Supreme Court will once again consider affirmative action in college admissions

Submitted by Scott Jaschik on June 29, 2015 - 9:30am

WASHINGTON -- The U.S. Supreme Court agreed today to review the constitutionality of the consideration of race and ethnicity in college admissions cases.

The case involves the admissions practices at the University of Texas at Austin. It is possible that the Supreme Court could rule in a narrow way about UT. But the case also gives the justices, several of whom are dubious of the consideration of race by schools and colleges, a chance to limit or ban the consideration of race in college admissions. The case will now be heard in the fall, with a decision likely in early 2016. The issues in this case are likely to be debated in the 2016 presidential race.

As is the norm in cases it agrees to hear, the Supreme Court did not issue any explanation. But the notification that the justices would take the case confirmed, as expected, that Associate Justice Elena Kagan would recuse herself from consideration of the case. Kagan was solicitor general in the Obama administration before being appointed to the court, and presumably worked on the case in that capacity.

The Supreme Court on Affirmative Action in Higher Education

- 1978: In Regents of the University of California v. Bakke [1], the court ruled that the medical school at the University of California at Davis could not reserve some slots with separate admissions standards for minority applicants. But the court also ruled that colleges could consider race and ethnicity in admissions decisions in ways that did not create quotas.
- 2005: In Gratz v. Bollinger [2], the court ruled that the University of Michigan at Ann Arbor had unconstitutionally used an undergraduate admissions system in which underrepresented minority applicants received points on the basis of their ethnic or racial background.
- 2005: In Grutter v. Bollinger [3], the court ruled that the University of Michigan's law school was within its constitutional rights in considering applicants' race and ethnicity because it did so through a “holistic” review and not by simply awarding points based on race and ethnicity.
• 2013: In Fisher v. University of Texas at Austin [4], the court ruled that lower courts needed to apply “strict scrutiny” and not give colleges deference in reviews of challenges to the consideration of race and ethnicity in admissions decisions.

The Supreme Court's 2013 ruling is in the same case that has now returned to the justices.

Ruling 7 to 1 [5], the court in 2013 found that the U.S. Court of Appeals for the Fifth Circuit had erred in not applying “strict scrutiny” to the policies of UT Austin. The case is Fisher v. University of Texas at Austin [4], in which Abigail Fisher, a white woman rejected for admission by the university, said that her rights were violated by UT-Austin's consideration of race and ethnicity in admissions decisions. Fisher's lawyers argued that the University of Texas need not consider race because it has found another way to assure diversity in the student body. That is the “10 percent plan,” under which those in the top 10 percent of Texas high schools are assured admission to the public college or university of their choice.

The 2013 ruling essentially raised the bar for colleges in terms of how they had to justify the consideration of race and ethnicity in admissions, but did not bar its use.

In July 2014, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit upheld, 2 to 1, the UT admissions plan [6]. And it is an appeal of that ruling that the U.S. Supreme Court has again agreed to consider.

The majority decision from the appeals court said that just because Texas could get some diversity based on the percent plan alone, does not mean it can't do more than that. “An emphasis on numbers in a mechanical admissions process is the most pernicious of discriminatory acts because it looks to race alone, treating minority students as fungible commodities that represent a single minority viewpoint,” the judges wrote. “Critical mass, the tipping point of diversity, has no fixed upper bound of universal application, nor is it the minimum threshold at which minority students do not feel isolated or like spokespersons for their race.”

Further, the appeals court said that the University of Texas is correct not to rely solely on the percent plan, which in turn works because of segregation. The plaintiff’s “claim can proceed only if Texas must accept this weakness of the top 10 percent plan and live with its inability to look beyond class rank and focus upon individuals,” the decision says. “Perversely, to do so would put in place a quota system pretextually race neutral. While the top 10 percent plan boosts minority enrollment by skimming from the tops of Texas high schools, it does so against this backdrop of increasing resegregation in Texas public schools, where over half of Hispanic students and 40 percent of black students attend a school with 90 [to] 100 percent minority enrollment.”

The dissent argued that the majority decision did not comply with the Supreme Court's 2013 decision. “At best, the university’s attempted articulations of ‘critical mass’ before this court are subjective, circular or tautological,” the dissent says. “The university explains only that its ‘concept of critical mass is defined by reference to the educational benefits that diversity is designed to produce.’ And, in attempting to address when it is likely to achieve critical mass, the university explains only that it will ‘cease its consideration of race when it determines… that the educational benefits of diversity can be achieved at UT through a race-neutral policy....’”

“These articulations are insufficient. Under the rigors of strict scrutiny, the judiciary must ‘verify that it is necessary for a university to use race to achieve the educational benefits of diversity.’ It is not possible to perform this function when the university’s objective is unknown, unmeasurable or
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What the Supreme Court says about these issues could be crucial to colleges nationwide. Many of them cite the idea of a “critical mass” as part of their explanation for a range of policies that consider race and ethnicity.

Another key issue for many colleges other than UT is the question of how much deference to give to colleges generally on matters related to their desire for diverse student bodies. The 2013 Supreme Court ruling said that no deference should be given to colleges just for being colleges as opposed to other kinds of organizations. And that significantly increased the burden for colleges because many courts have said, historically, that they are hesitant to question decisions on such policies as admissions.

The appeal filed by Fisher's lawyers [7], urging the Supreme Court to take the case, said that the appeals court had not in fact applied the required “strict scrutiny” to the university's actions.

“At every turn, the majority was ‘persuaded’ by UT’s circular legal arguments, post hoc rationalizations for its decision to reintroduce racial preferences and unsupported factual assertions,” the brief says, adding that the Supreme Court “has a special interest in ensuring that courts on remand follow the letter and spirit of [its] mandates…. That institutional interest is triggered here as the Fifth Circuit applied strict scrutiny in name only.”

In its reply brief, the University of Texas [8] said that the appeals court had indeed applied the Supreme Court's standards for reviewing the consideration of race in admissions. The Texas brief said Fisher's lawyers are in reality just trying to eliminate the right of colleges to consider race in any circumstance. “As is evident from their desire to eliminate racial preferences in education altogether, the real problem for petitioner and her amici is this court’s decisions… [that] establish that universities may consider race -- when narrowly tailored to their compelling interest in student body diversity.”

Fisher was a high school senior when she first sued UT Austin [9] in 2008. She enrolled at and graduated from Louisiana State University after she was rejected by UT, but has continued the legal case over her rejection.

Affirmative Action [10]


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