Respondent Rebecca Panwala and Emily Elott

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https://www.youtube.com/watch?v=x5nTme8oK4Y

Table of Cited Authorities

Act of July 25, 1868

Act of June 21, 1866

Hopwood v. Texas 78 F.3d 932 (5th Cir. 1996)

Regents of Univ. of California v. Bakke 438 U.S. 265 (1978)
United States v. Carolene Products Co. 304 U.S. 144 (1938)
Grutter v. Bollinger 539 U.S. 306 (2003)

Statement of Argument

The University of Texas affirmative action policy in university admissions is consistent with the Equal Protection Clause of the Fourteenth Amendment because it upholds measure of strict scrutiny. The policy meets the compelling state interest of diversity in higher education and is narrowly tailored in the least restrictive manner to achieve this goal. When considering the historical context of the Fourteenth Amendment, it becomes clear that affirmative action in this situation remains consistent with its philosophical, legislative, and constitutional principles. The Fourteenth Amendment arose out of a desire to assist freedmen in the South with becoming full participants and citizens in the democratic society. The chains of slavery still remain in figurative shackles upon the hands of minority groups in this country through the cycle of poverty and disproportionately low socioeconomic status of these individuals. Affirmative action works to remedy these remaining vestiges. Discriminatory policies such as federal appropriations for Howard University are considered constitutional and affirmative actions strives for the same goal with less drastic measures. The Supreme Court, as established in United States v. Carolene Products Co. 304 U.S. 144 (1938), is committed now to protecting “discrete and insular” minorities. Affirmative action is consistent with this mandate. And, finally, the precedent set by the Supreme Court in previous rulings on affirmative action upholds the constitutionality of this affirmative action policy at the University of Texas. Previous rulings of the Supreme Court in Regents of Univ. of California v. Bakke 438 U.S. 265 (1978) and

Grutter v. Bollinger 539 U.S. 306 (2003) have built a foundation on which the policies utilized by the University of Texas are found to be constitutional. Thus, affirmative action in the University of Texas system college admissions is integral to achieving the ultimate goal of diversity in higher education and should be found constitutional by this Court.

Argument

1. **Affirmative Action Policies are Necessary Because of Past Racism and Oppression to Minorities**

Affirmative action policies for colleges and universities are necessary because they function as a remedy for past discrimination and oppression of minority groups in the United States. The policies address the continued disadvantages these groups face, as many of their members are descendants of slaves or have faced past discrimination. According to Cornell University the overall purpose of affirmative action is to "eliminate unlawful discrimination between applicants, remedy the results of such prior discrimination, and prevent such discrimination in the future". Past discrimination dates from the time of slavery and its repercussions reverberate in society today. Today, affirmative action is constitutional under strict scrutiny, as explained by the court, because it strives for diversity in higher education, a goal found to fulfill the compelling state interest standard in Bakke.

The foundation of the disparities in wealth between the majority and minority populations, especially African American and Hispanic populations results from periods in American history when discrimination was legally permissible. Minorities often could not find well-paying jobs and worked as unskilled laborers and were paid less than their white counterparts for the exact same work. According to a Microdata Series Census, the mean annual earning for a African American male in 1939 was only $537.45, compared $1234.41 of their white counterpart, in a .44:1 ratio of income. The inherent white hegemonic power structure in the United States originated in the colonial era and is reflected in the oppression and even genocide of other races. Ironically, although the white immigrants from England traveled to the United States to establish a society free from religious discrimination and intolerance more generally, they unintentionally sowed the seeds of racism in the founding document, the US Constitution, through a provision that counted each slaves ⅗ of a person for representation, an addendum that forced Northerns to return fugitive slaves to bondage, and a restriction on a ban on the importation slaves until 1808.

The United States was built on innate institutional racism and the idea that the white race was dominant and superior and remnants of this ideology have been difficult to eradicate. For instance, in the case of Dred Scott, the Court held that slaves or freed slaves were not citizens of the United States. Although this decision was eventually rescinded, the tone and quality of its reasoning reflected a hostile attitude toward blacks in society, an attitude that remains vestigial today. Early white settlers either exterminated Native Americans or forcibly removed them, and used the slave labor of blacks to build their plantation homes and economic power. Later, Hispanic immigrants would face discrimination and intolerance as well, perhaps beginning most notably with the annexation of Texas by a group of white settlers. Yet after the Civil War, a Radical Reconstruction Congress saw the need to correct this pattern of unfairness and oppression through the 13th, 14th, and 15th amendments, with the 14th amendment being the most consequential. The attempts to eradicate institutional and de jure racism have had success but vestiges of these harmful laws, including restrictive covenants and economic segregation, still remain.

Although racial discrimination is now highly legally regulated under strict scrutiny, the generational cycle of poverty has ensured that blacks, Native Americans, Hispanics, and other minorities remain shackled in the chains of history. The legal discrimination of the past still affects the present and will woefully affect the future if policies to correct the errors of the past, such affirmative action, cannot be implemented. Affirmative action policies are therefore needed to “level the playing field” for disadvantaged minorities.

A study by PEW research concluded that “The median wealth of white households was 13 times the median wealth of black households in 2013” and “ the wealth of white households is now more than 10 times the wealth of Hispanic households”. The study also concluded that the wealth gap between white and minority household is continuing to grow. The generational inheritance of poverty directly correlates with the lack of access to higher education. In a Stanford study about those who pursue enrollment in more selective colleges and universities, white students were two to three times more likely to gain admission than black students, and three times more likely than Hispanic students. The research also shows that 58 percent of students in highly selective colleges come from families earning in the top quartile of income, and that students from the bottom quartile of income only made up 6 percent of the population. Education leads to high paying jobs, and creates opportunities in higher education for the next generation. which then in turn leads to the next generation with opportunities in higher education. The lack of access to higher education traps minority groups in poverty and abets the institutional racism in this society through chains that are now socioeconomic rather than legal.

II. The Fourteenth Amendment as a Response to Racism and Slavery

In order to understand the constitutionality of affirmative action, the Fourteenth Amendment must be considered and examined. The Fourteenth Amendment was born out of the uniting impetus of the post-Civil War era and a greater evolution in morality and thinking, suggesting that enslaving any person contradicted the ideals of the nation. The amendment sought to protect freedmen in the South who faced an incredibly hostile atmosphere as a result of state legislative action. Thus, the Fourteenth Amendment should still fulfill this sanctified, overarching purpose today. The Fourteenth Amendment states that "no state shall…deny to any person within its jurisdiction the equal protection of the laws". This equal protection clause is most pertinent to this case. Under the Equal Protection Clause, the current Supreme Court standard for discrimination is split into three tiers: strict scrutiny, intermediate scrutiny and rational basis. Strict scrutiny, the highest tier, applies to any discrimination on the basis of race, alienage or religion. Under the standard of strict scrutiny, a law is constitutional only if it satisfies the current standard. The law must fulfill a "compelling state interest" and must be "narrowly tailored" and use the "least restrictive means" to achieve its goal.

The history of the Fourteenth Amendment should not be ignored in its modern interpretation. The nation went to war in the Civil War over two ways of life, the Southern gentility and the Northern industrialism. Yet the issue of race and slavery was inextricably tied to this battle because the Southern plantation economy could not exist without extensive slave labor. After the North prevailed, it became clear that the slaves would need to transition to lives as normal citizens and perform the civic duties necessary for the proper function of a democratic society. Thus, the original purpose of the Fourteenth Amendment was to ease the transition from slavery to citizenry in the South. The Radical Reconstruction Congress attacked the problem through legislation whose constitutional support came from the Fourteenth Amendment. This manifested itself through such government institutions as the Freedmen's Bureau and Howard University. The Freedmen's Bureau was discriminatory because it extended services only to former slaves, but it was considered constitutional. An analogy exists between contemporary affirmative action and the Freedmen's Bureau. The Freedmen's Bureau focused heavily on educational opportunities for former slaves to help them find well-paid jobs and not be caught in the cycle of poverty. The policy of affirmative action today still espouses the same goal; it seeks to provide minority groups opportunities through increased access to education.

Although the vestiges of oppression, racism, and discrimination may now manifest themselves in different ways in modern America, they still exist. Freedmen may no longer be

sharecropping on fields in quasi-slave labor. Black workers in the South may now be able to sit at the front of the bus. But this does not mean that the fight for equality is over. Minority groups face different challenges now than they did 100 years ago, but the original intent of the framers of the Fourteenth Amendment remains. It was designed to protect and assist blacks, which can now be extended to other disadvantaged minority groups, through legislative action. Affirmative action continues the vision of these framers and is constitutional under the Supreme Court's current standard.

III. Howard University Represents More Drastic Action than Affirmative Action and is still Constitutional

The Fourteenth Amendment also allowed for the establishment of Howard University, a university designed to educate freedmen and prepare them for productive lives. The university received funding initially from the Freedmen's Bureau, and, after the bureau's dissolution, received appropriations from the federal government itself which continue to this day. Howard University is unique in its status as a private university that receives direct government funds, rather than indirect government funding through student loans or research sponsorship. And the university is still tailored toward combatting the vestiges of prejudice and racism in this society. This represents more drastic governmental action based on race than simply considering race as a factor in college admission. In the case of Howard University, the government is directly affirming one race through monetary assistance. In affirmative action policies that do not use quotas (ruled unconstitutional in Regents of Univ. of California v. Bakke 438 U.S. 265 (1978)), the university or college considers race as simply one additional factor in a holistic admissions scheme. For instance, Grutter found that an affirmative action policy designed to achieve a critical mass of minority students is constitutional under strict scrutiny. If Howard University can constitutionally receive government funds for its function and such discrimination is considered legal, then affirmative action for college and universities must also be legal because it strives for the same goal in a less restrictive manner.

IV. The Court's current mandate is to protect "Discrete and Insular" Minorities

When considering the issue of affirmative action brought forward by Fisher v. Texas, the Supreme Court's previous rulings on the issue must be considered. The Court's involvement in affirmative action policy perhaps begins with Carolene Products Co, In this case, the court considered whether the federal government can regulate coconut milk in margarine substitutes. Although the case considers an esoteric issue, its pertinence to a discussion of affirmative action arises in a footnote. This footnote states that the court would put new emphasis on protecting discrete and insular minorities instead of liberty and property rights. This change in direction, denoted by the footnote, is integral to understanding the constitutionality of affirmative action because affirmative action, by its nature, seeks to protect these minorities.

V. Diversity in Higher Education represents a Compelling State Interest

Affirmative action, in its essence, strives to support underrepresented minorities who have not always had access to the United States' bountiful opportunities. As established under the Equal Protection Clause of the 14th Amendment discussed earlier, legislation that discriminates against suspect classification must further a compelling state interest. In the case of Bakke, the court invalidated an affirmative action policy that utilized strict racial quotas but also established that an affirmative action policy seeking to increase diversity on college campuses constituted a compelling state interest. The policy in Bakke did not satisfy the narrowly tailored portion of the strict scrutiny standard but did satisfy the compelling state interest portion, as the courts found diversity in college campuses to be important enough to meet the first criterion under strict scrutiny.

In fact, affirmative action actually corrects institutional discrimination against these minorities. For instance, standardized testing constitutes an important part of a student's college application. But these standardized tests, authored by white test makers, favor white and Asian students. A statistical study from the book SAT Wars that took SAT data and broke it into 3 socioeconomic groups found that, within the lowest third, only 14% of test takers scored above 1400, as compared to 29% for the highest third. Those in lower socioeconomic status are disproportionately underrepresented minorities. These minority students also often lack the assistance, knowledge, and guidance of wealthy and educated parents who understand the nuances of the college application system. Thus, using race as a determinant, but by no means the only factor, in college admissions, can help equalize opportunity and increase diversity, which the court has upheld as a compelling state

interest. Considering race allows a correction to be made for institutional factors that unfairly disadvantage minority groups.

Opponents to affirmative action have argued that times have changed, and that while affirmative action once furthered a compelling governmental interest when the Grutter v. Bollinger 539 U.S. 306 (2003) decision was made, but that over the years affirmative action has come to no longer meet the criteria under strict scrutiny. While it is true that the percentage of minorities in colleges has increased, it is still below that of white students, especially in more selective colleges and universities. In addition there are still large gaps in minority representation bachelor programs. A study by PEW research found that "In 2012, blacks made up 14% of college-aged students (ages 18 to 24), yet just 9% of bachelor's degrees earned by young adults." So while progress has been made in terms of minority enrollment, substantial vestiges of past discrimination remain, and policies such as affirmative action are still necessary to decrease the educational gap.

VI. There is no other way to achieve the broader goal of diversity in higher education.

As the Supreme Court has affirmed, diversity is a compelling state interest. The next part of the criteria under strict scrutiny states that the law, or affirmative action must also be "narrowly tailored" and must use the "least restrictive means". The affirmative action policy used by the University of Texas system is the only way to achieve the compelling state interest of diversity in higher education and is narrowly tailored. When schools abandon affirmative action, there is a significant drop in minority representation on those campuses. In 1996 California passed a law that essentially banned affirmative action in state college admissions and from 1995 to 2011 the percentage of African American students had fallen by 52%. Additionally the percentage of Hispanic students, another minority on campus, had fallen by 43%. With drops this large in already underrepresented demographics it is clear that affirmative action is essential to maintaining diversity on college campuses.

Some have proposed other ways to increase diversity on campus, but most have had mixed results, and none have had the success of race-explicit affirmative action programs. For example, one of the programs implemented in Texas, called the Texas Ten Percent Plan, sought to increase diversity in colleges using race-neutral policies, following a 5th circuit ruling Hopwood v. Texas 78 F.3d 932 (5th Cir. 1996) that banned affirmative action program.1 The plan provided that all high school graduates that ranked in the top ten

percent of their high school class would be guaranteed admission to any public university in the state. In theory, this would give students from disadvantaged high schools that had large minority populations the ability to compete for college enrollment.

1The Hopwood decision that prohibited affirmative action in the fifth circuit was eventually overturned in 2003 with the Supreme Court's decision in Grutter v. Bollinger.

However, research from the National Student Clearinghouse (NSC) shows that "students in the top 10 percent of their high-school class are more likely to be white and female and less likely to be low-income than their peers". In addition studies found that under the Texas Top Ten Plan the number of black and Hispanic applicants and enrollees dropped. Research by the Texas Higher Education Opportunity Project (THEOP) showed that percentage of African American

applicants at Texas A&M University dropped from 4.7 percent in 1996, during the time of affirmative action, to 3.9 percent under the Texas Ten Percent Plan. Hispanic application percentages showed a similar drop from 13.6 to 11.8 percent. In addition, the number of minorities enrolled at Texas A&M University dropped during the implementation of the Texas Ten Percent Plan, with African American enrollment falling from 4.1 to 2.8 percent, and Hispanic enrollment falling from 12.8 to 9.7 percent.

Other race-neutral policies aimed at increasing minority representation have had the same minimal impact. Following the California ban on affirmative action, colleges such as Berkeley and UCLA attempted to create a legally permissible policy to increase diversity on their campuses. The policy was to increase "the preference given to both low-income students and students who were the first in their family to attend college." However as a result, statistics by American Institutes for Research show that only "20 percent of the loss in minority admissions rates at Berkeley and 30 percent at UCLA were offset by changes in the admissions process" and that "Giving preferences to socioeconomically disadvantaged students, does not fully restore the loss of racial diversity associated with ending affirmative action". These statistics demonstrate that when affirmative action is banned, minority representation will fall, even when race-neutral policies are implemented.

VII. The University of Texas Affirmative Action policy is narrowly tailored to accomplish its goal.

In the case of Abigail Fisher, Fisher was not part of the top 10% of high school graduates at her school. Under the Top-Ten Plan, members of the top 10% are guaranteed admission. Thus, the brightest and most prepared students are already being admitted to the university. Only when other students apply who are not in the top 10% does race become a considered factor. The affirmative action policy in this case is narrowly tailored to the situation. The top 10% rule ensures that the highest ranking students receive admission regardless of race. Then, when considering other applicants, race becomes a factor because minority students are disadvantaged. For instance, according to the Department of Education, black and latino students make up 37 % of high school students but only 27% of high school students taking an AP class. Minority students are less likely to go to a high school that even offers these advanced level courses. This achievement gap begins in kindergarten and persists through their pre-college education. The only way to correct this institutional discrimination and racism is to consider race as a factor in holistic college admissions. This is essential because these students' race is the reason why they do not perform as well as their white and Asian counterparts. The University of Texas policy ensures that the most capable students still get in regardless of any consideration of race, but also assists disadvantaged minority students in overcoming the huge achievement obstacles posed to them.

The policy at University of Texas is also narrowly tailored to achieve the goal of a diverse student body. It is clear from the past that race- neutral policies simply cannot bring about the diversity that comes from race- explicit affirmative action programs. In addition, the policy that University of Texas uses, of taking race into consideration as a single factor during admissions has been proven constitutional in previous court rulings (Grutter v. Bollinger). Thus when considering the precedent set by the court, as well as the compelling reasons affirmative action exists, it is clear to see that the affirmative action policy at the University of Texas is constitutional.
