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Affirmative Action Challenged Anew

When Texas and a few other states responded to bans on affirmative action with “percent plans,” which guarantee admission to public colleges to those who graduate in some designated top percentile of their high school classes, some critics of affirmative action were troubled. The plans were adopted in states like Texas where many high schools are largely segregated (by housing patterns, not law), so offering automatic admission for the top 10 percent of graduates assures a measure of diversity at public universities. Some critics viewed the plans as an end run around the bans on affirmative action since the plans were designed with the idea of getting more black and Latino students into top universities — but in a way that couldn’t be legally challenged.

Now a new lawsuit against the University of Texas at Austin from critics of affirmative action argues that because of the success of a percent plan, the institution should not be permitted to consider race in admissions. The suit doesn’t seek to reverse the Supreme Court’s rulings that, in certain circumstances, allowed the use of affirmative action in college admissions. Rather, the suit says that — if the Supreme Court’s directives were being carefully followed — colleges would have to eliminate or change many admissions policies that consider race and ethnicity. Critics of affirmative action think they may have a new legal strategy for use in some states, and even some defenders of affirmative action — while dubious of the argument — say it is novel and may attract new thinking to such litigation.

The lawsuit was filed in federal court Monday on behalf of a white high school senior, Abigail Noel Fisher, who was rejected from UT Austin. Like other challenges to affirmative action, the suit charges that Fisher would have otherwise been admitted — but for affirmative action as practiced by the university. Where the argument differs is that it is based on a portion of the 2003 Supreme Court decision, *Grutter v. Bollinger,* that upheld the right of the University of Michigan’s law school to consider race in admissions decisions. The decision noted the obligation of public universities to consider race-neutral alternatives to the explicit consideration of race and ethnicity. That obligation is typical of court decisions upholding affirmative action, and most colleges have argued that race neutral measures alone — such as affirmative action based on class, for example — would not produce a diverse class of students.

This is where things could get tricky for the University of Texas, the plaintiffs hope, because they are pointing to numerous statements from university officials praising the 10 percent plan for helping to admit classes of students with as much or more diversity than the university had before a ban on affirmative action. For example, this statement from the university — cited in the court filings — says that “the law is helping us to create a more representative student body and enroll students who perform well academically.”

The Project on Fair Representation, which is handling the suit against the university, is not attacking the legality of affirmative action or of the 10 percent law, said Edward Blum, who is involved in the case and has worked for several efforts against affirmative action. “The court in *Grutter* very distinctly said that you’ve got to try race-neutral means before you use affirmative action, and the University of

Texas is not," he said. "One of the results of this lawsuit may be that other colleges and universities may be put on notice that they must use race-neutral means."

One irony of the suit is that the University of Texas has been pushing hard since 2003 to have the state repeal the 10 percent law. At the time the law was adopted, a federal appeals court decision banning affirmative action was in place in Texas. But when the Supreme Court upheld affirmative action's legality, the university resumed consideration of race. University officials have said that they now have enough tools available to assure a diverse class that they don't need the top 10 percent law and fear it deprives them of flexibility. Last year, it looked like the Texas Legislature was poised to repeal the law, but at the last minute, the repeal effort failed — with many advocates for minority students saying that the 10 percent plan was still needed.

Blum said that if Texas does repeal the law, it would not change the suit. Texas can decide whether or not it wants to keep the law, he said. But it can't consider race in admissions when the success of the law has demonstrated the ability to obtain diversity in a student body without using race-specific policies.

Patti Ohlendorf, vice president for legal affairs at Austin, issued a statement noting that the university has just received a copy of the suit and hasn't had time to study it. "We will review the complaint, which challenges the university's admissions procedures on Constitutional grounds, with the UT System Office of General Counsel and the Office of the Attorney General," she said. "Each year we are very fortunate to receive applications from thousands of very able high school seniors, but as with many universities around the country, we are limited in the number of applicants we can admit. We believe that our undergraduate admissions policies are well administered and in compliance with Supreme Court precedent and all other applicable law."

Shirley Wilcher, executive director of the American Association for Affirmative Action, said she had not seen the suit. She said that if the plaintiffs prevailed, it could limit the ability of Texas colleges to diversify. "I have never been under the impression that the percentage plans were a ceiling above which you can't go," she said. "There's nothing that says that if you don't get the level of diversity you want, you can't go beyond that."

She also noted that the Supreme Court hasn't required colleges — or other entities engaged in affirmative action — to undertake every single possible alternative to the consideration of race. She questioned whether the suit may be "a ploy" to attack affirmative action in new ways.

Sheldon E. Steinbach, a lawyer with the Washington firm of Dow Lohnes, said that there is also a danger with relying on a 10 percent plan when such policies only work because of residential demographics that many people would like to see change. "There is a basic defect" in the percent plans, he said. "The 10 percent solution is predicated on a continuance of a segregated housing system that most individuals would like to see evaporate."

— Scott Jaschik

The original story and user comments can be viewed online at http://insidehighered.com/news/2008/04/08/affirm.