

# Spotlight:

## Affirmative Action & The Supreme Court



### **Change in Supreme Court Composition Poses Renewed Threat to How Universities Consider Race and Ethnicity in Student Admissions**



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The United States Supreme Court recently heard arguments in a reverse-discrimination case, *Fisher v. University of Texas at Austin*. The petitioners, two white, female applicants, claim that the University of Texas at Austin (“U.T.”) violated the Fourteenth Amendment’s Equal Protection Clause by its use of race and ethnicity in its admissions process. Although U.T. closely followed an approach approved by the Court just nine years ago in *Grutter v. Bollinger*, the Court’s conservative shift may dramatically alter how state universities consider race and ethnicity with respect to admissions.

State Universities Can Consider an Array of Characteristics of which Racial or Ethnic Origin is but a Single, Albeit Important, Element in Admissions.

The Equal Protection Clause pro-

vides that no State shall “deny to any person within its jurisdiction the equal protection of the laws.” Any governmental action based on a group classification – such as race – is strictly scrutinized to ensure that the personal right of equal protection is not infringed. Furthermore, government actions based on race are only constitutional if they are narrowly tailored and necessary to further a permissible and compelling governmental interest.

In *Grutter*, the Court approved a university’s consideration of race or ethnicity as one “plus factor” among other, race-neutral, factors to build a “critical mass” of under-represented minority students and to achieve a heterogeneous student body. The Court recognized that attaining a diverse student body is a permissible and compelling interest for a state university because diversity is necessary to prevent minority students from feeling isolated or that they are spokespersons for their race, and to foster a robust exchange of ideas and experiences. But the Court also reaffirmed that a university cannot use quotas or demographic mirroring to achieve such diversity.

The Petitioners in *Fisher* Argue that U.T.’s Disparate View of Critical Mass and Texas’s Top Ten Percent Law Render U.T.’s Use of Race and Ethnicity in Admissions Unconstitutional.

The *Fisher* case is essentially *Grutter* revisited, with a twist. U.T.’s admissions process had two components. First, state law required U.T. to admit all Texas high school seniors who graduated in the top 10% of their classes (the “Top 10% Law”). When implemented in 1998, the Top 10% Law had an immediate and positive effect on minority enrollment.

The second component closely followed, and was deliberately based on, the approved admission practices in *Grutter*. Students were admitted based on their personal achievement index or “PAI”—a composite score based on essay writing, extra-curricular activities, recommendations, and any “special circumstances” (e.g., socio-economic status, single parent household, languages spoken at home, overcoming adversity). Hispanic or African American heritage were “plus factors” for the PAI, for the stated purpose of building a critical mass of Hispanic and African-American students.

The petitioners’ main arguments in *Fisher* are: (i) the Top 10% Law sufficiently increased minority enrollment, and therefore racial and ethnic considerations were unnecessary; (ii) the number of minorities enrolled under the PAI process is too small to deem the racial and ethnic plus factors necessary or narrowly tailored in

light of race-neutral alternatives; and (iii) consideration of the state's demographics as a factor in determining critical mass is unconstitutional racial balancing.

The Supreme Court Likely Will Move Away from the "Critical Mass" Approach and Will Limit Consideration of Race and Ethnicity Further.

*Grutter* was decided by a 5/4 split decision, with Justice Kennedy, and the Court's conservatives, in the dissent. Since then, the addition of Justice Alito to the Court has shifted it to the right. This shift, and Justice Kagan's decision to recuse herself, has made *Fisher* closely watched.

At its heart, *Fisher* should be about whether U.T.'s admissions process was consistent with Court's holding in *Grutter*. But anti-affirmative action activists, including many amici, hope that the Court, as currently composed, will overrule the nine-year old case and hold that any use of race or ethnicity in college admissions violates the Equal Protection Clause.

The transcript from oral argument shows the conservative wing, and Justice Kennedy, are still very skeptical of the concept of "critical mass"—what it means, how it is measured, and when it is satisfied. They may also re-assert one of the key arguments in the *Grutter* dissent against U.T.'s "critical mass" claim. U.T. gave Hispanic applicants a "plus factor" for ethnicity, but did not give Asian American applicants a plus despite there being fewer Asian Americans enrolled. The dissent in *Grutter* believed that the number of students

necessary to reach "critical mass" should be the same for each racial

or ethnic group, and that providing a plus factor for applicants in one racial group, but denying that plus to applicants from a smaller racial group, renders the "critical mass" argument a "sham."

Based on the Justices' questions and comments at oral argument, and Justice Robert's majority opinion in the 2007 case *Parents Involved in Community Schools v. Seattle School District*, it does not appear likely that the Court will actually reverse itself and hold that student body diversity is not a compelling interest that can justify the consideration of race or ethnicity. But the Court will likely back away from the "critical mass" approach, and may significantly heighten the burden that must be overcome by universities that want to consider race or ethnicity where there is evidence that other race-neutral practices are already increasing minority enrollment.

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**The Schmoozing Factor**

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-ity. You handle the courtesy business exchange; that is the first and a must do. You also share the information you need for that other

person to know of you, about you, and remember you. You make inquiries in your conversations to

learn the information you need to know about the other person. You must leave a strong (and positive) impression. Engage meaningfully by focusing on commonalities, or anchoring your unique qualities, skills, experiences in the other person's active memory. You may not achieve your objective in the first exchange. Effective networking requires that you do not stop at following-up. Rather, you follow through. Effective networking operates with diligence.

We welcome new members every year, and learn from our veterans. Active membership serves up continuing opportunities to strengthen our connections and our connectors. In MCN, we build, enhance, increase, promote, encourage, advance, support and empower one another. For seasoned MCN members, this brief reflection may cause you to remember what we must do. For recent MCN members, it is a window into established principles we have adopted to advance your career and MCN. Networking is connective fiber that brings us together and advances MCN. Accordingly, in every networking engagement, you are as much the driver as you are a vehicle.

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