

AFFIRMATIVE ACTION IN American Colleges After *Fisher v. Texas*

ON JUNE 24, 2013, THE U.S. SUPREME COURT DECIDED THE AFFIRMATIVE ACTION CASE OF *FISHER V. UNIVERSITY OF TEXAS*. SOME HAD EXPECTED THE COURT TO STRIKE DOWN AFFIRMATIVE ACTION PROGRAMS IN HIGHER EDUCATION. INSTEAD, THE FISHER DECISION CLARIFIED PREVIOUS RULINGS BY THE COURT AND GAVE INSTRUCTIONS ON HOW LOWER COURTS SHOULD DETERMINE WHETHER AN AFFIRMATIVE ACTION PROGRAM IS CONSTITUTIONALLY PERMISSIBLE.

Affirmative action in higher education provokes great controversy. Affirmative action programs and policies attempt to create greater diversity on campuses by taking into account factors such as race, sex, and ethnic origin when admitting student applicants. Opponents of affirmative action argue that these factors should not be considered, because students should be admitted on merit alone (e.g., grades and test scores).

Affirmative action programs arose following the successes of the civil rights movement in the 1960s. In a speech at Howard University in 1965, President Lyndon Johnson voiced the rationale for affirmative action:

You do not wipe away the scars of centuries by saying: "Now, you are free to go where you want, do as you desire, and choose the leaders you please." You do not take a man who for years has been hobbled by chains, liberate him, bring him to the starting line of a race, saying, "You are free to compete with all the others," and still justly believe you have been completely fair . . . This is the next and more profound stage of the battle for civil rights. We seek not just freedom but opportunity — not just



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Fisher v. Texas is the most recent of a line of cases the Supreme Court has decided on affirmative action in higher education.

legal equity but human ability — not just equality as a right and a theory, but equality as a fact and as a result.

The federal government initiated affirmative action programs to continue the push for greater equality in American society. After the passage of the Equal Employment Opportunity Act in 1969, the Nixon administration pressed employers to hire more minorities and to help these workers rise in the ranks. By the 1970s, this concerted economic effort broadened. Many American universities began affirmative action programs for admissions decisions and hiring practices.

One result of affirmative action programs is that sometimes a minority applicant for school admission will be preferred over white

applicants with similar or even better qualifications. This amounts to a racial preference.

Many public college and university programs have faced court challenges. Several cases have reached the U.S. Supreme Court. The legal question in most affirmative action cases is: Does this affirmative action program violate the 14th Amendment?

The 14th Amendment to the U.S. Constitution guarantees equal protection. It reads: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." The amendment applies to all state entities, including public colleges and universities.

Bakke

The first affirmative action case to reach the Supreme Court was *Regents of the University of California* ▶

v. Bakke (1978). Allan Bakke claimed that the U.C. Davis School of Medicine had unlawfully discriminated against him and fellow white applicants by reserving at least 16 seats in each incoming class for members of historically disadvantaged groups. Bakke believed that the medical school's affirmative action policies violated the 14th Amendment's equal protection clause.

In a sharply divided ruling, the Supreme Court held in *Bakke* that the Constitution does not permit public institutions of higher education to apply racial quotas in admissions decisions. But the court also recognized the importance of diversity on college campuses, calling it a "compelling state interest." It therefore ruled that race could be considered in applications but only as a "plus" factor when the university reviews the many factors in an applicant's profile.

After *Bakke* was decided, American colleges did away with racial quotas, but many continued affirmative action programs using race as one factor in admissions decisions. Even so, affirmative action continued to be a hot-button issue in state politics.

In 1996, Californian voters approved an amendment to the state constitution that made it illegal for California public institutions — such as state universities — to discriminate "on the basis of race, sex, color, ethnicity, or national origin." Proposition 209 has been challenged multiple times in court, but has withstood attack. Defenders of Proposition 209 point to the rising graduation rates at Californian public universities since the passage of the constitutional amendment. Opponents of the proposition decry how the constitutional amendment has led to lower numbers of minority students at California's public universities.

Gratz and Grutter

Twenty-five years went by before the court heard another affirmative action case on higher education. In 2003, the Supreme Court issued two landmark affirmative action decisions in *Gratz v. Bollinger* and *Grutter v. Bollinger*. (Both cases involved lawsuits against the University of Michigan, and Lee Bollinger, the university's president, was named as a defendant in both lawsuits.)

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At issue in *Gratz v. Bollinger* was the undergraduate admissions system at the University of Michigan. The university had been using a 150-point scale to judge undergraduate admissions. Applicants needed 100 points for automatic acceptance. If applicants came from a historically disadvantaged racial or ethnic group, they automatically received 20 points. By comparison, an applicant with a perfect SAT score received 15 points. Jennifer Gratz, a white applicant with above-average test scores and high grades, was denied admission to the University of Michigan, while all minority students with Gratz's academic qualifications were admitted. She sued the University of Michigan, arguing that the undergraduate point system violated the 14th Amendment.

Six Supreme Court justices agreed with Gratz. The majority of the court held that the University of Michigan's point system failed the "strict scrutiny" test. In order to pass this test, the university needed to

show that a compelling state interest justified its admissions system. Additionally, the University of Michigan's point system would need to be "narrowly tailored" toward achieving the compelling interest.

The majority in *Gratz v. Bollinger* did not question the university's stated compelling interest: diversity within the student body. Instead, the court asserted that the University of Michigan's admissions system was not narrowly tailored to the university's interest in a diverse student body. The point system did not allow for an individual analysis of each applicant. The court stated:

Justice Powell's opinion in *Bakke* emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity.

Grutter v. Bollinger was decided on the same day as *Gratz*. The University of Michigan Law School had an admissions policy that used race and ethnicity as a plus factor. The policy aimed to produce "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers." The school wanted a "critical mass" of underrepresented students to ensure "their ability to make unique contributions to the character of the Law School."

Barbara Grutter, a white applicant who was denied admission into the University of Michigan Law School, challenged the school's admission policy. She charged that the policy was unconstitutional and represented reverse discrimination against white applicants.

In a 5-4 vote, the court upheld the law school's practices. Writing for the majority, Justice Sandra Day O'Connor stated that the University of Michigan Law School's admissions standards passed the strict scrutiny test. The law school had a compelling reason for furnishing a qualified and diverse student body, which could prepare students for the diverse world beyond law school. It also had used appropriate means to achieve its compelling interest. Michigan understood that a student could add to the quality and diversity of the student body in many ways, and therefore it considered numerous factors in its admissions decisions. Unlike the undergraduate admissions program in *Gratz*, the law school engaged in an individual analysis of each applicant. Although the University of Michigan used racial preferences, the law school's interest in student diversity included much more than simply racial and ethnic makeup.

One of the most surprising aspects of Justice O'Connor's opinion was the timetable that she set for affirmative action programs. O'Connor stated all these programs needed "sunset provisions" in place, so that "all race-conscious admissions programs have a termination point." The judge also forecast when such a termination point would arrive: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

After *Gratz* and *Grutter* were decided, many universities that had been uncertain about the legality of

NATIONAL OPINION POLLS ON AFFIRMATIVE ACTION

Do you approve or disapprove of affirmative action admissions programs at colleges and law schools that give racial preferences to minority applicants?

Approve	Disapprove	Unsure
29%	68%	3%

Source: CNN/ORC Poll. June 2013.

In order to make up for past discrimination, do you favor or oppose programs which make special efforts to help blacks and other minorities get ahead?

Favor	Oppose	Other	Unsure/Refused
68%	24%	2%	6%

Source: Public Religion Research Institute. May 2013.

Of the two following statements on affirmative action programs, which one comes closer to your own point of view. Affirmative action programs are still needed to counteract the effects of discrimination against minorities, and are a good idea as long as there are no rigid quotas. OR, Affirmative action programs have gone too far in favoring minorities, and should be ended because they unfairly discriminate against whites.

Still needed	Should be ended	Unsure
45%	45%	10%

Source: NBC News/Wall Street Journal Poll. June 2013

race-conscious admissions policies either became cautious about implementing affirmative action programs or cancelled their race-conscious plans altogether. The University of Michigan, which closed its affirmative action program because of *Gratz*, witnessed a downturn in minority enrollment for the next several years. Over the past decade, several more states, including Michigan, have passed bans on race-conscious admissions. (The Michigan ban was challenged in court, and unlike the bans in other states, a federal appeals court struck it down in 2011. The case was appealed to the U.S. Supreme Court, which will issue its decision during the 2013-14 term.)

Background to *Fisher*

After the *Gratz* and *Grutter* decisions, the University of Texas at Austin enacted a two-tiered admissions approach for undergraduate applications. The top tier was linked to the Top Ten Percent Law passed by the state legislature in the mid-1990s. Under this law, all Texas high school students in the

top 10 percent of their high school class are assured admission into any public university in the state. The majority of the University of Texas' entering freshmen come from this admissions tier.

For those applicants who do not fall within the top tier, the university applies a separate admissions criteria. Admissions counselors evaluate a greater number of factors than class rank when looking at applications in the second tier. The University of Texas reviews factors such as standardized test scores, personal essays, examples of leadership, work experience, and race and ethnicity when making admissions decisions in the second tier.

Abigail Fisher, a white Texan, applied to the University of Texas at Austin in 2008, when she was a senior in high school. Fisher was not in the top 10 percent of her high school class, so her application was evaluated under the second tier of the university's admissions approach. After the university denied her admission, Fisher sued the University of

Texas. She claimed that the university's consideration of race improperly influenced the outcome of her application.

Employing the language of the University of Michigan Law School's admissions policies, Fisher argued that Texas's top tier approach to undergraduate admissions — the Top Ten Percent tier — already achieved a “critical mass” of diverse perspectives in the classroom, and therefore the additional consideration of race in the second tier admissions policy was unnecessary. The University of Texas responded that the diversity gained from the Top Ten Percent tier is largely due to the school segregation present in Texas public school districts. By adding more variety *within* minority groups at the university — a goal that the University of Texas termed “diversity within diversity” — the second tier of the university's admissions approach supplies an extra degree of heterogeneity to the student body.

Both the district court and the court of appeals ruled that the University of Texas's two-tiered admissions approach fit within the constitutional framework set up by *Bakke* and *Grutter*. It thus did not violate the equal protection clause of the 14th Amendment. Fisher appealed the lower courts' rulings to the Supreme Court, which accepted review of the case.

Fisher v. University of Texas

The case was one of the most highly anticipated decisions of the year. Many legal experts expected the court to make a major ruling on affirmative action. In a 7-1 opinion, however, the Supreme Court decided to remand the case back down to the Fifth Circuit Court of Appeals. But this seemingly anticlimactic ruling did provide greater definition to the legal state of affirmative action in American colleges and universities.



The University of Texas admits all students in the top-10 percent of their high school graduating class. It has a separate admissions process for those students not in the top-10 percent.

Courtesy of Dereskey / Flickr.com

The majority decision upheld *Gratz* and *Grutter* in key respects. According to Justice Anthony Kennedy, who wrote the majority opinion, the academic and professional benefits that arise from a diverse classroom are still considered to be a compelling government interest. Additionally, racial preferences are still constitutionally permissible in limited contexts.

Justice Kennedy instructed public universities to consider race-neutral paths to a diverse educational environment. *Bakke* had asserted that race-conscious policies were permissible only if they were able to “demonstrate that their methods of using race ‘fit’ a compelling state interest ‘with greater precision than any alternative means.’” According to the majority, a race-conscious admissions approach can only pass the strict scrutiny test if it is “‘necessary’ for a university to use race to achieve the educational benefits of diversity” and “no workable race-neutral alternatives would produce the educational benefits of diversity.”

The Supreme Court remanded the *Fisher* case to the lower courts because the lower courts had not

been stringent in their review. The lower courts had deferred to the University of Texas' judgment that it had made a good faith effort in narrowly tailoring its admissions criteria. But the majority in *Fisher* rejected this passive judicial approach and argued that it is the duty of federal courts, not institutions of higher education, to perform a strict scrutiny assessment: “Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of how the process works in practice.” It is up to federal courts to determine whether racial preferences in the particular university are “essential to its educational mission.”

In their concurring opinions, Justice Scalia and Justice Thomas went further than the majority on the question of affirmative action. These justices believe that all racial preferences in higher education admissions decisions are indefensible under the 14th Amendment.

Justice Ginsburg provided the lone dissent in *Fisher*. In her opinion, she asserted that the University

of Texas's two-tiered admissions approach followed the *Grutter* precedent and ought to be deemed constitutionally appropriate.

Consequences of *Fisher*

In many ways, the *Fisher* decision represents a judicially moderate opinion. Instead of attacking the controversial topic of affirmative action head-on, the court opted for an indirect approach, focusing on questions of judicial procedure and keeping the *Bakke*, *Gratz*, and *Grutter* precedents intact.

In fact, after hearing the court's decision, the University of Texas responded, "Today's ruling will have no impact on admissions decisions we have already made or any immediate impact on our holistic admissions policies."

Although the University of Texas feels comfortable with its current admissions policies, many legal scholars believe that the *Fisher* decision will make universities even more leery about how they incorporate racial preferences into admissions decisions. Because *Fisher* directs public universities to explore race-neutral options before embracing race-conscious admissions policies, pressure will be placed on universities to demonstrate clearly the need for affirmative action programs. *Fisher* may deter universities from using race-conscious admissions criteria. Instead, pressured by conservative voters and legal groups about the empirical justification for racial preferences, universities likely may begin emphasizing applicants' socioeconomic status and family data in order to earn greater diversity in the classroom.

Fisher tremendously affects federal courts also. Lower courts will have to be more meticulous when deciding cases regarding affirmative action in higher education. Courts will be required to subject public universities' admissions policies to

the strict scrutiny requirements. They will not be able to defer to a university's assessment that its own admissions formula is necessary to the achievement of a compelling interest and that the university implements the formula using narrowly tailored means. Courts now must discern the necessity of race-conscious policies, case-by-case.

DISCUSSION AND WRITING

1. What is affirmative action? What is the purpose of affirmative action programs at public universities? Do you think this is a valuable purpose? Explain.
2. What constitutional problems do affirmative action programs have? What is the test that courts impose on these programs? Do you think the test makes sense? Explain.
3. Do you agree with the Supreme Court's decisions in *Bakke*, *Gratz*, and *Grutter*? Do you think the decisions are consistent with each other? Explain your answers.
4. Do you agree with Justice O'Connor's idea of "sunset provisions" for affirmative action programs? When do you think a termination date should be, if ever? Explain your answers.
5. What did the Supreme Court decide in *Fisher v. Texas*? What would you have ruled if you were a justice on the court? Explain.
6. What alternatives to affirmative action do schools have to achieve greater diversity on their campuses?

ACTIVITY

Trustees

In this activity, students will role play trustees of a public university charged with setting, among other things, admissions policy for the university. The trustees will decide on the goal of admissions policy and address the question of affirmative action at the school.

1. Form small groups. Each group is a board of trustees.
2. Each group should do the following:
 - a. Discuss and answer this question: What should be the goal of the admissions policy at your university?
 - b. Look at each of the proposed policies on affirmative action and discuss the pros and cons of each.
 - c. Decide which policy your university should adopt. If none of the listed policies are attractive, combine policies or create your own.
 - d. Be prepared to report on your decisions and the reasons for them.
3. Each group should report its decisions and the class should discuss them.

Proposed Policies on Affirmative Action

1. **Top Ten Percent.** Adopt a policy similar to Texas' Top Ten Percent Law (see article for details).
2. **Race or Ethnicity as a Plus Factor.** Adopt an affirmative action program similar to that of the University of Michigan Law School (see article for details).
3. **Class-Based Affirmative Action.** Give applicants a plus factor if they are from low-income families.
4. **Grades and Test Scores Only.** Base university admission on high school grades and SAT scores only.