



Affirmative Action at the Supreme Court: How can higher education prepare?

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Presenter Information



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The logo for Bricker Graydon features the word "Bricker" in a dark blue, sans-serif font, followed by a stylized icon consisting of a green square and a blue square. Below "Bricker" is the word "Graydon" in a larger, bold, blue, sans-serif font.

Disclaimer

We can't help it – we're lawyers

- This isn't legal advice!
- Ask questions in the chat box.
- The issues we are covering will impact institutions in myriad ways. We'll do our best to hit the high points.

Today's Roadmap

Focusing on potential impacts to higher education...

Quick review of the cases:

- Students for Fair Admissions Inc. v. President & Fellows of Harvard College, No. 20-1199 [Arg: 10.31.2022]
- Students for Fair Admissions v. University of North Carolina, No. 21-707 [Arg: 10.31.2022]

Issues to consider:

- If the use of race as a factor in admissions is found unconstitutional, what next?
- Application to programs? Scholarships? Housing?
- Tips on preparing for next semester.



Themes and ideas from cases this term regarding race

- The use of race is in three constitutional contexts:
 - Redistricting & Sec. 2 of the Voting Rights Act (Merrill v Milligan (consolidated with Merrill v Caster) No. 21-1086 (argued 10/4/22))
 - Indian Child Welfare Act cases (Haaland v Brackeen) Nos. 21-376, 21-377, 21-378, and 21-380
 - UNC and Harvard Affirmative Action cases (Students for Fair Admissions v UNC and Student for Fair Admissions v President & Fellows of Harvard College) Nos. 20-1199 and 21-707 (argued 10/31/22)

...will this be the end of race-conscious admissions?

What does the Fourteenth Amendment Say?

Fourteenth Amendment, Section 1:

[...][N]o State shall [...]deny to any person within its jurisdiction the equal protection of the laws.

Racial classifications are subject to strict scrutiny. It must past three tests:

- (1) The program must serve a “compelling governmental interest”;
- (2) It must be “narrowly tailored” to achieve that interest; and
- (3) It must be the “least restrictive means” of realizing that interest.

What is Title VI of the Civil Rights Act?

“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.**”

42 U.S.C. § 2000d

Title VI standards of proof are informed by Fourteenth Amendment holdings. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 412-18 (1978)

Students for Fair Admissions Inc. v. President & Fellows of Harvard College

Students for Fair Admissions v. University of North Carolina

Should this Court overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions?

Title VI of the Civil Rights Act bans race-based admissions that, if done by a public university, would violate the Equal Protection Clause. Is Harvard violating Title VI by penalizing Asian-American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race-neutral alternatives?

The Constitution and Title VI ban race-based admissions unless they are “necessary” to achieve the educational benefits of diversity. Can the University of North Carolina reject a race-neutral alternative because the composition of its student body would change, without proving that the alternative would cause a dramatic sacrifice in academic quality or the educational benefits of overall student-body diversity?





SHIFTING LEGAL LANDSCAPE OF AFFIRMATIVE ACTION

Rescission of Race Considerations in Admissions Guidance



U.S. Department of Justice
Civil Rights Division



U.S. Department of Education
Office for Civil Rights

July 3, 2018

Dear Colleague:

The purpose of this letter is to inform you that the Department of Justice and the Department of Education are withdrawing the following documents:

- December 2, 2011 Dear Colleague Letter Regarding the Use of Race by Educational Institutions;
- 2011 Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education dated December 2, 2011;
- 2011 Guidance on the Voluntary Use of Race to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools dated December 2, 2011;
- September 27, 2013 Dear Colleague Letter on the Voluntary Use of Race to Achieve Diversity in Higher Education After *Fisher v. University of Texas at Austin [Fisher I]*;

Supreme Court Cases -Affirmative Action-

- **REGENTS OF THE UNIV. OF CALIFORNIA V. BAKKE**
 - **GRATZ V BOLLINGER**
 - **GRUTTER V BOLLINGER**
- **FISHER V UNIV. OF TEXAS AT AUSTIN (I, II)**

Bakke (1977)

HOLDING: USE OF RACE IN ADMISSIONS IS CONSTITUTIONALLY PERMISSIBLE; BUT QUOTAS ARE UNCONSTITUTIONAL

5-4 DECISION FOR REGENTS OF THE UNIVERSITY OF CALIFORNIA

MAJORITY OPINION BY LEWIS F. POWELL, JR.

Title VI of the Civil Rights Act of 1964 does not prohibit the university's race-based admissions program.

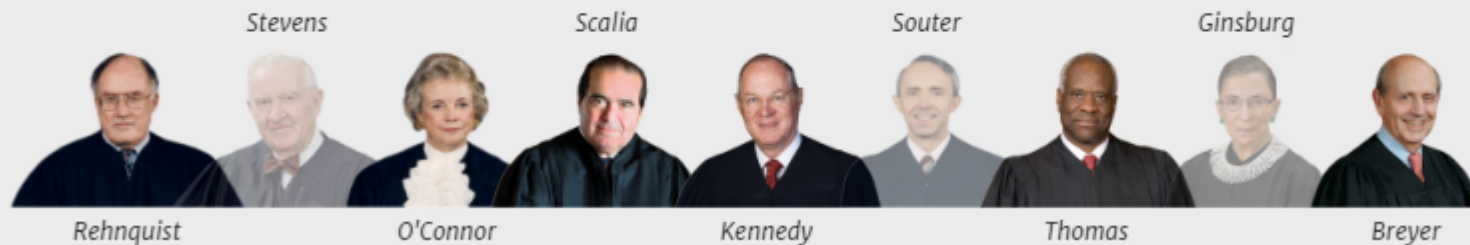


Gratz (2003)

HOLDING: USE OF POINT SYSTEM WAS UNCONSTITUTIONAL BECAUSE IT WAS NOT "NARROWLY TAILORED TO MEET STRICT SCRUTINY"

6-3 DECISION FOR GRATZ

MAJORITY OPINION BY WILLIAM H. REHNQUIST



Grutter (2003)

HOLDING: USE OF RACE AS A FACTOR IN ADMISSIONS IS PERMISSIBLE TO SERVE THE “COMPELLING INTEREST IN ACHIEVEING DIVERSITY AMONG [LAW SCHOOL’S] STUDENT BODY”

5-4 DECISION

MAJORITY OPINION BY SANDRA DAY O'CONNOR

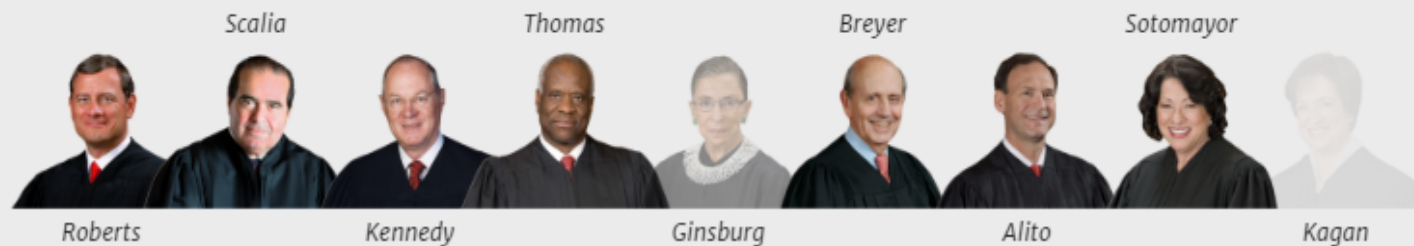


Fisher I (2013)

HOLDING: USE OF RACE AS A FACTOR IN ADMISSIONS IS PERMISSIBLE; “PRECISELY TAILORED TO SERVE A COMPELLING GOV. INTEREST;” COURTS WILL “VERIFY” NECESSITY

7-1 DECISION FOR ABIGAIL N. FISHER

MAJORITY OPINION BY ANTHONY M. KENNEDY



Fisher II (2016) (1 of 3)

**HOLDING: UNIV. OF TEXAS' PROGRAM
CONSTITUTIONAL**

**4-3 DECISION FOR UNIVERSITY OF TEXAS
MAJORITY OPINION BY ANTHONY M. KENNEDY**

The race-conscious admissions program in use at the time of the suit is legal under the Equal Protection Clause.



Fisher II (2016) (2 of 3)

- INTEREST IN OBTAINING “THE EDUCATIONAL BENEFITS THAT FLOW FROM STUDENT BODY DIVERSITY”
 - *SUFFICIENTLY MEASURABLE* TO PERMIT JUDICIAL SCRUTINY OF THE POLICIES ADOPTED TO REACH THEM

Fisher II (2016) (3 of 3)

- **UNIV. OF TEXAS → RACE-NEUTRAL PROGRAMS HAD NOT ACHIEVED THE UNIVERSITY'S DIVERSITY GOALS**
- **SUPPORTED BY SIGNIFICANT STATISTICAL AND ANECDOTAL EVIDENCE.**

- Arguments:
 - **Petitioner (Students for Fair Admissions)**
 - “Because *Brown* is our law, *Grutter* cannot be”
 - *Grutter* should be overruled, as it satisfies every factor that this Court considers when deciding to overrule precedent
 - *Grutter* has “no support in the Fourteenth Amendment’s ‘historical meaning’”
 - Neither Harvard’s nor UNC’s admissions program are narrowly tailored and neither survive strict scrutiny
 - **Respondents (Harvard/Univ. of North Carolina)**
 - *Bakke*, *Grutter*, and *Fisher* fully align with the Framers’ understanding of the Fourteenth Amendment and the text they chose.
 - *Bakke*, *Grutter*, and *Fisher* uphold *Brown* and authorize no categorical exclusion of anyone based on race, and relied on the importance of education that *Brown* underscored.

Issues raised during oral arguments

(1 of 2)

- **The Conservative members of the Court focused on concerns about how one defines diversity. And when does the University know when it has achieved a sufficient level of diversity to meet its goals? [Justice Thomas was particularly pointed with Harvard and UNC’s counsel]**
- **How can IHEs consider the applicant’s personal history if disclosed in the admissions process?**
 - **[Justices Jackson and Sotomayor] focused on considering whether a race-blind practice would cause institutions to not consider personal narratives where “his story in many ways [is] bound up with his race and the race of his ancestors.”**

Issues raised during oral arguments

(2 of 2)

- **How far will this Court's decision go? Admissions only? Housing [Justice Coney Barrett asked a question about affinity housing]?**
- **Efficacy of Race-Neutral Admissions Practices:** The Data suggest that race-neutral practices alone have not maintained or increased diversity on campus for flagship institutions in states where race-conscious admissions is prohibited.
- **The facts matter...?** The lower courts found that Harvard had not discriminated against Asian American applicants and that Harvard did not yet have a workable race-neutral alternative.
- **Military academies?** Justice Roberts suggested that there are differences between the military and universities and “it might make sense for us not to decide the service academy issue in this case.”

Affirmative Action in Admissions Decisions (cont.)

- Potential Impact:
 - inability to use race at all in admissions (and potentially extended to provision of services, funding, scholarships, etc.)
 - See Univ. of Michigan and Univ. of California admission programs, which have not been able to consider race in admissions for 15 years → significant challenges in maintaining a diverse student body, despite significant resource investments.

Thinking Strategically (1 of 2)

**Does your institution have race-conscious practices and program?
How are we analyzing our programs' impacts?**

1. Is existing diversity adequate to produce the desired educational experiences/outcomes for all students?
2. How has the institution seriously considered race neutral alternatives?
3. Could a workable alternative (or alternatives) achieve the same results as race-conscious policies about as well as and at tolerable administrative expense?
4. If neutral strategies alone are inadequate, could the institution use a combination of neutral strategies and a lesser consideration of race and other policies?
5. Are the race-conscious strategies in use effective to increase diversity as needed to achieve beneficial educational experiences for all students?

Thinking Strategically (2 of 2)

Does your institution have race-conscious practices and program?
How are we analyzing our programs' impacts?

What are your next steps?

- Review your admissions practices from top to bottom.
- Identify program and funding opportunities that use race as a factor for participation.
- Engage institutional research to provide overview of available data and potential gaps related to being able to effectively review and analyze impacts of race-conscious and race-neutral policies and practices.
- Make this an institutional priority this semester → don't get caught off guard this summer.
- Educate the community on the potential impacts of a decision that eliminated the use of race-conscious admissions.
- Consider different vehicles and practices for scholarships and programs (pooling scholarship funds and aggregation of programs); potential separate nonprofits for race-conscious scholarships?

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