2-18-2013

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http://www.chronicle.com/article/A-Critical-Look-at-the/137369/

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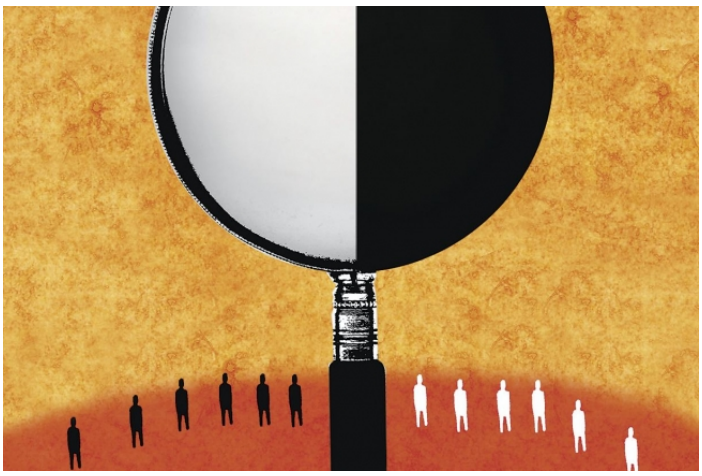
The Chronicle of Higher Education
February 18, 2013



Michael Morgenstern for The Chronicle

The Supreme Court's pending ruling in Fisher v. University of Texas at Austin is expected to largely decide how or even whether affirmative action can be used in college admissions. The university's argument for why minority enrollments need to reach a certain threshold, however, is problematic because it is inconsistent with previous court rulings involving race.

Abigail Fisher, a white applicant who was denied acceptance by the institution even though her grades and test scores were higher than those of other students who were admitted, is arguing that the university's policy of considering race as a factor in its decisions is unconstitutional. Whether affirmative action is in fact constitutional boils down to two separate inquiries: Is there a compelling reason for giving such preferences, and is there a close fit between the means and that compelling reason?

In terms of the first question—the "why"—the Supreme Court has held that diversity provides an educational benefit to all students, and so colleges may use racial preferences in admissions for that purpose. Colleges have argued, and the court has

agreed, that exposure to different backgrounds and perspectives requires people to defend and even reformulate their respective worldviews, and that diversity enriches what we think about ourselves and one another.

In terms of the second question—the "how"—the University of Texas argues that it must enroll a "critical mass" of underrepresented minority students for the educational benefits of diversity to occur.

A critical mass, in this case, is not a fixed percentage or number of students. Instead, it is defined by the university as the point at which students in underrepresented minority groups no longer feel isolated or like spokespeople for their races. In the absence of this critical mass, the argument goes, students in underrepresented minority groups will feel forced to communicate viewpoints that are characteristic of their races.

With a critical mass of students of the same race, however, those students will feel comfortable articulating their individual perspectives and opinions. As a result, they will break down preconceived notions that members of racial communities share monolithic or predictable positions.

Inasmuch as diversity is a permissible or desirable objective, the critical-mass approach gives rise to two concerns, neither of which was sufficiently discussed in 2003 when the Supreme Court's Grutter v. Bollinger decision approved the University of Michigan Law School's use of the critical-mass theory. With the University of Texas' affirmative--action policy under review, an opportunity exists for the merit of those concerns to be considered.

First, critical mass is based on the idea that, if such mass is not achieved, students in underrepresented minority groups will express representative racial opinions. In doing so, the critical-mass theory presupposes and reinforces the stereotype that there are such shared or common racial viewpoints that may be demanded of, and reflexively articulated by, an underrepresented minority.

The Supreme Court, however, has rejected the "offensive and demeaning assumption" that individuals of a given race "think alike." For example, in the context of voting, the court dismissed the suggestion that members of a particular race possess the same "political interests" or the same favorite "candidates at the polls."

It may be countered that the University of Texas does not hold those stereotypes but instead is attempting to challenge racial stereotypes potentially held by other students. But a telling example cuts against that saving argument. Counsel for Texas told the Supreme Court that the university wants to admit "individuals who will play against racial stereotypes," such as "the African-American fencer" or "the Hispanic … who has mastered classical Greek."

Those examples indicate that the university is itself constructing or affirming privately held stereotypes—that African-American students are not fencers and that Hispanics cannot master classical Greek—which the university then claims it must dismantle. For Texas to seek to validate those stereotypes seems inconsistent with

the Supreme Court's pronouncement that "private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

Second, the critical-mass theory implies that, without an adequate presence of members of the same race, underrepresented minority students are categorically incapable of articulating themselves as individuals. As a federal appeals court pointed out, it "assumes that students cannot function or express themselves unless they are surrounded by a sufficient number of persons of like race or ethnicity."

To be sure, it may not be easy for some minority students to convey certain viewpoints in the face of internally or externally imposed expectations. Members of the same race also may affirmatively provide support that facilitates free and candid expression. In the eyes of the law, however, no race should be construed as having a set of default viewpoints or as being effectively unable to be individuals in educational conversations.

The critical-mass theory, therefore, may actually validate racial stereotypes and perpetuate notions of racial inadequacy. If the court finds that it does, then colleges trying to create a diverse student body may be forced to find alternative means to meet that compelling and worthy goal.

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