

Affirmative Action on the Docket
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WASHINGTON – The U.S. Supreme Court today agreed to consider whether the University of Texas at Austin has the right to consider race and ethnicity in admissions decisions. Those bringing the case hope the Supreme Court will restrict or even eliminate the right of colleges to consider race in admissions – a prerogative last affirmed by the Supreme Court in 2003 in a case involving the University of Michigan’s law school.

In a sign that is likely to worry supporters of affirmative action (and to cheer critics of the practice), Justice Elena Kagan announced that she took no part in consideration of the appeal seeking a Supreme Court review -- a likely sign that she will not take any part in the actual review. Kagan did not announce why, but conservative legal bloggers have been calling on her to recuse herself because of her work as U.S. solicitor general filing a brief in support of the University of Texas. If she continues to recuse herself, a justice thought to be supportive of affirmative action will not be voting.

The case before the Supreme Court now is over whether the University of Texas is exceeding the right granted by the 2003 decision. The plaintiffs argue that because Texas uses a statewide "10 percent" plan – in which students in the top 10 percent of their high school classes are automatically admitted to the public college of their choice – the state’s flagship university can achieve a diverse student body without race-based policies. (Many Texas high schools have enrollments that are overwhelmingly made up of members of particular racial or ethnic groups, so the plan provides a steady stream of black and Latino students to UT Austin.)

The university and other defenders of affirmative action argue that just because a university can achieve some diversity without the consideration of race and admissions does not mean that it may not also consider race and ethnicity to achieve a higher level of diversity.

The 2003 ruling affirming the right of colleges to consider race in admissions, like most decisions upholding affirmative action plans, suggests that the consideration of race should take place only when other approaches would not work.

In theory, the Supreme Court could rule only on the question of whether universities with admissions plans like that of Texas (a relatively small number) are permitted to also consider race in admissions. But a reopening of the question of the use of race in admissions decisions could involve broader questions about whether any consideration of race and ethnicity in admissions is appropriate. Any such broader consideration makes many college officials very nervous. The Michigan decision was narrowly decided -- 5 to 4. The author of the 2003 decision – Justice Sandra Day O’Connor – has since left the court. And the court’s decisions since 2003 have shown skepticism about the consideration of race in education and public policy.

The lawsuit over the Texas policies was rejected by a federal district court and the U.S. Court of Appeals for the Fifth Circuit.

But the consideration of the case by the appeals panel demonstrates how divided courts are on these issues. The decision by the court was 3 to 0, but one judge filed a concurring opinion stating that the appeals panel had to rule as it did, given the 2003 Supreme Court case on Michigan, but that the Supreme Court ruling had been incorrect. Then in June, the full appeals court considered whether to take up the case, and rejected that idea by a vote of 9 to 7.

Several groups that have been critical of the consideration of race in admissions decisions have filed briefs urging the U.S. Supreme Court to take up the Texas case. The major higher education associations have not yet weighed in on the case at the Supreme Court. But a coalition of groups, led by the American Council on Education, filed a brief with the Fifth Circuit backing the University of Texas position.

UPDATES WITH REACTIONS

Advocates of both sides of the affirmative action debate have been issuing statements today. Abigail Fisher, on whose behalf the suit was filed, said: "My family and I are grateful that the U.S. Supreme Court has agreed to hear my case. I hope the Court will decide that all future UT applicants will be allowed to compete for admission without their race or ethnicity being a factor."

The National Association of Scholars, which has criticized affirmative action and argued for a traditional college curriculum, also praised the U.S. Supreme Court. Stephen Balch, the association's chair, said that "the only way to usher in true racial equality in America is to end race-based discrimination. There are many race-neutral ways of promoting equal opportunity on our college campuses, and we urge the Court to choose these instead."

Bill Powers, president of the University of Texas at Austin, issued a statement defending the importance of considering race and other factors in admissions. "It is vital for the university to weigh a multitude of factors when making admissions decisions about the balance of students who will make up each entering class. We must have the flexibility to consider each applicant's unique experiences and background so we can provide the best environment in which to educate and train the students who will be our nation's future leaders," he said.

And the Rev. Jesse Jackson Sr., the civil rights leader, issued a statement noting the many disparities in American today that place black and Latino citizens at a disadvantage. "So long as these disparities exist, race must continue to be a one of several standards applied and taken into consideration in the pursuit of higher education," he said. "Along with race, poverty, grades, ability to think and pay tuition, special skills and legacy – even military status - all of these 'categories' are taken into consideration during the college admissions process. So too should race and gender."

Commentary
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In signing off the majority opinion in *Grutter v. Bollinger*, Justice Sandra Day O'Connor opined, "That 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today" (2003, p. 342). The Supreme Court's acceptance of *Fisher v. University of Texas*, however, may signal an end to affirmative action, with or without an ending of need. This learning brief is divided as follows: (1) the Supreme Court and its case selection process, (2) the law related to affirmative action, and (3) the future of race conscious policies in higher education.

The Supreme Court and the Case Selection Process

The U.S. Supreme Court is one of several courts in the country that selects its docket. Supreme Court cases are appealed from a federal appellate or state supreme court. To be heard, an appellant must file a petition called a *writ of certiorari* and four of the justices must agree to hear the case. Approximately 10,000 *writs of cert.* are filed annually, with the Court hearing 75-80 cases. Given the small proportion of cases heard, the Court is purposeful in case selection, most likely to hear cases of a national scope, especially cases where there is a divergence in circuit court opinions (a.k.a. a circuit split). Ideally, the Court establishes legal guidelines lower courts can follow, providing national consistency (Supreme Court, 2012).

The selection of the *Fisher* case is curious for its timing given the absence of a split within the circuit courts and the Court's inclination to hear more commercial than civil rights suits (White, 2004). As such the Court's selection may indicate its willingness to settle this area of law, an area which has remained unstable since *Defunis v. Odegaard* (1974) and *University of California v. Bakke* (1978). The concern for colleges and universities is the direction the Court will take. Whereas Justice O'Connor balanced the political center of the Court in *Grutter*, the Court's current center, Justice Kennedy, teeters to her political right. Given his opinion in *Grutter*, the *Grutter* precedent and institutional academic freedom to consider race in admission may be in jeopardy.

The Law Related to Affirmative Action

According to the Fourteenth Amendment, "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." As interpreted, the legal default is that race should not be considered in public policy. Through a network of Supreme Court cases, the Civil Rights Act of 1964, and subsequent legislation, this principle extends to national origin, gender, age, disability, and veteran's status. Most state policies are evaluated by the courts under rational basis review – if the state has any reason for establishing a policy, courts will defer to the state's judgment. However, when it comes to these specific areas, the courts' scrutiny is heightened.

The most rigorous review, strict scrutiny, is used for policies involving race, national origin, and fundamental constitutional rights. Strict scrutiny is composed of two components, a compelling governmental interest and a policy narrowly tailored to be the least restrictive in the ways it impacts others. Policies, whether for or against the benefit of minorities, rarely survive this level of review, leading Gunther (1972) to coin the phrase “strict in theory, but fatal in fact” (p. 8). To date, the Court recognizes as compelling the use of race-specific/race-conscious policies: 1) to rectify directly inflicted past discrimination; and, 2) to pursue the educational benefits of diversity. It was in *Grutter* that a fragile majority of the Court endorsed the diversity rationale.

In the companion case to *Grutter*, *Gratz v. Bollinger* (2003), the admissions policy was struck down as it did not meet the narrow tailoring component of strict scrutiny:

- 1) necessity – race-neutral alternatives are not available or not effective;
- 2) flexible;
- 3) of limited duration;
- 4) directly targeted, and
- 5) of limited impact to innocent third parties (*U.S. v. Paradise*, 1987).

The policy in *Gratz* failed as it mechanically applied a point system, including race, among a host of factors in the consideration of student applications. By contrast, the procedure in *Grutter* involved a holistic review of individual applicants. This holistic review is essential in the crafting of admissions policies that can withstand strict judicial review (*Fisher v. University of Texas*, 2011, pp. 233-234; *Grutter v. Bollinger*, 2003; *Parents Involved in Community Schools v. Seattle School District No. 1*, 2007). Most race-conscious policies fail strict scrutiny under narrow tailoring, including two post-*Grutter* K-12 cases, *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) and *Meredith v. Jefferson County School District* (2007).

The *Fisher* case stems from the Texas 10% plan, upheld by the Fifth Circuit under *Grutter*'s precedent. The Texas plan, like a similar 20% plan in Florida and California's 4% plan, guarantees a percentage of students from each high school admission to a state college/university. The policies are racially conscious, but the policies do not include race in their terms. They enhance diversity by playing on segregated housing and schooling patterns. However, racial silence is not enough to reduce the level of judicial skepticism (Forde-Mazuri, 2000). Race is still a motivating factor behind the creation of these policies; therefore, they are not racially neutral.

In the *Fisher* suit, the 10% plan itself is not at issue, but whether the University of Texas needs a plan to enhance diversity. Following *Grutter*, the Fifth Circuit deferred to the university's institutional academic freedom and educational judgment.

The Future of Race-Conscious Policies in Higher Education

It is unclear whether the Court will rule narrowly as it did in the 2007 cases (above), restraining itself to resolving the *Fisher* suit, or if the Court will rule more broadly, disallowing the Texas plan and by implication the California and Florida plans or even outlaw race-conscious policies altogether. As such, state institutions should consider the areas in which they use race

conscious policies (e.g., admissions, financial aid, and employment) and the institution's valuation of diversity. While the educational benefits of diversity are measurable, tangible, and documented (Chang, Witt, Jones & Hakuta, 2003; Smith, 2009) if these benefits are valued, then rethinking their allocation within systems of higher education may be necessary to attain diversity goals, depending on the *Fisher* case outcome.

At the heart of such an effort would be to more effectively educate institutional stakeholders - students, parents, alumni, and legislators to name a few - on the benefits of diversity at both the individual and the societal levels. For example, emphasizing how multicultural competence increases employability and civic mindedness, something achieved at an institution with strong student diversity. Other intentional benefits education might include are increased critical thinking capacity and intergroup communication skills, and in some cases student grades.

Major corporations such as McDonald's and Coca-Cola have long recognized the value of diversity to their bottom-lines and reflect it in their product marketing. The non-profit Ad Council has worked for decades on social issue advertising and changing the minds of Americans on such topics as women in the workplace (recall Rosie the Riveter), pollution (recall the crying Indian), and the post 9-11 "I am an American" campaign emphasizing a strength in diversity theme. Regardless the Supreme Court's decision in *Fisher*, higher education would be wise to borrow a page from their playbooks and really sell the value of diversity on campus at selective and non-selective institutions alike.

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Discussion Questions

For those who may wish to use this article for teaching and/or a professional development purpose, here are some guiding questions that may be helpful:

1. What is diversity? Does it matter on campus? What are the benefits? What are the costs?
2. Do race conscious policies run afoul of Martin Luther King, Jr.'s dream? What does it mean to be colorblind? Is colorblindness a positive or negative attribute? Explain.
3. How do affirmative action policies work in admissions? What are some alternative strategies for increasing structural diversity (numerical representation) on campus? What are some strategies for increasing interactive diversity (interaction among groups) on campus?
4. How does institutional academic freedom factor into the composition of diverse student bodies?
5. Does the educational value of diversity outweigh the value of institutional selectivity? Explain.
6. What is the difference between diversity and equity? Should the Court reconsider limits on the remediation of societal inequities that are traceable to past discrimination?