

FROM: THE VOLOKH CONSPIRACY

ASIAN-AMERICANS,
AFFIRMATIVE ACTION, AND
FISHER V. TEXAS

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The *Chronicle of Higher Education*¹ reports that several Asian-American groups have filed an amicus brief opposing the University of Texas' affirmative action program, which is being challenged in *Fisher v. Texas*, an important affirmative action case before the Supreme Court:

A brief filed Tuesday with the U.S. Supreme Court seeks to shake up the legal and political calculus of a case that could determine the constitutionality of programs in which colleges consider the race or ethnicity of applicants. In the brief, four Asian-American organizations call on the justices to bar all race-conscious admissions decisions, arguing that race-neutral policies are the only way for Asian-American applicants to get a fair shake.

Much of the discussion of the case has focused on policies that help black and Latino applicants. And the suit that has reached the U.S. Supreme Court was filed on behalf of a white woman, Abigail Fisher, who was rejected by the University of Texas at Austin.

But the new brief, along with one recently filed on behalf of Fisher, say that the policy at Texas and similar policies else-

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¹ www.insidehighered.com/news/2012/05/30/asian-american-group-urges-supreme-court-bar-race-conscious-admissions#.T8YU5xx1Q0.email.

where hurt Asian-American applicants, not just white applicants. This view runs counter to the opinion of many Asian-American groups that have consistently backed affirmative action programs such as those in place at Texas

The brief filed Tuesday on behalf of Asian-American groups Tuesday focused less on the Texas admissions policy than on the consideration of race generally in college admissions. “Admission to the nation’s top universities and colleges is a zero-sum proposition. As aspiring applicants capable of graduating from these institutions outnumber available seats, the utilization of race as a ‘plus factor’ for some inexorably applies race as a ‘minus factor’ against those on the other side of the equation. Particularly hard-hit are Asian-American students, who demonstrate academic excellence at disproportionately high rates but often find the value of their work discounted on account of either their race, or nebulous criteria alluding to it,” says the brief

The brief focuses heavily on research studies such as the work that produced the 2009 book, *No Longer Separate, Not Yet Equal: Race and Class in Elite College Admission and Campus Life* (Princeton University Press)

The book suggested that private institutions essentially admit black students with SAT scores 310 points below those of comparable white students. And the book argued that Asian-American applicants need SAT scores 140 points higher than those of white students to stand the same chances of admission. The brief also quotes from accounts of guidance counselors and others (including this account in *Inside Higher Ed*) talking about widely held beliefs in high schools with many Asian-American students that they must have higher academic credentials than all others to gain admission to elite institutions

The impact of Texas’ affirmative action policy on Asian-American applicants raises serious questions about what the purpose of affirmative action actually is. As I have pointed out previously,² if the goal is compensatory justice for groups that have been victimized by government discrimination, Asian-Americans have a strong

² www.volokh.com/2009/10/17/asian-american-applicants-and-competing-rationales-for-affirmative-action-in-higher-education/.

case for being included in the program, and certainly should not be victimized by it. If, as the University of Texas argues, the purpose is ensuring that each group has a “critical mass” large enough to promote educationally beneficial “diversity,” then it is hard to understand why the Texas policy extends affirmative preferences to Hispanics, but not Asians, even though the former have a much larger absolute presence at the school:

The brief filed on behalf of [plaintiff Abigail] Fisher does focus on Texas policies — and specifically their impact on Asian-American applicants. Texas has stated that it considers black and Latino students “under-represented” at the university, based in part on their proportions in the state population. And the Fisher brief considers that illegal.

“UT’s differing treatment of Asian Americans and other minorities based on each group’s proportion of Texas’s population illustrates why demographic balancing is constitutionally illegitimate UT gives no admissions preference to Asian Americans even though ‘the gross number of Hispanic students attending UT exceeds the gross number of Asian-American students attending UT.’ This differing treatment of racial minorities based solely on demographics provides clear evidence that UT’s conception of critical mass is not tethered to the ‘educational benefits of a diverse student body.’ UT has not (and indeed cannot) offer any coherent explanation for why fewer Asian Americans than Hispanics are needed to achieve the educational benefits of diversity.”

As I explain [here](#),³ there is also no diversity-based reason to prefer Hispanics to a wide range of other groups that have lesser representation at UT, or to consider Asian-Americans as a single undifferentiated mass for diversity purposes:

“Asians” are not a monolithic group. Japanese, Chinese, Indians, Filipinos, Vietnamese, and Cambodians all have very different cultures. Indeed, immigrants from one part of India or China often have different cultures and speak different lan-

³ www.volokh.com/2009/10/17/asian-american-applicants-and-competing-rationales-for-affirmative-action-in-higher-education/.

guages from those hailing from other parts of the same nation. Treating them all as an undifferentiated mass of “Asian-Americans” is a bit like saying that Norwegians, Italians, and Bulgarians are basically the same because they are “Europeans.” If diversity is really the goal, university administrators should do away with the artificial “Asian-American” category altogether and start considering each group separately. They should do the same for the many groups usually lumped together as “white” or “Hispanic.” A university that already has a critical mass of native-born-WASPS might well not have a critical mass of Utah Mormons or Eastern European immigrants.

The glaring inconsistencies in Texas’ affirmative action policy and others like it suggest that many universities are either operating an ethnic spoils system,⁴ trying to run a compensatory justice program under the guise of promoting diversity (while ignoring Chinese and Japanese-Americans’ powerful claims for compensation) in order to avoid running afoul of Supreme Court precedent, or some of both.

To avoid misunderstanding, I should reiterate that I have some sympathy for the compensatory justice rationale for affirmative action,⁵ and do not believe that such policies are categorically unconstitutional. I also have significant reservations⁶ about the *Fisher* case in particular. My general position is the exact opposite of current Supreme Court precedent,⁷ which holds that racial preferences can be used to promote “diversity” but not compensatory justice for minority groups that have been the victims of massive “societal” discrimination.

That said, many current affirmative action policies are a travesty from the standpoint of either compensatory justice or promoting diversity. The University of Texas policy is no exception.

UPDATE: Some have suggested to me that UT’s policy may also

⁴ www.volokh.com/2012/05/28/elizabeth-warren-and-fisher-v-university-of-texas/.

⁵ www.volokh.com/2011/03/02/preferences-for-white-males-and-the-diversity-rationale-for-affirmative-action/.

⁶ www.volokh.com/2012/02/29/why-fisher-v-texas-might-turn-out-to-be-a-pyrrhic-victory-for-opponents-of-racial-preferences/.

⁷ www.law.cornell.edu/supct/html/02-241.ZS.html.

be motivated by a belief that GPA and test score admissions standards are more “culturally biased” against blacks and Hispanics than against Asians. To my knowledge, the University has not asserted any such justification for its policy of including blacks and Hispanics, but not Asian-Americans in its affirmative action program. In any event, it would be surprising if administrators really believed that the tests are more culturally biased against native-born blacks and Hispanics – including those from middle class backgrounds – than against recent Asian immigrants who come from very different cultures, and in some cases only recently became fluent in English. //