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Affirmative Action Returns to the Supreme Court

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By Charles J. Russo, J.D., Ed.D.

The Supreme Court considered the issue of affirmative action in admission policies yet again.

One of the most hotly contested issues in education during the past-half century is affirmative action, also known as race-based admissions policies. Supporters defend the practice as one designed to take "affirmative" steps to eliminate the present effects of past discrimination. Critics respond that these policies do not address how granting preferences today remedies past harms, especially because individuals who are passed over when affirmative action is applied played no role in creating past inequities.

Insofar as debate over affirmative action has heated up yet again, this column briefly examines the history of *Fisher v. University of Texas II* (2016) wherein the Supreme Court upheld the University of Texas's reliance on race in admissions. Then, the column focuses on the impact affirmative action can have on K–12 schools, reflecting on the meaning of *Fisher II* for school business officials, their boards, and other educational leaders.

Fisher v. University of Texas

In the past, as part of seeking admission at the University of Texas (UT), applicants were subjected to two different processes. The first process was governed by Texas' Top 10 Percent Law, which was designed to increase minority enrolments by granting automatic admissions to minorities graduating in the top 10% of their classes (Texas Educ. Code Ann. § 51.803(a-1) 2015). This process, adopted as the Top Ten Percent Plan (TTPP) at UT, does not take race into consideration. Using this plan, UT officials filled "up to 75 percent of the places . . . [a percentage] which has now been fixed by statute" (*Fisher II*, p. 2206).

Following the Supreme Court's 2003 judgment in *Grutter v. Bollinger* (2002) that affirmed the University of Michigan Law School's consideration of race in admissions in order to achieve diversity, officials in Texas revised the second admissions process to include individualized holistic review. Holistic review is a flexible, individualized way to assess an applicant's capabilities, taking into consideration experiences, attributes, and academic metrics.

The first step in the holistic review admissions process at UT requires officials to develop an Academic Index for applicants derived from their scores on the SAT and academic performance in high school. Next, officials develop a Personal Achievement Index (PAI), which is a numeric score derived from student written essays and recommendations plus evaluations of their leadership skills, records of participation in extracurricular activities, awards/ honors received, and other special circumstances such as socioeconomic status (SES) of applicants' families and schools as well as race to enhance their potential contribution to the student body. Using this process, UT officials perform a full-file individualized holistic review to admit the remaining 25% of their first year classes (*Fisher II*, p. 2206).

Judicial History

Fisher v. University of Texas was filed by two white female high school graduates who were denied entry to the university in the fall of 2008 under a policy admitting the top 10% of graduating classes. The plaintiffs alleged that Texas's Top Ten Percent Law—designed to increase minority enrollments by granting automatic admissions to students graduating in the top 10% of their classes—discriminated against them because of race in violation of their right to equal protection under the Fourteenth Amendment and federal statutes.

One of the students withdrew from the case, but Fisher, who was in the top 12% of her class, remained active in the case even though she attended, and graduated from, Louisiana State University.

A federal trial court in Texas (*Fisher* 2009) granted UT's motion for summary judgment, essentially dismissing the case because it was convinced officials' consideration of race as a factor in admissions was supported by a compelling interest that was narrowly tailored to achieve its goal. On further review, the Fifth Circuit affirmed that the policy was supported by the compelling interest of achieving a critical mass of minorities rather than outright racial balancing (*Fisher* 2011b). Dissatisfied with the outcome, the student appealed to the Supreme Court in what is now called *Fisher I* (2013).

In *Fisher I*, ruling in favor of the student, the Supreme Court vacated and remanded earlier judgments in favor of UT on the basis that the Fifth Circuit failed to apply strict scrutiny. In mandating the strict scrutiny review, the Court directed UT officials to prove that there was no alternative to race-conscious admissions plans.

On remand in *Fisher I*, (2014a) paying scant attention to strict scrutiny, a divided Fifth Circuit affirmed that UT officials demonstrated that race-conscious holistic review was necessary. Again dissatisfied, the student appealed to the Supreme Court (*Fisher I* 2015).

Affirming in favor of UT, Justice Kennedy opened the majority opinion in *Fisher II* (2016) by noting that "[t]he Court is asked once again to consider whether the race-conscious admissions program at the University of Texas is lawful under the Equal Protection Clause" (p. 2205). Kennedy was joined by Justices Ginsburg, Breyer, and Sotomayor.

After reviewing the facts, Justice Kennedy acknowledged that because race seldom provides a rationale for treating people disparately, it must be justified by a compelling governmental interest. Kennedy added that if officials provide a principled explanation of how race contributes to creating diverse student bodies, they are entitled to deference.

Fisher II provided little guidance to K–12 leaders about taking race, or other factors, into consideration in pursuit of diversity. However, in light of similar pending litigation at Harvard University and the University of North Carolina-Chapel Hill over affirmative action (Lewontin 2016), debate about race-conscious admissions policies is far from over.

Justice Kennedy observed that the admissions program at UT was "sui generis," literally, of its own kind, and that insofar as UT was unlike other institutions to the extent that it used both holistic review and the TTTP, even though the latter was not at issue, its judgment might have limited precedential value.

Finally, Justice Kennedy rebutted four arguments advanced by the plaintiff.

1. He rejected the claim that UT officials failed to articulate the need to rely on race.
2. He disagreed with the notion that UT no longer needed to use race in admissions because it reached a critical mass of minorities in its student body.
3. He denied the plaintiff's claim that taking race into account was unnecessary because it had a minimal impact on advancing UT's compelling interest in achieving diversity.
4. He rebuffed the plaintiff's call for race-neutral alternatives such as SES as unworkable. Kennedy feared that if UT adopted the plaintiff's idea by relying on class, in the form of SES, in the place of race, it "would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students" (p. 2213).

Justice Kennedy concluded by reminding UT officials of their duty to continue to refine their admissions policies to keep them in compliance with the requirements of equal protection.

Reflections

Fisher II is the Supreme Court's most recent opinion on race and education but is unlikely to be its last. Moreover, *Fisher II* was unusual because it was a four-to-three judgment following the death of Justice Scalia and the recusal of Justice Kagan due to her when she worked in the United States Department of Justice. Justice Thomas filed a dissenting opinion. Justice Alito filed a dissenting opinion, in which Chief Justice Roberts and Justice Thomas joined.

For supporters of affirmative action, the outcome in *Fisher II* represents the proverbial half of a loaf. The Supreme Court did continue to recognize diversity as a compelling governmental interest but did not endorse affirmative action without reservation. Yet, the Court failed to provide clear guidance as to how the use of race to achieve diversity satisfied strict scrutiny.

An important consideration to keep in mind is that because UT employed both the TTPP and holistic review processes in admissions, a combination infrequently used at other institutions, the impact of *Fisher II* is unclear for institutions of higher education as well as for education leaders in K-12 school systems.

Fisher II exacerbated confusion over the use of race in admissions because after *Fisher I* was remanded to the Fifth Circuit with directions to subject race-based admissions to strict scrutiny, Justice Kennedy's majority opinion in *Fisher II* also paid little heed to this standard. Instead, Justice Kennedy relied on a variety of rationales inconsistent with *Fisher I's* directive to apply strict scrutiny. Additionally, neither the Court nor university officials articulated a clear rationale justifying the use of race in admissions.

Interestingly, Justice Kennedy's opinion refused to take alternative factors such as SES into account in admissions. In response to the plaintiff's argument that UT include factors in addition to race, he thought that this approach "ignores the fact that the University tried, and failed, to increase diversity through enhanced consideration of socioeconomic and other factors" (*Fisher II*, p. 2213).

The Supreme Court's reluctance to include SES aside, it seems that by considering this variable when devising programming for qualified students from lower and middle income backgrounds, educators may be better able to serve the neediest, and most deserving, of applicants. Taking SES into account may also help to establish applicant pools that are more diverse on a variety of levels in K-12 school systems. As such, SES is something for education leaders to consider when creating programming of choice using admissions examinations or where state laws allow them to work with charter schools operating within their districts.

Another benefit of taking SES into account is that if used to expand the criteria for achieving diversity in student bodies via holistic review, then affirmative action might become more acceptable to its critics by expanding the qualifications to help to create larger applicant pools. To this end, it is unfortunate that in not providing clear guidance on the constitutionality of race-based admissions policies, the *Fisher II* Court largely deferred to UT officials.

In the aftermath of *Fisher II* it appears educational institutions can continue to rely on race in admissions to foster diversity as long as their policies employ genuinely holistic reviews of applications and are narrowly tailored to achieve their goals. Still, as the Supreme Court pointed out in *Grutter*, programs using race in admissions must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight" (p. 337). In other words, race can still be used as a criterion but not as the sole factor in admissions decisions.

Conclusion

Fisher II provided little guidance to K–12 leaders about taking race, or other factors, into consideration in pursuit of diversity. However, in light of similar pending litigation at Harvard University and the University of North Carolina-Chapel Hill over affirmative action (Lewontin 2016), debate about race-conscious admissions policies is far from over.

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