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College Diversity Nears Its Last Stand

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ABIGAIL FISHER, a white student, says she was denied admission to the University of Texas because of her race. She sued in Federal District Court in Austin, causing Judge Sam Sparks to spend time trying to make sense of a 2003 Supreme Court decision allowing racial preferences in higher education. "I've read it till I'm blue in the face," Judge Sparks said in an early hearing in Ms. Fisher's lawsuit. But the meaning of the central concept in the decision — "this esoteric critical mass of diversity of students," he called it — kept eluding him.

The 2003 Supreme Court decision he was trying to understand, Grutter v. Bollinger, had elevated the concept of "diversity" from human-resource department jargon to constitutional stature. The pursuit of diversity, a five-justice majority said, allows admissions personnel at public universities to do what the Constitution ordinarily forbids government officials to do — to sort people by race.

Judge Sparks in the end ruled that the Grutter decision meant that Texas was allowed to take account of Ms. Fisher's race. Now her case is hurtling toward the Supreme Court. That could provide a fresh opportunity to consider what we mean when we talk about diversity. It could also mean the end of affirmative action at public universities.

Ms. Fisher's lawyers filed a petition seeking a Supreme Court review last month, and legal experts say the justices will probably agree to hear it, setting the stage for a decision by June. Such a decision, given changes in the membership of the court since 2003, is likely to cut back on if not eliminate the use of race in admissions decisions at public colleges and universities.

Diversity is the last man standing, the sole remaining legal justification for racial preferences in deciding who can study at public universities. Should the Supreme Court disavow it, the student body at the University of Texas and many other public colleges and universities would almost instantly become whiter and more Asian, and less black and Hispanic.

A judicial retreat from diversity would be deeply symbolic, too. The term — a gauzy, unobjectionable way to talk about the combustible topic of race — has had a remarkable run. If the diversity rationale falls apart in university admissions, it could start to test the societal commitment to it in other arenas, notably private hiring and promotion.

There is little question that diversity as a legal justification for preferences is at risk. Grutter was decided by a 5-to-4 vote. The author of the majority decision, Justice Sandra Day O'Connor, announced her retirement in 2005. Her replacement, Justice Samuel A. Alito Jr., has consistently voted with the court's more conservative justices in major decisions hostile to the use of racial classifications by the government.

"There thus seem five votes Roberts, Scalia, Kennedy, Thomas and Alito to overrule Grutter and hold that affirmative action programs are unconstitutional," Erwin Chemerinsky, dean of the law school at the University of California, Irvine, wrote in "The Conservative Assault on the Constitution," published last year.

Chief Justice John G. Roberts Jr. has certainly been intensely skeptical of government programs that classify people by race. "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity,' " he wrote in a 2007 decision limiting the use of race to achieve public-school integration.

Justices Alito, Antonin Scalia and Clarence Thomas agreed. Justice Anthony M. Kennedy, the court's swing justice, was less categorical, and he has sometimes served as a brake on the ambitions of his more conservative colleagues in cases concerning race. But he has never, Professor Chemerinsky noted in an interview, voted to uphold an affirmative action program.

John A. Payton, president of the NAACP Legal Defense and Educational Fund, said studies supported the value of a diverse student body. "There is no longer any doubt as to the educational benefits of racially diverse students learning together and from each other," he said.

But Peter Wood, an anthropologist, the author of "Diversity: The Invention of a Concept" and a critic of the Grutter decision, argues that the educational value of racial diversity is problematic. "The part of diversity that matters to me and a lot of academics is the intellectual diversity of the classroom," he said. "The pursuit of a genuine variety of opinions that are well thought through and well grounded is essential. But that has an off-and-on, hit-or-miss connection with ethnic and racial diversity."

Grutter authorized admissions officials to admit a "critical mass" of minority students. But a brief filed in Ms. Fisher's case by the Asian American Legal Foundation said that Texas had gone far beyond that threshold and sought "the odious and unlawful objective" of trying "to make the racial composition of its student body mirror the racial composition of the state of Texas." The upshot, the brief said, was discrimination against Asian students.

A second brief, from the Asian Pacific American Legal Center and other Asian groups, took the opposite view, saying Asian students benefited from exposure to a diverse student body.

The admissions systems endorsed by Grutter are, perhaps incidentally and perhaps by design, opaque, meaning it is hard to identify specific students who would have been admitted but for their race. Texas officials, for instance, say Ms. Fisher cannot know that she would have gotten in had she not been white.

BUT the very murkiness of the diversity rationale, dissenting appellate judges in Ms. Fisher's case wrote, exists uneasily in a legal system that aspires to analytical rigor policed by judicial scrutiny.

The Texas system challenged by Ms. Fisher is idiosyncratic. Students in the top 10 percent of Texas high schools are automatically admitted to the public university system. Ms. Fisher just missed that cutoff at her high school in Sugar Land. She sued in 2008, challenging the way the state allocated the remaining spots using a complicated system in which race played a role.

Ms. Fisher is now a senior at Louisiana State University. Through her lawyers, she declined to be interviewed.

Grutter allowed but did not require states to take account of race in admissions. Several states, including California, have declined the invitation. As a result, there are fewer blacks and Hispanics on campus in the state.

"I would say that we have lost systemwide undergraduate, graduate and professional about one third of the black students we would have enrolled if affirmative action hadn't ended," said Vikram Amar, a law professor at the University of California, Davis. The proportion of blacks has dropped, he said, to about 3 to 4 percent from the 5 to 7 percent it would have been.

That creates practical problems, Professor Amar went on. For example, the entering law school class at Davis has fewer than 200 students, and the new students are divided into three large sections in their first year. The handful of black students, he said, may all be assigned to the same section to avoid "creating feelings of isolation." Other sections may have no black students.

Peter H. Schuck, a Yale law professor, said that should not matter. "The idea of racial and ethnic diversity altering the kind of conversation that goes on in the classroom is so overrated," he said.

Then he offered a footnote, literally, one from his book "Diversity in America." Reading it aloud, he said: "Any experienced, conscientious teacher, regardless of race, could and would get on the table any of the arguments that ought to be there, including ideas normally associated with racism or other analogous experiences not personally experienced by the teacher.

"One of my best students responded, 'Yes, but you wouldn't say it with the same conviction or affect as one who had experienced it personally,' " Professor Schuck continued, still reading. "This is a point I had to concede."