

Affirmative Action: A Closer Look

By Doug Edlin, Professor of Political Science and McHugh Professor of American Institutions and Leadership

I. Where does affirmative action originate in US law and politics?

Affirmative action entered United States politics legally and linguistically with the signing of Executive Order 10,925 by President John F. Kennedy.¹ This Order was intended to prohibit racial discrimination in the hiring and contracting practices of the federal government. The pertinent language reads: “The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.”² In the decades that followed, affirmative action would come to be seen by many Americans as tangible evidence that the government is committed to achieving substantive social justice and racial equality. At the same time, affirmative action is also viewed by many other Americans as fundamentally inconsistent with the notion that the United States Constitution is “color-blind.”³

As the pitch of the arguments on both sides has become more strident, the public debate in the country about affirmative action continues to generate much more heat than light.

Affirmative action arises in the context of admissions to schools of higher education and in

¹ By this statement, I do not mean to suggest that all concerted efforts to admit students of color to institutions of higher education began in 1961. On the contrary, several colleges and universities (notably selective liberal arts colleges) began to recruit minority students in the early nineteenth century, if not before. See generally Elizabeth A. Duffy and Idana Goldberg, *Crafting a Class: College Admissions and Financial Aid, 1955-1994* (Princeton University Press, 1998), ch. 5.

² Exec. Order No. 10,925, 3 C.F.R. 448, 449-450 (1959-1963) (emphasis supplied).

³ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

connection with practices of hiring, retention, and promotion in various employment settings.

II. What has the Supreme Court said about affirmative action?

A. *Bakke*

The first Supreme Court case in which affirmative action in higher education was addressed is *Regents of the University of California v. Bakke*. Allan Bakke, a white man, applied twice (in 1973 and 1974) for admission to the University of California at Davis Medical School. His applications were denied. Bakke objected to his rejection on the grounds that, in both years in which his application was rejected, other applicants of color were allegedly admitted with lower grade point averages, MCAT scores, and benchmark scores in the UC Davis application review system. Bakke alleged that the UC Davis admissions program violated the Equal Protection Clause of the 14th Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964, and the California Constitution.⁴

In defending its admissions process, the UC Davis offered four fundamental goals of its affirmative action plan: (1) to increase minority presence and reduce the historic deficit of traditionally disfavored minorities in medical schools and the medical profession, (2) to remedy past discrimination and counter the effects of longstanding societal disadvantage visited upon certain minority groups, (3) to enrich minority communities by increasing the number of physicians who will practice medicine in generally underserved areas, and (4) to increase diversity in student populations and realize the educational benefits that flow from the exchange of varying student backgrounds, experiences, perspectives and opinions.⁵

Justice Powell wrote the controlling opinion for the Court in the *Bakke* case and he

⁴ *Bakke*, 438 U.S. at 274-278.

⁵ *Bakke*, 438 U.S. at 305-306.

addressed each of these goals in turn.

In response to the stated goal of increasing minority presence, Justice Powell concluded that this goal was invalid, because the United States Constitution prohibits favoring one group of citizens over another solely on the basis of their race or ethnicity.⁶ In response to the effort by UC Davis to remedy past discrimination, Powell indicated that this might be an acceptable basis for an affirmative action program, but not in the *Bakke* case, because UC Davis had not pursued the necessary inquiry into the existence or effects of systematic discrimination on individual medical school applicants. In fact, Justice Powell suggested that no educational institution could ever adequately pursue this task, and effectively eliminated remedying past discrimination as a potential justification for affirmative action programs in the educational setting.⁷ Where enriching underserved minority communities is concerned, Justice Powell doubted that the program could achieve this goal. No matter what the incoming medical students might state or believe about where they would ultimately go on to practice medicine, there is no guarantee that these communities would receive the benefits of these doctors' education and expertise, and the university could not compel the doctors' compliance with their stated intentions upon graduation from medical school.

Increasing diversity in the student population was the sole justification for an affirmative

⁶ *Bakke*, 438 U.S. at 307.

⁷ *Bakke*, 438 U.S. at 309-310. I should note that the converse is true for affirmative action programs in the employment context. In general, remedying specific instances of past discrimination – and not attempting broadly to increase diversity – is the basis upon which an affirmative action program may proceed in employment contracting, hiring, promotion, etc. See, e.g., *Wygant v. Jackson Board of Education*, 476 U.S. 267, 276 (1986) (“Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and over-expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.”) (emphasis in original).

action program in the education setting that Justice Powell (and the Court) upheld as constitutional.⁸ A constitutional basis for the diversity justification is found, according to Justice Powell, in the principle of academic freedom traditionally protected by the First Amendment. In pursuance of this principle, institutions of higher education may attempt to provide and foster an educational atmosphere of “speculation, experiment and creation” through “a robust exchange of ideas.”⁹ Moreover, the principle of academic freedom encompasses the independent judgment of colleges and universities that efforts to increase diversity through affirmative action assist in creating this atmosphere and contribute to the exchange of ideas central to their overarching educational mission.¹⁰

Two other aspects of Justice Powell’s opinion are important in the ongoing legal and policy debate about affirmative action in the United States. First, the UC Davis admissions plan employed a quota system. Justice Powell concluded that this undifferentiated consideration of race in admissions was unsupportable under the Constitution and under the promotion-of-diversity rationale for affirmative action, because the quota system promotes diversity in abstract and absolute terms, rather than as a means to achieve the legitimate educational goal of improving debate and understanding.¹¹ Second, while the specific admissions process implemented by UC Davis in *Bakke* was held unconstitutional, Justice Powell went on to explain that other affirmative action programs, such as Harvard University’s “plus-factor” plan, are constitutionally acceptable insofar as they treat race as a factor relevant to

⁸ *Bakke*, 438 U.S. at 311-312.

⁹ *Bakke*, 438 U.S. at 312 (citations omitted).

¹⁰ *Bakke*, 438 U.S. at 312-314.

¹¹ *Bakke*, 438 U.S. at 315.

the evaluation of an individual student's profile rather than as the factor that fully determines a particular student's admissions decision.¹² That remains the principal basis for current admissions processes in higher education.

B. *Grutter*

Twenty-five years after deciding *Bakke*, the Supreme Court revisited the constitutionality of race-conscious affirmative action programs in higher education. In the years after *Bakke* was decided, lower federal courts reached conflicting decisions about the ongoing validity of Justice Powell's decision and, therefore, about the ongoing viability of race-sensitive affirmative action programs in college and university admissions.¹³

In *Grutter v. Bollinger*, the Supreme Court noted the conflict among certain federal circuit courts concerning the *Bakke* decision and settled (until now) the question whether *Bakke* remained the law and whether colleges and universities could continue to consider race as a factor in their admissions decisions. In doing so, the Court reviewed the affirmative action plan used by the University of Michigan Law School, which was based explicitly on the Harvard plus-factor plan upheld in *Bakke*.¹⁴ Barbara Grutter, a white Michigan resident, was denied admission to the University of Michigan Law School. Grutter's core complaint against the Law School was that "the Law School uses race as a 'predominant' factor, giving applicants who

¹² *Bakke*, 438 U.S. at 316-317, 321-324.

¹³ Compare *Smith v. University of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000) (upholding affirmative action plan) with *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996) (invalidating affirmative action plan).

¹⁴ *Grutter v. Bollinger*, 539 U.S. 306, 321, 337 (2003). In a companion case involving the University of Michigan's undergraduate affirmative action program, the Court struck down the plan as unconstitutional. Unlike the Law School's affirmative action plan, the undergraduate plan used a point system that granted minority applicants twenty points by virtue of their minority status. The Court held that the undergraduate plan, unlike the Law School's plus-factor plan, precluded individualized assessment and comparison of minority applicants with other applicants as required by Justice Powell's opinion in *Bakke*. *Gratz v. Bollinger*, 539 U.S. 244, 271-274 (2003).

belong to certain minority groups ‘a significantly greater chance of admission than students with similar credentials from disfavored racial groups.’”¹⁵

Writing for the majority, Justice O’Connor denied Grutter’s claims and upheld the Law School’s use of race as a plus-factor in its admissions decisions. Justice O’Connor began her analysis by reaffirming Justice Powell’s conclusion in *Bakke* that affirmative action was permissible in higher education admissions for the purpose of increasing diversity among the student population, together with the concomitant educational and social benefits for students.

One of the key aspects of the *Grutter* opinion is its consideration of the argument that race-based affirmative action plans should be prohibited because there are always race-neutral means of achieving the goal of diversity in the student body. After noting that the Law School seriously considered several race-neutral alternatives, the Court explained that these race-neutral alternatives would effectively force the Law School “to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.”¹⁶ The Court ruled that the Law School was entitled to maintain its educational interest in increasing the racial diversity of its student population alongside the commitment to academic rigor and selectivity that are central to its educational mission and its reputation for excellence.¹⁷

III. What are the cases that the Supreme Court is about to decide?

The Court is about to decided two cases that challenge the race-conscious admissions programs that have been permitted for the last forty-five years: *Students for Fair Admissions v.*

¹⁵ *Grutter*, 539 U.S. at 317.

¹⁶ *Grutter*, 539 U.S. at 339.

¹⁷ *Grutter*, 539 U.S. at 339-340.

Harvard College and Students for Fair Admissions v. University of North Carolina. Both of these cases ask the Court to overrule *Grutter* and determine that race may no longer be a distinct factor that is used in higher education admissions practices. Although the Harvard case has gotten more public attention, it is principally about the application of Title VI of the Civil Rights Act to affirmative action admissions plans. The UNC case raises a more expansive challenge to existing admissions practices, because it asks the Court to decide whether colleges and universities may decline to use race-neutral admissions practices in favor of race-conscious admissions programs (without comprehensively demonstrating that the race-neutral process would sacrifice the educational benefits of diversity). This is a more direct challenge to *Bakke* and *Grutter*, because it could result in a judgment that will effectively preclude higher education institutions from attempting to pursue the educational benefits of a racially diverse student body in a race-sensitive manner.

In the affirmative action debate, the interest in educational diversity is often seen as the logical extension of the legal principle articulated in *Brown v. Board of Education*.¹⁸ In *Brown*, the Supreme Court famously held that public schools (and public education) in the United States could not be segregated on the basis of race. The diversity justification for affirmative action means that students of color and white students learn by going to school with one another. By learning with one another they learn from one another.¹⁹

IV. What are the short-term and long-term implications of these decisions?

¹⁸ 347 U.S. 483 (1954). See generally David Strauss, *The Myth of Colorblindness*, 1986 Supreme Court Review 99, 100 (1986) (“Affirmative action is not at odds with the principle of nondiscrimination established by *Brown* but is instead logically continuous with that principle.”).

¹⁹ See *Bakke*, 438 U.S. at 312 n.48.

This depends, of course, on exactly what the Court says. But at this point almost everyone believes that the Court will, at the very least, rule that the current practice of using race as a factor in admissions decisions must change in a substantial way. If the Court leaves it open to colleges and universities to determine for themselves how they will construct the compositional diversity of their classes, without directly considering the racial identities of applicants, then institutions will need to develop alternative approaches that might incorporate other factors into their application review practices, such as the residential locations and lived experiences of applicants. If the Court rules more broadly that race is never a factor that colleges and universities may consider in differentiating applicants or students from one another, that could have pervasive impacts not just on admissions practices but also on services and support offered to students of color throughout their time on campus.

The experiences of colleges and universities that have operated under statewide affirmative action bans indicate that, in the short-term, the numbers of students of color admitted to many institutions of higher education will be reduced, in some cases very significantly.²⁰ In the longer term, depending on the language of the Court's decisions, higher education institutions may attempt to pursue the educational benefits of greater racial diversity in their student populations in a manner that is consistent with the Court's decisions in the Harvard and UNC cases, but the success of those efforts will take some time to determine.

²⁰ See, e.g., Grant H. Blume and Mark C. Long, *Changes in Levels of Affirmative Action in College Admissions in Response to Statewide Bans and Judicial Rulings*, 36 *Educational Evaluation and Policy Analysis* 228-252 (2014); Ben Backes, *Do Affirmative Action Bans Lower Minority College Enrollment and Attainment? Evidence from Statewide Bans*, 47 *Journal of Human Resources* 435-55 (2012); Liliana Garces, *Racial Diversity, Legitimacy, and the Citizenry: The Impact of Affirmative Action Bans on Graduate School Enrollment*, 36 *The Review of Higher Education* 93-132 (2012); Jessica Howell, *Assessing the Impact of Eliminating Affirmative Action in Higher Education*, 28 *Journal of Labor Economics* 113-166 (2010).