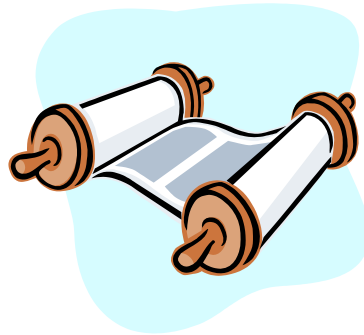


EIGHTH ANNUAL

MARSHALL-BRENNAN CONSTITUTIONAL LITERACY PROJECT

CONSTITUTION DAY TEACHING MODULE



**TOPIC: Diversity and Affirmative Action in College Admissions: The
Case of *Fisher v. University of Texas***

September 17, 2012

Produced by the **Marshall-Brennan Constitutional Literacy Project** at American University Washington College of Law. Maryam Ahranjani conceived the topic and structure of the lesson, Abby Duggan is the primary author, and Claire Griggs provided valuable editing support.

The Equal Protection Clause of the Fourteenth Amendment and Affirmative Action:

What Makes Sense in 2012?

Instructions

Description: This unit can be taught during the week of Constitution Day or afterwards. The overarching goal of this lesson plan is to teach 9th-12th grade students about the significance of the Constitution as a living document that applies to their daily lives as young people. Using the case of *Fisher v. University of Texas* as an example of how the Constitution applies to young people, students will learn about the Equal Protection Clause of the Fourteenth Amendment, affirmative action in college admissions, and the facts of *Fisher*, which will be heard by the Supreme Court on October 10, 2012.

Objectives:

- 1) To learn how diversity is taken into account in undergraduate admissions.
- 2) To learn what a strict scrutiny standard of review of the Equal Protection Clause means and how it applies to undergraduate admissions policies that take race into account.
- 3) To learn the facts and arguments involved in the *Fisher v. University of Texas* case.

Length of Lesson: 1-3 class periods of 60 minutes each. This module may take more time if your class is shorter than 60 minutes, or if you have a class of more than 20 students.

Supplies Needed: This packet.

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Recommended Approach

Day One

- Teach students about the Equal Protection Clause (EPC) of the Fourteenth Amendment using the “Equal Protection Clause Background” Handout.
 - A student or the teacher/presenter should read the actual text of the Fourteenth Amendment aloud to the class.
 - Depending on the class, the presenter may want to only read the EPC to help students focus on the relevant information.
 - Briefly discuss the history of the EPC as it applies to education.
 - Explain strict scrutiny and how the Supreme Court struck down racial segregation in public schools in *Brown v. Board of Education*.
 - Explain that since then there have been a number of legal challenges to the use of race in public education, and, in anticipation of the Supreme Court’s ruling during the 2012-2013 term in the case of *Fisher v. University of Texas*, this lesson focuses in particular on the use of race in undergraduate admissions policies.
- Review “Equal Protection Analysis” Handout, which students will use to complete the “Equal Protection and Affirmative Action” Worksheet.
- Students complete “Equal Protection and Affirmative Action” Worksheet.

Teacher/Presenter “To Do” List:

- Review entire module to decide whether to use all or parts of it.
- Make one copy per student of selected handouts.

Day 2

- Students complete “Do Now” activity to warm up for the day. Time permitting, instructors should ask students to share their responses.
- Students read “Modern Day Affirmative Action Application: *Bakke*, *Grutter* and *Gratz*” activity.
 - Depending on the class, the presenter will probably only read the summaries of the three cases.
 - There are also condensed Supreme Court opinions for *Grutter* and *Gratz* included for presenters and students who are interested in reading actual text of Supreme Court cases.
 - Make sure to discuss Justice O’Connor’s “25 years” quote in *Grutter* out loud in class.
- Group students into pairs or small groups and have them complete the “The Future of Affirmative Action” Worksheet to wrap up class. Each student should write their own answers to the questions.

Day 3

- Instructor leads *Fisher v. Texas* class activity.
 - Instructor should divide the class and assign each student to either the petitioner or respondent position.
 - Students read the bullet point list of facts and arguments silently and individually.
 - Depending on the class, instructor may choose to go over the arguments together as a class or have students get into small groups of petitioners and respondents to discuss the arguments on both sides of the case and decide how they think the Supreme Court should rule. If the instructor chooses to split the class into groups, each group should have students who studied both positions to encourage dialogue and diversity of opinion.
 - Have the class return to a larger group for a class discussion on the arguments for both sides.
 - The instructor may have one person representing petitioner and one person representing respondent present in front of the group.
- Time permitting, the instructor may have students return to their small groups to complete the “Follow-Up Group Activity on *Fisher v. Texas*.”
 - Students should utilize the “Modern Day Affirmative Action Application: *Bakke*, *Grutter* and *Gratz*” cover sheet and chart from Day 2 (p. 13 & 14) and Petitioner/Respondent arguments (p. 28 & 29) from *Fisher v. Texas* to complete these questions.
 - The instructor may choose to assign one question to each group to answer, or require each group to complete all five questions.

Equal Protection Clause Background

Equal Protection Vocabulary

WORD	DEFINITION
Deny	To refuse to give something to somebody; to keep something away from another person.
Jurisdiction	Body of law.
Equal Protection	The right of all persons to have the same access to the law and courts, and to be treated equally by the law and courts, as any other person.
Discrimination	Treating an individual or a group of people differently because they are part of a different group or class of people.
Affirmative Action	An action or policy favoring those who tend to suffer from discrimination or who suffered past discrimination as a group.
Segregation	Separation of humans into different groups or classes in daily life. Often refers to separating people because of their race.
Scrutiny	An investigation or a close examination of an issue.
Suspect Class	This is a term that refers to a specific group of people that have historically been discriminated against. The Supreme Court has recognized race, national origin, religion and alienage as suspect classes. The Supreme Court uses strict scrutiny to review policies or laws that affect suspect classes.
Rational Basis Review	The lowest level of scrutiny a court will apply. This means that a government action must be <i>rationaly related to a legitimate government interest</i> .
Intermediate Scrutiny	The middle level of scrutiny a court will apply. This is more difficult for the government to prove than rational basis. This means that the classification that is being challenged must further <i>an important government interest in a way that is substantially related to that interest</i> .
Strict Scrutiny	This is the highest level of scrutiny. This comes into play when a fundamental constitutional right has been limited, or when a suspect class is involved. The government must show that the classification is <i>necessary to further a compelling government interest</i> .

The Basics of Equal Protection

Section 1 of the Fourteenth Amendment

ALL PERSONS BORN OR NATURALIZED IN THE UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

Equal Protection Clause

NO STATE SHALL DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

Let's break it down.

Term	Explanation
No State	No government that is a part of the U.S., so no state government, local government, or other state actor
Shall Deny	Shall keep away from
To Any Person	<u>Anyone</u>
The Equal Protection of the Laws	An individual's right to live the way all other people live, or their right to be treated by the law in the same way all other people are treated.

The Fourteenth Amendment was added to the U.S. Constitution in 1868. Essentially, the Equal Protection Clause says that ***the government must apply all laws equally to all people***. However, the Supreme Court has determined that there are exceptions. A state may have a law that treats people differently provided that there is an important reason for the unequal treatment. For example, some states can require students under the age of 16 to go to school every day.

As long as the state can prove they have a strong reason to treat different groups of people differently, they can have laws that don't provide equal protection. The courts decide which laws are constitutional and which are unconstitutional. In general, the strict scrutiny standard is very hard to meet, so courts will strike down classifications or laws that affect suspect classes or groups that merit strict scrutiny review.

How the Equal Protection Clause Applies to Education

The Birth of Affirmative Action in Education: Setting the Scene.

The United States has a long history of discriminating against and enslaving African Americans and other minority groups. Because of this long history of discrimination, some groups have been denied access to basic opportunities and equal rights in education and other public functions (access to voting and public facilities like bathrooms and drinking fountains). Congress finally banned indentured servitude (or slavery) by passing the Thirteenth Amendment, and it also quickly passed the Fourteenth Amendment in 1868 to send the message that all Americans should be treated the same.

The Equal Protection Clause has had a unique impact on education in this country. Before 1954, public schools in the United States were racially segregated. That is, there were schools for black students and separate schools for white students. The rationale allowing these separate schools was that it did not violate the Equal Protection Clause as long as the schools were “separate but equal.” However, it was very clear that separate schools were never equal. Many African American students were segregated from whites and forced to go to underfunded schools with underpaid teachers, decaying facilities, and fewer resources. The Supreme Court finally decided in *Brown v. Board of Education* that racially segregated schools violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution, and ordered that public schools across the country desegregate.

How *Brown v. Board of Education* Affects Students Today

Today, race and education are viewed in a different way. In addition to remedying the legacy of slavery and discrimination, many people believe that attending a school where there are many different people of different races and backgrounds is an important part of a well-rounded education. Because the United States has a history of excluding African Americans and other minority students from educational opportunity, many public colleges and universities have implemented affirmative action plans to attract people of many different races to attend their school. Essentially, an affirmative action plan adds “race” to the list of many qualities that a college considers in a student’s application. If a school has an affirmative action plan, being of a different race or having some other unique characteristic might give an applicant an advantage.

Affirmative action plans have helped increase the diversity of many colleges by encouraging the number of women, minorities, students with disabilities, older students, and others who are accepted. People today generally believe that diversity in higher education is valuable because hearing diverse views forces students to think more critically and prepares them for an increasingly diverse world.

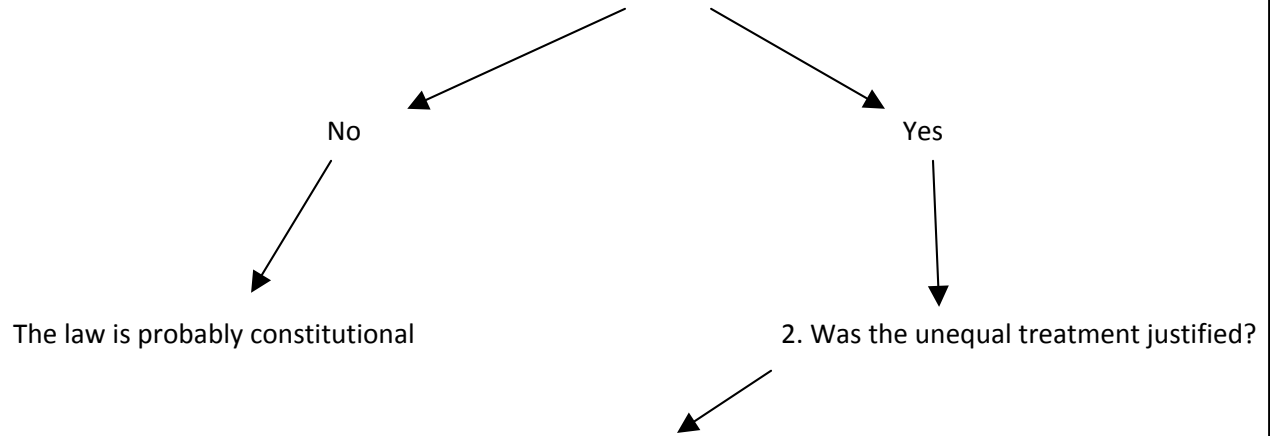
Courts evaluate affirmative action policies that are based on race by applying **strict scrutiny** just like any other race-based government classification. Even though affirmative action in higher education admission is seen as a way to benefit minorities, it is sometimes criticized as being unfair to non-

minorities. Therefore, to justify an admissions policy that takes race into account, the government interest in diversity must be *compelling*, and the policy must be *narrowly tailored*.

Equal Protection Analysis

If a law treats different people unequally, the courts determine whether or not the law is OK under the Equal Protection Clause. There are two questions the court must ask:

Question 1: Was the unequal treatment intentional?



Question 2:

To answer the second question, courts look at three things: 1) the class of people the law discriminates against, 2) why the government made the law the way it is – the government’s interest, and 3) how closely the law achieves the government’s interest. The courts use different levels of scrutiny depending on which class the law discriminates against. Courts use the chart below to decide what type of scrutiny to apply.

Equal Protection Chart:

Examples of groups	Government Interest	Law’s relationship to the government interest	Level of scrutiny
Race, religion, national origin	Compelling	Narrowly tailored	Strict scrutiny
Gender	Important	Substantially related	Intermediate scrutiny
Sexual orientation, disability, age, wealth	Legitimate	Rationally related	Rational basis review

Equal Protection and Affirmative Action

1. The 14th Amendment's Equal Protection Clause prohibits states from "deny[ing] to any _____ within its _____ the equal protection of the laws."

2. _____ v. _____ held that segregation was illegal under the equal protection clause and overruled the "separate but equal" doctrine.

3. _____ is the practice or policy of favoring those who have suffered from or are likely to experience discrimination.

4. What are the two questions a court must consider when making an equal protection decision?
 1. _____ ?
 2. _____ ?

5. Courts evaluate affirmative action policies based on race under _____ scrutiny. This means that the government interest in the policy must be _____ and the policy's relationship to the government interest must be _____ for the policy to survive.

Draw lines to match the classifications with the appropriate level of scrutiny.

Classification	Scrutiny
Gender	Strict
Sexual Orientation	Intermediate
Race	Rational Basis

Many colleges and universities have affirmative action policies, where diversity is taken into consideration when the school decides which applicants to admit. This helps increase the diversity of the incoming classes, but may have the effect of denying admission to otherwise qualified candidates. Do you agree with affirmative action? Why or why not?

Equal Protection and Affirmative Action (Answer Key)

1. The 14th Amendment's Equal Protection Clause prohibits states from "deny[ing] to any person within its jurisdiction the equal protection of the laws."
2. Brown v. Board of Education held that segregation was illegal under the equal protection clause and overruled the "separate but equal" doctrine.
3. Affirmative Action is the practice or policy of favoring those who tend to suffer from discrimination.
4. What are the two questions a court must consider when making an equal protection decision?
 1. Was the unequal treatment intentional?
 2. Was the unequal treatment justified?
5. Courts evaluate affirmative action policies based on race under a strict level of scrutiny. This means that the government interest in the policy must be compelling and the policy's relationship to the government interest must be narrowly tailored for the policy to survive.

Match the classifications with each level of scrutiny.

Classification	Scrutiny
Gender	Strict
Sexual Orientation	Intermediate
Race	Rational Basis

DO NOW: What Factors Should Be Considered in Undergraduate Admissions

Make a list of eight factors that you think should be considered in undergraduate admissions and rank them in order of importance. This should be based on your *own* opinion, not what you think actual admissions committees take into account. Be prepared to explain and support your opinions.

1. _____

_____.

2. _____

_____.

3. _____

_____.

4. _____

_____.

5. _____

_____.

6. _____

_____.

7. _____

_____.

8. _____

_____.

Modern Day Affirmative Action Application: *Bakke, Grutter and Gratz*

There are three major cases that have helped shape the way affirmative action in admissions works today: *Regents of the University of California v. Bakke* (1978), *Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003).

Regents of the University of California v. Bakke

In 1978 the Supreme Court considered a challenge to affirmative action in *Regents of the University of California v. Bakke*. In this case, the original plaintiff was Allan Bakke, a Caucasian applicant to the medical school of the University of California at Davis. After Bakke was denied admission, he sued the school for violation of his Equal Protection rights. He challenged the school's policy of reserving 16 out of 100 places in the entering class for minority students, including African Americans, Chicanos, Asian Americans, and Native Americans. Bakke successfully showed that many minority applicants, though certainly qualified to go to medical school, "were admitted with grade point averages [and] Medical College Admissions Test scores significantly lower than Bakke's." He did not show, and could not show, that he would have been admitted absent the affirmative action program, because many white applicants with scores lower than him were admitted. The Court was deeply divided in its opinion, but ultimately decided that the rigid numerical set-aside of 16 places was unconstitutional as an affirmative action plan and therefore Bakke was admitted to the medical school. However, the Court allowed an affirmative action plan that uses a minority's race or ethnicity as a softer "plus" factor as an acceptable affirmative action policy to promote educational diversity. Thus, the Court ruled that Bakke should be admitted to Davis, and it stated that affirmative action is permissible but not mandatory. This case shows how affirmative action plans are allowed and even encouraged, however they must take race and ethnicity into account as one factor among many criteria during the admissions process.

Gratz v. Bollinger and Grutter v. Bollinger

Twenty-five years later, in 2003, the Supreme Court decided to hear two more cases - *Gratz v. Bollinger* and *Grutter v. Bollinger* – dealing with diversity in higher education admissions. The two cases were brought by applicants of the University of Michigan at Ann Arbor. Jennifer Gratz had applied for undergraduate admissions, and Barbara Grutter had applied to the University of Michigan Law School. Both were denied admission, and they both argued that but for the affirmative action admissions programs that gave special consideration to diverse applicants, they would have been admitted. The Supreme Court drew a distinction between the undergraduate admissions policy that allotted a certain number of points for being a member of an underrepresented minority group and the law school, which considered race as an additional soft factor. Applying strict scrutiny, the Court found that there was still a compelling government interest in diversity. They applied the holding in *Bakke* and found that it was constitutional to consider race as a plus factor but found that the numerical system employed by the undergraduate admissions committee was not narrowly tailored enough to avoid violating the Equal Protection rights of Caucasian American applicants.

One of the most often cited quotes from the *Grutter* case is the following, by Justice Sandra Day O'Connor:

"It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

Specific details comparing the *Gratz* and *Grutter* cases can be found below.

Gratz: Jennifer Gratz was denied admission to the University of Michigan's undergraduate program. She sued the school, arguing that the university's admissions program discriminated against white students.

- The university used a point system for undergraduate admissions, assigning extra points to what it considered "under-represented" racial and ethnic minorities.
- The Court decided diversity *is* a compelling government interest.
- This system also added extra points to athletes, children of alumni, and men enrolling in the nursing school.
- The university argued there was nothing out of the ordinary about adding points for race as well.
- The court voted 6-3 to strike down the undergraduate point system.

Grutter: Barbara Grutter was denied admission to the University of Michigan's law school. She also sued the school, arguing that the university's admissions program discriminated against white students.

- The law school did not use any point system for admissions.
- However, race was used as a determining factor because, the university maintained, it helped promote cross-racial understanding.
- The Court decided diversity *is* a compelling government interest.
- The Court upheld the law school's less rigid program in a 5-4 vote.
- The opinion from this case, authored by Justice O'Connor, mentioned that "the Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

Gratz v. Bollinger
Supreme Court of the United States
Decided June 23, 2003
539 U.S. 244

Chief Justice RHENQUIST delivered the opinion of the Court.

We granted certiorari in this case to decide whether “the University of Michigan’s use of racial preferences in undergraduate admissions violate[s] the Equal Protection Clause of the Fourteenth Amendment.” Because we find that the manner in which the University considers the race of applicants in its undergraduate admissions guidelines violates these constitutional and statutory provisions, we reverse that portion of the District Court’s decision upholding the guidelines.

I
A

Petitioners Jennifer Gratz and Patrick Hamacher both applied for admission to the University of Michigan’s (University) College of Literature, Science, and the Arts (LSA) as residents of the State of Michigan. Both petitioners are Caucasian. Gratz, who applied for admission for the fall of 1995, was notified in January of that year that a final decision regarding her admission had been delayed until April. This delay was based upon the University’s determination that, although Gratz was “ ‘well qualified,’ ” she was “ ‘less competitive than the students who ha[d] been admitted on first review.’ ” Gratz was notified in April that the LSA was unable to offer her admission. She enrolled in the University of Michigan at Dearborn, from which she graduated in the spring of 1999.

Hamacher applied for admission to the LSA for the fall of 1997. A final decision as to his application was also postponed because, though his “ ‘academic credentials [were] in the qualified range, they [were] not at the level needed for first review admission.’ ” Hamacher’s application was subsequently denied in April 1997, and he enrolled at Michigan State University....

B

The University has changed its admissions guidelines a number of times during the period relevant to this litigation, and we summarize the most significant of these changes briefly. The University’s Office of Undergraduate Admissions (OUA) oversees the LSA admissions process. In order to promote consistency in the review of the large number of applications received, the OUA uses written guidelines for each academic year. Admissions counselors make admissions decisions in accordance with these guidelines.

OUA considers a number of factors in making admissions decisions, including high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, and leadership. OUA also considers race. During all periods relevant to this litigation, the University has

considered African-Americans, Hispanics, and Native Americans to be “underrepresented minorities,” and it is undisputed that the University admits “virtually every qualified ... applicant” from these groups.

During 1995 and 1996, OUA counselors evaluated applications according to grade point average combined with what were referred to as the “SCUGA” factors. These factors included the quality of an applicant's high school (S), the strength of an applicant's high school curriculum (C), an applicant's unusual circumstances (U), an applicant's geographical residence (G), and an applicant's alumni relationships (A). After these scores were combined to produce an applicant's “GPA 2” score, the reviewing admissions counselors referenced a set of “Guidelines” tables, which listed GPA 2 ranges on the vertical axis, and American College Test/Scholastic Aptitude Test (ACT/SAT) scores on the horizontal axis. Each table was divided into cells that included one or more courses of action to be taken, including admit, reject, delay for additional information, or postpone for reconsideration.

In both years, applicants with the same GPA 2 score and ACT/SAT score were subject to different admissions outcomes based upon their racial or ethnic status. For example, as a Caucasian in-state applicant, Gratz's GPA 2 score and ACT score placed her within a cell calling for a postponed decision on her application. An in-state or out-of-state minority applicant with Gratz's scores would have fallen within a cell calling for admission. In 1997, the University modified its admissions procedure. Specifically, the formula for calculating an applicant's GPA 2 score was restructured to include additional point values under the “U” category in the SCUGA factors. Under this new system, applicants could receive points for underrepresented minority status, socioeconomic disadvantage, or attendance at a high school with a predominantly underrepresented minority population, or underrepresentation in the unit to which the student was applying (for example, men who sought to pursue a career in nursing). Under the 1997 procedures, Hamacher's GPA 2 score and ACT score placed him in a cell on the in-state applicant table calling for postponement of a final admissions decision. An underrepresented minority applicant placed in the same cell would generally have been admitted.

Beginning with the 1998 academic year, the OUA dispensed with the Guidelines tables and the SCUGA point system in favor of a “selection index,” on which an applicant could score a maximum of 150 points. This index was divided linearly into ranges generally calling for admissions dispositions as follows: 100-150 (admit); 95-99 (admit or postpone); 90-94 (postpone or admit); 75-89 (delay or postpone); 74 and below (delay or reject).

Each application received points based on high school grade point average, standardized test scores, academic quality of an applicant's high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership. Of particular significance here, under a “miscellaneous” category, an applicant was entitled to 20 points based upon his or her membership in an underrepresented racial or ethnic minority group. The University explained that the “ ‘development of the selection index for admissions in 1998 changed only the mechanics, not the substance, of how race and ethnicity [were] considered in admissions.’ ”

In all application years from 1995 to 1998, the guidelines provided that qualified applicants from underrepresented minority groups be admitted as soon as possible in light of the University's belief that such applicants were more likely to enroll if promptly notified of their admission. Also from 1995 through 1998, the University carefully managed its rolling admissions system to permit consideration of certain applications submitted later in the academic year through the use of "protected seats." Specific groups-including athletes, foreign students, ROTC candidates, and underrepresented minorities-were "protected categories" eligible for these seats. A committee called the Enrollment Working Group (EWG) projected how many applicants from each of these protected categories the University was likely to receive after a given date and then paced admissions decisions to permit full consideration of expected applications from these groups. If this space was not filled by qualified candidates from the designated groups toward the end of the admissions season, it was then used to admit qualified candidates remaining in the applicant pool, including those on the waiting list....

II
B

....It is by now well established that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." This "'standard of review ... is not dependent on the race of those burdened or benefited by a particular classification.'" Thus, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny."

To withstand our strict scrutiny analysis, respondents must demonstrate that the University's use of race in its current admissions program employs "narrowly tailored measures that further compelling governmental interests." Because "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification," our review of whether such requirements have been met must entail "'a most searching examination.'" We find that the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single "underrepresented minority" applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program....

Justice Powell's opinion in Bakke emphasized the importance of considering each particular applicant as an individual, assessing all of the qualities that individual possesses, and in turn, evaluating that individual's ability to contribute to the unique setting of higher education. The admissions program Justice Powell described, however, did not contemplate that any single characteristic automatically ensured a specific and identifiable contribution to a university's diversity. Instead, under the approach Justice Powell described, each characteristic of a particular applicant was to be considered in assessing the applicant's entire application.

The current LSA policy does not provide such individualized consideration. The LSA's policy automatically distributes 20 points to every single applicant from an "underrepresented minority" group, as defined by

the University. The only consideration that accompanies this distribution of points is a factual review of an application to determine whether an individual is a member of one of these minority groups. Moreover, unlike Justice Powell's example, where the race of a "particular black applicant" could be considered without being decisive, the LSA's automatic distribution of 20 points has the effect of making "the factor of race ... decisive" for virtually every minimally qualified underrepresented minority applicant....

Respondents contend that "[t]he volume of applications and the presentation of applicant information make it impractical for [LSA] to use the ... admissions system" upheld by the Court today in Grutter. But the fact that the implementation of a program capable of providing individualized consideration might present administrative challenges does not render constitutional an otherwise problematic system. Nothing in Justice Powell's opinion in Bakke signaled that a university may employ whatever means it desires to achieve the stated goal of diversity without regard to the limits imposed by our strict scrutiny analysis.

We conclude, therefore, that because the University's use of race in its current freshman admissions policy is not narrowly tailored to achieve respondents' asserted compelling interest in diversity, the admissions policy violates the Equal Protection Clause of the Fourteenth Amendment....

It is so ordered.

Grutter v. Bollinger
Supreme Court of the United States
Decided June 23, 2003
539 U.S. 306

Justice O'CONNOR delivered the opinion of the Court.

This case requires us to decide whether the use of race as a factor in student admissions by the University of Michigan Law School (Law School) is unlawful.

I
A

The Law School ranks among the Nation's top law schools. It receives more than 3,500 applications each year for a class of around 350 students. Seeking to "admit a group of students who individually and collectively are among the most capable," the Law School looks for individuals with "substantial promise for success in law school" and "a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others." More broadly, the Law School seeks "a mix of students with varying backgrounds and experiences who will respect and learn from each other." In 1992, the dean of the Law School charged a faculty committee with crafting a written admissions policy to implement these goals....

The hallmark of that policy is its focus on academic ability coupled with a flexible assessment of applicants' talents, experiences, and potential "to contribute to the learning of those around them." The policy requires admissions officials to evaluate each applicant based on all the information available in the file, including a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School. In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admission Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school. The policy stresses that "no applicant should be admitted unless we expect that applicant to do well enough to graduate with no serious academic problems."

The policy makes clear, however, that even the highest possible score does not guarantee admission to the Law School. Nor does a low score automatically disqualify an applicant. Rather, the policy requires admissions officials to look beyond grades and test scores to other criteria that are important to the Law School's educational objectives. So-called "'soft' variables" such as "the enthusiasm of recommenders, the quality of the undergraduate institution, the quality of the applicant's essay, and the areas and difficulty of undergraduate course selection" are all brought to bear in assessing an "applicant's likely contributions to the intellectual and social life of the institution."

The policy aspires to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." The policy does not restrict the types of

diversity contributions eligible for “substantial weight” in the admissions process, but instead recognizes “many possible bases for diversity admissions.” The policy does, however, reaffirm the Law School's longstanding commitment to “one particular type of diversity,” that is, “racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans, who without this commitment might not be represented in our student body in meaningful numbers.” By enrolling a “ ‘critical mass’ of [underrepresented] minority students,” the Law School seeks to “ensur[e] their ability to make unique contributions to the character of the Law School.”

B

Petitioner Barbara Grutter is a white Michigan resident who applied to the Law School in 1996 with a 3.8 GPA and 161 LSAT score. The Law School initially placed petitioner on a waiting list, but subsequently rejected her application.... Petitioner allege[s] that respondents discriminated against her on the basis of race in violation of the Fourteenth Amendment....

II

B

The Equal Protection Clause provides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” Because the Fourteenth Amendment “protect[s] persons, not groups,” all “governmental action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed.” We are a “free people whose institutions are founded upon the doctrine of equality.” It follows from that principle that “government may treat people differently because of their race only for the most compelling reasons.”

We have held that all racial classifications imposed by government “must be analyzed by a reviewing court under strict scrutiny.” This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests....

III

A

With these principles in mind, we turn to the question whether the Law School's use of race is justified by a compelling state interest. Before this Court, as they have throughout this litigation, respondents assert only one justification for their use of race in the admissions process: obtaining “the educational benefits that flow from a diverse student body.”

The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici....

We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.... Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary."....

As part of its goal of "assembling a class that is both exceptionally academically qualified and broadly diverse," the Law School seeks to "enroll a 'critical mass' of minority students." The Law School's interest is not simply "to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin." That would amount to outright racial balancing, which is patently unconstitutional. Rather, the Law School's concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.

These benefits are substantial. As the District Court emphasized, the Law School's admissions policy promotes "cross-racial understanding," helps to break down racial stereotypes, and "enables [students] to better understand persons of different races." These benefits are "important and laudable," because "classroom discussion is livelier, more spirited, and simply more enlightening and interesting" when the students have "the greatest possible variety of backgrounds."....

These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its principle mission to provide national security." The primary sources for the Nation's officer corps are the service academies and the Reserve Officers Training Corps (ROTC), the latter comprising students already admitted to participating colleges and universities. At present, "the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies." To fulfill its mission, the military "must be selective in admissions for training and education for the officer corps, and it must train and educate a highly qualified, racially diverse officer corps in a racially diverse educational setting." We agree that "[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective."

We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to "sustaining our political and cultural heritage" with a fundamental role in maintaining the fabric of society. This Court has long recognized that "education ... is the very foundation of good citizenship." For this reason, the diffusion of knowledge and opportunity through public institutions of higher education must be accessible to all individuals regardless of race or ethnicity. The United States, as *amicus curiae*, affirms that "[e]nsuring that public institutions are open

and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.” And, “[n]owhere is the importance of such openness more acute than in the context of higher education.” Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.

Moreover, universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders. Individuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives. The pattern is even more striking when it comes to highly selective law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges.

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. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training....

B

To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot “insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.” Instead, a university may consider race or ethnicity only as a “ ‘plus’ in a particular applicant's file,” without “insulat[ing] the individual from comparison with all other candidates for the available seats.”

We find that the Law School's admissions program bears the hallmarks of a narrowly tailored plan. As Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a “plus” factor in the context of individualized consideration of each and every applicant.

We are satisfied that the Law School's admissions program, like the Harvard plan described by Justice Powell, does not operate as a quota. Properly understood, a “quota” is a program in which a certain fixed number or proportion of opportunities are “reserved exclusively for certain minority groups.” Quotas “ ‘impose a fixed number or percentage which must be attained, or which cannot be exceeded,’ and “insulate the individual from comparison with all other candidates for the available seats,” contrast, “a permissible goal ... require[s] only a good-faith effort ... to come within a range demarcated by the goal itself,” and permits consideration of race as a “plus” factor in any given case while still ensuring that each candidate “compete[s] with all other qualified applicants”....

THE CHIEF JUSTICE believes that the Law School's policy conceals an attempt to achieve racial balancing, and cites admissions data to contend that the Law School discriminates among different groups within the critical mass. But, as THE CHIEF JUSTICE concedes, the number of underrepresented minority students who ultimately enroll in the Law School differs substantially from their representation in the applicant pool and varies considerably for each group from year to year....

Here, the Law School engages in a highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either de jure or de facto, of automatic acceptance or rejection based on any single "soft" variable. Unlike the program at issue in *Gratz v. Bollinger*, the Law School awards no mechanical, predetermined diversity "bonuses" based on race or ethnicity. Like the Harvard plan, the Law School's admissions policy "is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight."

The Law School does not, however, limit in any way the broad range of qualities and experiences that may be considered valuable contributions to student body diversity. To the contrary, the 1992 policy makes clear "[t]here are many possible bases for diversity admissions," and provides examples of admittees who have lived or traveled widely abroad, are fluent in several languages, have overcome personal adversity and family hardship, have exceptional records of extensive community service, and have had successful careers in other fields. The Law School seriously considers each "applicant's promise of making a notable contribution to the class by way of a particular strength, attainment, or characteristic-e.g., an unusual intellectual achievement, employment experience, nonacademic performance, or personal background." All applicants have the opportunity to highlight their own potential diversity contributions through the submission of a personal statement, letters of recommendation, and an essay describing the ways in which the applicant will contribute to the life and diversity of the Law School....

We acknowledge that "there are serious problems of justice connected with the idea of preference itself." Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group....

We are satisfied that the Law School's admissions program does not. Because the Law School considers "all pertinent elements of diversity," it can (and does) select nonminority applicants who have greater potential to enhance student body diversity over underrepresented minority applicants....

We are mindful, however, that "[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." Accordingly, race-conscious admissions policies must be limited in time....

We take the Law School at its word that it would “like nothing better than to find a race-neutral admissions formula” and will terminate its race-conscious admissions program as soon as practicable. It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.

IV

In summary, the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body.... The judgment of the Court of Appeals for the Sixth Circuit, accordingly, is affirmed.

It is so ordered.

Fisher v. Texas Class Activity

Fisher v. Texas Background

Fisher v. Texas is a case concerning the affirmative action admissions policy of the University of Texas at Austin. The case, brought by undergraduate Abigail Fisher in 2008, asks that the Court declare the admissions policy of the University a violation of the Equal Protection Clause. The Fifth Circuit Court has already held that the University's affirmative action policy is constitutional and consistent with *Bakke*, *Gratz* and *Grutter*. Abigail Fisher is appealing her decision from the Fifth Circuit to ask the Supreme Court to hold that the University of Texas' policy is inconsistent with, or entirely overrule *Grutter v. Bollinger*, the 2003 case in which the Supreme Court ruled that race could play a limited role in the admissions policies of universities.

Activity

This activity includes three things for you to read and think about. Then you will be asked by your teacher to work in a group to decide whether or not you agree with Abigail Fisher, and whether you think the Supreme Court should rule in her favor, potentially eliminating affirmative action policies for the future, or uphold *Grutter* and rule in favor of the University of Texas.

1. Question Presented: the question presented is what the Court must decide. The Court will look at older cases in this area (like *Bakke*, *Gratz* and *Grutter*) as well as the arguments from both Abigail Fisher and the University of Texas to decide this question.
2. Petitioner's Argument: this is the argument Abigail Fisher has submitted to the Supreme Court for review. It describes her view of the law and her argument for why the Supreme Court should overrule the Fifth Circuit and decide the case in her favor.
3. Respondent's Argument: this is the argument the University of Texas has submitted to the Supreme Court for review. It describes the University of Texas' view of the law and rationale behind its affirmative action policy. It argues that the Supreme Court should uphold the decision of the Fifth Circuit and decide the case in the University's favor.

Keep in mind that if the court rules in favor of Abigail Fisher, the decision will overrule *Grutter* and could end affirmative action policies in admissions at U.S. public universities.

Question Presented

Whether [the Supreme] Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment permit the University of Texas at Austin's use of race in undergraduate admissions decisions.

Petitioner's (Abigail Fisher's) Arguments (from the actual [brief](#) filed with the Supreme Court)

- University admission is a unique area to enforce racial equality. State action should respect racial equality in university admissions because picking students for admission has enormous consequences for the future of American students and the perceived fairness of government.
- In order for the University of Texas (UT) to succeed in justifying its admission decisions under strict scrutiny, the University must demonstrate two things:
 1. That its use of race in admissions decisions is “necessary to further a compelling government interest” and,
 2. That “the means chosen to accomplish the government’s asserted purpose” are “specifically and narrowly framed to accomplish that purpose.”
- The Petitioner argues that UT cannot bear its heavy burden of proof for two reasons:
 1. Neither of UT’s justifications for restoring race to its admissions system is a constitutionally compelling state interest.
 - UT’s interest in pursuing educationally-based diversity is not compelling because it is not the same kind of educationally-based interest that *Grutter* tried to encourage. Instead, UT is trying to use race in admissions in a way that would inappropriately try to “racially” balance the classroom in order to keep minority students from feeling isolated. This is not a constitutional argument and should not be protected under the Equal Protection Clause.
 - UT’s interest in classroom diversity is not a compelling interest because *Grutter* nowhere suggests that every classroom must have a “critical mass” of minority students. UT wants diversity in every class; *Grutter* only wanted diversity in the school as a whole. Endorsing the classroom as the new benchmark would promote the use of race in perpetuity and is therefore unconstitutional.
 2. UT’s system of racial preferences is not narrowly tailored.
 - UT’s system is not narrowly tailored because it subjects all applicants to “disparate treatment based solely on the color of their skin” even though an entirely race-neutral admissions policy would be effective to achieve diversity.
 - Petitioner argues that race-neutral measures work just as well.
 - UT’s system is not narrowly tailored because it classifies Hispanics as an “underrepresented minority” which shows that UT’s use of race is more expansive than necessary to meet any legitimate “critical mass” goal and therefore cannot possibly be narrowly tailored.
 - Petitioner argues that because so many Hispanics are enrolled at UT and because UT has historically had success in graduating Hispanic students, UT cannot reasonably argue that Hispanic students are an “underrepresented minority”
- Because UT has not met its burden of demonstrating that its use of race is necessary to further a compelling interest and that its means of pursuing that interest were narrowly tailored, Petitioner argues that UT’s use of race in denying admission to the Petitioner was unconstitutional.
 - Under *Grutter*, UT may be entitled to deference on its “decision that it has a compelling interest in achieving racial ... diversity. But that is about as far as deference should go.”...
- The Supreme Court should not acknowledge UT’s interests because doing so would “justify racial engineering at every stage of the university experience.”

Respondent's (University of Texas') Arguments (from the actual [brief](#) filed with the Supreme Court)

- The University of Texas' (UT's) individualized consideration of race in the admissions process is Constitutional because it did not subject petitioner to unequal treatment under the Equal Protection Clause.
- In order for the Petitioner Abigail Fisher to succeed in arguing that UT's admissions policy is unconstitutional under strict scrutiny, the Petitioner must prove one of two things:
 1. That UT's use of race in its admissions decisions does not further a compelling government interest, or
 2. That even if UT's use of race in its admissions furthers a compelling interest, that UT's admissions process is narrowly tailored.
- The University of Texas argues that the Petitioner cannot bear her heavy burden of proof for three reasons:
 1. The UT use of race in decisions furthers the government's compelling interest in diversity.
 - The *Bakke* case told us that universities have a compelling interest in promoting student body diversity, and that a university may consider the race of applicants in an individualized context during the admissions process.
 2. UT's use of race in its admission decisions is narrowly tailored because UT uses race as only one modest factor among many others in making its admissions decisions.
 - UT's policy lacks the features that Justice Kennedy found disqualifying in *Grutter*: UT has not established any race-based target for its admissions.
 - UT has not set a "goal, target, or other quantitative objective" for minority admissions, as the Petitioner herself has admitted.
 3. The Petitioner's arguments that she was nevertheless subjected to unequal treatment in violation of the Fourteenth Amendment are refuted by both the record and existing precedent.
- Because accepting the Petitioner's argument also would discourage Universities in the future from experimenting with percentage plans, her argument cannot be sustained.
- UT's use of race in its admissions decisions is modest and nuanced role; therefore it does not cause a constitutional problem—UT's program is the hallmark of the type of plan this Court has held out as constitutional since *Bakke*.
- The Supreme Court should decline Petitioner's far-reaching request to overrule *Bakke* and *Grutter* because the Petitioner has failed to identify any reason for overruling *Grutter*, just nine years after this Court decided *Grutter*.
- Abruptly reversing course here would upset legitimate expectations in the rule of law—not to mention the profoundly important societal interests in ensuring that the future leaders of America are trained in a campus environment in which they are exposed to the full educational benefits of diversity.

4. Why does *Fisher v. Texas* fall under the Equal Protection Clause? Does the University of Texas' admissions strategy treat different groups of people unequally?

5. What is the value of diversity in higher education? Do you think people benefit from going to school with people from different backgrounds who have different interests and experiences?