Future of diversity in higher education hangs in the balance

The U.S. Supreme Court's grant of certiorari in *Fisher v. University of Texas, Austin*, No. 11-345 (Feb. 21, 2012), should frighten all who believe that diversity in higher education matters. The issue is whether a college may use race as a factor in its admissions decisions to benefit minorities and to enhance diversity.

In 2003, the Supreme Court's 5-4 decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), held that colleges and universities have a compelling interest in having a diverse student body and may use race as one factor in admissions decisions to enhance diversity. Since 2003, the Court's composition has changed dramatically and there seems little doubt that Fisher will move the law of affirmative action in a much more conservative direction; the only question is how far the Court will go.

In *Grutter*, Justice Sandra Day O'Connor wrote for the Court and was joined by Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer. The dissent was comprised of Chief Justice William H. Rehnquist and Justices Antonin Scalia, Anthony M. Kennedy, and Clarence Thomas. Four of these justices - O'Connor, Stevens, Souter, and Rehnquist - are no longer on the Court.

Justice Elena Kagan, who replaced Stevens, has recused herself from participating in *Fisher*. Souter was replaced by Justice Sonia Sotomayor and based on her rulings in favor of affirmative action as a judge on the 2nd U.S. Circuit Court of Appeals, and her overall ideology, it is expected that she will vote to affirm *Grutter*.

Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr. made their views on the issue clear in *Parents Involved in Community Schools v. Seattle School Dist.* No. 1, 551 U.S. 701(2007). The issue was whether school boards in Seattle and Louisville could use race as a factor in assigning students to schools so as to achieve desegregation. The Court, in a 5-4 decision, declared such efforts to violate equal protection. Roberts wrote in part for a majority and in part for a plurality of four. His opinion was joined in its entirety by Scalia, Thomas and Alito. Kennedy concurred in part and concurred in the judgment in part.

In writing for the plurality, Roberts rejected the claim that diversity in elementary and high schools constitutes a compelling government interest. Although he distinguished *Grutter* by saying that case involved diversity at the college and university level, his opinion left no doubt that he rejects that racial diversity is a compelling interest in any educational context. In his conclusion, Roberts emphatically declared that the Constitution requires colorblindness. He ended his opinion by stating: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

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powerfully about their experience of being stopped for driving while black or driving while brown.

Roberts and Alito thus seem sure to take the position urged by the three dissenters in *Grutter* - Scalia, Kennedy, and Thomas. In comparing the current Court to the one that decided *Grutter*, the key is the shift from O'Connor, who upheld affirmative action, to Alito, who clearly rejects it.

The only hope for affirmative action surviving is Kennedy. Yet since joining the Court in 1987, he has never voted to uphold any affirmative action program and, at times, has written opinions strongly condemning such efforts. *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990) (Kennedy, J., concurring).

However, in *Parents Involved*, Kennedy did not join the parts of Roberts’ opinion rejecting diversity as a compelling interest. But he did join the parts of the opinion, and wrote separately to emphasize, that race-conscious remedies are permissible only if there is no race-neutral alternative that can achieve the objective. In *Grutter*, O'Connor’s majority opinion expressly held the opposite, and said that the constitutionality of affirmative action programs does depend on proof that there is no other way to achieve racial diversity.

It thus seems very unlikely that Kennedy will join with Ginsburg, Breyer and Sotomayor to create a 4-4 split and uphold the University of Texas affirmative action program. The realistic question is whether Kennedy will be a fifth vote to end all affirmative action by colleges and universities or whether he will concur in the judgment, as he did in *Parents Involved*, to make affirmative action much more difficult by allowing it only where there is proof that no other alternative can achieve diversity.

Either way, diversity in higher education will suffer tremendously. After California adopted Proposition 209 in 1996, which amended the California Constitution to prohibit affirmative action, the percentages of African-Americans and Latinos at UC Berkeley and UCLA plummeted. In light of the long history of race discrimination, as well as current inequities in elementary and secondary education, the elimination of affirmative action will have a devastating effect on diversity in schools across the country.

Unlike Proposition 209, which concerned only government institutions in California, the Supreme Court’s decision in *Fisher* likely will apply to private colleges and universities as well. The Court has stated that Title VI of the 1964 Civil Rights Act, which prohibits race discrimination by recipients of federal funds, is identical to the equal protection clause in its requirements. Virtually every private college and university receives federal money and thus will be bound by a Supreme Court decision limiting or forbidding affirmative action.

Those who oppose affirmative action must argue that diversity does not matter in education or that diversity can be achieved without affirmative action or that the loss of diversity is offset by other more important reasons. None of these are tenable.

As O'Connor expressly recognized, diversity matters enormously in the classroom. I have been a law professor for 30 years now and have taught constitutional law in classes that are almost all white and those that are racially diverse. The conversations are vastly different and the education of all is enhanced. It is different to talk about racial profiling by the police when there are African-American and Latino men in the room who can talk powerfully about their experience of being stopped for driving while black or driving while brown. It is different to talk about affirmative action with a diverse classroom. Preparing students for the racially diverse world they will experience requires that they learn in racially diverse classrooms. This is exactly why the Court found diversity to be a compelling interest in *Grutter v. Bollinger*.

Nor are there realistic alternatives for achieving diversity without affirmative action. Giving preferences based on social class fails because there are many more poor whites than poor African-Americans, even if the percentage in poverty in the latter group is larger. Color blindness in admissions will mean dramatic decreases racial diversity in colleges and universities across the country.

is a question of how much money stores can be forced to pay in penalties.

**Obscure agency goes after credit union heads**

A federal agency that has sued former credit union executives in an unusually aggressive liquidation here does not have to front litigation fees as defense lawyers had sought, a judge ruled Monday.

**Government**

**Prosecutorial misconduct matters only for certain cases**

Government lawyers tend to get a free pass when they misbehave, unless the victim has special clout. By *Gideon Kanner* of Loyola Law School

**Perspective**

**Chapter 11: Tactical considerations**

When valuing real property collateral in Chapter 11 bankruptcies, keep these strategies in mind. By *Howard N. Madris* of Law Office of Howard N. Madris APC

**Real Estate**

**Award of litigation expenses rightfully allowed only after trial**

Public agencies that are forced to file condemnation actions should not be penalized for settling before trial. By *Mona M. Nemat* of Best Best & Krieger LLP

**Mergers & Acquisitions**

**Dealmakers**


**Entertainment & Sports**

**Law firms, agents court video game developers**

As studios and record labels continue to adjust to the harsh realities of an online world, many Hollywood agents have turned their energies to the growing video game business.

**Large Firms**

**Baker & McKenzie closing its doors in San Diego**

Baker & McKenzie LLP is slated to officially close its San Diego office by the end of March, according to three sources familiar with the matter.

**Government**

**Rare eviction ruling gains attention**

In an unprecedented case, a judge denied a mortgage company’s attempt to evict a non-paying tenant because it flouted a federal law requiring foreclosing parties to give such tenants
Those who oppose affirmative action assert that it undermines admissions based on merit. Under affirmative action plans, schools are taking only qualified students. And no school ever has admitted students based solely on test scores and grades. It has always been easier to get into Harvard or Yale if an applicant is from North Dakota than from New York City. That is because schools long have recognized that diversity matters. Schools also take applicants with lower grades and test scores if they have unusual talents, such as athletes.

The effect of overruling Grutter will be especially felt in law schools and the legal profession where diversity is already seriously lacking. From 2000 to 2009, the percentage of African-Americans in law schools decreased, from 7.5 percent to 7.2 percent of law students. African-Americans are 12.3 percent of the population but only 4.7 percent of attorneys. Latinos are 15.8 percent of the population, but only 2.8 percent of attorneys.

Perhaps the briefs and arguments in Fisher might cause Kennedy to change his mind from the views he expressed in his dissent in Grutter. That is the only hope for affirmative action and for diversity in law schools and ultimately the legal profession.

90 days notice before eviction.

Solo and Small Firms

**Boutique gains lawyer, changes name**
McKool Smith Hennigan LLC partner C. Dana Hobart joins forces with longtime colleague Kenneth A. Linzer to form Hobart Linzer LLP.

**Family**

**Innocent spouse gets double the protection**
The IRS has recognized that an indemnification clause is actually a reason to grant innocent spouse status, not deny it. By **Mitchell A. Jacobs** and **Jennifer Morra** of the Law Office of Mitchell A. Jacobs.

**Judicial Profile**

**Katrina West**
Superior Court Judge San Bernardino County
(San Bernardino)

**Real Estate**

**Green building poses more safety risks, new study shows**
Among the most dangerous jobs, construction is near the top of the list. Now, a new study warns environmentally sustainable, or "green," construction could be even more dangerous, which has lawyers talking about how to prevent injuries.