What the Supreme Court Said about Arbitrary Racial Categories
***Students for Fair Admissions v. Harvard & University of N. Carolina*,**
600 U.S. 181 (2023)

The **Department of Defense (DoD)** officials keep repeating the mantra ***"Diversity is a strategic imperative,"*** while claiming that demographic diversity is critical to our nation's ability to survive on the battlefield of the future.

The military service academies were not parties in ***Students for Fair Admissions v. Harvard & the University of N. Carolina***, but in oral arguments the **Department of Justice Solicitor General** claimed, without evidence, that **"diversity, equity, and inclusion" (DEI)** programs that discriminate between groups of persons serving in uniform contribute something essential to military readiness. The Defense Department and the various services are still acting on an array of **Diversity Strategic Plans** that categorize servicemen and women by their skin color and ethnicity, such as **Blacks**, **Asians**, **Hispanics**, **Native Americans** or **Pacific Islanders**.

The **Supreme Court**'s landmark decision unequivocally stated that there is no justification for treating people differently based on superficial characteristics such as race. No one can predict a future Court ruling, but the Court has signaled that race-based admissions policies at the military service academies likely will face an uphill battle when pending litigation gets to that level.

If the Supreme Court thought the national security argument were valid, it would have at least addressed it before disapproving of race-based admissions practices in **ROTC** programs at Harvard and the UNC. Instead, the Court did not even comment on the Solicitor General's argument that racial discrimination is necessary for national security reasons. In a military context, racial divisions based on arbitrary categories defy common sense, and the case for congressional action to end racial discrimination and to affirm meritocracy in the military is stronger than ever.

The following passages are excerpted from ***Students for Fair Admissions v. Harvard***, 600 U.S. 181(2023) with **SCOTUS** opinion page numbers noted but most citations omitted throughout:

Opinion of the Court

Excerpt #1:

> "Courts may not license separating students on the basis of race without **an exceedingly persuasive justification** that is measurable and concrete enough to permit judicial review. As this Court has repeatedly reaffirmed, **"[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification. The programs at issue here do not satisfy that standard."** (p. 217, emphasis added throughout.)

Application to the Military:

DoD repeatedly claims that "diversity is a national security imperative." What they haven't done, however, is produce any evidence to support that claim. Their inability to establish an "**exact connection between justification and classification**" means they cannot pass the "exceedingly persuasive justification" test established by SCOTUS to justify discrimination based on race.

Excerpt #2:

"The first time we determined that a governmental racial classification satisfied "the most rigid scrutiny" was 10 years before *Brown v. Board of Education* in the infamous case ***Korematsu v. United States,*** 323 U. S. 214, 216 (1944). There, **the Court upheld the internment *of 'all persons of Japanese ancestry in prescribed West Coast . . . areas"* during World War II** because "the military urgency of the situation demanded' it. We have since overruled *Korematsu*, recognizing that it was **'gravely wrong the day it was decided.'** The Court's decision in *Korematsu* nevertheless 'demonstrates vividly that even the most rigid scrutiny can sometimes fail to detect an illegitimate racial classification' and that '[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.' " (p. 207, footnote #3)

Application to the Military:

The reference to ***Korematsu*** is particularly important to DoD's failure to produce evidence of an **"exact connection"** between a racially diverse force and enhanced combat effectiveness. Instead of presenting objective, reliable, and measurable data to justify racial discrimination, DoD relies on the argument that the Article III judiciary should defer to the professional military judgment of generals who run the Pentagon. That was precisely the same argument that produced the **"gravely wrong"** decision in *Korematsu*. The Court won't make that mistake again.

Excerpt #3:

"[T]he universities measure the racial composition of their classes using the following categories: **(1) Asian; (2) Native Hawaiian or Pacific Islander; (3) Hispanic; (4) White; (5) African-American; and (6) Native American**. It is far from evident, though, how assigning students to these racial categories and making admissions decisions based on them furthers the educational benefits that the universities claim to pursue. For starters, the **categories are themselves imprecise** in many ways. Some of them are plainly **overbroad**: by grouping together all Asian students, for instance, respondents are apparently uninterested in whether **South Asian or East Asian** students are adequately represented, so long as there is enough of one to compensate for a lack of the other.

"Meanwhile other racial categories, such as 'Hispanic,' are **arbitrary or undefined**. And still other categories are underinclusive. When asked at oral argument 'how are applicants from Middle Eastern countries classified, [such as] **Jordan, Iraq, Iran, [and] Egypt**,' UNC's counsel responded*, '[I] do not know the answer to that question.'* [Transcript citation omitted] at 291–292 (Gorsuch, J., concurring) (detailing the **'incoherent'** and **'irrational stereotypes'** that these racial categories further). Indeed, the use of these **opaque racial categories** undermines, instead of promotes, respondents' goals." (pp. 216-217)

Application to the Military:

The racial and ethnic categories the Court found meaningless in *Students for Fair Admissions* are the **same categories** the Defense Department uses to monitor the racial make-up of the military. In other words, DoD officials claim that dividing people into ***"imprecise,"*** ***"overbroad,"*** ***"incoherent,"*** and ***"irrational stereotypes"*** materially enhances the combat effectiveness and lethality of the armed forces. Just as in *Students for Fair Admissions*, **"the use of these opaque racial categories undermines, instead of promotes"** DoD's stated goals of a cohesive, effective, and lethal military force.

Excerpt #4:

> "We have time and again forcefully rejected the notion that government actors may intentionally allocate preference to those 'who may have little in common with one another but the color of their skin.' The entire point of the **Equal Protection Clause** 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. **'One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.'**
>
> "But 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," – at the very least alike in the sense of being different from nonminority students.** In doing so, the university furthers **'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.' Such stereotyping can only 'cause continued hurt and injury . . . contrary as it is to the 'core purpose' of the Equal Protection Clause**.' " (pp. 220-221)

Application to the Military:

DoD's goal of racial balancing of the force uses **"offensive and demeaning assumptions"** about citizens who volunteer to serve the country in uniform and treats those brave volunteers **"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." As a result, instead of enhancing combat effectiveness and unit cohesion, employing these racial and ethnic stereotypes can only **"cause continued hurt and injury** . . . contrary as it is to the core purpose of the Equal Protection Clause."

Excerpt #5:

> "For the reasons provided above, the Harvard and UNC admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause. Both programs lack

sufficiently focused and measurable objectives warranting the use of race, **unavoidably employ race in a negative manner, involve racial stereotyping,** and lack meaningful end points. **We have never permitted admissions programs to work in that way, and we will not do so today.** (p. 230)

Application to the Military:

When the military grants racial preferences or applies different standards based on the race, ethnicity, or color of a service member's skin, it unavoidably employs race in a negative manner because for every person granted a racial preference another person is denied a preference. The argument that the generals know best and the Court should trust them to decide how and whether racial balancing and racial preference enhance national security elevates the unsupported, unreviewable, and unmeasurable opinion of senior military officers above the guarantees of the Equal Protection Clause.

Concurrence, Justice Neil Gorsuch

Excerpt #6:

"Start with how **Harvard and UNC** use race. Like many colleges and universities, those schools invite interested students to complete the Common Application. As part of that process, the trial records show, applicants are prompted to tick one or more boxes to explain "how you identify yourself." **The available choices are American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; Hispanic or Latino; or White.** Applicants can write in further details if they choose.

"**Where do these boxes come from? Bureaucrats**. A federal interagency commission devised this scheme of classifications **in the 1970s to facilitate data collection**. See **D. Bernstein, The Modern American Law of Race, 94 S. Cal. L. Rev. 171, 196–202 (2021)**; see also **43 Fed. Reg. 19269 (1978)**. That commission acted 'without any input from anthropologists, sociologists, ethnologists, or other experts. Recognizing the limitations of their work, federal regulators cautioned that their classifications '**should not be interpreted as being scientific or anthropological in nature, nor should they be viewed as determinants of eligibility for participation in any Federal program**.'

"Despite that warning, others eventually used this classification system for that very purpose—to 'sor[t] out **winners and losers** in a process that, by the end of the century, would grant preference[s] in jobs . . . and university admissions.'

"**These classifications rest on incoherent stereotypes**. Take the **'Asian'** category. It sweeps into one pile East Asians (e. g., **Chinese, Korean, Japanese**) and **South Asians** (**e. g., Indian, Pakistani, Bangladeshi**), even though together they constitute about **60% of the world's population**. Bernstein Amicus Brief 2, 5. . . . Consider, as well, the development of a separate category for '**Native Hawaiian or Other Pacific Islander**.' It seems federal officials disaggregated these groups from the 'Asian' category only in the 1990s and only 'in

response to political lobbying.' And even that category contains its curiosities. It appears, for example, that **Filipino Americans** remain classified as '**Asian'** rather than **'Other Pacific Islander**.'

"The remaining classifications depend just as much on **irrational stereotypes**. The **'Hispanic'** category covers those whose ancestral language is **Spanish, Basque, or Catalan**—but it also covers individuals of **Mayan, Mixtec, or Zapotec** descent who do not speak any of those languages and whose ancestry does not trace to the Iberian Peninsula but bears deep ties to the Americas. The **'White'** category sweeps in anyone from '**Europe, Asia west of India, and North Africa.**' That includes those of **Welsh, Norwegian, Italian, Moroccan, Lebanese, Turkish, or Iranian descent**. It embraces an Iraqi or **Ukrainian refugee** as much as a member of the **British royal family**. Meanwhile, **'Black or African American'** covers everyone from a descendant of enslaved persons who grew up poor in the rural South, to a first-generation child of wealthy **Nigerian** immigrants, to a **Black-identifying applicant with multiracial ancestry** whose family lives in a **typical American suburb**.

"If anything, attempts to divide us all up into a handful of groups have become only **more incoherent with time**. **American families have become increasingly multicultural**, a fact that has led to unseemly disputes about whether someone is really a member of a certain racial or ethnic group." (pp. 291-292)

Application to the Military:

See above discussion of the fallacious, unsupported, and illogical argument made by DoD that using these incoherent stereotypes enhances national security.

<u>Concurrence, Justice Clarence Thomas</u>

Excerpt #7:

"Yet, university admissions policies ask individuals to identify themselves as belonging to one of **only a few reductionist racial groups**. With boxes for only 'black,' 'white,' 'Hispanic,' 'Asian,' or the ambiguous 'other,' how is a Middle Eastern person to choose? Someone from the Philippines? See post, at 291–293 (Gorsuch, J., concurring). Whichever choice he makes (in the event he chooses to report a race at all), the form silos him into an artificial category. Worse, it sends a clear signal that the category matters. But, **under our Constitution, race is irrelevant, as the Court acknowledges. In fact, all racial categories are little more than stereotypes, suggesting that immutable characteristics somehow conclusively determine a person's ideology, beliefs, and abilities. Of course, that is false."** (pp. 276-277)

". . . [U]niversities' racial policies suggest that racial identity 'alone constitutes the being of the race or the man. **That is the same naked racism upon which segregation itself was built**. Small wonder, then, that these policies are leading to increasing racial polarization

> and friction. . . . Rather than forming a more pluralistic society, these policies thus strip us of our individuality and undermine the very diversity of thought that universities purport to seek. The **solution to our Nation's racial problems thus cannot come from policies grounded in affirmative action or some other conception of equity. Racialism simply cannot be undone by different or more racialism. Instead, the solution announced in the second founding is incorporated in our Constitution: that we are all equal and should be treated equally before the law without regard to our race.** Only that promise can allow us to look past our differing skin colors and identities and see each other for what we truly are: **individuals with unique thoughts, perspectives, and goals, but with equal dignity and equal rights under the law." (p. 277)**

Application to the Military:

Just like admissions programs that use racial and ethnic stereotypes as proxies for relevant characteristics, the military's employment of these same categories as proxies for competency, merit, leadership, commitment, and qualifications **"strip us of our individuality"** and **"increase[es] racial polarization and friction"** within military units. While racial polarization and friction can be unpleasant and disturbing within the context of higher education, it can be debilitating in a military unit and result in death and defeat on the battlefield.

Conclusion: Why Congress Should Act to End Racial Discrimination in the Military

The final judicial resolution of how **equal protection principles** apply to the military service academies' admissions practices is years away. Congress, however, has the constitutional authority and responsibility (**Art. 1, Sect. 8**) to address the issue immediately.

Legislation could, for example, provide that in all DoD civilian and military personnel actions, including hiring, accessions, promotions, assignments, training, terminations, discharges, admissions to the service academies and service academy preparatory schools, the **Department of Defense and the military services shall not discriminate against, or grant preferential treatment to, any individual or group based on race, color, ethnicity, or national origin.**

Furthermore, all such personnel actions shall be based **solely on individual merit**, qualifications, capabilities, performance, fitness, training, and integrity.

Congressional action that recognizes principles upheld by the Supreme Court in the context of higher education could resolve similar issues in the military without uncertainties and delays that are inherent in litigation.

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*Prepared by the **Center for Military Readiness**, an independent public policy organization that reports on and analyzes military/social issues. More information is available on the **CMR** website, www.cmrlink.og.*

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