



Unintended Consequences of the Supreme Court's New Affirmative Action Ruling for Implementing Anti-Racism Health Care Policies and Practices©

Paul D. Juarez, Ph.D. and Patricia Matthews-Juarez, Ph.D.

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POLICY BRIEF

Executive Summary

The recent Supreme Court's ruling on affirmative action in [Students for Fair Admissions, Inc. v. President and Fellows of Harvard College](#) (2023) will have a direct influence, not only on admissions policies in higher education, but also on policies in other arenas of health and human services designed to combat the historic vestiges of structural racism. This ruling is likely to embolden efforts that support and maintain the status quo while denying the legacy of structural racism and oppression in the United States by those opposed to diversity, equity, and inclusion. Without a counterbalance, the reemergence of conservative policies and practices that ignore the reasons that affirmative action measures were needed in the first place, are likely to continue to impede the progress in closing disparity gaps in health, education, and welfare among racial and ethnic minority communities. New strategies that address the historical legacy of discrimination and segregation are needed.

Background

Social welfare, healthcare policies, programs, and practices have a legacy in the United States that are deeply rooted in American values that include: individualism, social justice, community, and the rule of law.¹⁻³ Historically, however, countervailing social values have been used to legalize discriminatory practices and segregation, based on race, across all social domains, including education, employment, marriage, healthcare, and housing.^{4,5}

In recent years, colleges and universities have used affirmative action to help establish a diverse group of accepted students which, supporters claim, contribute to a more positive education experience.⁶⁻⁸ While ardent supporters of equality argue that affirmative action in college admissions is necessary to address historical and ongoing systemic racial disparities and promote diversity, opponents argue that college admissions should be based purely on merit, and qualifications.⁹⁻¹¹ Some opponents insist that affirmative action perpetuates stereotypes and stigmatizes racial and ethnic minority individuals, and affirmative action measures are themselves an example of reverse discrimination against white individuals.¹²

Striking down race-based affirmative action designed to promote equitable access to a college education disregards the historical trauma caused by systematic racism and governmentally sponsored racial discrimination. The unintended societal consequences of this decision, according to opponents of SFFA, will prevent the nation from healing that could have come through the development of a diverse and culturally competent workforce. While the ruling creates challenges for efforts to increase diversity in college admissions, it explicitly leaves room for anti-racism efforts that aim to address inequities in society, especially discrimination in the access and delivery of health care services by public and private institutions.^{13,14} In the meantime, the Pandora's box of public policies steeped in historical racial stereotypes, racial/ethnic biases, and tribalism has

been re-opened. The policies will affect marginalized populations seeking routine and customary health care.¹⁵

Recent Supreme Court College Admissions Affirmative Action Decision

In delivering its controversial opinion, the US Supreme Court (Court) [Students for Fair Admissions, Inc. v. President and Fellows of Harvard College](#) (2023) overturned twenty-five years of federal law that allowed the use of race in college admissions, which may have a chilling effect on the efforts of healthcare advocates and architects who are working to implement anti-racism health care policies and practices in the United States.¹⁶ In their 6-3 ruling, the [court found](#) that using race as one of many factors in college admissions program to achieve diversity violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. The majority opinion, written by Chief Justice Roberts, stated that the use of race to achieve diversity bore little or no relationship to the purported goals. While this statement appears on its face to strike a universal cord, it does not take into consideration historical trauma of slavery, systemic racism, and discrimination of African Americans across all segments of society and specifically in health care¹⁷⁻¹⁹

Chief Justice Roberts [wrote](#) that the Equal Protection Clause of the 14th Amendment applies “without regard to any difference of race, of color, or of nationality” and therefore must apply to every person. More specifically, the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. However, the Chief Justice [noted](#) that the prohibition on the use of race in admissions did not stop universities from considering a student’s discussion of how their race has impacted their life “so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university.”

In support of the SFFA ruling, opponents of affirmative action have argued that it leads to reverse discrimination and violates the principle of equal protection under the law ([Dred Scott](#), [Plessy vs. Ferguson](#), and [Brown v Board of Education](#)).^{20,21} They contend that over time, the Supreme Court decisions have eroded merit-based principles that ensure social justice for all individuals in spite of race/ethnicity and socioeconomic status. In contrast, supporters of affirmative action, argued that racism is baked into society.^{22,23} They maintain that education is a microcosm of the racism and discrimination that we see in the system. Supporters of affirmative action also argue that defined anti-racism policies and practices are needed to overcome systemic barriers as reflected in the social determinants of health and health disparities among racial/ethnic marginalized populations.²⁴ The debate continues regarding what is permissible and what is ethically responsible.²⁵

The SFFA decision most likely reflects the ebbs and flows in our current politics rather than a permanent change in direction as illustrated by the fact that US Supreme Court rulings, in the [25 years prior](#) to SFFA, upheld affirmative action policies in college admissions.²⁶ These prior ruling include [Regents of the University of California v. Bakke](#) (1978), [Grutter v. Bollinger](#) (2003), and [Fisher v. University of Texas at Austin](#) (2013).

Affirmative action policies in higher education [exist](#) because, historically, colleges, universities, and employers

could not be counted on to enact admissions and hiring practices that embrace diversity, equity and inclusion. As noted in Justice Sotomayor's [dissent opinion](#), numerous colleges and universities failed to admit qualified racial and ethnic minority students, including the University of North Carolina, which was under a consent decree because it would not admit qualified African American applicants well into the 1980s. Only in the late 20th century, did some of these institutions begin to actively prioritize diversity and expand access by adopting tools such as affirmative action.

Although the SFFA decision only applies to college admissions, it may have chilling effects beyond college admissions.^{19,27} For example, many institutions and [state](#) government [officials](#) have already begun to use the opinion to [threaten individuals](#) and [limit application](#) of [anti-racism policies](#). in addressing historical, systematic, and socially sanctioned discrimination faced by socially vulnerable minorities, including racial and ethnic groups, women, and individuals with disabilities.^{14,16} Therefore, new and sustained efforts to promote equitable access in higher education, health, and other social domains will require intentional and meaningful steps based on a common understanding of structural racism and the history of oppression.¹⁶

Addressing Structural Racism in Health Care

Structural and concrete barriers due to [structural racism](#) and oppression, include: 1) legal and policy barriers, access to education; 2) lack of access to culturally appropriate healthcare, income, housing; and 3) barriers to transportation, public facilities, and technology.²⁸ The Affordable Care Act offers a gateway for accessing health care services to some marginalized and minority populations, but gaps remain.^{29,30} In response to the SFFA case, institutions may now begin to limit access to customary and routine comprehensive health care for marginalized African American, Hispanic, and poor white populations who live in rural and medically underserved communities.¹⁶ These marginalized groups are at the greatest risk for the poorest of health outcomes, particularly in this current political climate where discussing equity, racism, and discrimination has become more difficult.³¹

These discussions have become increasingly polarized by the COVID-19 pandemic, which has magnified the underlying tensions between the government (federal and state) and individual rights.³² At the same time, the majority of the US Supreme Court, which traditionally has played a moderating role between the federal executive and legislative branches of government, has tilted strongly conservative, supporting positions of individual rights and a limited governmental role.³³ These tensions provide the frame for addressing current structural imbalances and inequities.

As the COVID-19 pandemic recedes and policies that mandated masks and vaccines recede into our memories, it is time to return to a less divisive political environment, with a universal nod towards moderation and traditional values. The discussion of anti-racism policies must once again focus on systemic barriers that must be overcome to end disparities, eliminate discrimination, and protect the civil rights of racial/ethnic marginalized populations and communities.³²

Existing policies and programs in the health and health care arenas that seek to mitigate the historical legacy of discrimination and work towards a more just and equitable healthcare system are still legal after the SFFA decision.¹⁶ Specifically, efforts that move the nation forward toward health equity and social justice for all, while addressing the legacy of racism are still valid after the SFFA case.³⁴ In fact, in the majority opinion of the SFFA decisions, Justice Roberts noted that race-based measures to address governmentally sponsored discrimination based on race are compelling governmental interests. In light of the Supreme Court’s decision reinforcing this compelling governmental interest, a review of all federal, state, and local policies must occur to highlight how they can be used to eliminate health care disparities and rectify the historical vestiges of racial discrimination, which is a “compelling government interest.”^{19,27,35-39}

Designing and implementing anti-racism health care policies can best be achieved through coalition and consensus building among diverse perspectives and populations.^{40,41} To sustain these efforts, we need to create an anti-racist environment in which consensus building and acceptance of historical trauma of racism can be integrated into policy changes at federal, state and local levels.⁴² Consensus building and community of practices can be achieved through the following steps:

1. Identify and clearly articulate the issue and its underlying causes to ensure everyone has a common understanding of the problem.
2. Develop policies and guidelines to restore the equilibrium of society.
3. Collect and analyze relevant data to understand the extent and impact of the problem.
4. Create a safe and inclusive space where all stakeholders can share their perspectives, concerns, and ideas.
5. Identify areas of agreement and build on them.
6. Engage diverse stakeholders through coalition building.
7. Communicate the proposed solutions to the broader community.
8. Restore resiliency, trust, and trustworthiness.
9. Implement and evaluate outcomes.
10. Adapt, assess, and modify.

Development of this new consensus will require the rebuilding of traditional coalitions of allies and civil rights groups that promote inclusive dialogue and transformational ideas to address our shared and unique histories.⁴³ These coalitions must also work to eliminate culture and structural inequities that have allowed privileges associated with “whiteness” and disadvantages associated with “color” to endure over time. Consensus building also requires several additional steps, including:

1. Finding common ground, developing common agendas, reaching consensus on shared values, and a willingness to compromise by all parties;
2. Leaving stereotypes and prejudices outside of the discussions and focusing on human needs and the public's interest in responding;
3. Using data to demonstrate need and support the allocation of public and private funds; and
4. Leadership by our elected officials to refrain from using "race" as red meat to inflame the racial stereotypes and prejudices held by many of their constituents.

To begin this work, we propose the establishment of a forward-thinking, national consensus group or a community of practice, with local, state, and national stakeholders to develop policies that highlight the unmet needs of racial/ethnic groups for access resources, resiliency, and restorative justice.^{44,45} This strategy will recruit new supporters and establish new coalitions needed to reverse the current course and address the legacy of historical and current racism, while abiding by the Supreme Court's opinion. It will also fulfill the government's duty of equality and responsibility to mitigate, remediate, and restore. Coalition and consensus building are the hallmark of our democracy and can occur in any combination at the local, state, and national levels. Without it, the democratic process breaks down and there is a sense of loss and bewilderment. The key is creating systems that value equality, but adjust for individual's equity needs.

Conclusion

Democracy cannot be just a word. It must be a commitment to transforming and sustaining all of society by providing social justice and equitable opportunities to everyone, particularly marginalized and socially vulnerable populations.²⁹ In light of the recent Supreme Court ruling, there is a need to create a national consensus for a more just society for everyone. This can be accomplished by developing new coalitions and political will to eliminate structural racism in health care, which limits racial and ethnic minorities' equal access to resources and opportunities. While this may seem unlikely in today's highly charged political environment, we must see this through the lens of history, which offers hope and perspective. It will take all of us as committed citizens of the general public to push forward the civil rights gains of the 1960's.

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[Paul D. Juarez, Ph.D.](#) and [Patricia Matthews-Juarez, Ph.D.](#) are Professors in the Department of Family & Community Medicine at Meharry Medical College and are members of the Anti-Racism Consortium.

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