Education in the Balance: Exploring the U.S. Supreme Court's Recent Decisions

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Counterman v. Colorado

(Argued April 19, 2023)

(Decided June 27, 2023)

Justice Kagan delivered the Opinion

Counterman v. Colorado

Facts: For a period of two years, Counterman sent "hundreds of Facebook" messages to C.W., a local singer and musician. The two had never met, and C.W. never responded to the messages. After C.W. blocked him (repeatedly), Counterman created new accounts to continue contacting her. Believing Counterman was a threat, she contacted law enforcement.

Counterman v. Colorado

Counterman was charged with violating a criminal statute (stalking) which makes it unlawful to "[r]epeatedly … make [] any form of communication with another person … in a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person … to suffer serious emotional distress."

Counterman v. Colorado

Defendant's Argument: Counterman moved to dismiss the criminal charge on First Amendment grounds. Because the social media messages were ***not*** "true threats," Counterman argued they could not form the basis of a criminal prosecution.

Trial Court: Assessed the "true threat" issue using an ***objective reasonable person standard*** (whether a reasonable person would have viewed the messages as threatening), and found that the substance of Counterman's messages rose to the level of a "true threat." As a result, the First Amendment did ***not*** pose a bar to prosecution, and a jury found Counterman guilty as charged.

Counterman v. Colorado

Colorado Court of Appeals: Affirmed and, based on its precedent, rejected Counterman's argument that the First Amendment required the State to show that ***he*** was aware of the threatening nature of his statements.

Colorado Supreme Court: Denied review.

U.S. Supreme Court: Granted certiorari because (1) courts are divided on whether the First Amendment requires proof of a defendant's subjective mindset in "true threats" cases and (2) if so, what *mens rea* standard is sufficient.

Counterman v. Colorado

Issue #1: Does the First Amendment require proof that a defendant, in connection with the prosecution of a true threats case, had some **subjective** understanding of the threatening nature of his statements?

Issue #2: If yes, what mens rea is required?

Counterman v. Colorado

Holding #1: *Yes*!

In reaching this decision, the U.S. Supreme Court considered "the prospect of chilling non-threatening expression, given the ordinary citizen's predictable tendency to steer 'wide[] of the unlawful zone.'"

In its review, an objective standard would discourage the "uninhibited, robust, and wide-open debate that the First Amendment is intended to protect."

As a result, the U.S. Supreme Court determined that a **subjective standard** is required, "lest true-threats prosecutions chill too much protected, non-threatening expression."

Counterman v. Colorado

Holding #2: A mental state of ***recklessness*** is required (and fits with the analysis in defamation decisions).

The U.S. Supreme Court advised, "we see no reason to offer greater insulation to threats than to defamation."

Therefore, in "true threats" cases, the State must show that ***the defendant*** consciously disregarded a substantial risk that his communications would be viewed by others as threatening violence.

Outcome: Vacated and remanded.

Counterman v. Colorado

In her dissent, Justice Barrett stated:

"… school administrators often discipline [students] who make true threats. True threats can also be expressed by a parent, a teacher, or an employee in another context altogether. … Barring some reason why the speech receives lesser constitutional protection, … the Court's new rule applies to … these situations. That can make all the difference in some cases. A delusional speaker may lack awareness of the threatening nature of her speech; a devious speaker may strategically disclaim such awareness; and a lucky speaker may leave behind no evidence of mental state for the government to use against her. The Court's decision thus sweeps much further than it lets on."

Groff v. DeJoy, Postmaster General

(Argued April 18, 2023)

(Decided June 29, 2023)

Justice Alito delivered the Opinion

Groff v. DeJoy

Facts: Groff is an Evangelical Christian who believes, for religious reasons, that Sunday should be devoted to worship and rest. To avoid the requirement to work on Sundays (a practice which resulted when the United States Postal Service (USPS) agreed to facilitate Sunday deliveries for Amazon), Groff transferred to a rural station that did not make Sunday deliveries. After Amazon deliveries began at the rural station, Groff remained unwilling to work Sundays, and USPS redistributed Groff's Sunday deliveries to other USPS staff. Groff received "progressive discipline" for failing to work on Sundays and, eventually, resigned.

Groff v. DeJoy

Plaintiff's Argument: Groff asserted that USPS violated Title VII of the Civil Rights Act of 1964 because it could have accommodated his Sunday Sabbath practice without undue hardship on the conduct of USPS's business.

District Court: Granted summary judgment to USPS.

Third Circuit. Affirmed based on the U.S. Supreme Court's decision in *Trans World Airlines, Inc. v. Hardison*.

Groff v. DeJoy

In affirming, the Third Circuit construed *Hardison* to mean "that requiring an employer 'to bear more than a de minimis cost' to provide a religious accommodation is an undue hardship."

Based on its interpretation of *Hardison*, the Third Circuit found that the de minimis cost standard was met because exempting Groff from Sunday work imposed a hardship on his coworkers, disrupted the workplace, and diminished employee morale.

Note: this is the first time the Supreme Court visited the Hardison case in 50 years

Groff v. DeJoy

Issue: To prove that a requested religious accommodation poses an undue hardship, it is sufficient for an employer to show more than a de minimis cost?

Groff v. DeJoy

Holding: ***No***.

Title VII requires an employer that denies a religious accommodation to show that the burden of granting an accommodation would result in **substantial increased costs in relation to the conduct of its particular business**.

Per the U.S. Supreme Court, "showing 'more than a *de minimis cost*," … does not suffice to establish 'undue hardship' under Title VII."

Groff v. DeJoy

Although *Hardison* stated, "To require CWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship," the U.S. Supreme Court clarified that this was ***not,*** despite the reliance of many lower courts on this language, "the authoritative interpretation of the statutory term 'undue hardship.'"

In fact, in responding to Justice Marshall's dissent, the majority in *Hardison* stated, three times, that an accommodation is not required when it entails "substantial" costs or expenditures.

Groff v. DeJoy

Groff therefore clarifies that, as initially stated in *Hardison*, "'undue hardship' is shown when a burden is substantial in the overall context of an employer's business." This is a **fact-specific inquiry**.

What an employer must show is that the burden of granting an accommodation would result in **substantial increased costs in relation to the conduct of its particular business**. The requisite burden or adversity must rise to an "excessive" or "unjustifiable" level.

Groff v. DeJoy

All relevant factors must be considered, including the particular accommodations at issue and their practical impact in light of the nature, size, and operating cost of an employer.

Groff v. DeJoy

The U.S. Supreme Court also clarified:

- Title VII requires an assessment of a possible accommodation on the ***conduct of the employer's business***.
  - Impacts on coworkers are relevant only to the extent that they impact the conduct of the business.

- Title VII requires that an employer "reasonably accommodate" an employee's practice of religion, not merely **assess** the reasonableness of a particular possible accommodation(s).

Groff v. DeJoy

Faced with an accommodation request, an employer must do more than conclude that forcing other employees to work overtime would constitute an undue hardship. Other options **must be considered and analyzed** (e.g., incentive pay, shift switching, etc.).

Outcome: Remanded.

Takeaway – Have the accommodation conversation and see what is really at issue.

Students for Fair Admissions, Inc. v. President and Fellows of Harvard College

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Students for Fair Admissions, Inc. v. University of North Carolina, et al.

(Argued October 31, 2022)

(Decided June 29, 2023)

Chief Justice Roberts delivered the Opinion

Students for Fair Admissions v. President and Fellows of Harvard College

Facts: Students for Fair Admissions (SFFA), a nonprofit organization whose stated purpose is to "defend human and civil rights secured by law, including the right of individuals to equal protection under the law," filed separate lawsuits against Harvard and the University of North Carolina (UNC) arguing that their race-based admissions programs violate Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment.

Students for Fair Admissions v. President and Fellows of Harvard College

Procedural History: After separate bench trials (lasting several days), the admissions programs at both Harvard College and UNC were found to be lawful.

Regarding Harvard, the First Circuit affirmed, and the U.S. Supreme Court granted certiorari.

As for UNC, the U.S. Supreme Court granted certiorari before the Fourth Circuit rendered judgment.

Students for Fair Admissions v. President and Fellows of Harvard College

Issue: Whether the admissions systems used by Harvard and UNC are **lawful** under the Equal Protection Clause of the Fourteenth Amendment.

Holding: ***No***. Per the U.S. Supreme Court, both admissions systems violate the Equal Protection Clause of the Fourteenth Amendment.

Students for Fair Admissions v. President and Fellows of Harvard College

In finding both admissions systems unconstitutional, the U.S. Supreme Court noted it has permitted race-based admissions within the confines of narrow restrictions.

More specifically, such admissions programs (1) must comply with strict scrutiny; (2) may never use race as a stereotype or negative; and (3) must, at some point, end.

It its review, the admissions systems at both institutions of higher education fail these restrictions.

Students for Fair Admissions v. President and Fellows of Harvard College

Regarding the **first restriction**, namely that the program must comply with strict scrutiny, the U.S. Supreme Court stated:

- The interests that Harvard and UNC view as compelling cannot be subjected to meaningful judicial review (e.g., training future leaders, acquiring new knowledge based on diverse outlooks, promoting a robust marketplace of ideas, and preparing engaged and productive citizens, etc.).
  - While commendable, "they are not sufficiently coherent for purposes of strict scrutiny."
    - It is unclear how courts are supposed to measure these goals, or how to know when they have been reached.

Students for Fair Admissions v. President and Fellows of Harvard College

- In addition, Harvard's and UNC's programs fail to articulate a meaningful connection between the means they employ and the goals they pursue.
  - To achieve the educational benefits of diversity, Harvard and UNC measure the racial composition of their classes using racial categories that are plainly overbroad (Asian); arbitrary or undefined (Hispanic); or underinclusive.
    - Per the U.S. Supreme Court, "the use of these opaque racial categories undermines … [their] goals."
    - It is also unclear how assigning students to these categories and making admissions decisions based on them "furthers the educational benefits that the universities claim to pursue."

Students for Fair Admissions v. President and Fellows of Harvard College

Although deference has generally been accorded to the academic decisions made by institutions of higher education, "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."

In its review, the programs at Harvard and UNC do not satisfy this standard/burden.

Students for Fair Admissions v. President and Fellows of Harvard College

As for the **second restriction**, that race may never be used as a stereotype or a negative, the U.S. Supreme Court stated:

- A benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter.
- Harvard's and UNC's admissions programs also result in stereotyping, "the very thing *Grutter* foreswore."
  - More specifically, "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" (and suggests that race in itself says something about who you are).

Students for Fair Admissions v. President and Fellows of Harvard College

Finally, and with regard to the **third restriction**, that the race-based admissions programs must, at some point, end, the U.S. Supreme Court advised:

- Harvard and UNC suggest that the end of race-based admissions programs will occur once meaningful representation and diversity are achieved on college campuses.
  - However, this amounts to racial balancing, which is "patently unconstitutional."
  - In addition, their admissions programs effectively assure that race will always be relevant (because they require alignment of an incoming class with the preceding class).

Students for Fair Admissions v. President and Fellows of Harvard College

- Harvard and UNC's second end point – when students receive the educational benefits of diversity – "fares no better" because a court cannot determine if or when such a goal is adequately met (or whether it would be met without race-based admissions programs).
- With regard to the suggestion that race-based preferences must continue for a few more years (until 2028), the Court stated that this argument was "oversold" as both universities fully expected to use race-based admissions beyond 2028 (and, in fact, used such a practice when evaluating the incoming freshmen class, who would graduate in 2028).
    - In addition, "frequent reviews" by Harvard and UNC to determine whether racial preferences are still necessary "cannot make unconstitutional conduct constitutional."

Students for Fair Admissions v. President and Fellows of Harvard College

Overall, because "Harvard's and UNC's admissions 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, those admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause."

However, "nothing prohibits universities from considering an applicant's discussion of how race affected the applicant's 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 this way, the student must be treated based on his or her experiences as an individual—not on the basis of race.

Students for Fair Admissions v. President and Fellows of Harvard College

By evaluating a student based on their race, universities "have for too long wrongly concluded that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned, but the color of their skin. This Nation's constitutional history does not tolerate that choice."

Outcome: Reversed.

303 Creative, LLC et al. v. Elenis et al.

(Argued December 5, 2022)

(Decided June 30, 2023)

Justice Gorsuch delivered the Opinion

303 Creative LLC et al. v. Elenis et al.

Facts: Lorrie Smith (Smith) wants to *expand* her graphic design business (303 Creative LLC) to include services for couples seeking wedding websites (and the websites would be "expressive in nature," communicate "a particular message", and be Smith's original artwork). Smith was concerned that Colorado would use its Colorado Anti-Discrimination Act (CADA) to compel her - in violation of the First Amendment (and the Free Speech Clause) – to create websites celebrating marriages she does not endorse. As a result, Smith filed a lawsuit seeking an injunction to prevent the State from forcing her to **create** websites celebrating marriages that defy her belief that marriage should be reserved to unions between one man and one woman.

What is a place of Public Accommodation in New Jersey ?

- A place of public accommodation is generally any place that offers goods, services, or facilities to the public, including
- Schools, colleges and universities
- Stores and businesses
- Restaurants
- Summer camps
- Hotels & motels
- Medical providers, hospitals, and doctors' offices
- Government offices or agencies

What is a place of Public Accommodation in New Jersey ?

- The law means people cannot be denied access to or treated less favorably by a place of public accommodation because of their actual or perceived race, religion, national origin, gender, sexual orientation, disability, gender identity or expression, or other protected characteristic.

- In addition, employees and agents of places of public accommodation cannot harass patrons or customers, and must take action to stop bias-based harassment if it knew or should have known about it, even if the harassment is perpetrated by a fellow patient, patron or customer.

303 Creative LLC et al. v. Elenis et al.

District Court: Smith was not entitled to an injunction.

10th Circuit: Affirmed, and determined that the State had satisfied strict scrutiny to compel her speech (and the creation of the websites).

- As the majority saw it, Colorado had a compelling interest in ensuring "equal access to publicly available goods and services," and no option short of coercing Smith's speech could satisfy that interest (because she was offering "unique" services that were not available elsewhere).

303 Creative LLC et al. v. Elenis et al.

Issue: Does the First Amendment ***prohibit*** Colorado from forcing a website designer to ***create*** **speech** [expressive designs (website content)] with which the designer disagrees, and does not believe/endorse?

Holding: ***Yes***. According to the U.S. Supreme Court, "the First Amendment protects an individual's right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply misguided, and likely to cause anguish or incalculable grief."

303 Creative LLC et al. v. Elenis et al.

- The wedding websites Smith seeks to create qualify as "pure speech."

- The First Amendment protects actions of **expression association**, and the government may not compel a person to speak its own preferred messages. Instead, the speaker has the right to choose the content of his own messages.

- The U.S. Supreme Court has recognized that "no public accommodations law is immune from the demands of the Constitution," and "public accommodations statutes can sweep too broadly when **deployed to compel speech**."

303 Creative LLC et al. v. Elenis et al.

- Although a person's voice is unique, that "hardly means a State may coopt an individual's voice for its own purposes."

- The State cannot use its public accommodations statute to deny speakers the right to **choose** the expressive content of their speech.

  - If Colorado's position was accepted, "that principle would allow the government to force all manner of artists, speechwriters, and others whose services involve speech to speak what they do not believe on pain of penalty." In this way, "creative professionals … could be forced to choose between remaining silent, producing speech that violates their beliefs, or speaking their minds and incurring sanctions for doing so."

303 Creative LLC et al. v. Elenis et al.

- Based on the U.S. Supreme Court's finding, where the government's interest is ***not*** in the speech/expressive speech, but rather in prohibiting conduct that is discriminatory (i.e., not providing services to certain classes of people), it *will* prevail, and such conduct will be regarded as discriminatory *even if* it has an incidental effect on expression.
  - However, the government cannot compel the expression of certain speech.

Hot off the Press

Guidance from the New Jersey Division on Civil Rights (DCR) Regarding

303 Creative, LLC et al. v. Elenis et al.

(Issued July 31, 2023)

Guidance from DCR

- Enforcement guidance explains how the NJOAG and the DCR will apply the NJLAD to prohibit discrimination by places of public accommodation.

- In order to assert an exemption from the NJLAD, a public accommodation must establish, *at a minimum*, that:

  - (1) Its creative services are "original" and "customized and tailored" for each customer;

  - (2) The creation is "expressive" and expresses the creator's own First Amendment-protected speech; **and**

  - (3) The public accommodation's refusal to provide the creative service to a customer is based on the message it conveys, not the customer's identity or protected characteristic standing alone.

Guidance from DCR

- Many of the products or services that meet the narrow definition for exemption, e.g., a documentary film created by a movie director, fall outside the NJLAD's definition of a place of public accommodation.

- Because the overwhelming majority of places of public accommodation do not provide "customized," "original," and "expressive" products or services that express the creator's own speech, the U.S. Supreme Court's decision does ***not*** exempt them from the NJLAD.

Guidance from DCR

- The guidance from DCR noted that the following (non-exhaustive) conduct/activity would still be unlawful:
  - A grocery store, department store, or hotel that sells products off its shelves or makes it services and facilities available to all guests cannot refuse to serve a prospective customer or treat a customer differently because of their protected characteristic (nor can their employees);
  - Even if "customized" products or services are offered by a place of public accommodation, it is exempt from the NJLAD only if the customized products or services are also "expressive" and reflect the designer's own First Amendment-protected speech. The following services, while customized, do not express the vendor's own speech:
    - A web platform that allows customers to design their own wedding websites and create their own content;

Guidance from DCR

- A caterer that customizes a menu for events cannot refuse to cater a meal for a same-sex wedding, anniversary, or party;
- A hair salon cannot refuse to provide a customized haircut or create a customized hairstyle for a customer based on their protected category; and/or
- An event planner cannot refuse to work with a patron based on a protected category.

– Even where a creative professional offers an original, customized service or product that is "expressive" and expresses the creator's own message, the creative professional cannot refuse to create that same message for a different customer based on their protected characteristic *(303 Creative* only exempted refusals to provide specific products or services based on the **message** they contain).

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