
Justices Set to Revisit Affirmative Action for Universities

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Nearly 30 years later, in *Grutter v. Bollinger* , a majority of the court held that diversity among the student population constituted a compelling state interest justifying the consideration of race in university admissions. It was in that same 2003 opinion that then-Justice Sandra Day O'Connor's majority opinion issued an infamously Pollyannaish prediction: "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." Sixteen years ahead of schedule, the court appears ready to scale back *Grutter*, if not completely overrule it, in *Fisher v. University of Texas at Austin* .

From *Bakke* to *Grutter*

The court's mixed views on the constitutionality of affirmative action precluded any majority opinion in *Bakke* . Under the University of California's admissions policy, 16 out of the school's 100 seats were reserved for members of specified minority groups. Four justices would have upheld this policy under an intermediate level of scrutiny, while four other justices believed that the policy violated the 1964 Civil Rights Act and would not have commented on its constitutionality at all.

Justice Lewis Powell ultimately broke the tie in favor of striking down the university's policy. His concurring opinion became the lasting legacy of *Bakke* and a roadmap for lower courts and universities grappling with

the issue. In that concurrence, Powell opined that all racial classifications were "suspect" and deserved strict scrutiny. For Powell, however, strict scrutiny did not mean an absolute prohibition. Rather, he advocated an admissions program "flexible enough" to treat race as a "plus" in a particular applicant's file.

Twenty-five years later, the court formally embraced Powell's formulation. In *Grutter* , a 5-4 majority reaffirmed Powell's view that student diversity was a compelling state interest. The court adopted this holding with respect to the admissions policy of the University of Michigan's law school, which analyzed applicants on a variety of variables, including race. Writing for the majority — along with Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer — O'Connor wrote that diversity was "essential" to ensuring that "all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America." Justices William Rehnquist, Antonin Scalia, Anthony Kennedy and Clarence Thomas dissented because, in their view, the law school's admissions policy operated as an impermissible racial quota.

Fisher

Only nine years after deciding *Grutter* — and with only three of the nine *Grutter* justices replaced — the Supreme Court has chosen to return to the subject of affirmative action in *Fisher* . This case presents a factual profile similar to *Grutter* . In *Fisher* , two white students sued the University of Texas, claiming that they were denied admission because of the university's use of diversity initiatives and that less-qualified minority students were admitted to the university on the basis of race.

This admissions policy closely paralleled the policy that the Supreme Court approved nine years ago in *Grutter* . The University of Texas (UT) used "The Top 10 Percent Plan" in its admissions policy to grant automatic admission to any Texas resident graduating from a Texas high school at the top 10 percent of the class. To fill remaining class spots, the university considered many variables, including race. The district court granted summary judgment to UT, concluding that the university's policy was constitutional pursuant to *Grutter* .

The 5th U.S. Circuit Court of Appeals agreed with the district court. The court refused to second-guess UT's "good faith" use of race in its admissions standards but cautioned that UT's race-conscious admissions programs could not continue "in perpetuity." In a concurring opinion, Judge Emilio Garza, in a begrudging concurrence, openly called for a re-examination of *Grutter* . He stated that " *Grutter* represents a digression in the course of constitutional law" and that "today's opinion is a faithful, if unfortunate, application of that misstep."

Garza explained that the outcome of any race-based policy was the same — "a determinative benefit based on race" — and that there was simply no way for such affirmative action policies to overcome the mandates of strict scrutiny. How, he asked, could one distinguish between (1) merely adding points to an admissions score based on race, and (2) adding points to an admissions score based on race while considering the candidate as a whole?

The 5th Circuit denied rehearing en banc by a 9-7 vote, and the students took their case to the Supreme Court. Fisher's petition for certiorari argued that the university's policies were designed to produce a mix of students that mirrored the racial composition of the state of Texas — in other words, a quota system that fell outside the scope of *Grutter* . Fisher, moreover, went one step further to argue that, even if UT's policies fell within *Grutter* 's guidelines, *Grutter* should be overruled.

Supreme Court Review

"Why" is perhaps the most interesting question attending the Supreme Court's decision to consider *Fisher* in October 2012. It is doubtful that the court would have granted certiorari just to affirm the 5th Circuit when there is no apparent split of authority among the lower courts and *Grutter* is not even 10 years old. Five of the nine justices from *Grutter* remain on the court, and those justices are not wont to review major constitutional issues simply for the opportunity to say "ditto." Thus, reversal seems likely, but on what grounds? Is it simply that the 5th Circuit misapplied *Grutter* , or does it reflect a more fundamental

movement to scale back *Grutter* , perhaps even altogether?

There is good reason to believe that a fundamental shift is coming. Three of the *Grutter* dissenters — Scalia, Thomas, and Kennedy — remain on the court today. Since *Grutter* was decided, the court has added two justices who are well-known opponents of racial preferences: Chief Justice John Roberts and Justice Samuel Alito. Indeed, Roberts wrote the 5-4 majority opinion in *Parents Involved in Community Schools v. Seattle School Dist. No. 1* , a 2007 case in which the court held that assigning students to public schools for the purpose of promoting racial balance was not a compelling state interest.

In that opinion, Roberts stated his jaundiced view of affirmative action quite succinctly: "The way to stop discriminating on the basis of race is to stop discriminating on the basis of race."

Breyer has openly noted the potential for jurisprudential change in this area because of the court's new composition. In his dissent in *Parents Involved* , Breyer ruefully observed: "It is not often in the law that so few have so quickly changed so much." Moreover, Breyer and the other so-called "liberal" justices will be forced to battle this apparent majority without the aid of the newest justice, Elena Kagan, who recused herself from the case because she participated in it earlier as solicitor general. Kagan would only be one vote — and her absence does not obviate the need for a five-justice majority to overturn *Grutter* — but she has quickly established herself as a powerful, persuasive voice on the court whose presence will be missed, especially by the remaining justices from the *Grutter* majority.

The court appears poised to hear oral argument in the case in October 2012 — just in time to highlight the importance of the court's changing composition to a country soon voting for its next president. •

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