4-19-2023

Expiration of the Sunset Clause: Is the Clock Ticking for the Grutter Standard and Affirmative Action in Higher Education?

Simona Stodulkova

Expiration of the Sunset Clause: Is the Clock Ticking for the Grutter Standard and Affirmative Action in Higher Education?

Photo by Clay Banks on Unsplash.

Affirmative action, an active effort to provide access to educational and employment opportunities to historically underrepresented groups, is now in danger of being eradicated by the Supreme Court. While the Court upheld affirmative action in *Grutter v. Bollinger* in 2003, it suggested in its "sunset clause" of the opinion that the issue should be revisited in twenty-five years. Two cases concerning affirmative action in higher education are now before the current conservative-led Court, which has already indicated that it is prepared to overrule its precedent.

Affirmative action in higher education has been advanced as a solution to past discriminatory practices against minorities in the United States. The Equal Protection Clause contained within the Fourteenth Amendment was passed in 1868 as one of the Reconstruction Amendments with the dual intent of ending slavery and protecting African Americans from discrimination. The Fourteenth Amendment provides that no State shall "deny to any person within its jurisdiction

the equal protection of the laws." White citizens began to use the Equal Protection Clause's protection of "any person" to challenge affirmative action as a form of reverse discrimination perpetrated against them.

Racial Quotas Held Unconstitutional in *Bakke*

In 1978, the Supreme Court upheld affirmative action in higher education in *Regents of University of California v. Bakke*. In that case, Allan Bakke, a white man, challenged the special admissions program of the University of California after having been rejected twice despite being qualified for admission. Bakke argued that he lost a seat due to the school's affirmative action policy, which reserved sixteen spots per one hundred students in the incoming class for minority applicants. While the Court invalidated the "set-aside program" as a violation of the Civil Rights Act of 1964, it held that diversity in higher education was a compelling governmental interest. Writing for the plurality, Justice Powell stated that race could be taken into account as one of the several factors in an admissions process, so long as the school did not establish racial quotas and did not use race as the sole factor in admissions decisions.

The *Grutter* Standard's Emergence from *Gratz* and the Implication of Its Sunset Provision

The Supreme Court reaffirmed Justice Powell's diversity rationale twenty-five years later in two affirmative action cases filed by white applicants against the University of Michigan: *Gratz v. Bollinger* and *Grutter v. Bollinger*. In *Gratz*, the Court evaluated the University undergraduate admission program's points system, which automatically awarded twenty points to applicants from underrepresented minority groups. The Court was concerned that the "minority points" constituted a substantive portion of the maximum of 150 points, strongly disadvantaging white applicants. It concluded that the fixed-points based system violated the Equal Protection Clause.


Photo by Adam Szuscik on Unsplash.

In *Grutter*, the Court upheld use of race as a "plus" factor in the law school admissions process. Mindful of the *Bakke* decision, the University of Michigan adopted a highly individualized law school admissions policy that took into account multiple factors, one of which was the applicant's race. Other variables included the applicant's GPA, LSAT score, the quality of the applicant's essay, the enthusiasm of recommenders, or the difficulty of undergraduate course selection. Barbara Grutter, one of the rejected applicants, challenged the law school's admissions process, arguing that her test scores would have qualified her for admission had she not been white.

Justice O'Connor, writing for the majority, stated that the admissions policy satisfied strict scrutiny because unlike the university in *Bakke*, which used a racial quota, the law school narrowly tailored its holistic review by using race only as a "plus factor" among many. However, Justice O'Connor acknowledged the danger of preferential racial treatment going forward and expressed that there must be a logical endpoint at which use of race in the admissions process will no longer be necessary. In its "sunset clause," the Court set the estimated aspirational deadline at twenty-five years from the 2003 decision.

***Grutter* Reconsidered in Light of the 25-Year Sunset Provision Deadline**

Nearly two decades later, the issue came in front of the Court once again for review in a pair of cases initiated by Students for Fair Admissions Inc. (SFFA), a nonprofit membership group, against both the University of North Carolina and Harvard College. Although the Supreme Court is known for adhering to its precedent and is generally reluctant to overturn its prior decisions, Justice O'Connor's inclusion of now slowly expiring sunset provision opened the door for subsequent review of the *Grutter* standard. A few decades of efforts to improve diversity have

not yet fully remedied hundreds of years of discrimination, but one thing has changed – the composition of the Supreme Court. During his presidency, Donald Trump appointed three conservative Supreme Court Justices. With the current conservative majority, the *Grutter* decision is in danger of being overturned.

Photo by Harry Lipson III on Flickr.

Justice Jackson, a justice likely to vote to uphold the *Grutter* precedent, has previously served as a six-term member of Harvard's Board of Overseers, and her daughter is currently a student at Harvard. Therefore, Jackson agreed to recuse herself from the Harvard case during her nomination hearings. She will, however, participate in the *SFFA v. UNC* decision.

The Conservative Majority's Line of Inquiry Surrounding *Grutter*'s Sunset Clause

During the oral arguments for both cases on October 31, 2022, the conservative justices repeatedly brought up Justice O'Connor's sunset clause, asking where the line should be drawn because such race-conscious approaches cannot continue indefinitely. Justice Barrett questioned when the UNC administration would know that diversity has been reached, and Justice Kavanaugh added that the standard was too vague if UNC were to end its race-conscious policy when it was "satisfied with diversity." He also mentioned that certain states where race-based admission programs are outlawed still produce significant numbers of minority students on

campuses, suggesting that there are indeed less restrictive, alternative means to achieve diversity. Justice Roberts noted that if universities were not allowed to consider race as a factor, they would eventually be incentivized to pursue race-neutral alternatives. Justice Gorsuch suggested that universities could assemble a diverse student body without considering race in admissions if they also removed other factors, such as whether the applicant's parents attended the same school or donated money, or whether the applicants were "squash athletes," hinting at the removal of factors that "tend to favor the children of wealthy white parents." All of these arguments may form the basis for determining that the universities cannot overcome the strict scrutiny standard because there are alternative means of achieving the same goal.

The Court's Liberal Minority Argues for Upholding the Affirmative Action

Justice Jackson expressed her concern that prohibiting race as a factor in the admissions process would create more equal protection issues instead of solving them. She stated that applicants whose racial backgrounds shaped them as individuals would be denied the opportunity to tell their stories in the same way applicants with other non-racial backgrounds and personal characteristics can. Justice Jackson also pointed out that there was no evidence that race, standing alone, guaranteed any student admission. Justice Sotomayor added that there were numbers of minority students who were rejected because they were not otherwise qualified for admission.

Justice Kagan used a creative originalist argument about the original meaning of the Fourteenth Amendment. Conservative justices often use originalism to decide constitutional issues, arguing that the Court should look to the original meaning and understanding of the Constitution at the time it was enacted. Justice Kagan asked Elizabeth Prelogar, the U.S. solicitor general appearing as amicus curae in support of the UNC respondents, what a committed originalist would think about the race-conscious admissions programs. Prelogar answered that, at the time the Fourteenth Amendment was passed, the central premise was "to bring African American citizens to a point of equality in our society." From this line of questioning, we can expect the liberal justices to argue that affirmative action would indeed be constitutional under the Amendment's original meaning.

With the End of Affirmative Action on the Horizon, What Does the Future Portend for Diversity Beyond Higher Education?

Despite the fact that the current Supreme Court is the most racially diverse Court in history, based on the conservative Justices' skepticism during the oral arguments, it seems likely that the Court will put an end to affirmative action in higher education. The release of the opinions is expected by the end of June 2023.

By Simona Stodulkova

Simona Stodulkova is a second-year student at Golden Gate University of Law. Simona is originally from the Czech Republic where she obtained her Bachelor degree in Special Education at the University of Ostrava. Simona also has an Associate's degree in Paralegal Studies from Skyline College, and worked as a paralegal at a full-service law firm in San Francisco. Simona plans to sit for the California Bar Exam in July 2024, and wants to specialize in Business and Intellectual Property Law.