**The Vermont Connection**

Volume 35 *(Re)creating New Domains: The Future of Higher Education*

Article 14

January 2014

# Affirmative Action Programs: Is the "Sun Setting" on Racial Preferences?

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# Affirmative Action Programs: Is the "Sun Setting" on Racial Preferences?

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*Affirmative Action programs originally were meant to create equal opportunities for historically marginalized students across institutions in the post-Civil Rights era (Backes, 2012; Kellough, 2006). Administrators in the United States grapple with the implementation of programs to increase the number of women and students of color into colleges and universities. The legality of these programs are under scrutiny; the Supreme Court heard two cases in 2013 involving affirmative action programs (Jaschik, 2013a). One involved the University of Texas when they denied Abigail Fisher admission in 2008. Another involved the state of Michigan barring state universities and colleges from considering issues such as race or ethnicity in admissions. This article takes a legal standpoint of the development of the Supreme Court's stance on affirmative action and explores policy implications.*

Since the end of the Civil Rights Era, institutions across the nation have grappled with how best to enhance educational opportunities for historically marginalized groups such as women and racial or ethnic minorities (Kellough, 2006). Over the years, as the courts changed leadership, the signals from these government entities shifted. Now with recent events involving both the states of Texas and Michigan, higher education professionals are at a crossroads in understanding how to best approach admissions policies. In response to challenges regarding policies many states began to ban public institutions from considering race in their admissions programs (Backes, 2012).

The Supreme Court has not been able to provide a clear formula for how to approach these issues. The judges struggle to discern whether affirmative action is an appropriate measure, or a specific case is constitutional (Marlowe, 2011).

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There are various implications for administrators and campus communities across the nation, and the development of this policy issue will drastically change the landscape of who has access to American higher education. In a continually diversifying world it is important for student affairs professionals to create campus environments that mirror accurate representation of racial demographics in the United States.

Examining the Supreme Court's decisions over the past several decades provides some insight into how this policy issue has and will develop. Spann (2000) argues, "[i]n the early years, the Supreme Court gave qualified support to the concept of racial affirmative action, but in recent years, a majority of the Court has consistently opposed affirmative action programs" (p. 1). This article explores the different eras of affirmative action as it applies to higher education admissions criteria, how Supreme Court judges have grappled with the different issues presented, and what signals they have left for institutions to approach these situations in the future. As we begin to reach what the Court has deemed as a "critical mass" (*Grutter v. Bollinger et al.,* 2003) we will observe the decline of race based affirmative action in exchange for a more race-neutral alternative.

## The Emergence of Affirmative Action Programs

During the Civil Rights Era courts were faced with many questions concerning race relations. As each area of the country had its own approach, the Supreme Court felt it necessary to intervene. Prior to this time period the Supreme Court provided no clear guidance on how to approach these situations. Scholars argue that in cases concerning *United States v. Carolene Products Co.* (1938), *Skinner v. State of Oklahoma, ex. rel. Williamson* (1942), and *Korematsu v. United States* (1944) the Court was able to pave the way for some standard of review. However, the landmark case of *Brown v. Board of Education*[1] (1954) stands as the true turning point (Marlowe, 2011). The Court began telling states and local entities to stop using race or ethnicity as a means to racially segregate students. Racial affirmative action is more broadly defined as, "the race-conscious allocation of resources—resources such as jobs, educational opportunities, and voting strength—that is motivated by an intent to benefit racial minorities" (Spann, 2000, p. 3).

Following the *Brown v. Board* (1954) decision, lawmakers were encouraged and supported by the Court to create racial remedies, and through a series of executive orders by John F. Kennedy institutions of learning began using race-conscious policies as a means to combat former constitutional violations (Spann, 2000). Simply put, "[a]ffirmative action developed as a means of combating such discrimination and its effects" (Kellough, 2006, p. 145). Policymakers and

1 Further referred to as Brown v. Board.

administrators alike enacted programs that used race-based pupil assignments and cross-city busing systems to achieve a more racially balanced education system (Spann, 2000).

Fifteen years later the Court heard the first challenge to affirmative action programs in higher education with *DeFunis v. Odegaard* (1974). The Court avoided making a judgment by claiming that the issue was moot given that DeFunis was about to graduate law school from a different institution. This case in particular was a clear indication of two things—growing contention amongst the greater society, and a Court "unable to agree upon anything other than the contentiousness of the affirmative action issue" (Spann, 2000, p. 14). The Court findings were a sign of growing discomfort and eventual backlash of affirmative action policies.

## Rising Contention Against Affirmative Action

### Regents of the University of California v. Bakke

Leading up to the Regents of the *University of California v. Bakke* [2](1978) decision, many institutions began using quota systems as a means to increase the number of students of color in their campus communities (Kellough, 2006). In this instance Allan Bakke, a White student, was denied admission to the University of California (U.C.)—Davis, School of Medicine, "while African-American students with lower qualifications (as measured by the University) were admitted" (Kellough, 2006, p.100). This was due to a quota system backed by University officials that set aside 16 seats for students of color. The Court was split and failed to come to a majority decision. As Marlowe (2011) states:

> With no majority opinion in any direction, a total of five justices believed that affirmative action programs could be constitutionally acceptable under the right circumstances, five felt that the U.C. Davis program in particular was impermissible, and one advocated applying the same strict scrutiny analysis to affirmative action programs that the Court applied to classifications that disadvantaged minorities. (p. 102)

This split would later create difficulties for institutions to find constitutional admissions criteria, but ultimately the decision laid the framework by which we evaluate cases concerning race-based programs today.

The decision of the case was in favor of Bakke and the Court held that he should be admitted into the medical school. The Court also struck down the use of quota systems and sent a message to institutions that they must find a narrowly tailored plan to diversify their student populations (Kellough, 2006; Marlowe,

2 Further referred to as Regents v. Bakke.

2011; Perry, 2007; Spann, 2000). Justice Powell advocated for a review of "strict scrutiny" [3] he provided a prelude for the argument that these programs must prove a compelling government interest in giving preferential treatment to different classifications of persons. Also the policies must be narrowly tailored to meet those interests (*Regents of the University of California v. Bakke,* 1978). Following the *Regents v. Bakke* (1978) decision, lower courts often clarified and applied strict scrutiny. It was not until the new millennium that the Court heard another affirmative action case directly involving higher education.

**Gratz and Grutter v. Bollinger et al.**

Leading up to the landmark decisions in *Gratz v. Bollinger et al.* [4] (2003) and *Grutter v. Bollinger et al.* [5] (2003), lower courts struggled to reconcile next steps regarding affirmative action programs. State governments began proposing pieces of legislation that would invalidate affirmative action programs. As Kellough (2006) writes:

> [i]n the mid- to late 1990s, a number of Republican members of Congress urged passage of a "civil rights bill" that would end federal government affirmative action efforts… as many as fifteen states had the issue placed on their legislative agendas in 1997, at a time when anti-affirmative action rhetoric was reaching a high point. (p. 57)

In 2003 the Court agreed to hear two cases involving the University of Michigan's (UM) admissions process. Jennifer Gratz and Patrick Hamacher both applied for undergraduate admission to UM and both were denied admittance. Similarly, Barbara Grutter applied to UM's Law School and was also denied admittance. In these cases the court attempted to clarify what was and what was not permissible in affirmative action policies.

The undergraduate admissions policy at UM gave students of color a certain point total towards their application that would ultimately guarantee their admission to the University. Many White applicants were turned away as a result (Marlowe, 2011). When the 6-3 decision came down in favor of Gratz and Hamacher it was clear what stance the Court was taking at that time. As Perry (2007) summarizes:

> Justice Powell in *Bakke* had required individual assessment of applicants, and he demanded that no single characteristic in a candidate's file should determine admission. UM's review of applications was not individualized,

3 Strict scrutiny standard of review is used by the Court to review cases that involve racial discrimination. It holds that an entity must have a compelling interest for taking race into consideration and the process must be narrowly tailored to meet that interest.

4 Further referred to as Gratz v. Bollinger.

5 Further referred to as Grutter v. Bollinger.

> and admissions officers' option of "flagging" applications for additional review could not save the policy from its illegal flaws. (pp.150-151)

The difference manners in which the candidates were reviewed divided the Court (Kellough, 2006; Marlowe, 2011; Perry, 2007). Separating out candidates based on racial or ethnic status is impermissible (*Gratz v. Bollinger et al.*, 2003; *Grutter v. Bollinger et al.*, 2003).

In *Grutter v. Bollinger* (2003) the Court affirmed UM's law school admission policy. Justice O'Connor, writing for the majority, held that the plan was narrowly tailored to meet the institution's interest of diversity, and that individuals were evaluated in a way where race or ethnicity was not the predominating factor (*Grutter v. Bollinger et al*, 2003). The majority upheld what Justice Powell had previously ascertained in *Regents v. Bakke* (1978), creating a diverse student body was still a compelling government interest. The justices also asserted that strict scrutiny applies in cases involving race-based discrimination (Kellough, 2006), but one of the more interesting pieces was the concept of "critical mass" and how it sets the stage to end race-conscious affirmative action programs.

The term "critical mass" is derived from the opinion Justice Powell gave in the *Regents v. Bakke* (1978) decision when he was discussed the Harvard Model—achieving "meaningful numbers" of students of color in order to avoid leaving underrepresented students feeling isolated (*Regents of the University of California v. Bakke*, 1978). Justice O'Connor in the *Grutter v. Bollinger* (2003) opinion also writes:

> [w]e take the Law School at its word that it… will terminate its race-conscious admissions program as soon as practicable. It has been 25 years since Justice Powell first approved the use of race to further the interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and tests scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today. (pp. 341-342)

This quote essentially sets a timer, or what many people call a "sunset" period when race-conscious affirmative action will no longer be of use (White, 2013).

These two decisions represent a growing divide among the justices, and a change in jurisprudence is occurring. As Marlowe (2011) surmises, "[t]his regime period follows the life cycle pattern of initially struggling to establish a governing doctrine… then showing some signs of deterioration" (p. 128). What Marlowe is highlighting is the ebb and flow of ideological difference among justices in the Court. As new presidential appointments are made, the standards will change depending upon how the justices view the legal applicability of race-conscious affirmative action programs. The University of Texas (UT) case this past year

was closely watched because it could have either reaffirmed the *Gratz v. Bollinger* and *Grutter v. Bollinger* decisions, or created a new era for evaluating affirmative action programs in higher education.

## Recent Issues Before the Court

### Fisher v. University of Texas at Austin

UT and many institutions around the nation began changing their admissions process dramatically after 2003. UT adopted a plan that would allow the top 10% of Texas high school graduates automatic admission to their University. The program was expected to meet the institution's diversity goals because many Texas high schools enroll predominantly students of color (Carey, 2012; Jaschik, 2013a; White, 2013). Along with the top 10%, each student had a calculated index (otherwise known as the "Personal Achievement Index") that generated a score for each applicant based on a consideration of six factors. Among those six factors, in the "special circumstances" section, race could be one of the considerations (White, 2013). Leading up to the *Fisher v. University of Texas at Austin* [6] (2013) case several other decisions came down previewing how the Court was evolving on the issue of race-conscious programs. Carey (2012) recalls, "Roberts wrote that 'the way to stop discrimination on the basis of race is to stop discriminating on the basis of race'" (para. 2). This was a popular sentiment from other justices serving on the Court and represented a growing disagreement regarding affirmative action programs. Kellough (2006) argues that many people felt that discrimination was no longer an issue for women and People of Color. In the case of *Fisher v. UT*, the two categories were pitted against each other.

Abigail Fisher, a White woman, in 2008 applied for undergraduate admission at UT's flagship campus in Austin. After UT denied Fisher admission, she filed a lawsuit claiming that the institution's consideration of race in their admissions policy was unconstitutional under the Equal Protection Clause (Tilsley, 2012). While Fisher did not prevail in the lower courts in asserting her claim, the Supreme Court decided to hear the case upon her appeal. The decision by the Court in June 2013 found that the Fifth Circuit had not applied "strict scrutiny" to UT's policies, but failed to offer a "definitive opinion on whether colleges may consider the use of race in admissions" (Jaschik, 2013b, para. 1). The Court asserted that, under certain circumstances, relying on an applicant's racial or ethnic identity is acceptable, but could not rule on UT's policy without sending it back to the lower federal court (Jaschik, 2013b; White, 2013). Even after a decade of the *Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003), decision the court has not fully come to a consensus on how to approach affirmative action in

6 Further referred to as Fisher v. UT

American higher education. However, the ruling still conveys that diversity is a compelling government interest.

**Schuette v. Coalition to Defend Affirmative Action**

The newest case to be considered by the Court is one involving a measure that was passed by Michigan voters in 2006 (Proposition 2) that would not allow public universities to consider race or sex in admissions decisions (Jaschik, 2013a). This vote resembles many other bans by other states, such as California, and has exponential legal ramifications across the nation. Jaschik (2013a) writes, "the Sixth Circuit—in two rulings… found that proposition 2 was unconstitutional. But those rulings have been stayed, pending this appeal" (para.3). This case raises an entirely different question—whether or not is it lawful for legislative bodies to prohibit the use of race or ethnicity in admissions. The question is fundamentally different from the *Fisher v. UT* case, but both speak to the larger issue (White, 2013). *Fisher v. UT* (2013) asks if affirmative action violates Equal Protection, and the Michigan case asks whether a ban on affirmative action violates Equal Protection (White, 2013). In the coming months it will be interesting to see whether the Court makes a definitive statement on affirmative action or chooses to dodge the issue entirely.

## Conclusion

Affirmative action has changed considerably since the era of *Regents v. Bakke* (1978). Yet in every Court ruling diversity is a compelling interest by institutions and satisfies the first test of the strict scrutiny standard (Jaschik, 2013b; White, 2013). Admissions policies change to meet the requirements set by the Court, and there is an observable shift as the Court is requiring more institutions to look at race-neutral alternatives. As Justice O'Connor mentioned in the *Grutter v. Bollinger* (2003) decision, the time of race-conscious affirmative action is coming to an end. Many higher education professionals and commentators have advocated for the use of socio-economic status as a new way to create diverse student populations (The Century Foundation, 2012; Kahlenberg, 2013). The Court's decision is critical moving forward because "[i]f the Court instead requires universities to use race-neutral alternatives… the effect would be to flip the emphasis so that class counts a great deal and race counts very little" (Kahlenberg, 2013). The "sun is setting" on the post *Regents v. Bakke* (1978) style of affirmative action. This marks the dawning of a new era that is more focused on socio-economic status as a tool to create diverse populations on college campuses.

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