
# Federal Affirmative Action Law: A Brief History

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# Summary

Affirmative action remains a subject of public debate as the result of legal and political developments at the federal, state, and local levels. Over the years, federal courts have reviewed minority admissions programs to state universities; scrutinized the constitutional status of racial diversity policies in public elementary and secondary schools; ruled on minority preferences in public and private employment as a remedy for violation of civil and constitutional rights; and considered federal, state, and local efforts to increase minority participation as contractors and subcontractors on publicly financed construction projects. This report provides a brief history of federal affirmative action law.

# Contents



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# Historical Origins of Affirmative Action

The origins of affirmative action law may be traced to the early 1960s as first the Warren, and then the Burger, Court grappled with the seemingly intractable problem of racial segregation in the nation's public schools. Judicial rulings from this period recognized an affirmative duty, cast upon local school boards by the Equal Protection Clause, to desegregate formerly dual-school systems and to eliminate the last vestiges of state-enforced segregation.[1] These holdings ushered in a two-decade era of massive desegregation—first in the South, and later the urban North—marked by federal desegregation orders frequently requiring drastic reconfiguration of school attendance patterns along racial lines and extensive student transportation schemes. School districts across the nation operating under these decrees later sought to be declared in compliance with constitutional requirements in order to gain release from federal intervention. The Supreme Court eventually responded by holding that judicial control of a school system previously found guilty of intentional segregation should be relinquished if, looking to all aspects of school operations, it appears that the district has complied with desegregation requirements in "good faith" for a "reasonable period of time" and has eliminated "vestiges" of past discrimination "to the extent practicable."[2]

Following the Court's lead, Congress and the executive approved a panoply of laws and regulations authorizing, either directly or by judicial or administrative interpretation, race-conscious strategies to promote minority opportunity in jobs, education, and governmental contracting. The basic statutory framework for affirmative action in employment and education derives from the Civil Rights Act of 1964. Public and private employers with 15 or more employees are subject to a comprehensive code of equal employment opportunity regulations under Title VII of the 1964 act.[3] The Title VII remedial scheme rests largely on judicial power to order monetary damages and injunctive relief, including "such affirmative action as may be appropriate," to make discrimination victims whole.[4] Except as may be imposed by court order or consent decree to remedy past discrimination, however, there is no general statutory obligation on employers to adopt affirmative action remedies. Official approval of affirmative action remedies was further codified by federal regulations construing the 1964 act's Title VI, which prohibits racial or ethnic discrimination in all federally assisted programs and activities,[5] including public or private educational institutions. The Office of Civil Rights of the Department of Education interpreted Title VI to require schools and colleges to take affirmative action to overcome the effects of past discrimination and to encourage affirmative action "[e]ven in the absence of such prior discrimination ... to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin."[6]

Since the early 1960s, minority participation goals have also been integral to executive branch enforcement of minority hiring and employment standards on federally financed construction projects and in connection with other large federal contracts. Executive Order 11246, as presently administered by the Office of Federal Contract Compliance Programs, requires that all employers

[1] See, e.g., Green v. County Bd., 391 U.S. 430 (1968); Swann v. Bd. of Educ., 402 U.S. 1 (1971); Keyes v. Denver Sch. Dist., 413 U.S. 189 (1973).

[2] Dowell v. Bd. of Educ., 498 U.S. 237 (1991). See also Freeman v. Pitts, 503 U.S. 467 (1993); Missouri v. Jenkins, 515 U.S. 70 (1995).

[3] 42 U.S.C. §§2000e et seq.

[4] 42 U.S.C. §2000e-5(g).

[5] 42 U.S.C. §§2000d et seq.

[6] 34 C.F.R. §100.3(b)(vii)(6)(ii).

with 50 or more employees and federal contracts in excess of $50,000 file written affirmative action plans with the government. These must include minority and female hiring goals and timetables to which the contractor must commit its good-faith efforts. Race and gender considerations—which may include numerical goals—are also a fundamental aspect of affirmative action planning by federal departments and agencies to eliminate minority and female "underrepresentation" at various levels of agency employment.[7]

Federal contract set-asides and minority subcontracting goals evolved from Small Business Administration programs to foster participation in the federal procurement process by small disadvantaged businesses (SDBs), or small businesses owned and controlled by "socially and economically disadvantaged" individuals.[8] Under certain provisions of federal law, minority group members and women are presumed to be socially and economically disadvantaged, while non-minority contractors must present evidence to prove their eligibility. Goals or set-asides for minority groups, women, and other disadvantaged individuals have also been routinely included in federal funding measures for education, defense, transportation, and other activities. Currently, each federal department and agency must contribute to achieving a government-wide, annual procurement goal of at least 5% with its own goal-oriented effort to create "maximum practicable opportunity" for minority and female contractors.[9] In addition, 10% of federal highway and surface transportation project funds must be set aside for small disadvantaged firms.[10]

By the mid-1980s, the Supreme Court had approved the temporary remedial use of race- or gender-conscious selection criteria by private employers under Title VII. These measures were deemed a proper remedy for "manifest racial imbalance" in "traditionally segregated" job categories, if voluntarily adopted by the employer,[11] or for entrenched patterns of "egregious and longstanding" discrimination by the employer, if imposed by judicial decree.[12] In either circumstance, however, the Court required proof of remedial justification rooted in the employer's own past discrimination and its persistent workplace effects. Thus, a "firm basis" in evidence, as revealed by an imbalance—or historic, persistent, or egregious underrepresentation—of minorities or women in affected job categories was deemed an essential predicate to preferential affirmative action.[13] Of equal importance, all racial preferences in employment were to be judged in terms of their adverse impact on identifiable non-minority group members. Remedies that protected minorities from layoff, for example, were most suspect and unlikely to pass muster if they displaced more senior white workers.[14] But the consideration of race or gender as a plus factor in employment decisions, when it did not unduly hinder the legitimate expectations of non-minority employees, won ready judicial acceptance. Affirmative

[7] 42 U.S.C. §2000e-16(b)(1); 5 U.S.C. §7201. The Equal Employment Opportunity Commission and the Office of Personnel Management have issued rules to guide implementation and monitoring of minority recruitment programs by individual federal agencies. Among various other specified requirements, each agency plan "must include specific determinations of underrepresentation for each group and must be accompanied by quantifiable indices by which progress toward eliminating underrepresentation can be measured." 5 C.F.R. §720.205(b).

[8] 15 U.S.C.§637 (a), (d).

[9] 15 U.S.C. §644(g)(1).

[10] Section 1101 of P.L. 112-141, the Moving Ahead for Progress in the 21st Century Act, carried forward prior long-standing Department of Transportation policy mandating a 10% SDB set-side "[e]xcept to the extent the Secretary [of Transportation] determines otherwise.... "

[11] *See, e.g.*, United Steelworkers v. Weber, 443 U.S. 193 (1979).

[12] *See, e.g.*, Local 28 Sheet Metal Workers v. EEOC, 478 U.S. 421 (1986).

[13] *See, e.g.*, Johnson v. Transportation Agency, 480 U.S. 616 (1987) (O'Connor, J., concurring).

[14] *See, e.g.*, Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986).

action preferences, however, had to be sufficiently flexible, temporary in duration, and narrowly tailored to avoid becoming rigid quotas.[15]

# Affirmative Action in Public Education

The *Regents of the University of California v. Bakke* ruling in 1978 launched the contemporary constitutional debate over state-sponsored affirmative action.[16] A "notable lack of unanimity" was evident from the six separate opinions filed in that case. One four-Justice plurality in *Bakke* voted to strike down as a violation of Title VI a special admissions program of the University of California at Davis medical school that set aside 16 of 100 positions in each incoming class for minority students, where the institution itself was not shown to have discriminated in the past. Another bloc of four Justices argued that racial classifications designed to further remedial purposes were foreclosed neither by the Constitution nor the Civil Rights Act and would have upheld the minority admissions quota. Justice Powell added a fifth vote to each camp by condemning the Davis program on equal protection grounds while endorsing the nonexclusive consideration of race as an admissions criteria to foster student diversity.[17]

In Justice Powell's view, neither the state's asserted interest in remedying societal discrimination, nor of providing role models for minority students was sufficiently compelling to warrant the use of a "suspect" racial classification in the admission process. But the attainment of a "diverse student body" was, for Justice Powell, "clearly a permissible goal for an institution of higher education" since diversity of minority viewpoints furthered "academic freedom," a "special concern of the First Amendment."[18] Accordingly, race could be considered by a university as a "plus" or "one element of a range of factors"—even if it "tipped the scale" among qualified applicants—as long as it "did not insulate the individual from comparison with all the other candidates for the available seats."[19] The "quota" in *Bakke* was infirm, however, since it defined diversity only in racial terms and absolutely excluded non-minorities from a given number of seats. By two 5-to-4 votes, therefore, the Supreme Court affirmed the lower court order admitting Bakke but reversed the judicial ban on consideration of race in admissions.

The Powell opinion in *Bakke* may help to explain the conflicting results reached by the Court in a pair of 2003 cases involving admissions to the University of Michigan Law School and undergraduate program. In *Grutter v. Bollinger*, a 5-to-4 majority of the Justices, led by Justice O'Connor, held that the University's Law School had a compelling interest in the "educational benefits that flow from a diverse student body," which justified its consideration of race in admissions to assemble a "critical mass of underrepresented minority students."[20] But in *Gratz v. Bollinger*,[21] six Justices decided that the University's undergraduate policy of awarding racial bonus points to minority applicants was not narrowly tailored enough to pass constitutional muster. The law school program was deemed constitutional because it was based on an individualized, holistic review of each applicant's file, in contrast to the undergraduate program,

[15] United States v. Paradise, 480 U.S. 149 (1987); Johnson v. Transp. Agency, 480 U.S. 616 (1987). For additional information, see CRS Report RL30470, *Affirmative Action in Employment: A Legal Overview*, by Jody Feder.

[16] 438 U.S. 265 (1975).

[17] *Id.* at 315.

[18] *Id.* at 311-12.

[19] *Id.* at 317.

[20] 539 U.S. 306, 328, 318 (2003).

[21] 539 U.S. 244 (2003).

which "[did] not provide for a meaningful individualized review of applicants" but instead "assign[ed] every underrepresented minority applicant the same, automatic 20-point bonus without consideration of the particular background, experiences, or qualities of each individual applicant."[22] In effect, *Grutter* enshrined in law the Powell diversity rationale—embraced by no other Justice in *Bakke*—that the state has a compelling interest in promoting racial diversity in higher education.

The *Grutter* and *Gratz* decisions, however, did not address whether diversity is a permissible goal in the elementary and secondary educational setting. To resolve this question, the Supreme Court agreed to review two cases that involved the use of race to maintain racially diverse public schools in Seattle and Louisville. In *Parents Involved in Community Schools v. Seattle School District No. 1*, a consolidated 2007 ruling that resolved both cases, the Court, in a fractured decision, struck down the school plans at issue, holding that they violated the equal protection guarantee of the Fourteenth Amendment.[23] Announcing the judgment of the Court was Chief Justice Roberts, who led a plurality of four Justices in concluding that the school plans were unconstitutional because they did not serve a compelling governmental interest. Although Justice Kennedy concurred in the Court's judgment striking down the plans, he declined to sign on to the plurality opinion in full, in part because he disagreed with its implication that diversity in elementary and secondary education, at least as properly defined, does not serve a compelling governmental interest. According to Justice Kennedy, "[d]iversity, depending on its meaning and definition, is a compelling educational goal a school district may pursue,"[24] but neither Seattle nor Louisville had shown that its plans served a compelling interest in promoting diversity or that the plans were narrowly tailored to achieve that goal. The Court's ruling appears to indicate that race-conscious measures to promote racial diversity in public elementary and secondary education remain constitutionally permissible in theory, although in practice it is less clear what types of programs the Court would consider to be sufficiently narrowly tailored to pass constitutional muster.[25]

In more recent years, the Court has once again taken up the issue of affirmative action in higher education. For more on these cases, see the "Recent Developments" section below.

# Minority Contracting

In another series of decisions, the Court approved of congressionally mandated racial preferences to allocate the benefits of contracts on federally sponsored public works projects, *Fullilove v. Klutznick*,[26] while condemning similar actions taken by local governmental entities to promote public contracting opportunities for minority entrepreneurs, *City of Richmond v. J.A. Croson Co.*[27] Contextual differences in the particular kind of governmental activity being challenged frequently account for variations in judicial approach to affirmative action in public employment, government contracting, admission to public schools, and election redistricting.[28] Almost

[22] *Id.* at 276-77 (O'Connor. J., concurring).

[23] 551 U.S. 701 (2007).

[24] *Id.* at 783.

[25] For more information, see CRS Report RL30410, *Affirmative Action and Diversity in Public Education: Legal Developments*, by Jody Feder.

[26] 448 U.S. 448 (1980).

[27] 488 U.S. 469 (1989).

[28] See, e.g., League of United Latin Am. Citizens v. Perry, 548 U.S. 399 (2006); Shaw v. Reno, 509 U.S. 630 (1993).

uniformly, however, the law has been marked by a failure of consensus on most issues, with bare majorities, pluralities, or—as in *Bakke*—a single Justice, determining the outcome of the case.

Not until 1989 did a majority of the Justices resolve the proper constitutional standard for review of governmental classifications by race enacted for a remedial or other benign legislative purpose. Disputes prior to the *City of Richmond* case yielded divergent views as to whether state affirmative action measures for the benefit of racial minorities were subject to the same strict scrutiny as applied to invidious racial discrimination under the Equal Protection Clause, an intermediate standard resembling the test for gender-based classifications, or simple rationality. In *City of Richmond,* a 5 to 4 majority settled on strict scrutiny to invalidate a 30% set-aside of city contracts for minority-owned businesses because the program was not narrowly tailored to a "compelling" governmental interest. While "race-conscious" remedies could be legislated in response to proven past discrimination by the affected governmental entities, racial balancing untailored to identifiable evidence of minority exclusion was impermissible. *City of Richmond* suggested, however, that because of its unique equal protection enforcement authority, a constitutional standard more tolerant of racial line-drawing may apply to Congress. This conclusion was reinforced a year later when, in *Metro Broadcasting, Inc. v. FCC*,[29] the Court upheld certain preferences for minorities in broadcast licensing proceedings, approved by Congress not as a remedy for past discrimination but to promote the important governmental interest in broadcast diversity.

This two-tiered approach to equal protection analysis of governmental affirmative action was short-lived, however. In *Adarand Constructors, Inc. v. Pena*,[30] the Court applied strict scrutiny to a federal transportation program of financial incentives for prime contractors who subcontracted to firms owned by socially and economically disadvantaged individuals, defined so as to prefer members of designated racial minorities. Although the Court refrained from deciding the constitutional merits of the particular program before it, and remanded for further proceedings below, it determined that all racial classifications by government at any level must be justified by a compelling governmental interest and narrowly tailored to that end. But the majority opinion, by Justice O'Connor, sought to "dispel the notion" that "strict scrutiny is 'strict in theory, but fatal in fact,'" by acknowledging a role for Congress as architect of remedies for discrimination nationwide.[31] According to the Court, "[t]he unhappy persistence of both the practices and lingering effects of racial discrimination against minorities in this country is an unfortunate reality, and the government is not disqualified from acting in response to it."[32] No further guidance was provided, however, as to the scope of remedial power remaining in congressional hands, or of the conditions required for its exercise. Bottom line, *Adarand* suggested that racial preferences in federal law are a remedy of last resort, which must be adequately justified and narrowly drawn to pass constitutional muster. In the post-*Adarand* era, lower federal courts have at times upheld and at other times struck down government programs that contain minority contracting preferences.[33]

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[29] 497 U.S. 547 (1990).

[30] 515 U.S. 200 (1995). For more information on Adarand and minority contracting, see CRS Report RL33284, *Minority Contracting and Affirmative Action for Disadvantaged Small Businesses: Legal Issues*, by Jody Feder.

[31] Adarand, 515 U.S. at 237.

[32] *Id.*

[33] *See, e.g.*, Rothe Dev. Corp. v. DOD, 545 F.3d 1023 (Fed. Cir. 2008) (holding that the Department of Defense's Small Disadvantaged Business program was unconstitutional). For more information on *Rothe*, see CRS Report R40440, *Rothe Development Corporation v. Department of Defense: The Constitutionality of Federal Contracting Programs for Minority-Owned and Other Small Businesses*, by Jody Feder and Kate M. Manuel.

# Recent Developments

More recently, the Court has considered several new challenges involving racial preferences in education. For example, in 2013, the Court once again took up the issue of affirmative action in higher education in *Fisher v. University of Texas at Austin*.[34] At issue in *Fisher* was the constitutionality of the undergraduate admissions plan at the University of Texas (UT) at Austin, which, in a stated effort to increase diversity, considers race as one factor among many when evaluating applicants to the school. Ultimately, the Court reaffirmed that the promotion of racial diversity in higher education may be constitutional as long as such programs can withstand strict scrutiny, but nevertheless vacated and remanded an appellate court's decision to uphold UT's admissions program.

Specifically, the Court emphasized that its earlier precedents regarding affirmative action in higher education—*Bakke*, *Grutter*, and *Gratz*—remain valid.[35] However, the Court held that the lower court had erred by applying an overly deferential form of strict scrutiny. According to the Court, *Grutter* calls for deference when evaluating whether an institution has established a compelling governmental interest under the first prong of the strict scrutiny test.[36] As a result, the courts should generally defer to a university's determination that racial diversity is essential to its educational goals. However, it was improper to defer to UT's assertion that its admissions program was narrowly tailored.[37] In particular, the Court emphasized that UT bears the burden of proving that its admissions program is narrowly tailored to meet its diversity goal. For UT to meet this burden, "[t]he reviewing court must ultimately be satisfied that no workable race-neutral alternative would produce the educational benefits of diversity."[38] Thus, the Court vacated the appellate court's decision and remanded the case for reconsideration under the correct standard. In doing so, the Court avoided a broader ruling on the constitutional merits of affirmative action in higher education, while simultaneously making it more difficult for institutions of higher education to maintain programs that promote racial diversity.

A little over a year after the Court issued its decision, the Fifth Circuit issued a new verdict in the *Fisher* case. On remand, the Fifth Circuit once again upheld UT's admissions plan, despite applying the more demanding standard of review set forth by the Supreme Court. According to the court, "UT Austin's holistic review program—a program nearly indistinguishable from the University of Michigan Law School's program in *Grutter*—was a necessary and enabling component of the Top Ten Percent Plan by allowing UT Austin to reach a pool of minority and non-minority students with records of personal achievement, higher average test scores, or other unique skills."[39] After reviewing the data, the court found that UT's "use of race in pursuit of diversity is not about quotas or targets, but about its focus upon individuals, an opportunity denied by the Top Ten Percent Plan."[40] As a result, the court concluded that UT's limited use of race in admissions was narrowly tailored to meet the university's diversity goals. Subsequently, the Supreme Court agreed once again to review the ruling.[41] Although the reason for the repeat

[34] 133 S. Ct. 2411 (2013).

[35] *Id.* at 2417.

[36] *Id.* at 2419.

[37] *Id.* at 2419-22.

[38] *Id.* at 2420.

[39] Fisher v. Univ. of Tex. at Austin, 758 F.3d 633, 653 (5th Cir. 2014).

[40] *Id.* at 654.

[41] Fisher v. Univ. of Tex. at Austin, 135 S. Ct. 2888 (2015).

grant of certiorari is uncertain, the Court's decision to revisit the case appears to indicate some disagreement with the Fifth Circuit's ruling. It is not clear, however, whether this apparent dissatisfaction is directed at the lower court's reasoning in the *Fisher* case specifically or at the constitutionality of such affirmative action programs more broadly.

Meanwhile, in a 2014 case, *Schuette v. Coalition to Defend Affirmative Action*,[42] the Court considered a different question involving racial preferences in higher education. In *Schuette*, the Court upheld the constitutionality of Michigan's Proposal 2, which amended the Michigan state constitution to prohibit, among other things, preferential treatment on the basis of race in public education. Unlike the line of cases involving diversity in higher education, the resolution in *Schuette* turned on two decades-old Supreme Court cases holding that an individual's ability to participate in the political process may not be disadvantaged on the basis of race. Together, these two cases—*Hunter v. Erikson* and *Washington v. Seattle School District No. 1*[43]—appeared to stand for the proposition that the Equal Protection Clause is violated if a law (1) has a racial focus or targets a policy or program that primarily benefits minorities, and (2) reorders the political process in a manner that places special burdens on a minority group's ability to achieve its goals through that process.

The Court's approach to these precedents was highly fractured. Although the Court upheld the Michigan law by a vote of 6-2, there were three different opinions concurring in the judgment. In an opinion announcing the judgment of the Court, Justice Kennedy distinguished its rulings in cases such as *Hunter* and *Seattle*, noting that these cases involved state laws that encouraged or inflicted injuries on racial minorities, while Michigan's Proposal 2 reflected the right of its voters to decide whether race-conscious preferences should continue to be used. In particular, Justice Kennedy, as well as other Justices, appeared concerned about judicial interference in the political process and the viability of the political process doctrine itself. According to Justice Kennedy, the Court lacks the authority "to set aside Michigan laws that commit this policy determination [about governmental use of racial preferences] to the voters."[44] As the divided ruling indicates, the Court remains split regarding the constitutionality of governmental actions that take race into account. For the moment, though, it appears that states are free to ban the use of racial preferences in public education—and in other contexts, such as public employment or contracting—should they wish to do so.

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This report was originally written by Charles V. Dale, Legislative Attorney.

[42] Schuette v. Coalition to Defend Affirmative Action, 134 S. Ct. 1623 (2014).

[43] 393 U.S. 385 (1969); 458 U.S. 457, 467 (1982).

[44] Schuette, 1345 S. Ct. at 1638.