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Lessons from *Fisher v. University of Texas*

By now, nearly everyone in higher education knows that the U.S. Supreme Court upheld the University of Texas's race-conscious admissions policy, turning back an effort to derail affirmative action. But the Court's ruling in *Fisher v. University of Texas*, was narrowly focused on the unique aspects of the program it was reviewing, and opens the possibility of future challenges. So what guidance can colleges and universities draw from the decision in shaping their own admissions policies?

Background. *Fisher* considered the unique admissions policy that the University of Texas had in place in 2008, when plaintiff Abigail Fisher applied for admission. The University filled 75% of its incoming class using the Texas "Top Ten Percent Plan," which guarantees admission to a state university for any Texas student who graduates in the top 10% of her high school class. The remaining 25% of the class was admitted using a complex "holistic approach." After the Supreme Court upheld the consideration of race in admissions in its 2003 decision in *Grutter v. Bollinger*, the University began considering race in a very limited way – as one factor in evaluating an applicant's potential contribution to the student body, which was itself one component of the holistic part of the admissions process. White applicant Abigail Fisher nonetheless challenged the University's consideration of race as a violation of the Equal Protection Clause.

In 2013, the Supreme Court held that the lower courts had not rigorously applied strict scrutiny in evaluating Fisher's claims. Courts can give some deference to a university's determination that diversity is essential to its educational mission and therefore a "compelling interest." But they cannot defer to the university in determining whether its consideration of race was "narrowly tailored," i.e., whether it was the least restrictive means of achieving the university's compelling interest in diversity. The Court said good faith is not enough – courts must analyze whether there are any effective race-neutral alternatives. On remand, the Fifth Circuit Court of Appeals again held, on the same facts, that the University's admissions policy satisfied both components of strict scrutiny, and the case returned to the Supreme Court.

Many believed that the Court's decision to take the case up again signaled an end to the University's policy or, more broadly, to affirmative action. This time, however, Justice Kennedy changed his position and wrote the 4-3 decision upholding the University's policy. (Only seven Justices participated because Justice Kagan recused herself after working on the case as Solicitor General and Justice Scalia's seat remains empty.)

The details of the decision, however, leave significant uncertainty about how it will be applied to future challenges to race-conscious admissions policies. Here are the conclusions we draw from *Fisher*.

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Affirmative action remains alive. Justice Kennedy and the Court rejected the invitation to overrule *Grutter* and disallow the consideration of race altogether in admissions policies. In doing so, the Court reaffirmed that diversity can be a compelling interest if that interest is clearly and specifically defined, and consideration of race can be constitutional if race-neutral alternatives have been considered and found ineffective. The significance of Justice Kennedy's position cannot be overstated. He had voted against upholding the consideration of race in *Grutter*, and in *Fisher I* he had criticized the lower court's review of the University's admissions policy as not strict enough. Clearly, he had a change of heart in *Fisher II*. If he holds to his current position, the diversity rationale for affirmative action will retain the support of five of the justices, even if an opponent of affirmative action is appointed to fill Justice Scalia's seat.

Fisher is a narrow decision that expressly leaves the door open to future challenges. The Court emphasized that *Fisher* involved a complex and unique admissions process that "may limit [the case's] value for prospective guidance." Race played a very limited role; as Justice Kennedy put it, race was "a factor of a factor of a factor" in the admissions calculus, and only affected the admission of 25% of the class. And the Court specifically left open the possibility that a challenge to the University's admissions policies today might come out the other way, warning that its decision was based on the facts and circumstances in 2008 and didn't mean that the University today "may rely on that same policy without refinement." On the contrary, the Court emphasized that institutions

have a "continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances."

Schools must set concrete, specific diversity goals. The Court made clear that institutions get "some but not complete judicial deference" in setting diversity goals. A college or university cannot rely on a generic goal of increasing diversity. Rather, it must articulate "concrete and precise goals" that courts can measure. The University of Texas met that standard by setting the following goals: (1) the destruction of stereotypes; (2) the promotion of cross-racial understanding; (3) the preparation of students for an increasingly diverse workforce and society; (4) the cultivation of leaders with legitimacy in the eyes of the citizenry; and (5) the creation of an academic environment that promotes a robust exchange of ideas, exposing students to different cultures. However, the Court relied heavily on the University's "reasoned, principled explanation" for its decision to consider race in pursuing those goals—the University had conducted a year-long study and concluded that its prior reliance on race-neutral alternatives had not achieved the University's diversity goals.

Institutions should dust off their admissions policies and check whether their stated diversity goals are specific enough. The policy cannot assert that race-conscious admissions is necessary to promote diversity, writ large. Instead, they must explain why diversity is necessary to meet the educational goals of their institutions. While *Fisher* gives some indication of the types of rationales that the Court might consider compelling, it is important to remember that the Court found these

reasons compelling in large part because of the investigation that the University of Texas had done before implementing its race-conscious policy. Institutions should avoid a rote recitation of the diversity interests cited in *Fisher* and instead evaluate and articulate the diversity needs of their own campus communities.

Schools will have to show that race-neutral alternatives are inadequate. Because the diversity rationale for affirmative action now seems to be on solid footing, future battles will likely focus on whether the institution can prove that race-conscious admissions programs are the least restrictive method of achieving diversity. This flows from the Court's use of strict scrutiny to evaluate the use of race in admissions, requiring institutions to show that there are no viable race-neutral alternatives. The University of Texas was able to do so because it had conducted a study showing that years of using race-neutral policies—such as intensifying outreach to minority communities, establishing scholarships, or giving more weight to socioeconomic factors—had failed to meet the University's diversity goals. The study concluded that race-neutral admissions had resulted in stagnation in the percentage of minority enrollment, feelings of "loneliness and isolation" among minority students, and a lack of classroom diversity. The extensive study included robust discussion among university stakeholders about the need for diversity, resulting in a 39-page policy proposal supported by both "statistical and anecdotal" information.

Schools already using race-conscious procedures face a heavier burden. They will have to devise ways to measure the

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impact that abandoning race-conscious admissions would have on campus diversity. That task is complicated by the fact that the Court's analysis was qualitative, rather than quantitative. The Court did not try to define statistically what "critical mass" of minority students was needed to achieve diversity and cautioned schools to avoid using "formalistic racial classifications" that may "fail to capture diversity in all of its dimensions" and may "undermine the educational benefits the University values." In other words, schools cannot rely heavily on a statistical gap in meeting numerical racial goals to support the continuing consideration of race in admissions.

Challenging as it may be, institutions will have to show that they still need a race-conscious admissions program to meet their legitimate diversity goals, in light of current demographics, changes in student body, and progress in meeting their goals. Among other things, student interviews, climate surveys, and demographic data may assist in demonstrating the ongoing need for diversity and the impact of that diversity on campus culture. And they must show that race plays no greater role than necessary to achieve diversity. To that end, schools should evaluate whether outreach to minority communities, scholarships focused on socio-economic status, or other race-neutral admission criteria could achieve their diversity goals.

Continual review is needed. Justice Kennedy's opinion is clear that universities have a "continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances." "Going forward," he advised, "the assessment must be undertaken in light of the experience the school has accumulated and the data it has gathered since the adoption of its admission plan." And, a university "must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest."

The Court's decision is less clear on how often an institution must evaluate its race-conscious admissions policy. On the one hand, the Court referred to the University's "ongoing obligation to engage in constant deliberation" about its admissions policies. On the other, the University's extensive study that the Court relied on took place four years prior to Ms. Fisher's application, giving some indication of the frequency that might be acceptable. Similarly, while the Court did not indicate what type of review must be conducted, the study the Court relied on in *Fisher* included review of demographic data, interviews with students, and qualitative evaluation of the ongoing campus need for diversity. The nature of the review may vary depending on an individual institution's history and current circumstances. But some ongoing, meaningful examination must be done to determine whether the institution continues to need race-conscious admissions to promote its articulated diversity goals and its educational mission.

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