AFFIRMATIVE ACTION

A review of caselaw.

WRITTEN BY **SHELBY BOSEMAN**

We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today [the use of race in college admissions to create a diverse student body]."[1] This expectation was declared by former U.S. Supreme Court Justice Sandra Day O'Connor in the 2003 case *Grutter v. Bollinger,* where the Supreme Court established its current precedent permitting universities to use race as a factor in admission decisions. Twenty years into this 25-year prophecy, race conscious admissions continues to be widely used by universities, frequently litigated, and absolutely necessary proponents argue.[2]

Race conscious admissions sprouted from 1960s affirmative action policies resulting from the civil rights movement.[3] These policies had an immediate impact, with many elite universities admitting more than twice as many Black students as they had the year before.[4] Despite the success of affirmative action policies in increasing diversity in enrollment, university race conscious programs quickly triggered a backlash, particularly among white applicants.[5]

In 1978, the Supreme Court first considered affirmative action in university admissions in *Regents of the University of California v. Bakke*.[6] Allan Bakke, a white man, had been twice rejected from the University of California at Davis School of Medicine. The admissions program guaranteed 16 out of 100 spots for students of color. The court's opinion struck down the admissions program as unconstitutional and a violation of Bakke's equal protection rights under the 14th Amendment, but it upheld the right of universities to use race conscious admissions programs. Consequently, although university admissions offices could not use racial quotas after 1978, they could still consider race as one factor among many others.

The plurality opinion was one of six opinions in the case, demonstrating deeply divided opinions on the court, and creating a catalyst to polarize affirmative action in higher education for the next 40 years.

The next seminal case(s) occurred in 2003 when Barbara Grutter,[7] a white resident of Michigan, sued the University of Michigan Law School, alleging the school discriminated against her on the basis of race in violation of the 14th Amendment, Title VI of the Civil Rights Act of 1964, and 42 U.S.C. § 1981.[8] Grutter applied with an LSAT score of 161 and a 3.8 undergraduate GPA. She was denied admission and sued arguing the university used race "as a 'predominant factor,' giving applicants belonging to certain minority groups a significantly greater chance of admission than students with similar credentials from disfavored racial groups."[9] The law school admitted that it used race as a factor in making admissions decisions because it served a "compelling interest in achieving diversity among its student body."[10]

In a 5-4 opinion, the Supreme Court set the constitutional standard still used today holding that universities' narrowly tailored use of race in admissions decisions furthers a compelling interest in obtaining the educational benefits that flow from a diverse student body and is not prohibited by the equal protection clause.[11]

In the companion case, *Gratz vs. Bollinger,*[12] two undergraduate students were denied early admission to the University of Michigan and sued alleging the use of racial preferences in undergraduate admissions violated the equal protection clause. Michigan's undergraduate guidelines used a selection method under which every applicant from an underrepresented racial or ethnic minority group was automatically awarded 20 points of the 100 needed to guarantee admission. The Supreme Court held the admissions policy was not narrowly tailored to achieve the university's asserted interest in diversity and violated the equal protection clause.

In 2012, Abigail Fisher,[13] a white applicant to the University of Texas at Austin, sued the university after her application was rejected,[14] contending that the university's use of race in the admissions process violated the equal protection clause.[15] The Supreme Court, in a 7-1 majority opinion, remanded the case back to the U.S. Court of Appeals for the 5th Circuit to assess whether the university had offered sufficient evidence to prove that its admissions program was narrowly tailored to obtain the educational benefits of diversity. The 5th Circuit, in its opinion, had presumed that the university had acted in good faith and gave Fisher the burden of rebutting that presumption, thus undertaking the narrow-tailoring requirement with a "degree of deference" to the university.[16] This contradicted *Grutter* requirement that racial classifications be analyzed by a reviewing court under strict scrutiny.

In 2016, the U.S. Supreme Court heard *Fisher II,*[17] Fisher's appeal of the remanded 5th Circuit decision, where the 5th Circuit again held the university's admissions program was constitutional. The Supreme Court, in a 4-3 split, agreed the university had not violated the equal protection clause and that its use of race in admissions was narrowly tailored because the university "articulated concrete and precise goals—e.g., ending stereotypes, promoting 'cross-racial understanding,' preparing students for 'an increasingly diverse workforce and society,' and cultivating leaders with 'legitimacy in the eyes of the citizenry'—that mirror the compelling interest this Court had approved in prior cases."[18]

While it appears the Supreme Court has established clear

precedent permitting universities to consider race as one of many factors in admission decisions, litigation continues and this past October, the Supreme Court heard oral argument in two cases again challenging the use of race in admissions.

In 2014, the Students for Fair Admissions founded by Edward Blum, an anti-affirmative action crusader who has appeared before the Supreme Court in six prior affirmative action cases, sued the University of North Carolina[19] and Harvard University[20] over their admissions processes. Plaintiffs allege the University of North Carolina's admission practice violates the equal protection clause by using race as a factor in admissions. In the Harvard case, plaintiffs allege Harvard, as a private institution, is in violation of Title VI by penalizing Asian American applicants, engaging in racial balancing, overemphasizing race, and rejecting workable race neutral alternatives.[21] Despite an increase in Asian American applicants, the percentage of admitted Asian American students has not increased in recent years plaintiffs claim. In both cases, the plaintiffs argue the Supreme Court to overrule *Grutter v. Bollinger* and hold that institutions of higher education cannot use race as a factor in admissions.

Both the University of North Carolina and Harvard University admit to using race as a factor in admission in accordance with existing law established in *Grutter v. Bollinger*. Harvard also argues that plaintiffs rely on flawed statistical analysis and denies the university discriminates against Asian Americans.

The oral arguments, scheduled to last just over two-and-a-half hours, stretched for nearly six hours, demonstrating a continued divisiveness on the court.[22] Considering the victories for affirmative action have been narrow in the past three different Supreme Court decisions—5-4, 5-4 ,and 4-3—and a current more conservative Supreme Court, a reversal may be on the horizon, in which case some may question whether fulfillment of Justice Sandra Day O'Connor's prediction may take another 25 years.[23] **TBJ**

NOTES

1. *Grutter v. Bollinger,* 539 U.S. 306 (2003) at 310.
2. Deborah Archer, *Race-Conscious Admissions Policies are Crucial to a Equitable Society,* Bloomberg Law (Feb. 1, 2022), https://news.bloomberglaw.com/us-law-week/race-conscious-admissions-policies-are-crucial-to-an-equitable-society.
3. Genevieve Carlton, *A History of Affirmative Action in College Admissions,* Best Colleges.com (Dec. 7, 2022), https://www.bestcolleges.com/news/analysis/2020/08/10/history-affirmative-action-college/.
4. Keith Buter, *Harvard's Black Admissions,* The Harvard Crimson (Sept. 1, 1974), https://www.thecrimson.com/article/1974/9/1/harvards-black-admissions-pbibn-1968-just/.
5. Supra Note 4; see also Donald E. Heller, Opinion: The Supreme Court is Poised to Handcuff Universities, Politico (October 31, 2022), https://www.politico.com/news/magazine/2022/10/31/supreme-court-affirmative-action-ban-00064058. This reaction also include several states, nine of which subsequently banned affirmative action policies. "In these states, admissions offices at the public institutions are not allowed to take an applicant's race or ethnicity into account when considering her for admission to the institution."
6. 438 U.S. 912 (1978).
7. *Supra* note 1.
8. Throughout this article these violations will be referred to as "equal protection."
9. *Supra* Note 1 at 306.
10. "The University of Michigan Law School (Law School), one of the Nation's top law schools, follows an official admissions policy that seeks to achieve student body diversity through compliance with *Regents of Univ. of Cal. v. Bakke,* 438 U.S. 265. Focusing on students' academic ability coupled with a flexible assessment of their talents, experiences, and potential, the policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, an essay describing how the applicant will contribute to Law School life and diversity, and the applicant's undergraduate grade point average (GPA) and Law School Admissions Test (LSAT) score. Additionally, officials must look beyond grades and scores to so-called "soft variables," such as recommenders' enthusiasm, the quality of the undergraduate institution and the applicant's essay, and the areas and difficulty of undergraduate course selection. The policy does not define diversity solely in terms of racial and ethnic status and does not restrict the types of diversity contributions eligible for "substantial weight," but it does reaffirm the Law School's commitment to diversity with special reference to the inclusion of African-American, Hispanic, and Native-American students, who otherwise might not be represented in the student body in meaningful numbers." *Supra Note 1* at 306.
11. Supra Note 1 at 343.
12. 539 U.S. 244 (2003).
13. *Fisher v. University of Texas,* 570 U.S. 297 (2013).
14. In 2008, when Fisher sought admission to the university's entering class, she was 1 of 29,501 applicants. From this group 12,843 were admitted, and 6,715 accepted and enrolled.
15. The University of Texas at Austin uses an undergraduate admissions system containing two components. First, pursuant to Texas Education Code Section 51.803(a-1 and a-2) the university is able to set an automatic admission requirement less than the state's Top Ten Percent Law. In 2012, the university offered automatic admission to any students who graduated from a Texas high school in the top 9% of their class. In 2019, the number was lowered to 6%, where it currently remains and will through at least the spring 2025 semester. https://tea.texas.gov/about-tea/news-and-multimedia/correspondence/taa-letters/the-university-of-texas-at-austin-automatic-admission-policy-3#:~:text=The%20University%20has%20determined%20that,from%20University%20President%20Jay%20C. It then fills the remainder of its incoming freshman class, some 25%, by combining an applicant's "Academic Index"—the student's SAT score and high school academic performance—with the applicant's "Personal Achievement Index," a holistic review containing numerous factors, including race.
16. *Supra* Note 12 at 298.
17. 579 U.S. 365 (2016).
18. *Id.*
19. *Students for Fair Admissions, Inc. v. University of North Carolina,* 567 F. Supp. 3d 580 (M.D.N.C. 2021).
20. *Students for Fair Admissions v. President of Harvard Coll.,* 397 F. Supp. 3d 126 (D. Mass. 2019).
21. U.S. Supreme Court, "Fair Admissions, Inc. v. President & Fellows of Harvard: QUESTION PRESENTED," https://www.supremecourt.gov/docket/docketfiles/html/qp/20-01199qp.pdf accessed December 4, 2022.
22. Allison Winter, U.S. Supreme Court Justices cast doubt on affirmative action in college admissions, Virgina Mercury (Nov. 2, 2022), https://www.virginiamercury.com/2022/11/02/u-s-supreme-court-justices-cast-doubt-on-affirmative-action-in-college-admissions/, accessed December 3, 2022.
23. *See* Key Facts: *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College,* https://www.harvard.edu/admissionscase/wp-content/uploads/sites/6/2022/05/FINAL_Key-Facts_FINAL.pdf.

SHELBY BOSEMAN
is the chief legal officer for the University of Texas at Arlington. He has over 18 years of in-house counsel experience, including 14 years at institutions of higher education, and is regarded as an expert in higher education law. Boseman has legal oversight for the entire university and acts as the university's chief legal officer, privacy officer, records management officer, ethics officer, and public information officer. He was previously the deputy general counsel for the Lone Star College System and in-house counsel for the Houston Housing Authority. Boseman is a graduate of the University of Houston Law Center and earned his undergraduate degree from Weber State University.