Grutter* imposed a fixed 25-year time limit. She pointed out that "[e]quality is an ongoing project in a society where racial inequality persists." and that "Harvard and UNC engage in the ongoing review that the Court's precedents demand."

Dissenting Opinion by Justice Jackson (to UNC case only)

Justice Jackson argued that race-conscious admissions programs do increase diversity and pointed to the precipitous drop in freshmen enrollees from underrepresented minority groups in California immediately after California banned race-conscious admission programs in 1996.

Justice Jackson indicated that the majority's decision ignores much of the evidence produced at trial about Harvard and UNC's admissions processes and their benefits.

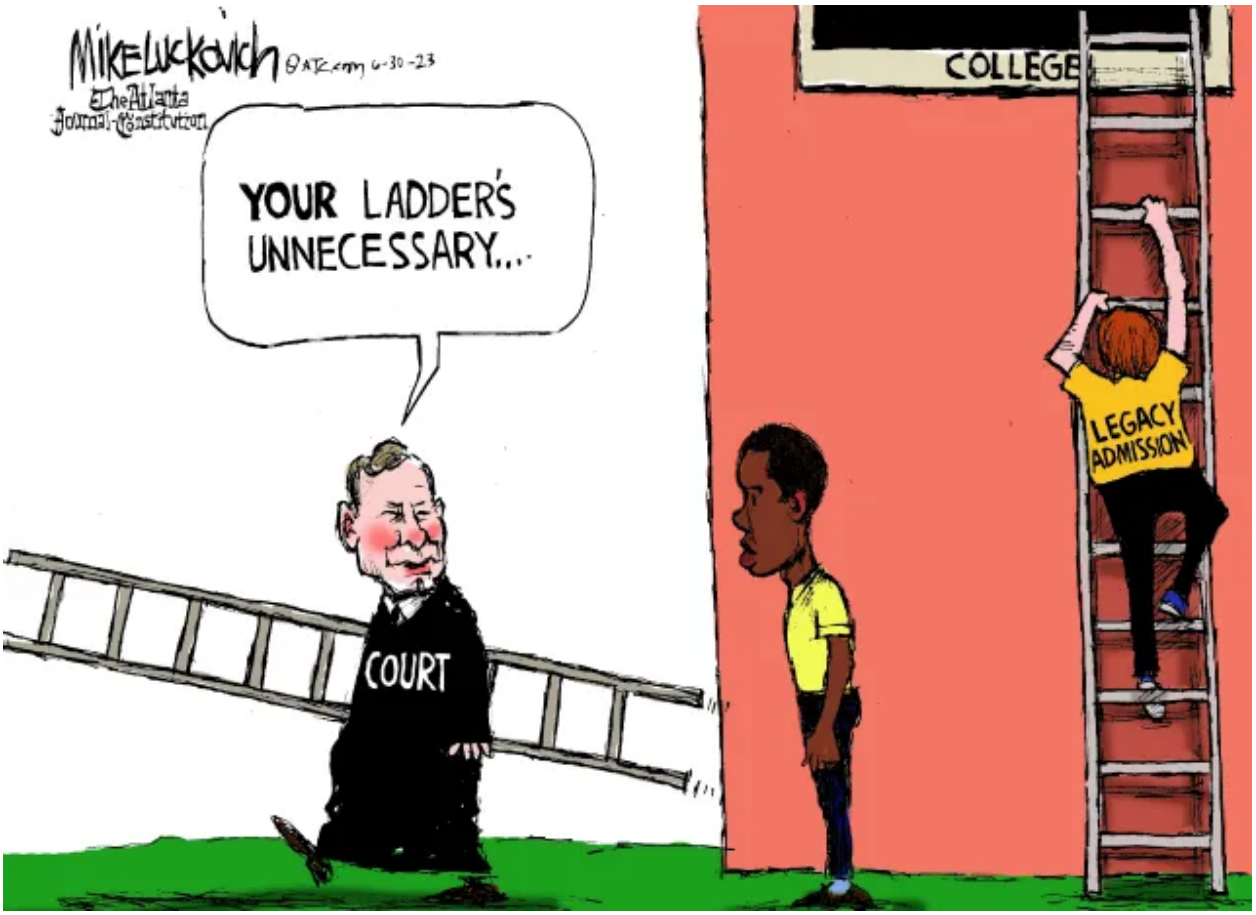
Justice Jackson pointed out that UNC has a holistic admissions process that considers over 40 criteria that applicants can choose to submit if they want, including race. An applicant of any race can receive a "plus" for their race or experiences stemming from race.

<u>Critical Thinking Question:</u>

1. What accounts for the different treatment of Harvard's admissions program in *Bakke* and *Students for Fair Admissions*? Is the Court overruling *Bakke*?

2. Do you agree with Justice Sotomayor that our society is not "colorblind"? Should our Constitution be "colorblind" as Justice Harlan proposed in his dissent in *Plessy*? What would that mean?

3. How important do you think education is in reducing racial inequality? Can there be an admissions program that does not burden any racial groups?



Critical Thinking Questions:

1. What prior knowledge do you need to have to understand the cartoon?

2. What is the topic of the cartoon?

3. What is the cartoonist's message about this topic?