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Charles J. Russo
University of Dayton, crusso1@udayton.edu

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

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Few issues in education have generated more ongoing controversy during the last half-century than affirmative action. Supporters view it as a positive step to eliminate the effects of past discrimination. Conversely, critics speak of race-conscious policies that they maintain create greater problems by failing to address how granting preferences today remedies past inequities.

Although typically more contentious in higher education, affirmative action is the centerpiece of this column because of the impact that race-conscious policies can have on K–12 schools.

Legal History of Affirmative Action

"Affirmative action" was introduced into the national legal lexicon when President Kennedy issued an executive order in March 1961 that primarily directed government contractors to "take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, creed, color, or national origin."

Following the passage of the Civil Rights Act of 1964, affirmative action was enforced for the first time when President Lyndon B. Johnson signed Executive Order 11,246 in September 1965. This directive confirmed the government's commitment by declaring that it would take "affirmative action to ensure that applicants are employed . . . without regard to their race, creed, color or national origin" (3 C.F.R. Part 340, 1965).

In October 1967, President Johnson's Executive Order 11,375 extended affirmative action to women. That order expanded the definition of affirmative action to include "sex" (32 *Fed. Reg.* 14,303, 1965) in directing affirmative action policies to take "race, color, religion, sex, [and/]or national origin" into consideration in order to ensure compliance with the Civil Rights Act of 1964.

Litigation

Regardless of whether the practice is referred to as affirmative action or race-conscious policies, it has led to a steady supply of litigation that has reached the Supreme Court.

The Court's first case on affirmative action, *De Funis v. Odegaard* (1974), was a dispute from Washington State. The justices vacated an order from state courts upholding the use of a race-conscious admissions policy in a public law school but chose not to address whether affirmative action was constitutionally permissible.

Regents of the University of California v. Bakke (1978) was the first Supreme Court case on the merits of affirmative action. A divided Court reached two different outcomes, ruling that a medical school's affirmative-action admissions policy was unconstitutional, yet forbidding any consideration of race in admissions, allowing it to be used as a "plus" factor that may elevate one candidate over another.

The Supreme Court refused to allow race to be a factor in a case involving public school teachers, finding in *Wygant v. Jackson Board of Education* (1989) that the layoffs of nonminorities based solely on race violated equal protection.

In *Gratz v. Bollinger* (2003), the Supreme Court reiterated that diversity can constitute a compelling state interest. Even so, the justices invalidated an undergraduate admissions policy as not narrowly tailored enough to achieve the state's goal of achieving a diverse student body.

Grutter v. Bollinger (2003) was a landmark case in which the Supreme Court upheld the affirmative-action admissions policy of the University of Michigan Law

School, ruling that the school had a compelling interest in promoting class diversity and that an admissions process that may favor "underrepresented minority groups" but that also considered other factors did not amount to a quota system.

Parents Involved in Community Schools v. Seattle School District No.1 (*PICS* 2007) considered the use of race in admissions in K–12 schools in Seattle, Washington, and Louisville, Kentucky. In *PICS*, the Court observed that Seattle neither operated racially segregated schools nor had ever been subject to a court-ordered desegregation order; Louisville was declared unitary, meaning that its schools were no longer segregated by race, and released from judicial supervision in 2000.

The Court decided that officials in both districts failed to demonstrate that the use of race in the student assignment plans was necessary to achieve their stated goals of racial diversity because they overlooked alternative approaches.

Fisher v. University of Texas

In *Fisher v. University of Texas* (2009), Abigail Fisher, a white high school student, filed a lawsuit contending that she was denied admission to the University of Texas-Austin in the fall of 2008 because she was white. The state requires all students in the top 10% of their high school classes to be admitted to state universities, but students who fall short of that threshold are admitted according to a formula that combines other factors, such as academic achievement, leadership, family circumstances, and race. Fisher's lawsuit is based on a claim that any consideration of race by a university in admissions violates the equal protection clause of the Fourteenth Amendment.

After a federal trial court in Texas and the Fifth Circuit agreed that the university's consideration of race as a factor in admissions met the standards laid out in *Grutter*, the plaintiff requested a review by the higher court.

Justice Anthony Kennedy began by pointing out that university officials treated race as one of a variety of factors in the admissions process in pursuit of a critical mass of minority students and thus identified the issue as the Court being asked to review whether the Fifth Circuit's order was consistent with its decisions interpreting the equal protection clause of the Fourteenth Amendment, including *Grutter v. Bollinger*. After determining that the Fifth Circuit failed to apply strict scrutiny, the highest level of constitutional analysis, as mandated by *Grutter* and *Bakke*, the Court remanded *Fisher* for further consideration.

Justice Kennedy indicated that while the justices agreed that university officials demonstrated that—consistent with *Grutter*—diversity was a compelling interest that was essential to the university's mission, they failed to devise a plan that was narrowly tailored to achieve their goal without using a race-conscious remedy.

Justice Kennedy next explained that institutional officials can no longer define diversity as "some specified percentage of a particular group merely because of its race or ethnic origin [since t]hat would amount to outright racial balancing, which is patently unconstitutional" (p. 2419). He indicated that the judiciary must be convinced that officials created admissions processes designed to "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application" (p. 2418, citing *Grutter* at 337).

Rounding out the Supreme Court's opinion, Justice Kennedy declared that officials must demonstrate that "no workable race neutral alternatives would produce the educational

benefits of diversity" (p. 2420), a standard that the Fifth Circuit mistakenly failed to apply. The Court thus directed the Fifth Circuit to apply the correct standard of review.

Reflections

For supporters of affirmative action, *Fisher* can be described as a kind of half-loaf outcome. On the one hand, the Supreme Court recognized diversity as a compelling government interest. On the other hand, although the Court found that university officials failed to devise a plan that was sufficiently narrowly tailored to achieve their goal, it did not explicitly forbid the use of race as a factor in admissions policies.

Still, in directing officials to prove that they have compelling interests if they take race into consideration in admissions—regardless of whether programs are in K–12 schools or higher education—the result in *Fisher* is likely to make it more difficult for administrators to do so.

Educators would be wise to take into account alternative factors, such as family socioeconomic status, when providing programming for qualified students. By considering family socioeconomic status when providing programming for qualified students from lower- and middle-income backgrounds, educational institutions may better serve the neediest and most deserving applicants while establishing pools that are more diverse on a variety of levels.

In K-12 schools in particular, socioeconomic status is something for school business officials, their boards, and other education leaders to think about if their students apply for admission or if state laws allow them to work with charter schools within their districts.

An additional benefit of taking socioeconomic status into account is that if it is used to expand the criteria for achieving diversity in student bodies, then affirmative action might become more palatable to its critics by helping create larger pools of applicants. To this end, it is unfortunate that rather than establish criteria for reviewing the constitutionality of race-based admissions policies, the *Fisher* Court left this issue up to the institution's officials by returning the dispute to the Fifth Circuit for further consideration.

Another shortcoming in *Fisher* is that the Supreme Court failed to provide clear standards to guide admissions officers, such as requiring them to take a student socioeconomic status into consideration or directing them to explain how much weight they assign to racial qualifications when evaluating applications. By simply declaring that the university policy failed to provide a compelling interest in pursuit of diversifying its student body, the Court inadvertently set the stage for additional litigation.

Conclusion

As is typically the case when dealing with contentious issues, *Fisher* is unlikely to be the last word on race-conscious policies. In fact, since the Sixth and Ninth Circuits, in disputes from Michigan and California, respectively, reached different results on the use of race in education and other arenas, the Supreme Court has stepped into the fray.

The Supreme Court has agreed to review the case from Michigan, wherein the Sixth Circuit invalidated a voter-approved state constitutional amendment that forbade officials at public colleges and universities, elementary and secondary schools, and other arenas from granting racial preferences. Since this case from Michigan is on the docket for the Court's 2013-2014 term, this dispute bears watching because it is likely to provide further guidance about the role of race in education.

References

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Charles J. Russo, J.D., Ed.D., is Joseph Panzer Chair of Education in the School of Education and Allied Professions and adjunct professor in the School of Law at the University of Dayton, Ohio. Email: crusso1@udayton.edu