Fisher v. UT–Austin and the Future of Racial Preferences in College Admissions

By Elizabeth Slattery

Note from the Editor:

This article discusses the Supreme Court's recent decision in *Fisher v. University of Texas–Austin* and is critical of the Court's decision and its legal reasoning.

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• Kimberly West-Faulcon, *Symposium: Surprisingly, facts rule the day in Fisher II*, SCOTUSblog (Jun. 24, 2016), http://www.scotusblog.com/2016/06/symposium-surprisingly-facts-rule-the-day-in-fisher-ii/.

• John Paul Schnapper-Casteras, *Symposium: Moving forward from Fisher II*, SCOTUSblog (Jun. 24, 2016), http://www.scotusblog.com/2016/06/symposium-moving-forward-from-fisher-ii/.

• Vinay Harpalani, *The Fishing Expedition is Over: Victory for Affirmative Action in Fisher v. Texas!*, ACSblog (Jun. 24, 2016), https://www.acslaw.org/acsblog/the-fishing-expedition-is-over-victory-for-affirmative-action-in-fisher-v-texas.

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Abigail Fisher made a second trip to the Supreme Court of the United States this term, in her challenge to the University of Texas at Austin's race-conscious admissions program. In 2013, the Supreme Court ruled 7-1 in her favor, finding that the lower courts were too deferential to school officials. But this time around, four justices found that deference "must be given" when school officials give a "reasoned, principled explanation" for why they must discriminate against some applicants in favor of certain preferred minority applicants. Now that *Fisher* has reached the end of the road, what happens next with racial preferences in college admissions?

I. From *Bakke* to *Grutter*: A Brief History of Racial Preferences Jurisprudence

In 1978, the Supreme Court reviewed the admissions program used by the University of California–Davis Medical School in *Regents of the University of California v. Bakke*. At that time, the school used a two-track system for admissions, with 84 out of 100 seats filled based on applicant merit and 16 set aside for "preferred" minorities. It turned out that race "was no mere tiebreaker in otherwise close cases," and that there was a large gap between the average "disadvantaged track" admittee's entering credentials and those of other admittees.[1]

In a fractured decision, the Supreme Court ruled against UC–Davis's program while allowing schools to continue using racial preferences—as long as they were intended to promote the "educational benefits that flow from an ethnically diverse student body."[2] Four members of the Court would have held that race conscious admissions policies are unconstitutional. Another four would have allowed the school to continue using racial preferences in order to "remedy[ ] past societal discrimination," warning against "let[ting] color blindness become myopia which masks the reality that many 'created equal' have been treated within our lifetimes as inferior both by the law and by their fellow citizens."[3]

The controlling opinion, written by Justice Lewis Powell, left the door open to the continued use of racial preferences. He wrote that a "state has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."[4] For years, legal scholars debated what a "properly devised" affirmative-action program entailed while these programs grew on campuses across the country. The Court subsequently determined that all racial classifications are subject to strict scrutiny, which means that they must be narrowly tailored to meet a compelling governmental interest.[5]

1 Gail Heriot, *A "Dubious Expediency": How Race-Preferential Admissions Policies on Campus Hurt Minority Students*, Heritage Foundation Special Report No. 167 at 3–4 (2015), *available at* http://www.heritage.org/research/reports/2015/08/a-dubious-expediency-how-race-preferential-admissions-policies-on-campus-hurt-minority-students#_ftnref3.

2 Regents of the University of California v. Bakke, 438 U.S. 265, 306 (1978).

3 *Id.* at 327–28 (Justices, Brennan, White, Marshall, Blackmun, JJ., concurring in part and dissenting in part).

4 *Id.* at 320.

5 *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995). As the majority explained, "[A]ny person, of whatever race, has the right to

It was not until 2003 that the Supreme Court revisited the issue of racial preferences in higher education in a pair of cases from the University of Michigan. In *Grutter v. Bollinger*, a challenge to the law school's purported use of racial quotas, the school claimed its goal was reaching a "critical mass of underrepresented minority students" to "realize the educational benefits of a diverse student body."[6] The admissions data showed that the school maintained separate admissions criteria based on race and admitted preferred minorities "in proportion to their statistical representation in the applicant pool."[7] In an opinion by Justice Sandra Day O'Connor, the Court ruled in favor of the law school, deferring to the school officials' "educational judgment" that a diverse student body is "essential to its educational mission."[8] It found that the school's "critical mass" goal was not an impermissible race-based quota.[9] Justice Clarence Thomas disagreed in a dissenting opinion, pointing out that:

> The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.[10]

In *Gratz v. Bollinger*, the Court held that the university's undergraduate admissions policy, which included automatically giving "one-fifth of the points needed to guarantee admission… to every single 'underrepresented minority' applicant," was not narrowly tailored because it "ha[d] the effect of making the factor of race decisive for virtually every minimally qualified underrepresented minority applicant."[11] The school's failure to provide individualized review of applicants and heavy reliance on race could not be squared with strict scrutiny review.

Taken together, these two decisions underscore that the Court has not issued a blanket endorsement of race-based admissions; any consideration of race must be carefully and narrowly crafted and executed. *Grutter* requires that, before resorting to sorting applicants by race, a school must pursue a "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."[12] Though schools need not exhaust "every conceivable race-neutral alternative," they must "remain flexible enough 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."[13] *Gratz* teaches that race may be considered, but that it may not be the decisive factor in admissions.

In the real world, however, few competitive universities have willingly implemented race-neutral programs to replace racial preferences.[14] Moreover, universities are anything but transparent about their admissions processes. Some schools, including Yale Law School, have even destroyed their admissions records;[15] some speculate that this is to avoid having to disclose the criteria such as race and other standards they use to determine admissions.[16]

II. The Challenge to UT–Austin's Admissions Program

Before *Grutter* was decided by the Supreme Court, a federal appeals court reviewed the race-based admissions policy used by the University of Texas School of Law, finding that the school's overt use of race was constitutionally impermissible.[17] In response to this ruling, the Texas legislature passed the Top 10 Percent Law in 1997. Under this law, students who graduated in the top 10 percent of Texas high schools would be automatically admitted to state-funded colleges and universities.[18] This boosted minority enrollment, drawing in students from majority-minority schools, as well as enrollment from rural areas. In fact, enrollment of African Americans and Hispanics surged, surpassing minority enrollment levels achieved with race-based admissions. Larry Faulkner, the president of UT–Austin at the time, wrote that "the Top 10 Percent Law has enabled us to diversify enrollment at UT–Austin with talented students who succeed."[19] Faulkner added that minority students were earning higher grade-point averages and had better retention rates than students who had previously been admitted through the old race-based admissions program.[20]

Despite these gains, the day the Supreme Court released its *Grutter* decision, Faulkner announced that the university would reintroduce race-based admissions. Thus, for spots not filled by Top 10 Percent students—about one-quarter of offers of admission—the university began conducting a "holistic review" of

demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Id.* at 224.

6 539 U.S. 306, 318 (2003).

7 *Id.* at 386 (Rehnquist, C.J., dissenting).

8 *Id.* at 328.

9 *Id.*

10 *Id.* at 353 (Thomas, J., dissenting).

11 539 U.S. 244, 271–72 (2003) (internal citations omitted).

12 *Grutter*, 539 U.S. at 339.

13 *Id.* at 337–39.

14 Most of the schools that have implemented race-neutral alternatives have been in states that passed ballot initiatives or referenda outlawing racial preferences. *See Studies Show Race-Neutral College Admissions Could Work*, USA Today (Oct. 3, 2012), http://www.usatoday.com/story/news/nation/2012/10/03/study-race-neutral-admissions/1609855/.

15 Joseph Pomianowski, *Yale Law School Is Deleting Its Admissions Records, and There's Nothing Students Can Do About It*, The New Republic (March 16, 2015), *available at* http://www.newrepublic.com/article/121297/yale-law-deletes-admissions-records-congress-must-fix-ferpa.

16 *Plaintiff in Harvard University Admissions Lawsuit Objects to Destruction of Student Records at Yale Law School*, PR Newswire (March 19, 2015), *available at* http://www.bizjournals.com/prnewswire/press_releases/2015/03/19/DC59476.

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

18 Tex. Educ. Code Ann § 51.803 (West 2009).

19 Larry Faulkner, *The 'Top 10 Percent Law' Is Working for Texas*, Your Houston News (Oct. 26, 2000), *available at* http://www.yourhoustonnews.com/archives/the-top-percent-law-is-working-for-texas/article_46e57a32-3c15-56f9-818e-217dc49bb854.html.

20 *Id.*

applicants that allowed administrators to consider race as a "plus factor" for certain preferred minorities. The university defended its decision by arguing that, while minority enrollment was up because of the Top 10 Percent Plan, it did not mirror the overall demographics of Texas.

Abigail Fisher, a white Texas resident, did not graduate in the top 10 percent of her high school class, so her application for admission to UT–Austin was in competition with candidates who received a preference based on their race or ethnicity. After she was denied admission, she sued the university for discriminating against her based on race. Her case went to the Supreme Court, which held that UT–Austin must prove its use of racial preferences meets the narrow tailoring standard state-run universities must meet under the *Grutter* decision.[21]

In an opinion by Justice Anthony Kennedy, the Court determined that the lower courts gave too much deference to UT–Austin officials when examining whether their use of race was narrowly tailored. The Court said that university officials are entitled to "no deference" because it is "for the courts, not for university administrators" to ensure that the means used by the university pass strict scrutiny review.[22] Under narrow tailoring, the school's use of race must have been "necessary…to achieve the educational benefits of diversity."[23] In other words, there must be "no workable race-neutral alternative" that would produce such benefits.[24]

The *Fisher I* opinion stressed that courts must look at *actual* evidence and not "simple…assurances of good intention" from the university.[25] In a concurring opinion, Justice Thomas further noted that even though it may be "cloaked in good intentions, the university's racial tinkering harms the very people it claims to be helping."[26] Six members of the Court joined the majority. Justice Elena Kagan recused herself, presumably based on her involvement with the case when she was U.S. Solicitor General, and Ruth Bader Ginsburg dissented, stating that she would defer to the judgment of university officials.[27]

Thus, Abigail Fisher's case returned to the Fifth Circuit for an examination of the evidence the university used to justify its race-conscious admissions policy. On remand, a three-judge panel upheld the school's plan once again. Two of the judges on the panel claimed that there were "no workable race-neutral alternatives" since Texas had unsuccessfully tried various alternatives to increase diversity in the past.[28] The Top 10 Percent Plan produced too many students from majority-minority schools, which allegedly did not advance the school's interest in "qualitative" diversity.[29]

Judge Emilio Garza dissented, questioning the sufficiency of the evidence provided by UT–Austin. He concluded that the university's "bare submission" of proof that its admissions plan passed strict scrutiny "begs for the deference that is irreconcilable with 'meaningful' judicial review."[30] Based on the Supreme Court's ruling in *Fisher I*, the burden was on the university to demonstrate that its use of racial and ethnic preferences advanced its compelling interest in obtaining a "critical mass" of campus diversity. But, as Judge Garza pointed out, the university "failed to define this term in any objective manner. Accordingly, it is impossible to determine whether the University's use of racial classifications in its admissions process is narrowly tailored to its stated goal—essentially, its ends remain unknown."[31] Judge Garza faulted the majority for continuing "to defer impermissibly to the University's claims" in defiance of the "the central lesson of *Fisher*."[32] In fact, he wrote, the university's failure to produce evidence to justify its race-conscious admissions policy "compels the conclusion" that it "does not survive strict scrutiny."[33]

III. Fisher Returns to the Supreme Court

The Supreme Court agreed to rehear the case in its just-concluded term. Fisher argued that the university had not met its burden of demonstrating why it needed to use race in making admissions decisions.[34] More than 80 percent of minority enrollees in the 2008 freshman class (the class for which Abigail Fisher applied) were admitted through the Top 10 Percent Plan.[35] Among minority students admitted under the "holistic review," program, it is estimated that only 2.7% (or 33 black and Hispanic students) received a preference to gain admission—leading to the conclusion that this use of race in this program was unnecessary to increase minority enrollment.[36] Furthermore, in 2010, UT–Austin reported that its entering freshman class included more minority students than white students for the first time in its history.[37] Fisher maintained that the university's newly asserted interest in "qualitative" diversity could not survive strict scrutiny review. Though Fisher did not ask the Supreme Court to completely ban the use of racial preferences, she asked that UT–Austin

21 Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2420-21 (2013) [hereinafter "*Fisher I*"].

22 *Id.*

23 *Id.* at 2420.

24 *Id.*

25 *Id.* at 2421.

26 *Id.* at 2432 (Thomas, J., concurring).

27 *Id.* at 2434 (Ginsburg, J., dissenting).

28 Fisher v. University of Texas at Austin, 758 F.3d 633, 649 (2014).

29 *Id.* at 667 (Garza, J., dissenting).

30 *Id.* at 673.

31 *Id.* at 661–662.

32 *Id.* at 662.

33 *Id.*

34 Brief for Petitioner at 22-23, Fisher v. University of Texas at Austin, No. 14-981.

35 *Id.* at 10.

36 *Id.*

37 *Class of First-Time Freshmen Not a White Majority This Fall Semester at The University of Texas at Austin*, UTNews (Sept. 14, 2010), *available at* https://news.utexas.edu/2010/09/14/student_enrollment2010.

be held to the constitutional standard of strict scrutiny, which should not be "strict in theory but feeble in fact."[38]

The case was argued in the Supreme Court's December 2015 sitting, and court watchers waited six months for a decision. The Court released the long-awaited decision on June 23, 2016. Once again, Justice Anthony Kennedy wrote for the majority. This time, however, only three justices joined—Justices Stephen Breyer, Sonia Sotomayor, and Ruth Bader Ginsburg—while Chief Justice John Roberts and Justices Samuel Alito and Clarence Thomas dissented.[39]

Justice Kennedy's majority opinion took the university at its word that it needed to use race-conscious admissions because it could not meet its "diversity goals" using only the Top 10 Percent Plan. In allowing the university to continue using a race-conscious admissions program without sufficiently articulating its "diversity goal" or providing proof that it was meeting that goal, Justice Kennedy departed from his previous equal protection jurisprudence and the firm standard to which he held the university in *Fisher I*. Echoing his dissent in *Grutter*, Justice Clarence Thomas reiterated that government classifications based on race "demean[ ] us all," and that the "'faddish theor[y]' that racial discrimination may produce 'educational benefits'" does not change the constitutional command of equal protection.[40]

Justice Kennedy noted that race-conscious programs still must meet strict scrutiny review.[41] This means a school must show "with clarity" that its "purpose or interest [in the educational benefits of diversity] is both constitutionally permissible and substantial" and that the use of race is necessary to advance that purpose or interest.[42] While a school may not use "fixed quota[s]" or a "specified percentage" of a race or ethnicity, once they give "a reasoned, principled explanation," "deference must be given to the university's conclusion, based on its experience and expertise, that a diverse student body would serve its education goals."[43] Finally, judges must not defer to school officials on whether the use of race is narrowly tailored to advance the asserted goal. This last requirement lost any teeth it may have had because, as Justice Alito explained in his dissent, the university "merely invok[es] 'the educational benefits of diversity'" without "identify[ing] any metric that would allow a court to determine whether its plan is needed to serve, or is actually serving those interests. This is nothing less than the plea for deference that we emphatically rejected" in *Fisher I*.[44]

While the majority said that the university is "prohibited" from having a set number of seats based on students' races and ethnicities, it also stated that "asserting an interest in the educational benefits of diversity writ large is insufficient."[45] So how does a school sufficiently prove it is meeting its diversity goal without setting quotas? The answer, according to the majority, is putting out a study with all the right buzzwords: promoting "cross-racial understanding," "break[ing] down racial barriers," "cultivat[ing] a set of leaders with legitimacy in the eyes of the citizenry."[46] The problem with this, as Justice Alito explained in his dissent, is that these "amorphous goals"[47] (though laudable) are neither concrete nor precise and provide no basis for a court to determine whether a school has made sufficient progress without simply deferring to the judgment of school administrators.

Justice Kennedy's majority opinion concluded by stating that the university must continue to "scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary."[48] Leaving it up to school officials to review their own race-conscious admissions program is like letting a fox guard the henhouse.

IV. The Next Wave of Cases Challenging Racial Preferences

Fisher II has not dramatically changed the Court's jurisprudence in the area of racial preferences in college admissions, and more cases are on the way. Lawsuits are currently pending in federal district courts that challenge the admissions policies of Harvard University and the University of North Carolina–Chapel Hill. The Harvard suit[49] was brought by Asian American applicants who claim they were denied admission because the university has put limits on the number of Asian Americans it will admit, similar to the quotas and caps that Ivy League schools put on the number of Jewish students they would admit in the 1920s.[50] The plaintiffs in the UNC–Chapel Hill case highlight the fact that the university conducted a study showing that, if the school dropped its racial preference policy and switched to a "top ten percent plan" like Texas, its minority enrollment would soar.[51]

Additionally, more than 130 Asian American organizations recently asked the Department of Education and the Justice Department to investigate Yale University, Brown University, and Dartmouth College for their use of racial preferences, which they claim amount to race-based quotas that lock out well-qualified Asian American applicants.[52] They point to data from the Depart-

38 *Fisher I*, 133 S. Ct. at 2421.

39 Justice Kagan was again recused from the case, and Justice Scalia had passed away by the time the case was decided.

40 Fisher v. University of Texas at Austin, 579 U.S. __ (2016), slip op. at 1 (Thomas, J., dissenting).

41 *Id.* at 7 (majority opinion).

42 *Id.*

43 *Id.* (internal quotation marks omitted).

44 *Id.* at 1-2 (Alito, J., dissenting).

45 *Id.* at 12 (majority opinion).

46 *Id.*

47 *Id.* at 15 (Alito, J., dissenting).

48 *Id.* at 19.

49 Complaint at 3, Students for Fair Admissions v. President and Fellows of Harvard College, No. 14-176 (D. Mass. Nov. 17, 2014).

50 Malcolm Gladwell, *Getting In–The Social Logic of Ivy League Admissions*, New Yorker (Oct. 10, 2005), *available at* http://www.newyorker.com/magazine/2005/10/10/getting-in.

51 Complaint at 6, Students for Fair Admissions v. University of North Carolina, No. 14-954 (M.D.N.C. Nov. 17, 2014).

52 Complaint of the Asian American Coalition for Education for the Unlawful

ment of Education showing that Asian American enrollment at Brown and Yale has been stagnant since 1995, and at Dartmouth since 2004, despite an increase in the number of highly qualified Asian American students applying to these schools during that time. In fact, data show that Asian Americans must score, on average, "approximately 140 point[s] higher than a White student, 270 points higher than a Hispanic student and 450 points higher than a Black student on the SAT, in order to have the same chance of admission."[53]

The groups suspect Yale, Brown, Dartmouth, and other Ivy League schools "impose racial quotas and caps to maintain what they believe are ideal racial balances."[54] Like many other schools, Yale, Brown, and Dartmouth use a "holistic" approach to evaluate applicants, which allows race and ethnicity to become large factors in the admission equation. In their complaint, the Asian American groups assert that these colleges rely on stereotypes and biases to deny Asian Americans admission. Admission board reviewers' notes track the stereotypes: "He's quiet and, of course, wants to be a doctor," or her "scores and application seem so typical of other Asian applications I've read: Extraordinarily gifted in math with the opposite extreme in English."[55] Since the admissions policies at these schools are highly secretive, they are free to discriminate against Asian American applicants.

Perhaps if a case involving blatant discrimination against Asian Americans reaches the Supreme Court, the justices in the *Fisher II* majority will see that these admissions officials are not necessarily acting in good faith, but rather are seeking to exclude certain students because of their race. Justice Kennedy once wrote that "[d]istinctions between citizens solely because of their ancestry are by their nature odious to a free people."[56] The Supreme Court should put this principle in place by banning racial preferences in college admissions.

Discrimination Against Asian-American Applicants in the College Admissions Process to the Office for Civil Rights, U.S. Dep't. of Educ. and Civil Rights Division, U.S. Dep't. of Just. (May 23, 2016), *available at* http://asianamericanforeducation.org/wp-content/uploads/2016/05/Complaint_Yale_Brown_Dartmouth_Full.pdf.

53 *Id.* at 2-3.

54 *Id.* at 3.

55 *Id.* at 18.

56 Rice v. Cayetano, 528 U.S. 495, 517 (2000).