COMING FULL CIRCLE

Affirmative Action in Higher Education

by Sadé Calin

Affirmative action, particularly in the educational context, is one of those timeless topics that are always hotly debated. In *Regents of Univ. of Cal. v. Bakke*,[1] the seminal case on affirmative action, the United States Supreme Court struck down the idea of using racial quotas to achieve diversity in college admissions, but held that race could be constitutionally considered in a narrowly tailored plan seeking to achieve the compelling interest of crafting a diverse student body.

In *Bakke*, the Court explained that strict scrutiny is the proper standard by which to consider any classifications based on race or ethnic background, as they are inherently suspect.[2] Announcing the judgment of the Court, Justice Lewis Powell touted Harvard College's admissions process as a prime example of constitutional consideration of race.[3] The Harvard plan, as it is often called, became the benchmark by which other race-conscious admissions programs were compared.

Nearing the 40th anniversary of *Bakke*, discourse has come full circle, with the end of 2017 seeing a Department of Justice (DOJ) investigation launched against Harvard to determine again whether its consideration of race constitutes unlawful discrimination, this time against Asian students.

The Latest Controversy

The newest story on the affirmative action front involves a lawsuit launched against Harvard by the nonprofit organization Students for Fair Admissions (SFFA).[4] In this suit, SFFA alleges violation of Title VI of the Civil Rights Act of 1964 and the equal protection clause of the 14th Amendment.[5] The media coverage of these allegations has grown due to the ongoing DOJ investigation into Harvard's admissions practices based on a complaint filed by a coalition of Asian-American organizations on behalf of Asian students in 2015.[6] While the Department of Education under the previous administration dismissed the complaint, this administration's DOJ picked it up and issued a letter to Harvard, dated Nov. 17, 2017, insisting that Harvard produce for inspection, essentially, the documents it was required to produce in the underlying SFFA litigation.[7] As of Dec. 2017, Harvard agreed to cooperate with the DOJ investigation by granting the DOJ access to admissions-related documents, including information about applicants.[8] It has been suggested that this investigation is part of a DOJ plan to target affirmative action in college admissions.[9]

In a 120-page complaint filed Nov. 17, 2014, the SFFA alleges Harvard employed racially and ethnically discriminatory policies and procedures in administering its undergraduate admissions program. The complaint alleged Title VI violations as follows: count 1 (intentional discrimination against Asian-Americans), count 2 (racial balancing), count 3 (failure to use race as a 'plus' factor in admissions decisions), count 4 (failure to use race to merely fill the last 'few places' in the incoming freshman class), count 5 (availability of race-neutral alternatives), and count 6 (any use of race as a factor in admissions).[10]

Harvard admits that it does consider race in admissions, alongside many other factors, for the purpose of increasing student body diversity, including racial diversity.[11] Notably, a group consisting of nine minority high school students intending to apply to Harvard and five minority undergraduate students currently enrolled there filed a motion to intervene in the SFFA suit in support of Harvard's admissions practices in order to argue that affirmative action is necessary to counter the school's other policies (*i.e.*, legacy policies) that decrease diversity.[12] While these students were denied the opportunity to intervene, they were invited to participate as *amici curiae*, and make submissions to the court, including personal declarations or affidavits.[13]

On June 2, 2017, a district judge granted partial judgment on the pleadings in favor of Harvard on two counts—count 6 because it would require the court to overrule Supreme Court precedent, which it may not do, and count 5 because it is reliant on SFFA's unsupported argument that race may only be considered "for the last few places left."[14]

Diversity is a 'Plus'

In 1978, the Supreme Court decided *Bakke*,[15] the landmark case setting out when race-conscious admissions programs are permissible under the United States Constitution. In *Bakke*, the Medical School of the University of California at Davis maintained two separate admissions tracks applicable to determine the single entering class of 100 students.[16] The two tracks had separate admissions committees.[17] The regular admissions program was used to fill 84 of the 100 open spaces.[18] The regular admissions committee implemented a strict GPA cut off.[19] Applicants below the cut off were summarily rejected, and applicants above the cut off then competed against each other for interviews.[20] The interviewed applicants were then rated on a scale of one to 100, and ranked against each other.[21]

The remaining 16 spots were reserved for applicants accepted through the special admissions program.[22] The special admissions committee, the majority of which were members of minority groups, assessed applicants who wished to be considered "economically and/or educationally disadvantaged."[23] The application also allowed applicants to denote whether they wished to be considered members of a minority group (*i.e.*, "Blacks, Chicanos, Asians, and American Indians").[24] These applicants

were ranked only against each other, as opposed to being ranked against the larger admissions group.[25] These candidates also were not subject to the hard GPA cut off.[26] Only minority students had been granted admission through the special program for 'disadvantaged' applicants.[27]

Bakke was twice rejected from admission at the medical school despite receiving high rankings in the regular admissions criteria.[28] Bakke applied through the special admissions programs as well, but was again denied admission.[29] His second rejection occurred when there were still four spots open for the admission of special applicants.[30] The special applicants who were ultimately admitted had significantly lower scores than Bakke, but were racial minorities.[31]

The Supreme Court of California held that the medical school could not take race into consideration when making admissions decisions.[32] Finding a violation of the federal equal protection clause, the state court struck down the admissions program.[33] On appeal, the Supreme Court affirmed in part and reversed in part in a decision quoted in almost every Supreme Court consideration of affirmative action policies since.[34]

Delivering the opinion of the Court, Justice Powell affirmed the part of the state court's decision striking down the medical school's admissions process because it essentially operated as a racial quota that was not necessary to achieve the compelling goal of student body diversity, and so did not survive strict scrutiny.[35] However, the Supreme Court reversed the court below on its holding that race could not be considered in the admissions process.[36]

In the *Bakke* opinion, Justice Powell stated, "the atmosphere of speculation, experiment and creation—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body."[37] Further, the opinion highlights the fact that physicians serve a heterogeneous population and that an otherwise qualified student of a particular background may be able to bring enriching ideas and experiences that better equip the students to serve humanity.[38] Accordingly, the opinion recognized that diversity is a compelling interest in the educational context and so consideration of race and ethnicity may be considered necessary to promote this interest.[39]

Holding out the Harvard College admissions program as "an illuminating example," the opinion lauded the approach of using race simply as a "plus."[40] Race does not insulate an applicant from comparison to other qualified individuals.[41] Rather, it is used only as one potential plus factor, just as "exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important" could be considered a "plus."[42]

Race may be considered one of various factors of diversity used in the admissions process to craft a well-rounded educational experience.[43] Unlike in a quota system, the Court found "[t]he applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration from that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment."[44]

In so concluding, Justice Powell appended to the opinion a statement describing the Harvard College admissions program.[45] The statement provides that, when reviewing applications from admissible applicants "deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them."[46]

This ideal and this method of considering race or ethnicity, only as a plus rather than an insulating factor, has been the guide for constitutional affirmative action policies ever since.

Bakke to the Future

Schuette v. Coalition to Defend Affirmative Action

In 2014, the United States Supreme Court decided *Schuette v. Coalition to Defend Affirmative Action*.[47] Here, a coalition of prospective state school applicants sued Michigan government officials alleging that an amendment to Michigan's state constitution was adopted in violation of the equal protection clause.[48] Voters passed Proposal 2 by a margin of 58 percent to 42 percent.[49] The amendment serves to prohibit the use of race-based considerations in the admissions process for Michigan's state institutions, including educational institutions.[50] Though the district court granted summary judgment to Michigan, on appeal the Sixth Circuit Court of Appeals found the proposal adopted by voters violated the Constitution.[51]

After granting *certiorari*, the Supreme Court reversed the Sixth Circuit holding.[52] Though the Supreme Court voted 6–2 to reverse, there were three different

conclusions as to why reversal was appropriate.[53] Three justices voted for reversal because there is no constitutional or Supreme Court precedent to support overturning the voters' policy determination.[54] Other justices voted to reverse the lower court holding because there was no discriminatory purpose in the state action or because, among other reasons, while the Constitution permits use of race-conscious programs it does not require them, and voters may resolve these issues through the exercise of the democratic process.[55]

The admissions process at issue in *Schuette* was adopted after a statewide debate was sparked by the Court's 2003 decisions in *Gratz* and *Grutter*.[56] The question of race-conscious considerations was presented to voters in the form of Proposal 2, and proposed to ban the use of discriminatory or preferential treatment on the basis of race, sex, color, ethnicity, or national origin in either public employment, public education, or public contracting.[57]

In delivering the judgment of the Court in the plurality opinion, Justice Anthony Kennedy stated, "it is important to note what this case is not about. It is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education…the Court did not disturb the principle that the consideration of race in admissions is permissible provided that certain conditions are met…The question here concerns not the permissibility of race-conscious admissions policies under the Constitution but whether, and then what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions."[58]

The *Schuette* decision saw a dissent, by Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg.[59] The dissent stated, "[w]e are fortunate to live in a democratic society. But without checks, democratically approved legislation can oppress minority groups."[60] Highlighting a long history of the country "stymieing the right of racial minorities to participate in the political process," the dissent thoroughly examined the after-effects on university admissions in other states that have banned race-conscious admissions programs, including California, noting the immediate and drastic decline in underrepresented minority application and enrollment.[61] The dissent concluded that the plurality decision allowed the majority of voters in Michigan to strip away a constitutionally permissible policy and "eviscerates an important strand of our equal protection jurisprudence."[62]

Fisher I and II

In 2013, the Supreme Court decided *Fisher v. University of Texas (Fisher I)*.[63] In the case below, the Fifth Circuit Court of Appeals granted summary judgment to the University of Texas at Austin on a challenge that its consideration of race in admissions violated the equal protection clause.[64] In its considerations, the Fifth Circuit held that the university was entitled to substantial deference, and because it implemented its admissions policy in good faith, summary judgment was appropriate.[65] On appeal, the Supreme Court vacated the judgment and remanded it for the Fifth Circuit to apply the proper standard of strict scrutiny—the applicable standard to any challenge of improper consideration of race.[66]

In a lone dissent, Justice Ginsburg noted the university's policy was "patterned after the Harvard plan referenced as exemplary in Justice Powell's opinion" in *Bakke*.[67] Noting the absence of an impermissible quota system, Justice Ginsburg determined the university's policy, that "flexibly considers race only as a 'factor of a factor of a factor of a factor' in the calculus," was permissible and need not be returned to the Fifth Circuit for review.[68] On remand, the Fifth Circuit again granted summary judgment in favor of the university after analyzing the policy under strict scrutiny.[69] From this decision came another appeal, *Fisher II*.[70]

In 2016's *Fisher II*, the Supreme Court considered the substantive question of whether or not an admissions policy that considered race as a part of a holistic review process violated the equal protection clause.[71] Ultimately, the Supreme Court affirmed the Fifth Circuit decision upholding the university's admissions policy.[72] The policy at issue set out two ways that applicants could get admitted to the university.[73] First, as a result of state legislation, the university extended admissions offers to all students who graduated from a Texas high school in the top 10 percent of their class.[74] This left approximately 25 percent of the incoming class to be selected through an application process that combined an academic index, consisting of solely academic achievements, and a personal achievement index that resulted from a holistic review in which numerous factors, including race, were considered.[75]

The Court reiterated the principle that a public university's admissions process is unable to consider race unless it can withstand strict scrutiny (*i.e.*, show both a compelling interest and that the means used to accomplish that interest is narrowly tailored).[76] Here, the largest impacting factor in the petitioner's rejection from the university was that she failed to graduate in the top 10 percent of her class, not the fact that race was considered as a part of the holistic review process.[77] In *Fisher II*, the Court also stated that a university will have a continuing obligation to meet strict scrutiny, meaning periodic reassessment of its program's constitutionality and narrow tailoring to meet the compelling interest.[78] Prior to the *Fisher* cases, it had been 10 years since the Supreme Court last considered affirmative action.

Gratz and Grutter

On June 23, 2003, the Supreme Court decided two suits challenging the consideration of race in admissions programs at the University of Michigan. One suit, *Gratz v. Bollinger*,[79] challenged the admissions program in undergraduate admissions, while another, *Grutter v. Bollinger*,[80] challenged the law school admissions program.

The undergraduate policy in *Gratz* was based on a point system in which underrepresented minority group members were granted an automatic 20 points.[81] Because this had the effect of making race the decisive factor for "virtually every minimally qualified underrepresented minority applicant," the policy violated the equal protection clause, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981.[82]

In this class action suit for racial discrimination, the class representative was a student who was denied admission where it was found that he would have been admitted if he were an unrepresented minority due to the 20-point bump.[83] Finding that this was the functional equivalent of having a quota system, summary judgment was granted for the petitioners.[84] An appeal of this decision was filed with the Sixth Circuit.[85] Despite the Sixth Circuit having not yet given an opinion in this case, the Supreme Court decided to grant *certiorari* and hear it alongside *Grutter*, upon which the Sixth Circuit had already ruled.[86]

In *Gratz*, the Court rejected the argument that diversity cannot constitute a compelling state interest, even though it found the automatic provision of 20 points was not an acceptable means of meeting this interest.[87] Quoting the *Bakke* decision, the Court noted that it would be permissible to use race or ethnic background as a plus in an applicant's file; however, the consideration should not be decisive for essentially every spot.[88]

In *Grutter*, the Court addressed a law school admissions policy that considered race in a more narrow way.[89] Unlike the *Gratz* policy, it did not serve to function as a quota, but instead considered both academic ability and an assessment of other factors that would contribute to the educational environment.[90] 'Diversity' in the law school policy was defined as broader than just race or ethnicity.[91]Accordingly, while race or ethnic diversity could be considered a plus for the campus's diversity, it was only one potential plus factor, and neither decisive nor the only consideration.[92] The Court found this was narrowly tailored to further the school's compelling interest, and so did not violate the constitutional protections and prohibitions at issue.[93] The Court found important that the law school admission scheme conducted "a highly individualized, holistic review of each applicant, giving serious consideration to all the ways the applicant might contribute to a diverse educational environment," with applicants of all races receiving this individualized consideration.[94]

The 15-year anniversary of *Gratz* and *Grutter* is approaching. In *Grutter*, the Court imagined that in 25 years (from issuing that 2003 opinion) race-conscious admissions decisions might no longer be necessary to serve the compelling interest of achieving a diverse student body.[95] The Court reaffirmed its commitment to Justice Powell's opinion in *Bakke*, holding that student body diversity is a compelling state interest supporting the consideration of race in university admissions considerations as long as it is only a plus and not a quota, or a system that puts racial or ethnic groups on separate admissions tracks.[96] Still, the Court stated that "race-conscious admissions policies must be limited in time...[the court] expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[97] Today, the end of the Court's envisioned timeline is just 10 years away.

Back to Basics

In 2018, things appear to have come full circle, and the future of affirmative action in college admissions may again be reliant on Harvard's plan. ⚖

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Endnotes

1. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).
2. *Id*. at 291.
3. *Id*. at 316.
4. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (Harvard Corp.)*, No. 14-cv-14176-ADB (D. Mass. Nov. 17, 2014).
5. *See generally id*.
6. Susan Svrluga and Nick Anderson, Justice Department investigating Harvard's affirmative-action policies, *Washington Post* (Nov. 21, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/11/21/justice-department-investigating-harvards-affirmative-action-policies/?utm_term=.5cdf97c953b5.
7. *Id*.
8. Anemona Hartocollis, Harvard Agrees to Turn Over Records Amid Discrimination Inquiry, *N.Y. Times* (Dec. 1, 2017), https://www.nytimes.com/2017/12/01/us/harvard-justice-department-discrimination.html.
9. *Id*. *See also* Sophie Tatum and Daniella Diaz, Justice Dept. pushes back on NYT's 'race-based discrimination' report, CNN (Aug. 3, 2017), https://www.cnn.com/2017/08/01/politics/nyt-

trump-administration-affirmative-action/index.html.

10. Complaint, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College et al,* No. 1:14cv14176 (D. Mass. Nov. 17, 2014).
11. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (Harvard Corp.)*, 807 F.3d 472, 474 (1st Cir. 2015) *aff'g Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (Harvard Corp.)*, 308 F.R.D. 39 (D. Mass. June 15, 2015).
12. *Id*. at 475.
13. *Id*. n.3.
14. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College (Harvard Corp.)*, 2017 U.S. Dist. LEXIS 84656, *3 (D. Mass. June 02, 2017).
15. 438 U.S. 265 (1978).
16. *Id*. at 272-73.
17. *Id*. at 273.
18. *Id*. at 289.
19. *Id*. at 273.
20. *Id*. at 273-74.
21. *Id*. at 274.
22. *Id*. at 289.
23. *Id*. at 274.
24. *Id*. (internal punctuation omitted).
25. *Id*.
26. *Id*. at 275.
27. *Id*. at 276.
28. *Id*. 276-77.
29. *Id*.
30. *Id*.
31. *Id*. at 277.
32. *See generally Bakke v. Regents of Univ. of Cal*., 132 Cal. Rptr. 680 (1976).
33. *Id*. at 700.
34. *See generally Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).
35. *See generally id*.
36. *Id*. at 272.
37. *Id*. at 311 (internal quotations omitted).
38. *Id*. at 314.
39. *Id*. at 314-15.
40. *Id*. at 316-17.
41. *Id*. at 317.
42. *Id*.
43. *Id*.
44. *Id*. at 318.
45. *Id*. at 321.
46. *Id*. at 323.
47. *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623 (2014).
48. *See generally id*.
49. *Id*. at 1629.
50. *Id*.
51. *Id*. at 1630.
52. *Id*. at 1638.
53. *See generally Schuette*, 134 S. Ct. 1623 (2014).
54. *Id*. at 1629 (plurality opinion).
55. *See Id*. at 1638 (Roberts, C.J., concurring); *Id*. 1639 (Scalia, J., concurring); *Id*. at 1651 (Breyer, J. concurring).
56. *Id*. at 1629.
57. *Id*.
58. *Id*. at 1630.
59. *Id*. at 1651.
60. *Id*.
61. *Id*.
62. *Id*. at 1683.
63. *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013).
64. *Fisher v. Univ. of Tex.*, 631 F.3d 213 (5th Cir. 2011).
65. *See generally Id*.
66. *Fisher v. Univ. of Tex.*, 570 U.S. 297, 314 (2013).
67. *Id*. at 334.
68. *Id*. at 336.
69. *Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 637 (5th Cir. 2014).
70. *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198 (2016).
71. *See generally id*.
72. *Id*. at 2215.
73. *See generally id*.
74. *Id*. at 2205.
75. *Id*. at 2206.
76. *Id*. at 2208.
77. *Id*. at 2208-09.
78. *Id*. at 2212.
79. *Gratz v. Bollinger*, 539 U.S. 244 (2003).
80. *Grutter v. Bollinger*, 539 U.S. 306 (2003).
81. *Gratz*, 539 U.S. at 255.
82. *Id*. at 272.
83. *Id*. at 254.
84. *Id*. at 259.
85. *Id*.
86. *Id*. at 260.
87. *See generally id*.
88. *Id*. at 272.
89. *See generally Grutter*, 539 U.S. 306 (2003).
90. *Id*. at 318.
91. *Id*. at 338.
92. *Id*. at 339.
93. *Id*. at 334.
94. *Id*. at 337.
95. *Id*. at 343.
96. *See generally id*.
97. *Id*. at 343.