The Use of Race In University Admissions Policies

I. Introduction

Universities’ use of race in admissions decisions has been a heavily debated topic over the past several decades. Most recently, the United States Supreme Court granted Certiorari in Fisher v. University of Texas at Austin, and the case will be heard during the October 2012 term. This paper examines: (1) past U.S. Supreme Court cases regarding race in admission policies; (2) whether the Court’s decisions interpreting the Equal Protection Clause of the Fourteenth Amendment permit the University of Texas at Austin’s (UT) use of race in undergraduate admissions decisions; (3) interactions among students with diverse backgrounds inside and outside the classroom; and (4) the changes in the makeup of the Court since Grutter v. Bollinger in 2003 and the potential outcome in Fisher. For the reasons stated below, the Court should affirm the Court of Appeals’s decision that UT’s admissions policy is constitutional and hold that race may be used in admissions decisions as outlined in Grutter v. Bollinger. In addition, universities should promote interactions among students of diverse backgrounds inside and outside of the classroom.

II. Past United States Supreme Court Cases Regarding Race

There are four leading cases in which the Court has examined the use of race in admissions decisions: Regents of the University of California v. Bakke; Grutter v. Bollinger; Gratz v. Bollinger; and Parents Involved in Community Schools v. Seattle School District No.

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1 438 U.S. 265 (1978)
3 539 U.S. 244 (2003)
Under the Equal Protection Clause of the Fourteenth Amendment, all racial classifications must be analyzed under strict scrutiny. In order to pass strict scrutiny, the racial classification must serve a compelling government interest and must be narrowly tailored to further that interest.

The Court held that the use of race quotas in admitting students to universities violates the Equal Protection Clause of the Fourteenth Amendment. A quota is a “program in which a certain fixed number or proportion of opportunities are reserved exclusively for certain minority groups.” The Court in *Bakke* envisioned admissions programs that “treat each applicant as an individual in the admissions process.”

In *Grutter v. Bollinger*, the Court held that a university may use race as one factor among many to benefit minorities and create a diverse student body. Diversity, including seeking a critical mass of students, is “a compelling state interest that can justify the use of race in university admissions.” The Court reasoned that the benefits of a diverse student body are substantial: it “promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races.” The Court concluded that the University of Michigan Law School’s admission policy that included race among many factors

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4 551 U.S. 701 (2007)
5 *Grutter*, 539 U.S. at 326.
6 *Id.*
7 *Bakke*, 438 U.S. at 319-20.
8 *Grutter*, 539 U.S. at 306.
9 *Bakke*, 438 U.S. at 318.
10 539 U.S. at 343.
11 *Id.* at 325.
12 *Id.* at 330.
in admissions decisions was constitutional.\textsuperscript{13} The Court stated that the Law School engaged in a “highly individualized, holistic review of each applicant’s file, [and gave] serious consideration to all the ways an applicant might contribute to a diverse educational environment.”\textsuperscript{14} In addition, Justice O’Connor, writing for the majority, opined that “[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative.”\textsuperscript{15} On the other hand, the dissent contended that the Court’s extreme deference to the Law School abandoned strict scrutiny and emphasized that “constitutional limitations protecting individual rights may not be disregarded.”\textsuperscript{16}

In \textit{Gratz v. Bollinger}, the Court struck down the University of Michigan undergraduate’s admissions policy.\textsuperscript{17} The University’s policy automatically distributed plus-points to every single underrepresented minority applicant solely because of race.\textsuperscript{18} The Court held that such a policy is not narrowly tailored to achieve the interest in educational diversity because the use of race was too mechanical and inflexible.\textsuperscript{19}

In \textit{Parents Involved in Community Schools v. Seattle School District No. 1}, the Court held that a public school that may not rely upon race in classifying and assigning students.\textsuperscript{20} The Court reasoned that racial classifications must only be used as a “last resort” to achieve a compelling government interest, and that the District did not satisfactorily consider race-neutral

\begin{itemize}
  \item \textsuperscript{13} \textit{Id.} at 342.
  \item \textsuperscript{14} \textit{Id.} at 337.
  \item \textsuperscript{15} \textit{Id.} at 339
  \item \textsuperscript{16} \textit{Id.} at 339 (Rehnquist, C.J., dissenting).
  \item \textsuperscript{17} 539 U.S. at 275.
  \item \textsuperscript{18} \textit{Id.} at 255.
  \item \textsuperscript{19} \textit{Id.} at 270.
  \item \textsuperscript{20} 551 U.S. at 711.
\end{itemize}
alternatives in “good faith.” In a plurality opinion, Chief Justice Roberts questioned whether the school district satisfied the compelling interest prong of strict scrutiny. However, Justice Kennedy declined to adopt this view and opined that the school district’s system was not narrowly tailored.

III. Fisher v. University of Texas at Austin

A. Procedural and Factual History

In Fisher v. University of Texas at Austin, two female Caucasian students applied for and were denied admission to UT’s undergraduate class entering in the Fall 2008. The plaintiffs argued that UT’s use of race violated the Equal Protection Clause of the Fourteenth Amendment because it neither served a compelling government interest nor was narrowly tailored to further the government interest. In 1997, the Texas Legislature passed the Top Ten Percent Law, which automatically grants to high school seniors in the top ten percent of their class admission to any Texas state university. Although facially neutral, the purpose of the law was to increase racial diversity in the state university system. After Grutter, UT altered its policy in 2004 to include race as one factor when making undergraduate admissions decisions.

21 551 U.S at 735; see also Kimberly A. Pacelli, Fisher v. University of Texas At Austin: Navigating The Narrows Between Grutter and Parents Involved, 63 M.e. L. Rev. 569, 575-76 (2011).
22 Parents Involved, 551 U.S. at 727.
23 429 U.S at 787-78 (Kennedy, J., concurring).
24 Fisher, 631 F.3d at 217.
25 Id.
26 Id. at 224.
27 Id.
28 Id. at 226.
UT divides applicants into Texas residents, domestic non-Texas residents, and international students. 29 “Texas residents are allotted 90% of all available seats, with admission based on a two-tiered system, beginning with students automatically admitted under the Top Ten Percent Law and then filling the remaining seats on the basis of the Academic and Personal Achievement Indices.” 30 The Academic Index is the “mechanical formula that predicts freshman GPA using standardized scores and high school class ranks.” 31 The Personal Achievement Index is “based on three scores: one score for each of the two required essays and a third score, called the personal achievement score, which represents an evaluation of the applicant’s entire file.” 32

The Fifth Circuit Court of Appeals held that UT’s admissions policy, designed to achieve UT’s goal of a diverse student body, did not violate the Equal Protection Clause of the Fourteenth Amendment because it served a compelling state interest and was narrowly tailored to further that interest. 33 The Court of Appeals reasoned that UT’s admission policy mirrored those approved by the Court in Grutter. 34 Lastly, the Court of Appeals held that a “university may decide to pursue the goal of a diverse student body, and it may do so to the extent it ties that goal to the educational benefits that flow from diversity.” 35

**B. The Court Should Hold That UT’s Admissions Policy Is Constitutional**

The Court should affirm the Fifth Circuit’s opinion and hold that UT’s admissions policy does not violate the Equal Protection Clause of the Fourteenth Amendment. The Court has

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29 Id. at 227.
30 Id.
31 Id.
32 Id. at 227-28.
33 Id. at 246-47.
34 Id. at 230.
35 Id. at 247.
recognized that a diverse student body is a compelling government interest. UT’s admissions policy is narrowly tailored because it individually and holistically evaluates each applicant’s entire file. Unlike the University of Michigan’s undergraduate admissions policy in Gratz, UT does not automatically distribute plus-points to every single underrepresented minority applicant solely because of race. Rather, students that are not admitted under the Top Ten Percent Law are evaluated using the Academic Index and the Personal Achievement Index. Under the Incides, race is one factor in determining admissions, but not the sole factor. For example, it is possible that UT may deny admissions of an African American male whose parents are successful doctors. On the other hand, UT may admit a Caucasian male with parents that live from paycheck-to-paycheck. UT’s admissions policy provides this flexibility. Therefore, because UT has instituted a policy that evaluates a potential student’s entire file, including academic history and personal history, the Court should hold that UT’s admissions policy does not violate the Equal Protection Clause.

The Court should continue to defer to higher education institutions in determining whether a university’s admissions policy passes the constitutional muster of strict scrutiny. “Once a university strays into a mechanical use of race, it violates narrow tailoring; but, so long as colleges continue to apply an individualized, holistic review where race is only one factor, their programs survive strict scrutiny.” The Court’s deference permits universities to be flexible so that they may experiment with race-neutral alternatives.

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36 Grutter, 539 U.S. at 325.
38 Pacelli, supra note 21, at 591.
39 Id.
are in the greatest position to determine the appropriate admissions policy that permits the university to select the study body that will best prepare its students for academic success.

There is no denying that minority groups have historically been underrepresented in educational systems and society due to racial inequalities. As a result, race-conscious admissions policies are necessary in order to increase racial diversity in higher education. Justice O’Connor observed that the Court “expect[s] that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”\(^{40}\) Without race-conscious admissions policies, and assuming that race-neutral policies fail to increase minority enrollment, universities will not be able achieve a level of racial diversity within 25 years so that race may no longer need to be a factor. Therefore, the Court should hold that a race-conscious admissions policy that considers race among many factors is constitutional so long as the university engages in a highly individualized, holistic review of each applicant’s file in order to achieve a compelling interest in diversity in higher education.

IV. Interactions Among Students Of Diverse Backgrounds

Although the Court has accepted that a university’s stated goal of achieving a diverse student body is a compelling interest, the Court has ignored the question of whether diverse interactions within the classroom are actually occurring. The Court has stated that diverse perspectives improve the quality of the educational process because “classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.”\(^{41}\) Thus, the question is whether simply admitting students of diverse backgrounds will lead to interactions and classroom conversations that the

\(^{40}\) *Grutter*, 539 U.S. at 343.
\(^{41}\) *Id.* at 330.
Grutter Court envisioned. For purposes of this section, assume that a diverse student body improves the quality of the educational process.

According to Meera E. Deo’s article on diverse interactions at the University of Michigan Law School, there seems to be “sufficient structural diversity (raw numbers of students of color) for interactional diversity to be occurring.” In addition, students at the University of Michigan Law School had high levels of interaction with peers from their same racial or ethnic background, as well as with students from different backgrounds. Moreover, a large majority of respondents from all racial and ethnic backgrounds reported positive social interactions with other students. Deo notes that “the main purpose of affirmative action according to Grutter is to promote educational diversity in order to create stimulating classroom discussions that then dismantle stereotypes, lead to increased cross-racial understanding, and craft better professionals in our global society.”

Universities should encourage professors create diversity discussions in classes. Deo suggests that one way to do this is to include a question on teaching evaluations that asks whether faculty members include social context when teaching the subject. Moreover, in the context of law school, a professor should not merely teach the facts and holding of a case such as *Grutter*. Rather, the professor should promote a discussion of the social implications of the decision, thereby permitting students to lend their personal experiences and background, and have a livelier discussion that the Grutter Court envisioned.

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43 *Id.* at 91.
44 *Id.* at 93.
45 *Id.* at 95.
46 *Id.* at 111.
Despite the conclusion that diverse interactions may not be frequently occurring within the classroom, educational and social benefits flow from interactions among students with different backgrounds outside of the classroom. Universities should be pro-active in developing other mechanisms by which students of diverse backgrounds can interact outside of the classroom. For example, a university could create events such as student-led discussions about poverty in the United States. Events may be as simple as a social-mixer in a residence hall cafeteria. Students may then take the discussions that are actually occurring outside of the classroom and use it to further foster livelier discussions within the classroom. As long as interactions among students with diverse backgrounds are occurring at the university, whether inside or outside the classroom, the university setting plays an important role in helping to dismantle stereotypes, promote cross-racial understanding, and craft better professionals in our global society.

V. Change in Composition of Court

The composition of the Court has changed since the Court’s 5-4 decision in Grutter in 2003. Generally speaking, the majority opinion in Grutter included Justices O’Connor, Stevens, Souter, Ginsburg, and Breyer. The dissenters were Justices Scalia, Kennedy, Thomas, and Chief Justice Rehnquist. Since 2003, Justice Samuel Alito, Jr. replaced Justice Sandra Day O’Connor, whom delivered the majority opinion in Grutter. In addition, Chief John Roberts replaced Chief Justice Rehnquist, Justice Kagan replaced Justice Stevens, and Justice Sotomayor replaced Justice Souter.

Presently, the Court may be divided into three blocks. The first block is the conservative block of four justices: Scalia, Thomas, Alito, Jr. and Chief Justice Roberts. The second block is
the liberal block of four justices: Justices Breyer, Ginsburg, Sotomayor, and Kagan. The final block is the moderate block of Justice Kennedy. Only eight out of the nine justices will potentially take part in the *Fisher* decision. Justice Kagan recused herself from the *Fisher* case because she worked on the issue in her prior job as solicitor general for the Obama administration. Thus, assuming the blocks remain as above, Justice Kennedy will be crucial to the resolution of *Fisher* and the remaining questions about affirmative action presented before the Court.

Justice Kennedy has suggested that the Court has been too deferential to universities on the question of narrow tailoring. In *Grutter*, Justice Kennedy accepted the University of Michigan Law School’s argument that diversity is a compelling government interest. However, he insisted that the Court abandoned strict scrutiny because the Court was extremely deferential to the law school. Justice Kennedy stated that “[t]he Court confuse[d] deference to a university’s definition of its educational objective with deference to the implementation of this goal.” In addition, Justice Kennedy observed, “measures other than differential treatment based on racial typing of individuals first must be exhausted.”

For the reasons provided above, it seems likely that Justice Kennedy will join the conservative block in *Fisher*. The Court will then limit the kinds of narrow tailoring requirement required to satisfy strict scrutiny, but not overrule that the goal of a diverse student body is a compelling state interest. As a result, the Court will hold that UT’s admissions policy is not narrowly tailored to achieve the compelling interest of a diverse student body. However, if

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47 *Grutter*, 539 U.S. at 387-88 (Kennedy, J., dissenting).
48 *Id.* at 388.
49 *Id.*
50 *Parents Involved*, 551 U.S. at 798 (Kennedy, J., concurring).
Justice Kennedy joins the liberal block, then the Court will issue a plurality opinion and *Grutter* will remain the law.

**VI. Conclusion**

The United States Supreme Court should conclude that UT’s admissions policy is constitutional because it is narrowly tailored to achieve the compelling interest of student diversity. UT considers race among many factors and individually and holistically reviews each applicant’s entire file. Educational benefits flow interactions among students with diverse backgrounds regardless of whether the interactions occur within or outside of the classroom. Lastly, Justice Kennedy has signaled that he will join the conservative block and may hold that UT’s admissions policy is not narrowly tailored.