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FISHER V. TEXAS

A HISTORY OF AFFIRMATIVE ACTION
AND POLICY IMPLICATIONS FOR
LATINOS AND HIGHER EDUCATION

ROBERT CHAO ROMERO
AND
MARCIA V. FUENTES

FOR MORE INFORMATION, CONTACT:

UCLA Chicano Studies Research Center • 193 Haines Hall • Los Angeles, CA 90095-1544
Phone: 310-825-2642 • Fax: 310-206-1784 • E-Mail: press@chicano.ucla.edu

For information on CSRC Press publications, visit www.chicano.ucla.edu

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In its recent ruling in *Fisher v. Texas*, the United States Supreme Court upheld race/ethnicity-based affirmative action in university admissions in theory, but it opened the door to future constitutional challenges.¹ This research report analyzes the *Fisher* case within the broader context of affirmative action history and discusses its ramifications for Latinos and higher education.

FROM TITLE VI THROUGH GRUTTER AND GRATZ

The Supreme Court's ruling in *Fisher*, issued in June 2013, is part of a tumultuous history of affirmative action. President John F. Kennedy coined the concept of affirmative action fifty-two years ago in Executive Order 10925. The order mandated that government contractors "take affirmative action to ensure that applicants are employed, and employees are treated during employment, without regard to their race, creed, color, or national origin."² This policy was not enforced, however, until the passage of the Civil Rights Act of 1964. Title VI of this act, which prohibits discrimination on the grounds of "race, color, or national origin" in programs and activities receiving financial assistance from the U.S. government, threatened institutions of higher education with the loss of federal funds if they did not abide by the law.³ In an effort to subscribe to the federal mandate, institutions of higher education, both public and private, developed affirmative action policies and practices in which they considered, and gave preference to, applicants of historically underrepresented racial/ethnic groups, including Latinos.

DeFunis v. Odegaard (1974) was the first case before the Supreme Court to challenge the consideration of race/ethnicity in university admissions.⁴ The case involved a lawsuit by a white applicant, Marco DeFunis, who alleged that he had been denied

admission to the University of Washington law school on account of his race, violating the Equal Protection Clause of the Fourteenth Amendment. Although the case was ultimately dismissed on procedural grounds, it was significant insofar as it was the first affirmative action case related to education to reach the Supreme Court.

Following closely on the heels of *DeFunis*, *Regents of the University of California v. Bakke* (1978) established the constitutional parameters of race-based admissions policies and governed educational affirmative action programs for a quarter-century.⁵ The lawsuit was filed by Alan Bakke, a white plaintiff who claimed that he was denied admission to the medical school at the University of California, Davis, because of his race. At issue in *Bakke* was whether the university had violated the Equal Protection Clause of the Fourteenth Amendment through its implementation of separate admissions policies for white and minority medical school applicants.

In a narrow 5-4 decision, the court ruled in favor of Bakke and held that racial quotas, such as the one in question, were illegal. At the same time, however, there was no single majority opinion in the case. Four justices argued that government racial quota systems violated the Civil Rights Act of 1964; Justice Powell supported this position, but added that racial/ethnic quotas ran counter to the Equal Protection Clause of the Fourteenth Amendment. The remaining four justices held that it was constitutionally permissible to consider race in admissions decisions as long it did not rise to the level of becoming a decisive factor. In an unexpected twist, Justice Powell also joined in this minority position.⁶ Out of six opinions written for the case, Powell's served as the controlling opinion because it represented the narrowest reasoning for the court's decision.

In his landmark opinion Powell asserted that the government has a compelling interest in educational diversity, which justifies the "competitive consideration of race and ethnic origin" in

admissions programs.⁷ He also articulated some general principles for developing permissible admissions policies. Although an applicant's race can be a "plus factor" in admissions decisions, it can never rise to the level of being decisive. Moreover, according to Powell, every applicant must receive individualized consideration in the admissions process, and numerical quotas are always unconstitutional.

Bakke remained largely undisturbed as the law of the land until 1996, when four white plaintiffs challenged their rejection to the University of Texas law school before the Fifth Circuit Court of Appeals in *Hopwood v. Texas*.⁸ The central issue in *Hopwood* was the validity of Powell's diversity rationale—whether diversity represents a compelling interest that justifies the consideration of race in university admissions. Plaintiffs contended that Powell's rationale was not binding because it was not supported by a five-vote majority of the court. The appellate court rejected Powell's diversity rationale as a controlling precedent, invalidating the university's use of diversity as justification for its race-based admissions policies, and held that the University of Texas had no compelling interest that justified its race-conscious admissions policies. In so ruling, the court struck down all educational affirmative action programs within its jurisdiction of Texas, Mississippi, and Louisiana.

Following the decision in *Hopwood*, opponents of affirmative action filed similar constitutional challenges in federal appellate courts in Washington and Georgia. *Smith v. University of Washington Law School* (2000) involved another challenge to Powell's diversity rationale, this time brought by a white female student who was denied admission to the University of Washington law school. In this case the Ninth Circuit Court of Appeals upheld the use of diversity as a compelling interest.⁹

Johnson v. Board of Regents of the University System of Georgia (2001) was spawned by the rejection of three white female students to the University of Georgia.¹⁰ The Eleventh Circuit

Court of Appeals evaded the controversial question at the heart of *Bakke* and instead based its ruling in favor of the plaintiffs on the grounds that the University of Georgia's race-conscious admissions policy was not narrowly tailored.¹¹

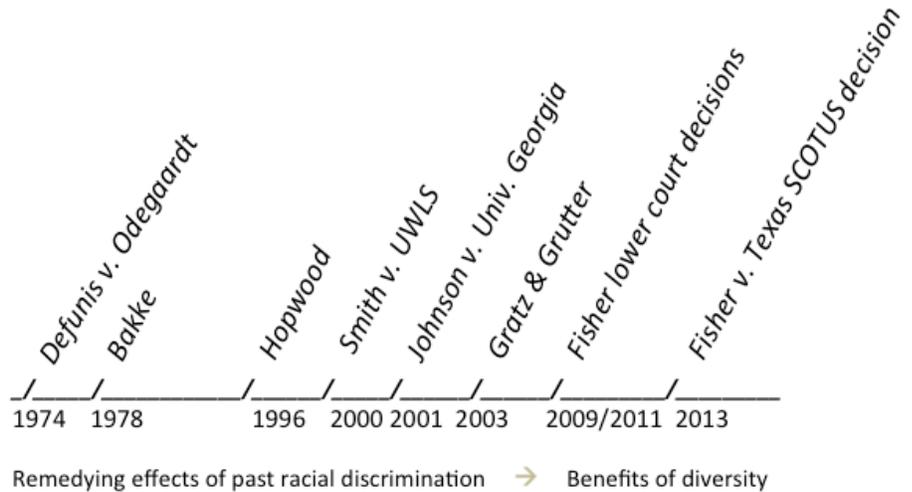
The Supreme Court intervened in the muddy waters of educational affirmative action law in 2003 through twin cases involving the University of Michigan: *Grutter v. Bollinger* and *Gratz v. Bollinger*.¹² *Grutter* and *Gratz* clarified the constitutional parameters of affirmative action law for the next decade, and perhaps beyond. At issue in *Grutter* and *Gratz* was the constitutionality of the race-conscious admissions policies of the university's undergraduate program and law school. As in the several cases that preceded it, *Grutter* and *Gratz* involved the protestations of white applicants who were denied admission to the university.

The central legal question posed in *Grutter* was, again, whether Powell's diversity rationale represents a compelling interest that justifies the implementation of race-conscious admissions policies at public universities. *Gratz* addressed a related question: what does a race-conscious admissions policy need to look like in order to be narrowly tailored?

In *Grutter* the Supreme Court held that diversity is a compelling interest that justifies the narrowly tailored use of race in admissions decisions. According to the court, public universities have a compelling interest in obtaining the educational benefits that flow from a diverse student body. These benefits include the promotion of cross-racial understanding, the breaking down of stereotypes, and the preparation of a diverse global workforce.

Whereas *Grutter* affirmed Justice Powell's view of diversity, *Gratz* defined the contours of a constitutionally permissible affirmative action program. In further agreement with *Bakke*, the Supreme Court ruled that race-conscious admissions programs are considered narrowly tailored if they provide individualized and holistic consideration

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of every applicant. Although race may be explicitly considered as one factor in admissions decisions, racial considerations may not rise to the level of being a decisive factor. Moreover, the court confirmed that quotas are always unconstitutional.

FISHER V. TEXAS

Grutter and *Gratz* remained largely uncontested until Abigail Noel Fisher brought a lawsuit against the University of Texas at Austin on April 7, 2008, in the Western District Court of Texas.¹³ Fisher claimed that the race-conscious admissions policies of U.T. Austin violated her constitutional rights according to the Equal Protection Clause of the 14th Amendment.

Fisher, a white female, had graduated from Stephen F. Austin High School in Sugar Land, Texas, with a grade point average of 3.59. She took the Scholastic Assessment Test (SAT) twice—scoring 1170 on her first attempt and 1180 on her second. Significantly, she ranked in the top 12 percent of her graduating class. Upon application, Fisher was denied admission to U.T. Austin but offered admission to the university's Coordinated Admission Program (CAP). Students enrolled in CAP are allowed to enroll in another University of Texas campus and, upon the completion of CAP requirements, are guaranteed admission to the College of Liberal Arts or

the College of Natural Sciences at U.T. Austin after their freshman year.

Rachel Multer Michalewicz was added as a co-plaintiff on April 17, 2008.¹⁴ Also a white female, Michalewicz graduated from Jack C. Hays High School in Buda, Texas, with a 3.86 grade point average. She scored 1290 on the SAT and was in the top 11 percent of her graduating class. Like Fisher, Michalewicz was also denied admission to U.T. Austin.

Admission to the University of Texas is based on a stepped process. The "Top Ten Percent Law" (HB 588), enacted by the Texas state legislature in 1997, guarantees admission to all Texas students who graduate in the top 10 percent of their high school class. To fill the rest of the slots allocated for Texas residents, admissions personnel employ two additional measures: the Academic Index (AI), and the Personal Achievement Index (PAI).¹⁵ AI is calculated based on high school class ranking, successful completion of college preparatory curriculum, and standardized test scores. PAI evaluates the following factors: personal essays, leadership experience, extracurricular activities, awards and honors, work history, service to the school or community, and special circumstances such as socioeconomic status. In 2004 the university added race and ethnicity to the "special circumstances" category.¹⁶ Under this rubric, some students are

admitted based on their high AI scores alone; those with lower AI scores are admitted based on joint consideration of AI and PAI scores.

Fisher and Michalewicz applied for the class entering U.T. Austin in the fall of 2008. That year, 88 percent of the slots for Texas residents were filled based on the Ten Percent policy.¹⁷ The balance—12 percent, or 1,216 slots—was filled based on AI and PAI criteria. Fisher and Michalewicz did not qualify under the Top Ten Percent Law, and their applications were then denied based on their AI and PAI scores.

LEGAL ISSUES

Fisher and Michalewicz claimed that their constitutional right to equal protection had been violated because the PAI explicitly considers race. In order for its race-conscious admissions policy to be found constitutional, the University of Texas was required to prove that its policy was justified by a compelling governmental interest and was narrowly tailored. Since plaintiffs did not challenge the university's stated compelling interest in the benefits associated with educational diversity, the main focus of contention was whether the PAI portion of the admissions policy was narrowly tailored.¹⁸

In determining the policy's constitutionality, the district court turned to the precedents in *Bakke* and *Grutter*.¹⁹ In a direct challenge to *Grutter*, Fisher and Michalewicz contended that race should not be allowed as a specific factor in university admissions decisions if *race-neutral alternatives are available*. According to the plaintiffs, the race-conscious admissions policy of the University of Texas was not narrowly tailored—even though it complied with the language of *Grutter*—because race-neutral policies such as the Top Ten Percent Law that could effectively increase student body diversity were available. This reasoning was so clearly at odds with the Supreme Court's holding in *Grutter* that it led the Texas solicitor general to famously comment, "If the plaintiffs are right, *Grutter* is wrong" (Parilo 2006).

The judge, Sam Sparks, did not allow the case to move forward to trial, ruling in favor of the University of Texas's motion for summary judgment. In his decision Sparks stated that because the U.T. admissions policy was narrowly tailored according to *Grutter*, it did not violate the Equal Protection Clause of the 14th Amendment and was therefore constitutional.

Following their loss in federal district court, Fisher and Michalewicz challenged the lower court ruling in the Fifth Circuit Court of Appeals. On January 18, 2011, the ruling was unanimously upheld by the appellate court's four-judge panel.²⁰ Fisher subsequently appealed to the Supreme Court and was granted certiorari on February 21, 2012.

THE COURT'S DECISION

The Supreme Court issued its decision in *Fisher* on June 24, 2013.²¹ In a 7-1 ruling, the Supreme Court vacated the decision of the lower court and ordered the case remanded to the Fifth Circuit Court of Appeals.²² Rather than address the substantive legal issues raised by the case, however, the Supreme Court remanded the case on the grounds that the appellate court had failed to properly apply the legal test of "strict scrutiny." Specifically, the Supreme Court held that the appellate court erred in *deferring* to the University of Texas's judgment that its admissions program was "narrowly tailored" and "necessary" for the promotion of student body diversity. The opinion, written by Justice Anthony Kennedy, states that the appellate court should have conducted its own rigorous judicial review to determine whether the contested affirmative action program was in fact narrowly tailored.

Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets strict scrutiny in its *implementation*. The University must prove that the means chosen by the University to attain diversity are narrowly tailored to that goal. On this point, the University receives no deference. . . .

But, as the Court said in *Grutter*, it remains at all times the University's obligation to demonstrate, and the Judiciary's obligation to determine, that admissions processes "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application."²³

The appellate court had additionally erred in giving deference to the university's consideration of race-neutral policies.

Narrow tailoring also requires that the reviewing court verify that it is 'necessary' for a university to use race (i.e. racial classifications) to achieve the educational benefits of diversity. . . . Although "narrow tailoring does not require exhaustion of every conceivable race-neutral alternative," strict scrutiny does require a court to examine with care, and not defer to, a university's "serious, good faith consideration of workable race-neutral alternatives." . . . If "a non-racial approach . . . could promote the substantial interest about as well and at tolerable administrative expense," . . . then the university may not consider race. . . . Strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.²⁴

POLICY IMPLICATIONS

In basing its ruling on such narrow grounds, the Supreme Court upheld, in theory, the constitutionality of race-based affirmative action in university admissions.²⁵ This is good news for Latinos in higher education because race-based affirmative action has been an important tool in the promotion of Latino educational achievement, especially at elite colleges and universities (Barreto and Pachon 2003).

Although on the surface this appears to be good news for advocates of affirmative action, a close reading of Kennedy's opinion reveals that the case may have opened the door to future constitutional challenges. The opinion might be read to imply that the explicit consideration of race may not

always be “necessary” to achieve the educational benefits of diversity when effective race-neutral alternatives are available. Kennedy seems to hint that the Top Ten Percent Law is an effective race-neutral policy that produces high levels of diversity and, therefore, that the race-conscious PAI portion of the admissions procedure is not “necessary” or narrowly tailored.

Narrow tailoring also requires that the reviewing court verify that it is “necessary” for a university to use race to achieve the educational benefits of diversity. . . . The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.²⁶

In addition to his heavy insistence on the consideration of nonracial approaches, Kennedy also cites statistics that appear to demonstrate that the University of Texas had greater success in promoting racial diversity when it implemented solely race-neutral admissions policies than when it utilized race-conscious policies. He notes that in the fall of 2004, before race and ethnicity were added as special circumstances to the PAI, the entering class was “4.5% African-American and 16.9% Hispanic.” In contrast, in the fall of 1996, when race was explicitly considered—before the implementation of the race-neutral Top Ten Percent Law—the entering class was “4.1% African-American and 14.5% Hispanic.”²⁷

These statistics, coupled with the opinion’s strong emphasis on the viability of race-neutral alternatives, seem to indicate that Kennedy believes that the explicit consideration of race is not necessary for the promotion of a diverse student body at the University of Texas. If interpreted in this manner by the Fifth Circuit Court of Appeals on remand, Kennedy’s opinion may provide legal justification for the outlawing of race-conscious admissions policies. In turn, such a decision by the appellate court could embolden opponents of affirmative action to raise similar lawsuits in other jurisdictions throughout the country.

FUTURE CONSIDERATIONS

Because of the legal uncertainties created by the Supreme Court decision in *Fisher*, some institutions of higher education are reporting a state of confusion. Larry White, general counsel at the University of Delaware, for example, is quoted as stating, “It’s pretty clear what we have to do. What’s not clear is how we have to do it, and when we have to do it” (Hoover, Mangan, and Schmidt 2013, 20). Whereas proponents of affirmative action do not interpret the ruling to mean that a trial-and-error period must ensue before institutions can legally adopt race-conscious policies, opponents assert that public universities are liable to litigation if they did not first apply race-neutral policies to achieve their goals of diversity (Hoover, Mangan, and Schmidt 2013). This legal uncertainty is likely to encourage an institutional shift toward the use of race-neutral policies in addition to, or in place of, race-conscious admissions policies.

As they await the new ruling and prepare for possible litigation, administrators and policy makers at institutions of higher education are reportedly starting to secure data that will affirm their need for race-conscious practices. Included in this process is an assessment of the impact that the adoption of race-neutral policies would have on the racial/ethnic composition of their student bodies. Among these policies are percentage plans, such as Texas’s Top Ten Percent Law, and consideration of geographic location and socioeconomic status. A related issue is that public universities do not know at this time how much deference the courts will allow them in determining the effectiveness of race-neutral policies (Hoover, Mangan, and Schmidt 2013).

Fortunately, social science researchers continue to extend a base of evidence that refutes the notion that race-neutral admissions policies are just as effective as race-based affirmative action in promoting student body diversity. For example, empirical research has found that Texas’s Top Ten Percent Law has a negative impact on the

proportion of Latinos applying to and enrolling in the University of Texas (Chapa 2005; Kain, O’Brien, and Jargowsky 2005; Long 2004; Long and Tienda 2008; Tienda and Nui 2006). Studies also show that race-conscious admissions policies are the most efficient means of diversifying college campuses, especially in highly segregated states like Texas (Harris and Tienda 2012).

Other scholars have similarly highlighted the negative impact that race-neutral admissions policies have had on Latino representation in the public university systems of California, Washington, and Florida (Barreto and Pachon 2003; Brown and Hirschman 2006; Colburn, Young, and Yellen 2008). The banning or abandonment of affirmative action, even in the mitigating presence of race-neutral policies and increased programmatic efforts to craft a racially diverse student body, disparately impacts Latinos. In the case of the University of California, the ban on affirmative action has reduced the application and enrollment rates of Latinos system wide (Santos, Cabrera, and Fosnacht 2010) and has led to a disproportionate decrease in the admission of Latinos to the most selective U.C. campuses (Gándara 2012). It has effectively sorted Latinos to less selective campuses (Hinrichs 2012, Santos, Cabrera, and Fosnacht 2010), where their college completion rates are comparatively lower (Gándara 2012). Similar sorting patterns are found across systems of public institutions in other states that ban race-conscious affirmative action, including Texas, Florida, Michigan, Washington, and Georgia (Backes 2012).

A less frequently noted race-neutral practice is the use of admissions preferences based on geographic location. The California State University at Long Beach gave preferential admission to students from specific geographic areas located close to the campus in an attempt to yield a racially diverse student body. Despite concerted attempts, the race-neutral practice failed as a viable policy to replace the

banned race-conscious practices when it did not yield the hoped-for number of Latina/o students (Rendon, Novack, and Dowell 2005).

The third race-neutral practice considered by colleges and universities is the use of class-based admissions preferences, also referred to as socioeconomic status (SES)-based, or economically disadvantaged-based, affirmative action policies. Because the number of institutions that have implemented class-based preferences is small, several researchers have used models to simulate how this race-neutral policy would impact the diversity of enrolled students. Their studies predict that when compared with the continued use of race-based admissions policies, SES-based admissions policies would result in decreased levels of Latina/o representation at universities (Cancian 1998; Carnevale and Rose 2004; Fryer, Loury, and Yuret 2008; Young and Johnson 2004).

It is also worth noting that in some cases the elimination of race-based affirmative action programs has resulted in a hostile campus climate for Latino students (Kidder 2013). A negative campus environment and increasing racial isolation may be reasons why some qualified Latina/o students are choosing to forego attending institutions like the University of California in order to attend more-diverse campuses (Kidder 2012).

Studies on the effects of affirmative action bans indicate that, in addition, some campuses have decided to abandon, or open up to all students, race-conscious scholarships and academic enrichment programs out of a fear of litigation (Chapa 2005, Palmer, Wood, and Spencer 2013; Santos, Cabrera, and Fosnacht 2010). Given the relationship between finances and college completion, this trend is harmful to the educational attainment of Latinos.

A move away from race-conscious policies would also affect Latinos beyond the baccalaureate level. Research demonstrates that banning affirmative action in California, Texas, Florida, and Washington has led to a decrease

in the enrollment of students of color, including Latinos, in graduate school (Garces 2013). Indeed, the reimplementation of race-conscious admissions policies after 2003 was shown to increase the representation of graduate students of color at public institutions in Texas (Kidder 2012).

These many studies establish that the explicit consideration of race is indeed “necessary” for the promotion of meaningful diversity in public colleges and universities in the United States.

RECOMMENDATIONS

The most effective way to increase the enrollment of Latino students at colleges and universities is to maximize race-based affirmative action in admissions for as long as it remains constitutional. Because the Fifth Circuit Court of Appeals may further undermine the ability of institutions of higher education to use race-based policies, however, administrators and policy makers are advised to consider the following recommendations:

1. Determine and document the extent to which existing race-conscious and race-neutral policies and practices affect diversity needs on campus (Coleman et al. 2013).
2. Determine and document race-neutral alternatives to existing practices and policies. Assess the viability of relying on race-neutral strategies to achieve a meaningful level of diversity as required by institutional mission statements (Coleman et al. 2013).
3. Hone existing institutional policies regarding affirmative action to relate to specific goals for campus diversity. With respect to Latinos, clearly articulate the contributions made by Latino students to campus diversity.
4. Reassess admissions criteria and standards and the values that these embody. Highly selective institutions have the ability to greatly influence admissions practices and thus carry an additional responsibility to find new ways to identify potential and talent (Posselt et al.

2012). In particular, reconsider the commonly held belief that diversity conflicts with merit. Measures of merit in college admissions processes, such as SAT scores, engender bias along racial/ethnic lines, leading admissions officers to underestimate the potential of underrepresented students of color (Walton, Spencer, and Erman 2013; see also Solorzano, Villalpando, and Oseguera 2005).

5. Acknowledge the intersecting identities of Latinos and fashion policies that take these into consideration. Latinos are a diverse population and possess distinct identities related to citizenship, gender, immigration status, and SES, and these factors lead to particular patterns of educational access and equity (Covarrubias 2011).

A supporting set of recommendations focuses on race-conscious and race-neutral policies that can increase the number of Latino students applying to and matriculating in college by promoting their educational achievement:

1. Increase support and funding for outreach programs that target underrepresented Latino populations in grades K-12 (Lomibao, Barreto, and Pachon 2003).
2. Support the cultivation of college-going cultures at under-resourced high schools with significant Latino populations (Harris and Tienda 2012).
3. Buttress financial aid programs that support the matriculation and graduation of Latino students who are admitted to elite colleges and universities every year but whose success is undermined by their low-income background (Harris and Tienda 2012).

Finally, education professionals must support social science research that furthers an understanding of higher education access and equity for historically excluded populations and that examines the current role played by affirmative action policies in disrupting educational structures of oppression and exclusion (Orfield 2013).

NOTES

1. *Fisher v. University of Texas at Austin et al.*, U.S.____(2013). In its ruling, the Supreme Court used the term *race* loosely to include both race and ethnic origin. For further discussion of the Supreme Court ruling in the Fisher case see the coverage at *SCOTUSblog*: <http://www.scotusblog.com/case-files/cases/fisher-v-university-of-texas-at-austin>.
2. Exec. Order No. 10925 (1961), 3 C.F.R. (1959-63) 448. Although the official history of affirmative action began in 1961 with the issuance of Kennedy's Executive Order, historians correctly assert that the earliest racial preference programs were established to benefit whites in the 1930s and 1940s as part of the New Deal and Fair Deal. At the behest of Southern legislators, most African Americans were excluded from the legislation of this era, which created Social Security, established minimum wages, regulated work hours, and allowed for the formation of modern unions. The result was a wide array of social welfare programs for whites only, which helped the formation of the white middle class in America. For more on the historical antecedents of official affirmative action, see Katznelson 2006. For the text of the executive order, see <http://www.eeoc.gov/eeoc/history/35th/thelaw/eo-10925.html>.
3. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1964). <http://www.justice.gov/crt/about/cor/coord/titlevstatat.php>.
4. *DeFunis v. Odegaard*, 417 U.S. 312 (1974).
5. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
6. Justices Warren Burger, William Rehnquist, John Paul Stevens, and Potter Stewart voted in support of Bakke; Justices Harry Blackmun, William J. Brennan, Thurgood Marshall, and Byron White held that race could be considered in admissions decisions as long as it did not rise to level of being a decisive factor.
7. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
8. *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).
9. *Smith v. University of Washington Law School*, 233 F.3d 1188 (9th Cir. 2000).
10. *Johnson v. Board of Regents of the University of Georgia*, 263 F.3d 1234 (11th Cir. 2001).
11. According to this legal standard, a law or policy must be only as broad as necessary to accomplish its government compelling interest.
12. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).
13. *Fisher v. University of Texas at Austin et al.*, 645 F. Supp. 2d 587, 590 (W.D. Tex. 2009).

14. Rachel Michalewicz was a party in the initial lawsuit and appeal, but she dropped out of the case when it reached the Supreme Court.
15. The Top Ten Percent Law and the individualized review (AI and PAI) were devised to comply with the court's decision in *Hopwood*.
16. The University of Texas proposed this revision in June 2004, following the court's ruling in *Grutter*. The new policy took effect for the class entering in the fall of 2005.
17. The University of Texas reserves 90 percent of the slots of each freshman class for Texas residents; the remaining 10 percent are for nonresident and international students.
18. In asserting diversity as its compelling interest, the University of Texas followed the clear holding of the court in *Grutter*.
19. *Regents of the University of California v. Bakke*; *Grutter v. Bollinger*.
20. *Fisher v. University of Texas at Austin et al.*, 631 F.3d 213.
21. *Fisher v. University of Texas at Austin et al.*, U.S.____(2013).
22. Justices Samuel Alito, Stephen Breyer, Anthony Kennedy, Roberts, Antonin Scalia, Sonia Sotomayor, and Clarence Thomas voted in favor of this ruling. Justice Ruth Bader Ginsburg issued a dissenting vote, and Justice Elena Kagan took no part in the consideration or decision of the case.
23. *Fisher v. University of Texas at Austin et al.*, U.S.____(2013), 10. Emphasis added.
24. *Ibid.*, 11.
25. Although race-conscious admissions policies in public universities are legally permissible according to *Fisher*, they are not constitutionally required. California, Michigan, Washington, Florida, New Hampshire, Arizona, and Nebraska have passed voter referendums banning race-based affirmative action in higher education. These anti-affirmative action laws, moreover, have been consistently upheld as constitutional by federal courts. In October 2013 the Supreme Court is scheduled to hear oral arguments in *Schutte v. BAMN*, which has the unlikely potential of striking down such voter referendums as unconstitutional. At issue in *Schutte* is whether Michigan's Proposal 2, which was passed by voters in 2006, violates the Equal Protection Clause by impermissibly restructuring the political process along racial lines. *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*, 701 F.3d 466 (6th Cir. 2012) [2012 BL 298649].
26. *Fisher v. University of Texas et al.*, U.S. ____ (2013), 10.
27. *Ibid.*, 3.

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NOTES

ABOUT THE AUTHORS

Robert Chao Romero is an attorney and associate professor of Chicana/o studies and Asian American studies at UCLA. He received his J.D. from U.C. Berkeley and his Ph.D. in Latin American history from UCLA. He is the author of *The Chinese in Mexico, 1882-1940* (2010), which received a Latino/a Studies Section Book Award from the Latin American Studies Association.

Marcia V. Fuentes is a doctoral candidate in the Higher Education and Organizational Change program in the Graduate School of Education and Information Studies at the University of California, Los Angeles. She holds master's degrees in public policy and higher education administration from the University of Michigan, Ann Arbor. Her co-authored article, *A Compelling Interest: Activating the Benefits of Classroom-Level Diversity*, will be published in the December 2013 issue of the *Journal of Diversity in Higher Education*.



UCLA CHICANO STUDIES RESEARCH CENTER

193 Haines Hall
Los Angeles, CA 90095-1544

Phone: 310-825-2642 • Fax: 310-206-1784 • E-Mail: press@chicano.ucla.edu

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