2-22-2022

Attacks on Affirmative Action: Holistic Review of College Applicants Under Fire

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The Supreme Court has upheld affirmative action in higher education recognizing that the consideration of race in a holistic review of a college applicant is narrowly tailored to obtain the compelling state interest of educational benefits associated with a diverse student body. However, recent cases are challenging this precedent and threaten to end the holistic review of college applicants. The Supreme Court has agreed to hear Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina. These two cases will determine the future of race conscious admissions practices. The cases are brought by Students for Fair Admissions (SFFA) against Harvard and the University of North Carolina. SFFA is an organization founded by Edward Blum who seeks a prohibition on awareness of race in college admissions.

Generally, the Constitution views policies that have racial classifications as highly suspect. Title VI of the Civil Rights Act of 1964 places the same limitations on private universities such as Harvard. In 2003, the Supreme Court held in *Grutter v. Bollinger* that the law school in that case had a compelling interest in "obtaining the educational benefits that flow from a diverse student body." The Court further held that the admissions program was narrowly tailored since the means chosen fit the compelling interest so closely that there was "'little or no possibility that the

motive for the classifications was illegitimate racial prejudice or stereotype.'" In 2016, the Supreme Court reaffirmed through *Fisher v. University of Texas* that universities may consider race in order to establish a diverse student body so long as this practice is narrowly tailored and in compliance with the Constitution's Equal Protection Clause. The Court found that there were no other workable race neutral means of achieving the university's compelling interest.

Students for Fair Admissions, Inc. v. President and Fellows of Harvard College

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SFFA first filed a complaint against Harvard for its use of race in undergraduate admissions claiming that it violated Title VI of the Civil Rights Act of 1964. The complaint asserted multiple claims: that Harvard is intentionally discriminating against Asian American applicants, that Harvard is participating in racial balancing through a quota system, that Harvard is not using race as merely a plus factor but as a defining feature, and that Harvard's use of race is not narrowly tailored since there are race neutral alternatives that can achieve the desired diversity. Ultimately, SFFA insists that the Supreme Court should overrule their decisions holding that the Fourteenth Amendment allows the use of race to obtain the benefits of diversity in universities.

The Court of Appeals for the First Circuit has recognized four of Harvard's goals in terms of its valid interest in diversity. The first goal is to train students to be leaders in the public and private sectors in accord with Harvard's mission statement. The second goal is to equip its graduates to adjust to a pluralistic society. Harvard's third goal is to produce a better education for its students though diversity. The final goal is to produce new knowledge which comes from diverse viewpoints. The court notes that these goals demonstrate that Harvard's interest in diversity is not simply for purposes of ethnic diversity but for "'a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.'"

Under the Supreme Court's precedent, a university's admissions policies are not narrowly tailored if it involves racial balancing, uses race as a "mechanical plus factor," or if race is used despite workable race neutral alternatives. The Court of Appeals in Harvard's case found that the number by which admitted Asian American students fluctuates is greater than the change in number of applications submitted by Asian Americans. This is also true for Hispanic and African American applicants. This demonstrates that Harvard does not utilize quotas and does not engage in racial balancing. The court determined that Harvard's admission program contemplates race as part of its holistic review process, and that it values various types of diversity not only racial diversity. The court found that Harvard has attempted to apply alternative policies that do not consider race such as eliminating Early Action and increasing financial aid, but these policies have not been sufficient. Due to the reasons above, the Court of Appeals in this case concluded that Harvard's admission policies did not violate Title VI of the Civil Rights Act of 1964.

Students for Fair Admissions, Inc. v. University of North Carolina

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SFFA subsequently filed a complaint against the University of North Carolina-Chapel Hill (UNC) for its use of race in undergraduate admissions claiming that UNC violates the Fourteenth Amendment. SFFA claims that UNC's use of race is not sufficiently narrowly tailored to withhold constitutional muster. In addition, SFFA argued that UNC is not using race neutral alternatives that would assist in achieving diversity. Similarly, as in SFFA's case against Harvard, SFFA reiterates that the Supreme Court should overrule its past decisions holding that the use of race is permitted in achieving diversity under the Fourteenth Amendment.

The District Court for the Middle District of North Carolina found that the UNC has determined that fulfilling its mission of serving "'as the center of research, scholarship, and creativity and to teach a diverse community of undergraduate, graduate, and professional students to become the next generation of leaders'" requires enrolling a diverse student body. UNC seeks to obtain educational benefits such as to promote an exchange of ideas, broaden and refine understanding, foster innovation, prepare productive leaders, enhance "appreciation, respect, and empathy, cross-racial understanding," and break down stereotypes.

The Supreme Court has indicated that admissions programs considering race are narrowly tailored when they "flexibly are a part of an individualized holistic review" of the applicant which considers all of the distinct ways in which the applicant can contribute to a diverse educational environment. The District Court found that UNC considers race flexibly as a plus factor among multiple factors in the individualized consideration of the applicants. The District Court determined that UNC made a good faith consideration of workable race neutral

alternatives to the consideration of race. UNC also met their burden of demonstrating that there are no appropriate race neutral alternatives available to achieve the educational benefits of diversity. Although the court commented that UNC is a long way from creating the diverse environment that is depicted in its mission statement, it concluded that the University of North Carolina's consideration of race in their admission program does not violate the Fourteenth Amendment.

The Future of Affirmative Action

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Since the Supreme Court's 2016 decision in *Fisher v. University of Texas*, the Court's membership has significantly changed by tilting towards a more conservative outlook. The Court is now likely to view the challenged admission programs with increased skepticism. This will place forty years of precedent allowing racial considerations in evaluating college applicants at risk. A skeptical view of racial considerations in admissions would fundamentally affect college admissions and likely decrease the number of Black and Latino students who attend highly selective universities. Selective universities have long struggled to admit historically marginalized students of color. The consideration of race in admissions ensures that

students of color are not "'overlooked in a process that does not typically value their determination, accomplishments and immense talents.'"

Society at large and courts throughout the nation have long recognized that diversity in higher education has positive, crucial effects that go beyond the classroom. Students who come from diverse backgrounds and learn from each other are better suited to be successful in society. If the Supreme Court decides to prohibit the consideration of race in evaluating college applicants, the result will be the denial of the importance of individual experiences in diversifying student bodies in universities. In her concurrence in *Grutter v. Bollinger*, Justice Ginsburg observed that "[f]rom today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action." Today, it is clear that society is not at a point where minorities have genuine equal opportunity, which is why the Supreme Court should uphold affirmative action in higher education.

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