Addressing Affirmative Action Within Higher Education:

Fisher v. University of Texas (2016)

Rose Hunskor

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Contemplating Constitutional Claims: Main Case Overview

Is it permissible to practice affirmative action, or are there instances in which it violates the Equal Protection provisions of the Fourteenth Amendment? In Supreme Court Case *Fisher v. University of Texas at Austin,* 579 U. S. (2016), the justices grappled with this case of compelling interest. Student Abigail Fisher applied to the undergraduate program at the University of Texas at Austin, seeking admission in 2008. The university, in order to strengthen diversity amongst their student body, instated a new policy in which all in-state high school students who graduated in the top ten percent of their class would be granted automatic admission. Other students not ranked in the tenth percentile would be pooled with general admission students, and race would become a factor to consider. Fisher, a white female, though not graduating within the tenth percentile of her class, applied for admission. Fisher was denied general admission and filed suit against the University of Texas on the grounds that the school's consideration of race in their general admissions process had discriminated against her because of her race, resulting in a violation of the Fourteenth Amendment's Equal Protection Clause. The university argued that they must uphold a race-conscious admissions process to increase populations that were previously underrepresented.[1]

Both Fisher and the University of Texas argued whether UT's admissions policy satisfied strict scrutiny, a form of judicial review required of any action that may compromise constitutional rights to ensure it restricts constitutional privileges as little as possible. The main components involved in this process are narrow tailoring and compelling government interests. For a practice to be considered for strict scrutiny, the Court must first declare that it is furthering

[1] "Fisher v. University of Texas," Oyez, https://www.oyez.org/cases/2012/11-345, (Accessed December 1, 2020).

a compelling interest, meaning this act is so valuable they are willing to compromise some rights to achieve whatever benefit it may produce. Fisher's legal representation believed that "the University has not articulated its compelling interest with sufficient clarity…[they] must set forth more precisely the level of minority enrollment that would constitute a "critical mass." Without a clearer sense of what the University's ultimate goal is… a reviewing court cannot assess whether the University's admissions program is narrowly tailored to that goal." However, UT argued that the "impact of racial consideration [was] minor." They stated: "the Court has recognized that a university is entitled to make 'an academic judgment' that the pursuit of such diversity is 'integral to its [educational] mission.'" [2] Both petitioner and respondent addressed the central conflict of whether the University's plan was narrowly tailored; Fisher felt that UT's admissions process lacked clarity in accomplishing its intended goals, whereas UT argued that race was only considered as a factor in a small portion of admissions, highlighting that their holistic review process was as narrowly tailored as possible. However, the narrow tailoring of college admissions cannot necessarily be measured by a numerical value, which made the Court's investigation of UT's admissions process incredibly complex. The University's plan was enacted with the purpose of considering race as a factor in admissions solely in pursuit of diversifying their student body, which would benefit the education of all students. If the admissions policy did not execute this plan with the least restrictive measures as possible, that plan would fail to meet the burden of strict scrutiny.

The Court ruled 4-3 in favor of UT's practices, highlighting the fact that the program was both narrowly tailored and satisfied a compelling state interest. The Court addressed all aspects

[2] *Fisher v. University of Texas at Austin*, 579 U. S. (2016), Supreme Court of the United States, https://www.supremecourt.gov/opinions/15pdf/14-981_4g15.PDF, (Accessed December 1, 2020).

of Fisher's multifaceted argument, including her belief that the University had failed to determine when a critical mass of students had been achieved. In response, Justice Kennedy, delivering the majority opinion, stated: "the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining "the educational benefits that flow from student body diversity."" [3] The University was looking to create an environment of equity and representation that served an entire institution and its population, while Fisher's limited perspective and personal goals were a hindrance to seeing the necessity of a fluctuating and qualitative admissions process. The University's decision to utilize a holistic review process was not a violation of the Fourteenth Amendment because rather than admitting a proscribed, "magic number" of diverse students each year, they recognized the value in simply aiming to have a community of diverse perspectives and experiences. Once that goal was visibly achieved, only then could there be a sufficient number of minority students on campus. The Court additionally addressed Fisher's claim that the admissions program had only a small impact on diversity percentages and was unnecessary due to the preexisting race-neutral policies, such as the Ten Percent Plan. Kennedy retorted that "it is not a failure of narrow tailoring for the impact of racial consideration to be minor. The fact that race consciousness played a role in only a small portion of admissions decisions should be a hallmark of narrow tailoring, not evidence of unconstitutionality." [4] The review process at UT allowed for all aspects of a student to be considered when being admitted, not just their race. The fact that race was one factor in an entire holistic review process proved that UT's consideration of race in their

[3] *Fisher v. University of Texas at Austin*, 579 U. S. (2016).
[4] *Fisher v. University of Texas at Austin*, 579 U. S. (2016).

admissions program was as restrictive and narrowly tailored as possible, thus satisfying strict scrutiny.

Justice Alito provided a dissenting opinion in which he claimed that the Court left too much up to the University, meaning the University was wrongly given the freedom to define its critical mass how they saw fit. Alito proclaimed: "UT prefers a deliberately malleable "we'll know it when we see it" notion of critical mass."[5] UT defined critical mass as being an adequate representation of diverse students so that the educational benefits that flow from diversity are present. Alito took issue with the fact that there is no numerical value attached to this "goal". However, as recognized by Kennedy, the University articulated precise goals, such as breaking down stereotypes and promoting "cross racial understanding" amongst their student body. Additionally, assigning a numerical number to UT's definition of critical mass would isolate students of color and undermine their goal of offering underrepresented perspectives.

Justice Ginsburg concurred with the Court, providing a stance almost exactly opposing Alito's, stating that "the University's admissions policy flexibly considers race only as a "factor of a factor of a factor of a factor" followed a yearlong review through which the University reached the reasonable, good-faith judgment that supposedly race-neutral initiatives were insufficient to achieve... the educational benefits of student-body diversity."[6] UT's narrowly tailored admissions process only looked to achieve the bare minimum, meaning that they made race as small of a factor as they could without disregarding its educational value. Ginsburg also highlighted the fact that the University was not aiming to enroll a certain number of minority

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[5] *Fisher v. University of Texas at Austin*, 579 U. S. (2016).
[6] "Fisher v. University of Texas," Oyez.

students, but rather used their "good-faith judgment" to enroll a student body that enriches each student's experience and prepares them for the reality of life beyond the college campus.

Justice Thomas stated his views in the initial 2013 case, ultimately voting against the University and fundamentally disagreeing with many aspects of the Court's ruling. Thomas stated: "The Constitution does not pander to faddish theories about whether race mixing is in the public interest…All applicants must be treated equally under the law, and no benefit in the eye of the beholder can justify racial discrimination."[7] Thomas and many others interpreted the Equal Protection Clause as a colorblind, race-neutral statement. However, this viewpoint neglects to recognize that our country is place where racial classification affect a person's opportunities. Until such systemic issues are addressed in full, people cannot be "treated equally under the law," and the need for affirmative action remains paramount.

Fisher reinforced the idea that qualified minority students are deserving of an equal college education without facing the systemic barriers established to prevent them from succeeding in this goal. Educational institutions around the nation have looked to the Court's ruling to construct programs that allow minority experiences and perspectives to be uplifted and supported on their campuses, thus providing a rich, diverse learning environment from which all students benefit. In addition, this decision reinforced the idea that race-conscious admissions will require constant and meaningful reflection to meet the specific needs of each individual institution and emphasized the role educational systems play in shaping diverse leadership for our future.

[7] "Fisher v. University of Texas," Oyez.

Setting the Scene: Precedent Summary #1

Allan Bakke, a white male, graduated as a National Merit Scholar from his high school with a GPA of 3.51. Bakke went on to join the Marine Corps and served four years including seven months in Vietnam. He then worked for NASA as an engineer, until he decided to become a doctor. Bakke scored remarkably well on the Medical College Admissions Test, and he was deemed a "well qualified student" during an interview with the prestigious University of California, Davis School of Medicine. Bakke applied to UC Davis in 1973 and 1974, and despite his outstanding qualifications, both applications were rejected.[8] The Medical School of the University of California had instated a "special admissions program," which was operated separately from the general admissions. This program was designed with the intention to integrate minority groups into the school's educational programs. The special admissions process was conducted similarly to the general admissions process, one difference being the minority applicants did not have to meet the minimum 2.5 GPA set for general applicants. The school also set a prescribed amount of minority students, admitting 16 applicants of color out of 100 students per class. In Supreme Court Case *Regents of The University of California v. Bakke,* 438 U.S. 265 (1978), Bakke, after his second rejection, filed suit against the school on the grounds that the University of California had set a direct quota of diversity that discriminated against his race, and that a significant number of admitted minority students were extremely underqualified compared to his application. The school argued that its special admissions process was both lawful and integrative.[9]

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8 "Allan Bakke: The Applicant and Plaintiff," The Civil Rights Movement, February 19, 2015, https://civilrightsmovement.blogs.wm.edu/2015/02/18/allan-bakke-the-applicant/, (. Accessed April 27, 2021).

9 Alex McBride, "Regents of University of California v. Bakke (1978)," PBS, https://www.thirteen.org/wnet/supremecourt/rights/landmark_regents.html#:~:text=Bakke%20(1

The central constitutional claims made by each side offered interpretations of the Fourteenth Amendment, mainly arguing whether it granted a school the ability to infringe on a particular student's rights in order to serve a compelling interest. Reynold H. Colvin, the lawyer representing Bakke, argued that the quota set by UC Medical School violated Bakke's rights that are protected under this amendment. Colvin stated that the school rejected Bakke "not because of somebody else's race or anything else, but because of Mr. Bakke's race…he becomes ineligible to enter the medical school and…He has a right to that protection…he is entitled to enter that medical school [and] to keep him out because of his race we submit is an impropriety."[10] The impropriety that Colvin discussed relates to the "protection" Bakke should be granted under the Equal Protection Clause of the Fourteenth Amendment, which is a right to equal opportunities without bias or discrimination. Bakke was a qualified student with credentials worthy of acceptance, and Colvin believed he was being discriminated against because he did not satisfy the University's diversity quota. However, the University claimed:

> It may be more important to have a qualified member of a minority there than it is to have somebody whose benchmark was higher, and this is the kind of judgment that has to be made…We submit first that the Fourteenth Amendment does not outlaw race-conscious programs where there is no invidious purpose or intent where they are aimed at offsetting the consequences of our long tragic history of discrimination and achieving greater racial equity.[11]

Race-conscious admissions programs are not only constitutional, but important to addressing the broader implications of racism, thereby creating a valuable and diverse learning environment. The University had no "invidious purpose or intent," meaning they created the special

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,In%20Regents%20of%20University%20of%20California%20v.,was%20constitutional%20in%20some%20circumstances. (Accessed January 20, 2021).

10 "Regents of the University of California v. Bakke," Oyez, https://www.oyez.org/cases/1979/76-811, (Accessed January 21, 2021).

11 "Regents of the University of California v. Bakke," Oyez.

admissions program without the intent of discriminating against certain racial groups and instead sought to foster an environment of "greater racial equity". UC Davis recognized that the degree of qualification differed among special vs. general applicants but claimed that the idea of what constitutes a qualified individual is not solely based on test scores and GPAs. Due to the systemic barriers starting at the lowest levels of education, minority students, compared to their white counterparts, have statistically been placed at a disadvantage to receive high test scores and GPAs. If UC Davis fails to address the "history of discrimination" in our country, minority students will lack a space that uplifts and empowers them, and instead will find themselves in yet another environment that perpetuates a cycle of deeply embedded prejudice and discrimination.

The Supreme Court of California did not reach a single majority conclusion on any aspect of the case. Given the multifaceted arguments presented by both petitioner and respondent, the Court first ruled 5-4 that the Equal Protection Clause prohibits the university's specific racial quotas and that Bakke be admitted. However, the Court also decided that race-conscious admissions programs in their entirety are not unconstitutional, but only if race is considered alongside other factors and on a case-by-case basis. Justice Powell, delivering the majority opinion in support of Bakke's argument, stated, "It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others."[12] The University's program was not one of equality, but of preferential treatment. It is unconstitutional to require certain students of a majority group to suffer losses so that other racial groups in the minority can succeed.

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[12] *Regents of The University of California v. Bakke*, 438 U.S. 265 (1978), Supreme Court of the United States, http://cdn.ca9.uscourts.gov/datastore/general/2017/11/21/University%20of%20California%20Regents%20v.%20Bakke,%20438%20US%20265%20-%20Supreme%20Court%201978%20-.pdf, (Accessed January 20, 2021).

Additionally, a quota system like the one at UC Davis perpetuates the idea that without preferential treatment, minority groups are unable to thrive. Thus, it cannot be lawful for any school to create a percentage of a student body based solely on their race. However, the Court also stated that "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity."[13] The idea of "genuine diversity" relates to the compelling interest that justifies the consideration of diversity in admissions. Requiring a stagnant number of students of a certain ethnicity be admitted each year does not achieve true, genuine diversity. Instead, quotas ignore the qualities of diversity that would truly add educational value, such as the experiences and identities that shape a student and allow them to bring a unique perspective to the classroom. The Court, despite naming quotas as unconstitutional, endorsed affirmative action programs that aim to both offset past discrimination and admit a student body with a wide range of perspectives.

Justice Thurgood Marshall provided an opinion that both concurred with parts of Powell's argument and dissented from others. Justice Marshall believed that it is permissible to consider race as a factor in a student's application. However, he dissented from the majority opinion that the University's admissions program was unconstitutional. Marshall stated:

> Neither its history nor our past cases lend support to the conclusion that a university may not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors in this country… These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination."[14]

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[13] *Regents of The University of California v. Bakke,* 438 U.S. 265 (1978).
[14] "Regents of the University of California v. Bakke," Oyez.

Marshall, being the only person of color on the Supreme Court at the time, spoke from his experience as a black man and addressed the Court solely with the intent to educate and share a valuable perspective. He made the case that after centuries of experiencing deeply rooted discrimination in all areas of life, people of color - more specifically, African Americans - are deserving of "special treatment" as a form of reparations. The notion of "colorblindness" must be rejected in our society; rather than refusing to acknowledge the legacy of discrimination and bigotry in our country, we must face its effects and look to create educational opportunities that consider one's race to create not only an inclusive society, but a society where people of color thrive and have influence. Thus, UC Davis' admissions policy would not be considered unconstitutional because it afforded minority groups "greater protection" and the chance to achieve greater opportunities at a high level, and in turn diversify the field of medicine.

Justice Brennan concurred in part and dissented in part from the Court's decision, believing the usage of race-conscious admissions programs to be acceptable and encouraged when executed properly. Brennan stated: "because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications… to justify such a classification, an important and articulated purpose for its use must be shown."[15] The usage of certain admissions processes can be problematic in that they further perpetuate and stigmatize racial divides. The "invidious classifications" that Brennan references are grouping members of the same race into one unit and forcing those students to become spokespersons for their entire racial group. Additionally, Brennan concurred with Powell reiterating that even though race-conscious admissions programs can be "established for ostensibly benign purposes," they can cause greater harm than good.

[15] "SPAN Landmark Cases: Regents Univ Cal v Bakke," C-SPAN, http://landmarkcases.c-span.org/Case/27/Regents-Univ-Cal-v-Bakke, (Accessed January 24, 2021).

Thus, it is the responsibility of educational institutions to provide ample evidence to show the specific benefits of a race-conscious admissions program on their campus. This will ensure that each program satisfies compelling interest, meaning they are necessary to promoting the general welfare of their students.

Justice Stevens concurred with Powell's statement that UC Davis' admissions program was unlawful but instead of the Constitution, he used Title VI of the Civil Rights Act of 1964 as the reasoning behind his beliefs. Title VI decrees that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." After this citation, Stevens stated: "In order to interpret this unusually clear colorblind statute, there is no need to decide whether the Constitution is also colorblind."[16] Stevens held that the "colorblindness" of Title VI was the only necessary piece of legislation to examine, and that the constitutionality of the special admissions at UC Davis was irrelevant. Although he believed that the standards set forth in Title VI were sufficient in proving the discrimination upheld by UC Davis, he was still in agreement with Justice Powell's decision that quotas harm, rather than protect, a student's right to equal educational opportunities.

Bakke was a landmark case, establishing a legal precedent for affirmative action in higher educational institutions. The case struck down the usage of strict racial quotas, which regulated the admissions policies of universities around the country. Through this case, the Supreme Court acknowledged that genuine diversity on a college campus furthers the education of all students; with greater diversity comes richer experiences from which all students benefit. Institutions such as UC Davis are molding the minds of our future leaders, and it is imperative these people are

[16] "Regents of the University of California v. Bakke," Oyez.

from myriad backgrounds. The way in which this level of diversity is accomplished is through equitable admissions policies from institutions that are dedicated to promoting all voices, not just those in the majority.

Furthering the Facts: Precedent Summary #2

On April 1st, 2003, protesters of all ages swarmed the United States Supreme Courthouse, holding signs stating, “DEFEND AFFIRMATIVE ACTION!!” and “SUPPORT Affirmative action and Integration, FIGHT for Equality”. The demonstrators, primarily people of color, marched to the courthouse, eyes ablaze with passion and fervor. They marched for their right to a fair and equal education, hoping to encourage the Supreme Court to listen to minority voices as *Grutter v. Bollinger* 539 U.S. 306 (2003) was heard for the first time in front of the Court. Barbara Grutter, a white female with a 3.8 GPA and 161 LSAT score, was undoubtedly a good student. However, she was denied admission to one of the top law schools in the country, the University of Michigan Law School. Grutter filed suit against the University, more specifically the Dean, Lee Bollinger, on the grounds that her rejection was due to the University’s “predominant” consideration of race as a factor in prospective students’ applications. Grutter believed that the admissions process allowed minority students a greater chance of admission over white students with equal qualifications. The University argued that their admissions policy was narrowly tailored because each application was extensively reviewed to examine all aspects of the applicant, with additional weight given to a student’s race. This dedication to diversity grants students who may otherwise be underrepresented due to their race, a chance to succeed at an elite academic level. Ultimately, the law school’s goal was to strengthen the field of law by ensuring that students of all backgrounds are able to practice this profession.[17]

17 "Grutter v. Bollinger.”, Oyez, https://www.oyez.org/cases/2002/02-241, Accessed February 5, 2021.

Crucial to Grutter's argument was a key provision in the Constitution: The Equal Protection Clause of the Fourteenth Amendment. Grutter's lawyer, Mr. Kolbo, stated: "The Constitution provides individuals with the right of equal protection. And by discriminating on the basis of race at a point of competition, innocent individuals are being injured in their constitutional rights. That's the distinction between that and simply trying to cast a wider net, recruiting…a very principal line."[18] The point of "competition" that Kolbo refers to is when students are competing against each other for the same spot, which, in this case, is admittance to the University. This competition cannot be interfered with, and this, according to Kolbo, is what the University is responsible for. Their race conscious admissions program is injuring students and creating a system in which their right to equal opportunities is vanquished. However, Ms. Mahoney, representing the law school, believed that the University's program was sufficiently compelling enough to take race into consideration when looking at students' applications. She argued that "there is a compelling interest in having an institution that is both academically excellent and racially diverse, because our leaders need to be trained in institutions that are excellent, that are superior academically, but they also need to be trained with exposure to the viewpoints, to the prospectives, to the experiences of individuals from diverse backgrounds."[19] The main question presented by both petitioner and respondent is whether the law school's program was discriminatory. If the school neglected to train their students "with the exposure" to multiple "viewpoints", the students at the University of Michigan would lack the tools to engage in a society with people of all races and economic statuses. Furthermore, students of color experience barriers when applying to schools compared to their white counterparts, and without this program, admission rates would fall for minority groups. This would injure the entire field of law because law schools would lack the crucial diversity to serve the people of our nation.

In a 5-4 decision delivered by Justice O'Connor, the Supreme Court ruled that the University's admissions program was narrowly tailored and did not violate the Equal Protection Clause of the Constitution. O'Connor decreed: "The Law School's claim of a compelling interest is further bolstered by its *amici*, who point to the educational benefits that flow from student body diversity. In addition to the expert studies and reports entered into evidence at trial, numerous studies show that student body diversity promotes learning outcomes."[20] Positive "learning outcomes," including much of what Mahoney had previously argued, lead to the betterment of a student body. A heterogenous society calls for educational institutions that are representative of such an environment, and the reliable evidence provided fulfills the criterion for the program being of compelling interest. O'Connor additionally addressed the issue of whether the school's policy was narrowly tailored to satisfy strict scrutiny. The Court utilized the precedents set by the landmark case *Bakke*, which listed the criteria for constitutional admissions policies within systems of higher education. In order for a program to be narrowly tailored, it cannot use a quota system, which requires that a specified number or percentage of minority group members be admitted. O'Connor stated:

> That a race-conscious admissions program does not operate as a quota does not, by itself, satisfy the requirement of individualized consideration…a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.[21]

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[18] *Grutter v. Bollinger*, 539 U.S. 306 (2003), U.S. Supreme Court, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2002/02-241.pdf, (Accessed February 5, 2021).
[19] *Grutter v. Bollinger*, 539 U.S. 306 (2003).
[20] *Grutter v. Bollinger*, 539 U.S. 306 (2003), U.S. Supreme Court, https://caselaw.findlaw.com/us-supreme-court/539/306.html#:~:text=Held%3A%20The%20Law%20School's%20narrowly,Title%20VI%2C%20or%20%C2%A71981, (Accessed February 5, 2021).
[21] *Grutter v. Bollinger*, 539 U.S. 306 (2003).

The law school aimed for a critical mass of diversity, but its number of minority students varied from year to year to ensure that it did not operate as a quota system. Equally as important, the University aimed for a holistic review process when looking at applications. In order to admit students who would passionately contribute to a diverse learning environment, all applicants were reviewed as personally as possible. This is important to the narrow tailoring of a program because race remained only a small factor in what constituted a qualified student. Justice O'Connor, who wrote and delivered the main opinion, was Republican and moderately conservative. Her political leanings are important in this case because despite affirmative action being typically seen as a more progressive concept, O'Connor's full and undying support of affirmative action and the benefits it engenders proves that this was not an issue of politics, but of human rights and equal treatment.[22]

Justice Ginsburg was one of four justices concurring with Justice O'Connor's opinion. Ginsburg argued that the need for affirmative action programs exists due to the deep-seated discrimination in our country that places minority students at a disadvantage in all walks of life, starting with education. Ginsburg stated that "despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country's finest…institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today's vantage point…over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."[23] "High thresholds," such as the one set by the University of

[22] History.com Editors, "Sandra Day O'Connor," History.com, November 09, 2009, https://www.history.com/topics/us-government/sandra-day-oconnor, (Accessed May 3, 2021).
[23] *Grutter v. Bollinger*, 539 U.S. 306 (2003).

Michigan, are harder for minority students to meet; therefore, progressive policies, such as the one represented in this case, are necessary in remedying the effects of systematic racism. Ginsburg was a victim of intense gender-based discrimination throughout her career in the legal field. As the director of Women's Rights Project of the American Civil Liberties Union, Ginsburg fought against gender discrimination and was successful in arguing six landmark cases before the U.S. Supreme Court. Ginsburg spoke passionately against oppressive forces, such as racism and sexism. She saw firsthand how discrimination, while not racially charged, impacts the oppressed and the goals they aim to achieve. She recognized that the educational foundation laid by our nation must also be reformed, but until then, we must work tirelessly to serve minority groups at all points in their lives, even at the level of graduate schooling.[24]

Justice Thomas, dissenting from the Court's majority opinion, shared his almost exact opposite opinion to Ginsburg's analysis: "The Law School, of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it knows produces racially disproportionate results. Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy."[25] The University's "exclusionary" actions are a result of the high standards set by the school for admission. Instead of maintaining such rigorous academic standards, Thomas suggested that if the University wants to be truly race-neutral, they must lower their thresholds for all students. The school's level of merit is unreachable for minority applicants, and rather than lowering the standards for racially diverse students and maintaining them for white applicants, the way to remedy this issue is by sacrificing some of the school's academic excellence. Justice Thomas was considered the Supreme Court's most

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24 "Ruth Bader Ginsburg," Oyez, https://www.oyez.org/justices/ruth_bader_ginsburg, (Accessed May 2, 2021).

25 *Grutter v. Bollinger*, 539 U.S. 306 (2003).

conservative member and was the second person of color to serve on the Court. Thomas, despite his racial identity, was known for his strong stance against affirmative action. He saw affirmative action as a concept that devalues black individuals' accomplishments and permits people of color to get ahead without working as hard as white students.[26]

Both Ginsburg and Thomas provided thorough analysis of the need for the existence of affirmative action programs, but Justice Kennedy, while dissenting from the Court, applied strict scrutiny to his analysis of the constitutional claims. Kennedy stated that "the Court takes the first part of Justice Powell's rule but abandons the second. Having approved the use of race as a factor in the admissions process, the majority proceeds to nullify the essential safeguard Justice Powell insisted upon as the precondition of the approval. The safeguard was rigorous judicial review, with strict scrutiny as the controlling standard."[27] The University lacked ample evidence to prove that their admissions program was established without the potential to become a quota system. In attaining a critical mass, Justice Kennedy saw that the school engaged in racial balancing, with minority numbers fluctuating by less than a percent each year. If the school's "critical mass" was strictly enforced, it is the view of the dissenting justices that the opportunity for an individualized review is compromised. The University claimed that their critical mass was simply a "goal" and never an enforced numerical value, but the idea of a critical mass is not constitutional if a minimum number of minority students had to be admitted each year.

The Court's ruling in *Grutter* was one of many landmark cases in the realm of higher education. After *Bakke* was decided almost 25 years prior, *Grutter* provided the Supreme Court with the opportunity to refine its stance on affirmative action programs. Colleges around the

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26 "Clarence Thomas," Oyez, //www.oyez.org/justices/clarence_thomas, (Accessed May 2, 2021).

27 *Grutter v. Bollinger*, 539 U.S. 306 (2003).

nation looked to *Grutter* to examine the legality and specificity of their diversity policies. It remained that colleges could use affirmative action, but only in a way that allowed each student's application to be reviewed holistically. Affirmative action remains a crucial component of higher education because it is imperative that we create a society where our lawyers, doctors, engineers, and other civic leaders are diverse and representative of this country as a whole. Through *Grutter*, our Justice system recognized that discrimination cannot be remedied overnight; with just and moral policies, we are one step closer to creating a country of equal opportunities.

Consider the Consequences: Main Case Opinion

I concur with the majority opinion in the case of *Fisher v. University of Texas* in that the University of Texas' admissions program was constitutional, but I would like to respectfully offer different logic for the Court's ruling surrounding the compelling interest in this case. I believe that the compelling interest outlined in *Fisher* and in both precedents is not the educational value that flows from diversity, which primarily benefits non-minority students, but rather the value in uplifting minority voices and experiences. The constitutional interpretation, however, is correct. UT's program fulfills the criteria for strict scrutiny and therefore does not violate the Fourteenth Amendment. Despite the constitutionality in *Fisher*, the Court failed to address the issue of affirmative action as it relates to the discrimination within higher education and all systems in the United States. Rather than looking at how the majority is benefited by diversity, it is imperative that affirmative action policies are established with the intent to provide underrepresented students with opportunities they have been denied due to the systemic barriers in our country.

The Court relied heavily on the decisions made in *Grutter v. Bollinger*, which appropriately affirmed that colleges could use affirmative action programs in their admissions processes, but only in a way that allows each student's application to be reviewed holistically. I believe that a holistic review process is the only way to gain a proper understanding of a student and ensure that all their qualifications are equally evaluated. In *Fisher*, Justice Kennedy utilized the logic displayed in *Grutter*: "As this Court's cases have made clear, however, the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining the educational benefits that flow from student body diversity."[28] The Court correctly recognized that quota systems are unconstitutional because they perpetuate the idea of preferential treatment and ignore the need for holistic assessments of a student's values and experiences. The Court relied on *Grutter's* ruling to ensure that UT's usage of affirmative action had no iota of a quota system because quotas simply do not "justif[y] consideration of race in college admissions". Establishing a holistic review process is important, but the idea of "obtaining the educational benefits of diversity," meaning the value of multiple perspectives in a classroom, is where I take issue with the Court's logic. As stated in my precedent summary, the lawyer representing the University of Michigan in *Grutter* believed that students "need to be trained with exposure to the viewpoints, to the perspectives, to the experiences of individuals from diverse backgrounds."[29] However, it is not all students that need this "exposure to viewpoints", it is white students. The importance of affirmative action, as outlined in *Grutter* and reaffirmed in *Fisher*, is to ensure that white students are gaining such educational benefits and are prepared for a diverse workforce in their future. The Court needs to

[28]*Fisher v. University of Texas at Austin*, 579 U. S. (2016).
[29] "Regents of the University of California v. Bakke," Oyez.

reexamine the idea of promoting affirmative action for the purpose of diversifying classrooms to benefit white students, and instead recognize the root of why these admissions policies are in place: to make our educational institutions more equitable and accessible for minority students and the talents they offer.

The Court relied on much of what was decided in *Regents of California v. Bakke* in that they clearly articulated that quota systems are unconstitutional due to the problematic classifications they engender. As I previously stated, quotas neglect the need for a consideration of not just a student's race, but also their experiences and qualifications. Justice Powell highlighted the effects of racial quotas in *Bakke*'s main opinion: "State programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the same hazard of stigma, since they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own."[30] Despite having "ostensible" purposes, I agree with Powell that any usage of racial quotas will inevitably result in a more divided, "separatist" educational environment that lacks opportunities to uplift and support minority students. Additionally, quotas are often seen as a way to admit minority students without any real reason other than their racial background, thus creating the idea that minority students are "incapable" of receiving admission without their race. While *Fisher* reflected the same opinion as *Bakke* in this regard, the case utilized a different compelling government interest to justify affirmative action programs. In *Bakke*, Justice Powell and many concurring justices focused on remedying the past effects of racial discrimination as the compelling interest in the case. Powell stated: "Davis' articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use

[30] *Regents of The University of California v. Bakke*, 438 U.S. 265 (1978).

of race-conscious admissions programs where there is a sound basis for concluding that…the handicap of past discrimination is impeding access of minorities to the Medical School."[31] Justice Powell, delivering the main opinion, was a progressive justice who along with Justice Marshall, a concurring justice and the lawyer who successfully argued the *Brown v. Board* case, believed that the law was an instrument of change. Their broadly constructed interpretations of the Constitution provided thoughtful insights into how we can better understand the entirety of discrimination in our country. They expressed that there cannot be a colorblind approach to college admissions until our country is a place where there is visible equality amongst all people, and minorities' access to higher education is not "impeded" upon. This is an extremely valuable interpretation because each of the precedents, as well as *Fisher,* rely on each side's definition of the Equal Protection Clause of the Fourteenth Amendment. However, I believe that the Fourteenth Amendment cannot apply laws equally when there has been no ample evidence of a free and equal society. People of color are continuously discriminated against in all avenues of life due to our nation's dark and tragic history of slavery and unequal treatment. Powell recognized that while such inequalities still exist, the need for affirmative action programs is paramount. In *Fisher*, however, there was less focus on looking at affirmative action as an equitable step towards anti-discrimination, and instead more of an emphasis on diversifying student bodies, which as I have stated, is not a compelling interest.

Within the main case, the Constitutional claims outlined by either side directly correlate to the question of whether UT's plan used race as a factor in admissions solely in pursuit of diversifying their student body. However, their misfocus led to an incorrect assumption that this would benefit the education of all students and meet the burden of strict scrutiny. Despite such a

[31] *Grutter v. Bollinger*, 539 U.S. 306 (2003).

wrongfully guided interpretation, the constitutionality of the program itself was properly analyzed. Fisher's legal representation stated: "The Equal Protection Clause forbids courts, no less than litigants, from relying on 'overbroad generalizations about the different talents, capacities, or preferences of minority children based solely on the racial makeup of their community."[32] In order to satisfy the compelling interest outlined in *Grutter*, the University must provide clear evidence that each of their students offer different "talents"" or "capacities" that would bring about the compelling interest of diversifying and thus, improving their college campus. This argument is inherently flawed because the race of a student was a small factor in their admission to the University of Texas. Each student was evaluated for all their strengths and potential contributions to the University. This ensures the narrow tailoring of the admissions program because a holistic review process was deemed necessary and constitutional in both *Bakke* and *Grutter.* In response to Fisher, the University stated: "the Court has recognized that a university is entitled to make 'an academic judgment' that the pursuit of such diversity is 'integral to its [educational] mission.'"[33]It is clear that the Court deferred to the University's "academic judgement" and relied on the facts provided by the University to decide whether their admissions program was constitutional. In this case, this was the proper decision as UT provided the Court with thorough evidence of a narrowly tailored program that stemmed from "the one set forth in *Grutter*…[they] look[ed] to whether or not the University reached an environment in which members of underrepresented minorities…do not feel like spokespersons for their race…an environment where cross-racial understanding is promoted."[34] The goal was to allow admittance to only a critical mass of minority students, but with quotas being prohibited, the idea

[32] "Fisher v. University of Texas," Oyez.
[33] "Fisher v. University of Texas," Oyez.
[34] "Fisher v. University of Texas," Oyez.

of critical mass is mostly determined by the University. I agree with UT that a critical mass is obtained when “cross-racial understanding” is not only evident, but also “promoted”. Though seemingly vague, this important standard set by the University empowers members of minority communities to utilize their voice in the classroom. I also agree with the Court that when there is a flourishing community of people of color, it directly affects their sense of wellbeing and belonging within that community. Nevertheless, diversifying a campus should not be the driving force behind the constitutionality of affirmative action.

The majority opinion in this case centered around the idea of serving a compelling interest while doing so in a narrowly tailored fashion. The Court arrived at the correct conclusion, but did so in the wrong way. In the context of *Bakke* and *Grutter*, Kennedy’s interpretation of UT’s admissions program was sufficient. The University clearly outlined their goals, including that race, as stated by both Kennedy and Justice Ginsburg in their opinions, was but a “factor of a factor of a factor” within the entire application of a student. Solely utilizing *Bakke and Grutter’*s definition of what serves a compelling interest, the University of Texas did fulfill that criteria. However, both precedents failed to recognize that the real beneficiaries of these programs are not students of color, but instead their white classmates. Since the implementation of affirmative action around the country, "The primary beneficiaries of affirmative action have been Euro-American women," according to Kimberlé Crenshaw, a law professor at Columbia University. Crenshaw also writes:

> In each of its major affirmative action cases, the racial past has been pictured as a distant reality disconnected from the present…antidiscrimination law appears as a portal through which contemporary Americans stepped through to a brand-new present, a world free of the structural iniquities forged during the era of American apartheid. Indeed, the present is so attenuated from that past that we have to speculate whether the social realities in

> which we now live bear anything but the most coincidental relation to our nations recent past.[35]

Affirmative action is commonly thought of as a tool to create a society "free of structural inequities," but it is truly naïve to think of affirmative action as it is defined in *Fisher* as anything but a flimsy band-aid on the gaping wound of systemic inequality within our country. The Supreme Court failed to engage in any meaningful analysis of the issues that affirmative action programs are designed to "correct." Instead, the justices sought to remedy racial inequality through a system that disregards a person's racial identity and fails to uplift and acknowledge minority students' experiences as members of a marginalized community. Justice Alito, who authored the primary dissenting opinion on this case, possessed extremely conservative views on affirmative action that I strongly disagree with. However, despite his general closed-mindedness on the topic, Alito did recognize that UT's "primary argument is that merely invoking "the educational benefits of diversity" is sufficient and that it need not identify any metric that would allow a court to determine whether its plan…is actually serving, those interests."[36] I agree with Alito's statement that both the University and the Court failed to determine the true benefits of educational diversity. Rather than viewing diversity as crucial to the education of students with limited perspective, UT should have seen diversity on a college campus as necessary because it provides minority students with an equal opportunity to achieve greatness.

Redefining the compelling government interest that justifies affirmative action would result in the need for educational institutions to reexamine the environment they create on campus: do they ensure that all students recognize why affirmative action is necessary in the first

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[35] *Fisher v. University of Texas at Austin*, 579 U. S. (2016).
[36] Kimberlé W. Crenshaw, *"Framing Affirmative Action"*, 105 Mich. L. Rev. First Impressions 123 (2006), (Accessed April 6, 2021).

place? Are minority students given the space to express their identity within their own community, and without the pressure to "expose" students to different perspectives? Ultimately, changing the basis for affirmative action would empower people of color because they would be valued not for their contributions to the betterment of white students' education, but for their personal merits and experiences.

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