Business Ramifications of the Supreme Court's Affirmative Action Decision

As discussed in a prior Taft law bulletin, the U.S. Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (*SFFA*) invalidated racial preferences in admissions programs nationwide. Specifically, the court held that the admission policies used by the University of North Carolina (UNC), a public institution, and Harvard University (Harvard), a private university, unlawfully discriminated against some applicants, notably Asian Americans, by considering an applicant's race *qua* race when deciding whom to admit.[1] The court adopted a fundamentally colorblind approach to interpreting Title VI and the Constitution.

Chief Justice John G. Roberts, Jr., authored the opinion for a 6-3 court. Justices Clarence Thomas, Neil M. Gorsuch,[2] and Brett M. Kavanaugh filed concurring opinions. Justice Sonia Sotomayor dissented on behalf of herself and Justice Elena Kagan as to both the UNC and Harvard cases and on behalf of Justice Ketanji Brown Jackson as to just the UNC case.[3] And finally, Justice Jackson filed a dissenting opinion as to the UNC case and was joined by Justice Sotomayor and Justice Kagan.

The same day that the Supreme Court issued its decision, Equal Employment Opportunity Commission (EEOC) Chair Charlotte A. Burrows issued a press release expressing her view that *SFFA* "does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background." Chair Burrows added that "[i]t 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."

Time will tell. A careful reading of the *SFFA* opinion, however, indicates that it jeopardizes the future of Diversity, Equity, and Inclusion (DEI) initiatives undertaken by many employers. As this article goes on to explain, there is a serious argument to be made that the logic of and the signals given by the Supreme Court's *SFFA* opinion effectively puts employers subject to Title VII on notice that their programs may well be unlawful.[4] Because the Supreme Court has interpreted Title VI consistently with the Equal Protection Clause, the majority's analysis focused on the Equal Protection Clause (applicable to public colleges and universities like UNC) without independently addressing Title VI (applicable to all colleges and universities that receive federal funds, including both UNC and Harvard).

The Origins of the *SFFA* Case

First, a quick background of how the *SFFA* decision came to be. Students for Fair Admissions, Inc., is a nonprofit organization that filed separate lawsuits against Harvard and UNC in 2014, alleging that their respective admissions policies violated the Fourteenth

[1] Although the Supreme Court in *SFFA* used the term "college admissions," there is no doubt that its opinion applies to all academic institutions that accept Title VI funds and practice selective admissions.
[2] Justice Thomas joined Justice Gorsuch's concurrence.
[3] Justice Jackson had recused herself from the Harvard case.
[4] Among others, private sector employers with 15 or more employees are subject to Title VII.

Amendment's Equal Protection Clause in the case of UNC and Title VI of the Civil Rights Act of 1964 in the case of both universities. After separate bench trials, the federal district judges in North Carolina and Massachusetts, respectively, presiding over the two cases concluded that both universities' (Harvard and UNC) admissions policies were permissible under Title VI, the Equal Protection Clause (for UNC), and applicable Supreme Court precedents, notably *Grutter v. Bollinger* (2003).[5] The First Circuit upheld the Harvard plan and the Fourth Circuit did not have an opportunity to rule on the UNC program.

Grutter, it is appropriate to recount, had held that the narrowly tailored use of race in university admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause, Title VI, or 42 U.S.C. § 1981. When many had expected affirmative action in university admissions to be invalidated, a 5-4 majority of the Supreme Court in *Grutter* upheld it. Writing for the court, Justice Sandra Day O'Connor approved the limited consideration of race — not as a quota or by way of points but only as one factor among many — in admissions decisions. Conceptually, Justice O'Connor's majority opinion essentially adopted the same approach undertaken a quarter of a century previously by Justice Lewis F. Powell, Jr., in *Regents of the University of California v. Bakke* (1978).[6] Yet the Supreme Court in *Grutter* gave affirmative action a short, one-generation-at-the-most reprieve. Mentioning that *Bakke* had approved the limited consideration of race 25 years previously, in 2003 *Grutter* noted its "expect[ation] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[7]

After years of litigation, the Supreme Court eventually granted certiorari in the Harvard case and granted certiorari before judgment in the UNC case, and the court reversed the judgments of the lower courts in favor of the two universities. Chief Justice Roberts' majority opinion explained that both universities' admissions policies "lack sufficiently focused and measurable objectives warranting the use of race [thus failing strict scrutiny], unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points," adding that a "student must be treated based on his or her experiences as an individual — not on the basis of race." The *SFFA* court was careful to insist that a university's use of race in admissions had to satisfy each of those conditions.

As the *SFFA* court and Justice Kavanaugh's concurrence observed, time had run out in part because the universities could not show an endpoint, even an aspirational one.[8] The governmental interests most closely aligned with a more flexible timeline had been flatly rejected by Justice Powell's dispositive opinion in *Bakke*. Even Justice Harry A. Blackmun, who had voted to approve racial quotas in *Bakke*, had expressed in that case his "hope" that by 1988 (at the latest), affirmative action in university admissions could be sunset.

---

[5] 539 U.S. 306.

[6] 438 U.S. 265. The *Bakke* court split 4-1-4. Justice Powell's solo opinion approved the limited role of race in admissions but not explicit quotas. No justice's opinion or point of view commanded a majority of the court in *Bakke*. Justice Powell's opinion was believed to lay down the controlling principle since it split the difference between the two flanks in *Bakke*. Whereas Justice William J. Brennan, Jr., Justice Byron R. White, Justice Thurgood Marshall, and Justice Harry A. Blackmun wanted to uphold even explicit racial quotas as consistent with the Equal Protection Clause and Title VI, on the other side Justice John Paul Stevens, joined by Chief Justice Warren Burger, Justice Potter Stewart, and then-Justice William H. Rehnquist thought it enough that, in their view, Title VI prohibited any consideration of race *qua* race in making admissions decisions and thus did not require them to decide the constitutional question.

[7] It has been contended that the carefully-curated diction in this timing caveat did not necessarily mean that universities had all of 25 years — it meant that they had up *to* 25 years.

[8] Justice Kavanaugh noted that "[t]he [*SFFA*] Court's decision will first apply to the admissions process for the college class of 2028, which is the next class to be admitted."

The Impact of *SFFA* on Higher Education

It would be facile to pretend that the court's decision does not mark a decisive shift in the way that race is permitted to affect admissions decisions — and beyond. Indeed, the two key pages in the court's analysis precluding the use of race as a negative factor could have been all that was needed to end racial preferences in university admissions. In the court's own words — a theme resounding from the lengthy oral arguments in the Harvard and UNC cases — "race may never be used as a 'negative'" and selection processes "are zero-sum." To Harvard's and UNC's contention that they never use race as a negative factor but only as a positive one, the court's answer was unequivocal: "A benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter." Analytically, this pronouncement was sufficient to invalidate, under the Constitution's equal-protection principles and Title VI, any use of race *qua* race in admissions. But the court did not stop there.

Much of what *SFFA* held would apply to university programs even after a candidate has been admitted. The Supreme Court added: "Eliminating racial discrimination means eliminating *all of it*."[9] This sentence echoed the Chief Justice's earlier pronouncements on this issue: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[10] Or: "It is a sordid business, this divvying us up by race."[11] Thus, the court's further, two-page discussion on the impermissibility of racial "stereotypes" calls into question even post-admission programs such as race-based affinity groups, scholarships, programs, activities, functions, and pipelines. Summing it all up, the Supreme Court in *SFFA* rejected what it called "stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts — their very worth as citizens — according to a criterion barred to the government by history and the Constitution."[12]

As the same time, however, the majority made clear 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." Even this analysis had an important caveat: "the [applicant] must be treated based on his or her experiences as an individual — not on the basis of race," so any consideration of race *qua* race was forbidden. What was not forbidden was that the university might consider a particular applicant's "courage and determination" in overcoming racial discrimination or being inspired by matters in the racial firmament. The emphasis in *SFFA* shifted away from an applicant's benefiting because of their race to any benefits being available only on account of how race affected that same candidate. It was a marked shift from the applicant's self-identified race to life experience, which might include particular racially-infused experiences that same candidate has had. The *SFFA* court took pains to emphasize that the universities could not circumvent the decision by considering an applicant's race on a pretextual basis — as an example, "[a] benefit to a student who overcame racial discrimination, for example, must be tied to that student's courage and determination," the court stressed.

---

[9] Emphasis added.
[10] *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion).
[11] *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., dissenting).
[12] Cleaned up.

Title VII and the Broader Implications for Employers

All this is highly consequential for employers subject to Title VII for an important reason: The court has long treated, as it did in *SFFA*, Title VI as co-extensive with the Fourteenth Amendment's Equal Protection Clause. That is why Harvard also lost the case, just as UNC did. And as Justice Gorsuch's concurrence in *SFFA* pointed out, Title VII uses "essentially identical terms" as Title VI. Title VII renders it "unlawful ... for an employer ... to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin."

Specifically, Title VII prohibits employers from "fail[ing] or refus[ing] to hire or … [from] discharg[ing] any individual, or otherwise … [from] discriminat[ing] [on any of those prohibited bases] against any individual with respect to his *compensation, terms, conditions, or privileges of employment*." For historical context, Title VII was enacted around the same time as Title VI, thereby suggesting that the living community at the time of either's enactment — really, the same group of people — could not have understood the two laws to say diametrically opposite things (colorblindness for Title VI but not for Title VII). Typically, people do not understand the same words to mean one thing on Monday and another on Tuesday, and especially not when a lot is riding on how those words are carried out.

Though the majority opinion did not need to, and thus did not, address any Title VII questions, Justice Gorsuch's concurring opinion may embolden those who would seek to challenge certain DEI initiatives in the workplace. Needless to belabor, Title VII currently forbids consideration of race in making employment decisions. Given the current Supreme Court's emphasis on textualism — the ordinary, contemporary meaning of the statute should be the only way that a law is interpreted — the overriding role of race in the country, and Title VII's capaciously prohibitive language, *SFFA* almost surely invites suits challenging corporate DEI initiatives as well as other business decisions concerning race-based (and perhaps sex-based too) promotions, affinity groups, and more.

All these phenomena implicate, directly from Title VII's language, at least "terms, conditions, [and] privileges of employment" and sometimes they implicate "compensation" as well. Under recent Supreme Court precedent, any consideration of race (or any other prohibited criterion) in making employment decisions — not just hiring decisions but also decisions concerning the "terms," "conditions," or "privileges of employment" — "def[ies]" Title VII.[13]

Additional Precedent Complicates Employment Decisions

Two wrinkles would remain. As an initial matter, two Supreme Court precedents — *Johnson v. Transportation Agency* (1987),[14] and *United Steelworkers of America, AFL-CIO-CLC v. Weber* (1979)[15] — seem to indicate that employers may take steps to "eliminate manifest racial [or gender] imbalances in traditionally segregated job categories."[16] And second (indeed, relatedly), many justices believe that statutory *stare decisis* is at its peak — it occupies "enhanced force" — because Congress has chosen to leave an old judicial decision (perhaps especially the Supreme Court's, due to its prominence and impact) well enough alone; in fact, the older the statutory decision, the more precedential effect it is entitled to.[17] And that is

[13] *Bostock v. Clayton County*, 140 S. Ct. 1731, 1748-49 (2020) (stating or suggesting that neither race nor "sex [need] be the sole or primary cause of an adverse employment action for Title VII liability to follow."); *id*. at 1754.
[14] 480 U.S. 616.
[15] 443 U.S. 193.
[16] *Id*. at 197.
[17] *Kimble v. Marvel Entertainment, LLC*, 576 U.S. 446, 456 (2015).

especially true when "Congress has spurned multiple opportunities to reverse" a judicial decision or when it has calibrated related statutory concepts but never the one in question.[18] (Unlike the Supreme Court's constitutional decisions, which only the Supreme Court or a constitutional amendment may alter, Congress gets to change the court's statutory decisions and it has often done so.[19]) Private employers might argue that these considerations militate in favor of the court's staying the *Weber-Johnson* course.

Not so fast, the detractors of affirmative action would contend. Their argument might be that not only is colorblindness a principle that overrides these hardly-ironclad canons of statutory interpretation, but also that Title VI, Title VII, and the Constitution's equal-protection guarantee are rather like triplets that must mean the same thing. That unifying principle is colorblindness, as it rejects — as *SFFA* did — the anti-subordination view of equal protection and Title VI.[20] Any dissonance among them on the issue of colorblindness is simply inexplicable, this view would assert. This theory would suggest that just as Title VI and equal protection are co-extensive, so are Title VI and Title VII. Thus all three walk the same road. This is because, as already explained, Titles VI and VII were enacted around the same time with a particular meaning by the same living community. These statutory provisions could not, it would be suggested by the colorblindness proponents, hold polar opposite positions on the "principal evil" they were combating: discrimination.[21] And the antidote that Titles VI and VII devised was colorblindness. Further, the colorblindness proponents would also argue that *SFFA* has abrogated the "statutory and doctrinal underpinnings" of *Weber* and *Johnson*, thereby isolating those cases from and disharmonizing them with the rest of the Supreme Court's racial-equality jurisprudence.[22] To them, these counterarguments to any *stare decisis* weight claimed by *Weber* and *Johnson* would constitute "superspecial justification[s] to warrant reversing [those precedents]."[23]

To be sure, a voluminous body of administrative regulations resists that inference. For instance, Executive Order 11246 requires federal contractors to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin." According to the Office of the Federal Contract Compliance Programs (OFCCP), this "affirmative action" may require federal contracts to take such actions as "assessing and revising policies and practices that hinder employment opportunities, broadening recruitment and outreach to increase the diversity of applicant pools, and/or instituting training and/or apprenticeship programs to increase promotion opportunities and applications from underrepresented groups." At the same time, though, federal contractors are prohibited from taking race or other protected characteristics into account when making actual employment decisions, even when attempting to meet diversity goals.[24] According to the OFCCP, "affirmative action" in the employment context is "wholly distinct from the concept of affirmative action as implemented by some post-secondary educational institutions in their admissions processes." But whole tomes of administrative regulations are inferior to just one word in a duly enacted statute. That is how the legal system, with its familiar hierarchy (in which the U.S. Constitution

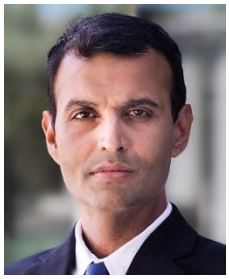
---

[18] *Id.* at 456-57.
[19] *See*, *e.g.*, *Allen v. Milligan*, 143 S. Ct. 1487, 1515 (2023) (noting that "statutory *stare decisis* counsels our staying the course" where a long line of Supreme Court precedents has been left intact by Congress).
[20] In their respective *SFFA* opinions, Justice Thomas (concurring) and Justice Jackson (dissenting) exchanged their diametrically opposite views on this issue.
[21] *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).
[22] *Kimble*, 576 U.S. at 458.
[23] *Id*.
[24] 41 C.F.R § 60-2.16.

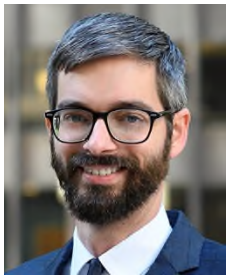
trumps federal statutes, which in turn supersede administrative regulations), works. In sum, then, entities subject to Title VII may well face liability if they consider race *qua* race — or an end-run substitute thereof — when making employment decisions.

Employers should continue to follow along as courts and agencies interpret DEI policies. For questions about how to ensure that policies comply with applicable laws, contact any attorney in Taft's Employment Law practice.

Taft Authors



Sohan Dasgupta, Ph.D.
Partner
Washington, DC
(202) 664-1564
sdasgupta@taftlaw.com



Andrew S. Murphy
Associate
Chicago
(312) 836-4145
amurphy@taftlaw.com