

The Decision That Upends the Equal-Protection Clause

“Deeming race irrelevant in law does not make it so in life,” wrote Justice Ketanji Brown Jackson in her dissent.

By [Adam Harris](#) [The Atlantic](#) JUNE 29, 2023

The Supreme Court’s decision today that the race-conscious admissions programs as practiced at the University of North Carolina at Chapel Hill and Harvard—the nation’s oldest public and private universities, respectively—are unconstitutional upends more than four decades of precedent on the use of race in college admissions. The decision could have major implications for the country’s approach to the Fourteenth Amendment’s promise of “equal protection of the laws.” Meanwhile, its consequences for diversity at institutions of higher education are far from clear.

In a 40-page opinion, Chief Justice John Roberts, writing for the majority, argued that the institutions violated the equal-protection clause of the Fourteenth Amendment of the Constitution by failing to use race “within the confines of narrow restrictions outlined by the court.” The programs, Roberts wrote, effectively require stereotyping of underrepresented minorities. “When a university admits students ‘on the basis of race, it engages in the offensive and demeaning assumption that [students] of a particular race, because of their race, think alike,’” Roberts wrote. He also pointed out that the Court has, in the past, suggested that such programs need a sunset date and lack a “logical endpoint.”

But Roberts stopped short of banning institutions from considering race *at all* in their admissions programs. He included a significant caveat that institutions could consider an applicant’s discussion of “how race affected his or her life, be it through discrimination, inspiration, or otherwise,” on a case-by-case basis. Additionally, in a footnote, he wrote that military academies could continue to operate their race-conscious systems in “light of potentially distinct interests that military academies may present.” (Roughly 18 percent of military officers come from the five service academies.)

Legally, the decision is a landmark, taking a tool—the Fourteenth Amendment—meant to prevent discrimination against Black Americans in a post-Civil War landscape and turning it on its head, into a guarantor of a “race neutral” approach. The amendment has been used in the past to guarantee the rights of marginalized groups in voting and employment; it animated the decision in *Brown v. Board of Education*. In this case, the Court took Justice John Marshall Harlan’s dissent in *Plessy v. Ferguson*, that “our Constitution is color-blind, and neither knows nor tolerates classes among citizens,” to upend that historical purpose, a result that Justice Thurgood Marshall had in some ways predicted four decades ago. “It would be the cruelest irony for this Court to adopt the dissent in *Plessy* now and hold that the University must use color-blind admissions,” Marshall wrote.

The term *affirmative action* first came into the federal lexicon in 1961, when President John F. Kennedy issued Executive Order 10925, aimed at banning discrimination in the federal government and diversifying its workforce. In short order, colleges—which had become subject to enhanced federal antidiscrimination laws after the passage of the Civil Rights Act of 1964 and the Higher Education Act of 1965—began to implement affirmative-action programs to build up their enrollment of students from historically marginalized communities. The programs were intended to correct a history of segregation and inequity in America’s higher-education system—a system in which no state in the country funded Black and white students, or the colleges they attended, equally.

But nearly as soon as affirmative action was put in place, a Supreme Court case severely limited its scope. In the 1970s, Allan Bakke, a white applicant to the medical school at UC Davis, contended that he had been denied admission because of an admissions program that allotted seats for minority applicants. The university set aside 16 seats each year, out of a 100-person class, for such students. By 1978, when the Court issued its ruling, the justices came to a compromise opinion written by Justice Lewis Powell, who wrote that race could not be used to remedy past discrimination; it could be used only for the approved goal of diversifying the student body for the sake of the educational experience of all students.

In his opinion today, Chief Justice Roberts took a sledgehammer to that diversity rationale, arguing that it gives too much deference to universities. “Unlike discerning whether a prisoner will be injured or whether an employee should receive backpay, the question whether a particular mix of minority students produces ‘engaged and productive citizens,’ sufficiently ‘enhance[s] appreciation, respect, and empathy,’ or effectively ‘train[s] future leaders’ is standardless,” Roberts wrote. “The interests that respondents seek, though plainly worthy, are inescapably imponderable.” Powell’s articulation of the reason for race-conscious admissions became its undoing.

Now institutions are left to decipher what this all means in practice. America has examples of what happens when race-conscious admissions programs go away. Michigan experienced a 10 percent decline in its Black enrollment in the three years after the state banned affirmative action through a 2006 ballot initiative. California saw a similar decline following its 1996 ban—and consequently, as the education-policy researcher Kevin Carey wrote, Black and Hispanic students were “less likely to earn bachelor’s degrees in a science and engineering field, as well as less likely to graduate overall,” than they were before the ban.

Meanwhile, a 2020 report from the nonprofit Education Trust showed that Black enrollment had already been declining at 60 percent of the nation’s most selective public colleges—that is to say, the types of institutions that reject enough students to have to consider race in admissions. These institutions rarely enroll underrepresented students at rates proportional to their state populations in the first place. This inequality is now poised to get much worse. Private institutions, such as Harvard and Yale, may be able to marshal their resources to allow admissions officers more time to review applications on the first read—at many of the most selective schools, reviewers have only a few minutes to spend with each application. But even that might have a limited life span. After all, deciphering how race has affected a student’s life and employing that in individual admissions decisions will not erase the haziness around selective admissions that invites these legal challenges in the first place.

In her dissent, Justice Ketanji Brown Jackson zeroed in on the irony of this decision being based in the equal-protection clause. “With let-them-eat-cake obliviousness, today, the majority pulls the ripcord and announces ‘colorblindness for all’ by legal fiat,” Jackson wrote. “But deeming race irrelevant in law does not make it so in life.”