Diversity in the Workplace and Beyond

The Anthony M. Kennedy American Inn of Court

Team 6

March 21, 2023

List of References and Authorities

ACT I: WORKING FROM HOME

Ethics Opinion:

State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Interim Opinion No. 20-0004, accessible at: https://www.calbar.ca.gov/Portals/0/documents/publicComment/2021/20-004-Ethical-Obligation-when-Working-Remotely.pdf

Articles:

Carole J. Buckner, *Spotlight on Ethics: Rules of Remote Work*, California Lawyers Association (CLA), January 27, 2021, accessible at: https://calawyers.org/california-lawyers-association/spotlight-on-ethics-rules-of-remote-work/

Thomson Reuters, *Motivating Lawyers to Participate in Law Firms Return to Office Policies*, Legal Blog, April 27, 2022, accessible at:
Key considerations as law firms return to office | Legal Blog (thomsonreuters.com)

Casey Conway, *Is Your Personality Making It Hard to Work From Home?*, Business News Daily, February 21, 2023, accessible at:
Personality Types Compatible With Remote Work (businessnewsdaily.com)

ACT II: AFFIRMATIVE ACTION

Federal References

Cases:

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

Gratz v. Bollinger, 539 U.S. 244 (2003) (Fourteenth Amendment prohibits a public university from using an undergraduate admissions policy in which race is the sole reason behind awarding 20% of the minimum points required for admission)

Grutter v. Bollinger, 539 U.S. 306 (2003)

> The Law School's narrowly tailored use of race in 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 § 1981.

> In the landmark *Bakke* case, this Court reviewed a medical school's racial set-aside program that reserved 16 out of 100 seats for members of certain minority groups. The decision produced six separate opinions, none of which commanded a majority. … In a part of his opinion in *Bakke* that was joined by no other Justice, Justice Powell expressed his view that attaining a diverse student body was the only interest asserted by the university that survived scrutiny. … 311 However, he also emphasized that "it is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups," that can justify using race. Rather, "[t]he diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."…
>
> [T]he Court endorses Justice Powell's view that student body diversity is a compelling state interest that can justify using race in university admissions. The Court defers to the Law School's educational judgment that diversity is essential to its educational mission. The Court's scrutiny of that interest is no less strict for taking into account complex educational judgments in an area that lies primarily within the university's expertise. …
>
> [R]ace conscious admissions policies must be limited in time. The Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable. The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

(*Id.* at 311 (citations omitted).)

> Concurring Opinion of Justice Ginsberg:
>
> However strong the public's desire for improved education systems may be, it remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. … From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action

(*Id.* at 346 (citation omitted).)

Plessy v. Ferguson, 163 U.S. 537 (1896) (separate but equal passenger accommodations not inconsistent with 13th or 14th Amendments of the US Constitution), *overruled in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).*

U.S. Constitution

U.S. Constitution, Fourteenth Amendment, Title VI:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Statutes:

Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d, *et seq*.

> §2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin
>
> > No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

(Pub. L. 88–352, § 601, 78 Stat. 252 (July 2, 1964).

Comprehensive reference to statues, regulations and executive orders can be accessed on the Department of Justice website at:
Title VI of the Civil Rights Act of 1964 | CRT | Department of Justice.

Pending Supreme Court Cases (no longer consolidated):

Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, U.S. Supreme Court Docket Nos. 20-1199, 21-707, accessible at:
Search - Supreme Court of the United States

Students for Fair Admissions, Inc. v. University of North Carolina U.S. Supreme Court Docket Nos. 21-707, 21-2263), accessible at:
Search - Supreme Court of the United States

> Question(s) presented:
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> 1. Should this Court overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), and hold that institutions of higher education cannot use race as a factor in admissions?
>
> 2. Title VI of the Civil Rights Act bans race-based admissions that, if done by a public university, would violate the Equal Protection Clause. Gratz v. Bollinger, 539 U.S. 244, 276 n.23 (2003). Is Harvard violating Title VI by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives?

Selected Briefs

Louis D. Brandeis Center for Human Rights Under Law and Silicon Valley Chinese Association Foundation *Amici Curiae* Brief in Support of Petitioner, accessible at: https://www.supremecourt.gov/DocketPDF/20/20-1199/173420/20210331104529484_Amicus%20brief.pdf ("Brandeis Center Brief")

Excerpts:

> *Amici* are concerned about Harvard's use of racial preferences in its admissions process, which demand higher standards for Asian-American applicants on the basis of their race. Abusing the discretion extended to it in Grutter v. Bollinger, 539 U.S. 306 (2003), Harvard has established a system in which the percentage of Asian-American applicants is reduced based on subjective factors that are examined through the lens of prejudicial assumptions and stereotypes, just as Harvard had done to Jewish applicants in the 1920s and 1930s.
>
> Harvard discriminated against Jews in the 1920s and 1930s because it found the increasing presence of Jewish students on campus to be repulsive to wealthy Protestant families. Harvard was, thus, concerned that a large Jewish student population would discourage Protestant students from choosing Harvard over other comparable colleges, such as Yale and Princeton.

(*Id.* at pp. 1-2.)

> The admissions office limited the total enrollment of new students to 1,000, and, with a nod and a wink, it was directed to admit only those students of suitable "character and fitness." Knowing that President Lowell considered Jews to lack character and other redeeming qualities, the admissions office got the hint. New methods of assessing applicants' backgrounds were adopted, and, for decades, the percentage of Jewish students in the freshman class was reduced to 15 percent. What happened to Jewish applicants in the 1920s and 1930s at Harvard is happening all over again to Asian-American applicants today. As with the Jewish applicants of that prior time period, the percentage of Asian-American applicants admitted to Harvard began to soar in the 1980s. Then, after Harvard altered its admissions process in order to attain student-body diversity, the percentage of Asian-American applicants admitted to Harvard decreased significantly in 1993 and stabilized at 17 percent year over year. As with the Jewish students of the past, Asian-American students became too plentiful for Harvard.

(*Id*. at pp. 3-4.)

> Harvard uses a "personal rating" in the admissions process today that examines, among other characteristics, an applicant's "leadership," "self-confidence," "likeability," and "kindness" as evidenced by the applicant's interview, essays, extracurricular activities, letters of recommendation, and anything else in the application. [citation] Harvard denies using race in connection with how it scores applicants on the personal rating, but the data reveal that the low personal ratings for Asian Americans, as a group, reduce their admissions to a statistically significant degree. African-American applicants, as a group, routinely receive the highest personal ratings, followed by Hispanics, then whites, and then Asian Americans at the bottom.

(*Id.* at p. 24.)

American Civil Liberties Union, American Civil Liberties Union of Massachusetts, and American Civil Liberties Union of North Carolina Legal Foundation *Amici Curiae* Brief in Support of Respondents, accessible at:
SFFA Amicus 8_1 FINAL 10.36.pdf (supremecourt.gov) (ACLU Brief.)

Excerpts:

> Petitioners' request is fundamentally inconsistent with the original meaning of the Fourteenth Amendment, which was understood at adoption to have as its "pervading purpose" not formal color-blindness but ending the subjugation of racial minorities, especially Black people, and the provision of equality of opportunity, including by providing for race-conscious remedial measures (ACLU Brief at pp. 2-3.)

> Both Harvard and UNC have made the academic judgment that diversity is critical. ... Harvard's and UNC's respective judgments that diversity is essential to their academic enterprise are widely shared and well founded (*Id*. at p. 8.) Respondents' judgment that student body diversity is essential to their academic mission is thus well supported by the judgments of other universities, scientific studies, and this Court's precedent. Nothing has changed that would justify this Court abandoning that traditional deference and imposing its own views on a matter of institutional academic freedom.

(*Id*. at pp. 10-11.)

> Enrolling a diverse student body also helps to combat discrimination and to further integration, and to that extent affirmatively promotes Fourteenth Amendment values. Few things are more central to the flourishing of a multicultural society than mutual understanding. When free and open academic inquiry takes place in a diverse student body, it "helps to break down racial stereotypes, and enables students to better understand persons of different races." [Citation] (ACLU Brief at p. 11.)

> The value of diversity in higher education is as important now as ever, and nothing has changed in the national community that would warrant this Court abandoning the deference it has long paid to this uniquely academic judgment. In a society that remains characterized by substantial residential segregation, higher education affords a unique opportunity to bring together people of different backgrounds and worldviews, thereby promoting cross-cultural understanding and serving as a laboratory of democracy. The United States is becoming increasingly diverse, but also increasingly divided and stratified. The vestiges of past intentional discrimination "remain today, intertwined with the country's economic and social life." [Citation] (ACLU Brief at p. 17.)
>
> The point of the narrow tailoring analysis in which the Grutter Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance." [Citation] Here, as with the compelling interest in diversity, nothing has changed to alter this Court's conclusion that such limited consideration of race is an adequately narrowly tailored means. (ACLU Brief at p. 20.)

Articles:

Adam Liptak & Anemona Hartocollis, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, New York Times (published Jan. 24, 2022, updated Oct. 31, 2022), accessible at:
[Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C. - The New York Times (nytimes.com)]

State References:

Cal. Const., Article 1, § 31

(A) [Proposition 209]: The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

…

(E) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State.

Proposed Legislation

AB-2774 (2021-2022 Legislative Session) (Education finance: local control funding formula: supplemental grants: lowest performing pupil subgroup or subgroups) (ordered to inactive file at the request of Assembly Member Reyes Aug. 31, 2022, where it died at end of legislative session on Nov. 20, 2022), accessible at:
Bill History - AB-2774 Education finance: local control funding formula: supplemental grants: lowest performing pupil subgroup or subgroups.

> This bill expands the definition of "unduplicated pupil" for Local Control Funding Formula (LCFF) purposes by adding a pupil who is classified as a member of the lowest performing subgroup or subgroups, as defined, commencing with the 2023-24 fiscal year and contingent on an appropriation in the annual Budget Act.

(Senate Floor, Senate Floor Analysis on AB 2774 (Aug. 26, 2022) accessible at:
202120220AB2774_Senate Floor Analyses.pdf.)

Articles:

Srishti Prabha, Black Educators in California Say State Budget Reaffirms Black Students Don't Matter, The Sacramento Observer (Feb. 7, 2023), accessible at:
Black Educators In California Say State Budget Reaffirms Black Students Don't Matter (sacobserver.com)