WISCONSIN LEGISLATIVE COUNCIL

IssueBrief

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Developments in Constitutional Law: Race-Conscious Higher Education Admissions Policies

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In *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, the U.S. Supreme Court held that university admissions policies that consider race outside of an individualized context are impermissible under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. The Court's decision effectively, though not expressly, overturned prior decisions that had upheld race-conscious admissions policies if the policies allowed for the consideration of race as one of many factors, as part of a holistic review of each applicant. The Court's decision does not, however, prevent admissions officers from considering a student's own discussion of how race has impacted the student's life. This issue brief describes the court's prior precedents on race-conscious admissions policies as well as the Court's holding in *Students for Fair Admissions*.

PRIOR LEGAL PRECEDENTS

The Supreme Court first considered race-conscious admissions policies in 1978, in *Regents of the University of California v. Bakke*.[1] There, the Court was asked to determine whether the Equal Protection Clause of the 14th Amendment and the Civil Rights Act of 1964 permitted a medical school admissions program to reserve 16 of 100 spaces for minority applicants. The Equal Protection Clause of the 14th Amendment to the U.S. Constitution provides that "no state shall make or enforce any law which shall … deny to any person within its jurisdiction the equal protection of the laws."[2] Equal Protection Clause challenges to government use of race-based considerations are reviewed under a "strict scrutiny" standard, meaning that such preferences must be "narrowly tailored" to achieve a "compelling governmental interest."[3] In a split decision, the Court held that although the university demonstrated a compelling government interest in attaining a diverse study body, the admissions program constituted an impermissible racial quota and was not narrowly tailored to achieve the government's compelling interest.[4]

Twenty-five years later, in *Grutter v. Bollinger*, the U.S. Supreme Court upheld the University of Michigan Law School's policy of considering race in admissions as one part of a holistic review of an individual student's qualifications. In that case, race was one of several factors taken into account in admissions decisions. The Court found that, unlike in *Bakke*, the law school's consideration of race was one part of a larger effort to achieve overall diversity in the law school student body, rather than only an effort to achieve racial balance.[5] In making its decision, the Court assumed that "25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today" and held that race-conscious admission policies must have some end point.[6]

In contrast, in *Gratz v. Bollinger*, the Court struck down the University of Michigan's undergraduate admissions policy, which involved awarding "racial bonus points" to students of minority racial groups. The Court found that this policy did not "'provide for a meaningful individualized review of applicants" but rather made "the factor of race decisive for virtually every minimally qualified underrepresented minority applicant" and thus was not narrowly tailored enough to survive strict scrutiny.[7]

Finally, in *Fisher v. University of Texas at Austin*, the Court was asked to consider the University of Texas at Austin's admissions policy, which considered an applicant's race as one factor among many in a holistic review. The Court reaffirmed its prior cases, holding that educational diversity is a compelling government interest. Further, the Court held that the university's policy was narrowly tailored because the university sufficiently demonstrated that it had explored alternative methods of achieving this interest and found them unworkable.[8]

STUDENTS FOR FAIR ADMISSIONS V. PRESIDENT AND FELLOWS OF HARVARD COLLEGE

In June 2023, the Supreme Court issued its opinion in *Students for Fair Admissions v. President and Fellows of Harvard College*.[9] Similar to the cases before, the Court was asked to consider whether the admissions policies of Harvard College and the University of North Carolina (UNC) violated the Equal Protection Clause of the 14th Amendment.

Though the Court did not expressly overrule its prior case law, it concluded that both Harvard's and UNC's admissions policies, which considered an applicant's race as one of many factors in a holistic review, were constitutionally impermissible. The court explained that, in its view, *Grutter* and *Bakke* required that race-conscious university admissions do all of the following: (1) comply with strict scrutiny; (2) never use race as a stereotype or negative; and (3) have a logical end point. The Court held that Harvard and UNC failed all three of these criteria.

The Court found that both universities' policies failed strict scrutiny because their asserted compelling interest in attaining a diverse student body lacked "sufficiently focused and measurable objectives" and, thus, could not be subjected to meaningful judicial review. In other words, the Court found that Harvard's and UNC's policies both failed strict scrutiny because "attainment of a diverse student body" is not a goal that can be measured by a court.

Next, the Court found that both admissions policies inevitably and impermissibly used race as a negative attribute for some students, because "college admissions are zero-sum . . . a benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter." The Court also found that the universities' uses of race impermissibly stereotyped applicants by assuming that "students of a particular race, because of their race, think alike."[10]

Finally, the Court found that neither university's policy had a "logical end point" and, as a result, failed the final test. The Court explained that, under *Grutter*, universities' race-conscious admissions policies must have an end point. The Court rejected UNC's and Harvard's assertions that their race-conscious admissions policies would end when, without them, the universities achieved their goals of diversity; the Court held that because courts cannot reasonably measure the completion of these goals, they do not present an actual end point.

While the Court struck down Harvard's and UNC's race-conscious admissions policies, it emphasized that its opinion should not be construed to prohibit universities from "considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." The Court used the example of a student writing in his or her personal essay about how the student demonstrated courage and determination when overcoming racial discrimination. The Court explained that such consideration of race, provided it is "tied to that student's unique ability to contribute to the university," is not prohibited by its opinion in this case.[11]

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[1] 438 U.S. 265 (1978).
[2] U.S. Const. amend. XIV.
[3] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995).
[4] In dicta, the Court also explained that a university may constitutionally consider race and ethnicity as one of several applicant characteristics and qualities it considers as part of the admissions process. Dicta in a legal opinion includes comments, suggestions, discussions, or observations published in a court opinion that are not considered to be legally binding, but that may be cited as persuasive authority. So while the majority opinion in *Bakke* discussed a race-conscious admissions policy that would likely be constitutionally permissible under the Equal Protection Clause, it did not formally or legally make it so.
[5] 539 U.S. 306 (2003). The policy used by the University of Michigan Law School was similar to that suggested in the dicta of the *Bakke* opinion.
[6] *Id.* at 342 and 343.
[7] 539 U.S. 244 (2003).
[8] 579 U.S. 365 (2016).
[9] 600 U.S. __ (2023).
[10] *Id.* at 27 and 29.
[11] *Id.* at 40.