Goodbye, Bakke: Understanding Students for Fair Admissions v. Harvard

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CLE Materials: the Road to the Harvard Case

The following materials provide the background for the Supreme Court's doctrine of affirmative action prior to its recent decision in *Students for Fair Admissions v. Harvard* (2023).

Regents of the University of California v. Bakke

438 U.S. 265 (1978)

In *Bakke*, two sharply-opposed blocs of four justices concurred in the result with one of the two key holdings in a single opinion by Justice Lewis Powell. Although initially representing only Justice Powell's views, Powell's *Bakke* opinion has become the authoritative, foundational opinion for the law on affirmative action.

Powell insisted on applying strict scrutiny to a voluntarily-enacted affirmative action program. This was not dictated by *Brown* or any prior race case, all of which dealt with discrimination that was designed to promote racial castes or place a badge of inferiority on racial minorities and that is the significance of Bakke – it set the Court on a path toward establishing strict scrutiny for benign racial classifications. Strict scrutiny was not inevitable or compelled by precedent.

Justices Brennan, White, Marshall and Blackmun argued in *Bakke* that intermediate scrutiny was appropriate. They offered a version of the anti-subordination argument. In short, it is that Black people have been subject to a 300-year history in America of slavery and Jim Crow, whereas the *Brown* decision is a mere 24 years old. On the other hand, in this case, "no fundamental right is involved…. Nor do whites have any of the 'traditional indicia of suspectness….'" Intermediate scrutiny, rather than rational basis, is appropriate only to avoid unintended consequences of measures taken to eliminate traces of race subordination: "because of the significant risk that racial classifications established for ostensibly benign purposes can be misused…" How exactly is affirmative action is harmful to whites? The Brennan and Marshall opinions did not seem to accept the premise that it was demeaning or stigmatizing. If judicial review is meant to serve as a check on majority tyranny, then racial majorities can be said to have electoral checks on affirmative action programs that make heightened judicial scrutiny less necessary or unnecessary.

Powell's opinion took a crabbed view of compelling governmental interests for strict scrutiny analysis. Remedying "the disabling effects of identified discrimination" represents a compelling

interest. The contrast between "identified" and "societal" discrimination would appear to require – as elaborated by later cases, such as *Croson* – the identification of specific subdivisions of government that engaged in provable intentional discrimination in the past. "Societal discrimination" seems to refer to the lingering effects of discrimination caused by wrongdoers who are unidentified or, if known, unconnected to the governmental agency implementing the affirmative action plan. Powell rejected this as a compelling interest—a momentous decision that charted the path of affirmative action jurisprudence ever since. He also rejected demographic representation.

The only other compelling interest recognized by Powell was the interest in the education benefits of having a student body with diverse life experiences and backgrounds, including racial diversity. For Powell, this interest stems from the First Amendment interest in academic freedom. This was an "all lives matter" approach, since the benefits to minorities of affirmative action under Bakke are not even a permissible goal: rather, the goal of affirmative action, for Powell, was to provide the benefits of educational diversity to all students, who are predominantly white. Any benefit to minorities in particular is a by-product of that goal.

Significantly, Powell left a narrow space for affirmative action if institutions followed plans like "the Harvard plan," which used race as a plus factor in an individualized application review that considered numerous other credentials and other forms of "diversity," such as diverse extra-curricular interests or life experiences. Powell deemed "quotas" or set-asides to be categorically impermissible.

Grutter v. Bollinger

539 U.S. 306 (2003)

Grutter, a case against Michigan Law School, formally adopted Powell's Bakke opinion as the doctrine of the full Court. *Bakke*'s recognition of diversity as a compelling interest was adopted by a majority in *Grutter*, and for the same reasons: the interest of an academic institution of providing a rich educational experience that includes exposure to the cultural pluralism of our society. The Court founds the plan narrowly tailored by determining that racial diversity is only one of several plus factors that is not given determinative weight.

How much weight can be given to diversity before it crosses the line and becomes impermissibly determinative? We don't know; O'Connor was the deciding vote, and in classic O'Connor style, *Grutter* was a case-by-case, "we know it when we see it" decision.

"Critical mass" is a recognition that diversity can't be achieved through the token admission of a small number of minorities. Because the interest is to enable students to learn from interactions with students from diverse backgrounds and circumstances, low numbers will be insufficient to accomplish this and the small number of minority students might feel undue pressure to "represent" their race in some fashion. Ironically, the concept is later used in *Parents Involved* to reject an effort to integrate public schools in part on the grounds that the plan generated more diversity than was necessary under a critical mass theory.

O'Connor's aspiration (or perhaps finger-wagging) on the duration of affirmative action plans suggested that affirmative action should be phased out within 25 years.

Significantly, Barbara Grutter's GPA/LSAT combination would have placed her very low in the applicant pool at Michigan Law School. On the one hand, there was evidence that minority applicants with lower GPA/LSAT scores were admitted; on the other hand, it is clear that Grutter would have been unable to prove by a preponderance of the evidence that in the absence of the affirmative plan, she would have been admitted. In other words, she could not establish "but for" cause that she was denied admission on account of her race. None of the nine justices considered that a problem with Grutter's case. Denial of admission, therefore, cannot have been her injury; so what was it? And why should she have had standing?

The Court has consistently held that every applicant has a right to be considered for admissions in a process free of race discrimination. A discriminatory process is injurious per se, and thus confers standing and gives rise to a claim for relief. No showing of but-for cause was required. This doctrine does not, of course, explain how it is that Grutter was discriminated against when she would have been turned down no matter what. Apparently, there is a kind of burden shift where a policy takes race into account, and a plaintiff like *Grutter* is authorized to act as a private attorney general on behalf of all disappointed white applicants.

Justice O'Connor's majority opinion states: "In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." That is certainly a defensible assertion. But it seems unconnected to "diversity" defined as the enrichment of the educational experience by having students with different backgrounds and perspectives. Powell's educational-diversity rationale in Bakke is an end in itself, not a means to the end of generating demographic diversity among graduates of higher education, which Powell rejected as illegitimate. O'Connor's statement implies that demographic diversity is a legitimate goal for affirmative action programs, and perhaps it should be. But her inconsistency with Bakke while purporting to solidify it as a precedent should not pass without comment.

In Gratz v. Bollinger, 539 U.S. 244 (2003), a companion case to Grutter, the Court struck down the University of Michigan's undergraduate affirmative action plan which awarded a set number of points to minority applicants. Justice O'Connor, who provided the deciding fifth vote, found the point system meaningfully different from the "soft variable" system used by the law school, deeming it constitutionally preferable to use a numberless system like the Harvard plan and the Michigan Law School plan, in which, presumably, race can be weighted differently for similarly situated applicants. Note, too, that Michigan reviewed 13,500 undergraduate applications, making "individualized" application decisions exceedingly difficult.

Fisher v. University of Texas at Austin

("Fisher II")

136 S.Ct. 2198 (2016)

Fisher II proved to be the high-water mark for post-*Bakke* acceptance of affirmative action. The Court rejected a challenge to the University of Texas affirmative action plan. Despite

statements about the need for ongoing self-study, the majority gave more deference to the university's interpretation of data and its conclusions about the educational benefits of diversity than was heralded by the tough language in *Fisher I*. *Fisher II* certainly reaffirmed the central elements of *Bakke* and *Grutter*: application of strict scrutiny, recognition of the educational benefits of diversity as a compelling interest, disapproval of quotas, and approval of holistic admissions in which race is a plus factor. Interestingly absent from *Fisher II* was reference to the language about the need to sunset affirmative action by 2028.

The Court seemed satisfied with fairly generalized data showing low minority enrollments from the 10% plan and low minority enrollments in individual courses. As the to more qualitative conclusions, the Court seemed to defer to what it deemed to be detailed internal studies by the university. This approach seems consistent with the limited deference afforded in Grutter. The Fifth Circuit, the Texas legislature, and perhaps the *Fisher II* dissenters seemed to think that the Texas 10% plan, automatically admitting the top 10% of each Texas high school's graduating class, as a "race neutral" way to achieve diversity. But Justice Ginsburg had a strong argument that a percentage plan that works because of underlying racial segregation is not race neutral, particularly where "works" is defined as increasing minority enrollment in the UT system. If that were recognized, a percentage plan would arguably have a harder time meeting strict scrutiny, since the case for narrow tailoring may be difficult to make.

The Alito dissent attacked the University for "crude" racial categorization that lumps together diverse subgroups within categories like "African American," "Hispanic," and "Asian American," while also ignoring bi- or multi-racial backgrounds. Clearly, Alito was not arguing that a university could or should implement an affirmative action plan using more fine grained racial distinctions. His unstated point is that the problem of hyper-diversity undermines the constitutionality of any, and thus all, affirmative action plans. It strikes us as an argument that proves too much. Taken to its logical conclusion, it would be meaningless to collect data on, for example, police stops of African-Americans. The question is whether use of admittedly imperfect racial classifications can achieve a certain degree of social benefit. What that degree should be is a question begged by a version of strict scrutiny that demands perfection.

Justice Thomas continued to assert that affirmative action is never constitutional when undertaken voluntarily and proactively by governmental institutions. (Presumably, it would be constitutional for a court to order race conscious remedies for race discrimination proven in litigation.)

The dissenters in Grutter and Fisher II presented their arguments as though some plan could meet affirmative action, yet it is hard to see what plan. There is a "whipsaw" quality to their arguments. For instance: admitting numerous minority applicants in a holistic "plus" review is taken to be evidence either of a disguised quota or of overweighting race as a factor; admitting too few minority applicants, as argued by Alito, is evidence that the plan is not narrowly tailored to achieve its goal.

Students for Fair Admissions v. Harvard

600 U.S. 181 (2023)

Key points:

1. Struck down affirmative action plans, 6-2, of Harvard (yes, the same plan extolled by Powell in Bakke), and UNC (6-3). (Justice Jackson recused herself from the Harvard case)

2. Diversity is too amorphous or incoherent to be a compelling interest; compelling interest in diversity must be "sufficiently measurable to permit judicial review." Harvard & UNC plans are not.

3. The plans are not narrowly tailored because the racial categories are arbitrary and imprecise (taken from Alito's dissent in Fisher).

4. Race must only be a plus factor and cannot be a negative. But since, as the Court concludes, university admissions are a zero sum game, any plus factor is by definition a negative. So—game over right there.

5. Connecting race to diverse viewpoints is automatically stereotyping, which is impermissible discrimination.

6. Affirmative action skeptics painted affirmative action plans into a corner by restricting them to the diversity rationale, and then ridiculed the plans for the flimsiness of diversity as a rationale.

7. Roberts (majority) purports not to overrule any cases, but it is clear that no affirmative action plan can survive new strict scrutiny.

8. Thomas (concurrence) correctly asserts that *Bakke-Grutter-Fisher* are overruled and affirmative action is per se unconstitutional (as he always wanted).