The Heritage Foundation

LEGAL MEMORANDUM

No. 168 | DECEMBER 3, 2015

Discriminatory Racial Preferences in College Admissions Return to the Supreme Court: *Fisher v. University of Texas at Austin*

Hans A. von Spakovsky and Elizabeth H. Slattery

Abstract

For a second time, the Supreme Court is hearing a challenge to the University of Texas at Austin's race-based admissions policy. The Court previously held that the school must prove that its use of race is narrowly tailored to further compelling governmental interests. Challenger Abigail Fisher argues that the school has failed to produce evidence demonstrating why its use of race is compelling. She also maintains that the university's newly asserted interest in "qualitative" diversity cannot survive constitutional review. Research has shown admissions decisions based on race harm the very students they are supposed to benefit. Whether in this case or a future one, the Supreme Court should ban race-based discrimination in college admissions.

This term, the U.S. Supreme Court is reconsidering whether it is constitutional for the University of Texas at Austin to use race in its undergraduate admissions decisions, to the detriment of some students and the benefit of others. In *Fisher v. University of Texas at Austin*, Abigail Fisher argues that the school's policy of giving racial preferences to preferred minorities is discriminatory and violates the Equal Protection Clause of the Fourteenth Amendment.

In this case's prior appearance before the justices in 2013, the Supreme Court held that the lower courts gave too much deference to the university when examining whether its racial preference program was constitutional. The Supreme Court ruled that schools must prove their use of race is narrowly tailored to further compelling governmental interests and that courts must look at actual evidence and not rely on schools' assurances of their good intentions. On remand, the lower court found that the university's

Key Points

- The Supreme Court is considering whether it is constitutional for the University of Texas at Austin to use race in its undergraduate admissions decisions.
- Schools are permitted to use race in admissions if it is narrowly tailored to further compelling governmental interests.
- Before putting a thumb on the race scales, a school must pursue a "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks."
- Texas claims that it needs to consider the race of applicants to advance its interest in "qualitative diversity," but this racial balancing is nothing more than government-sanctioned discrimination.
- It is time for the Supreme Court to ban racial preferences and other discriminatory practices in college admissions.

This paper, in its entirety, can be found at **http://report.heritage.org/lm168**

The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002
(202) 546-4400 | heritage.org

newly asserted interest in enrolling more minority students from majority-white high schools ("qualitative diversity") justified its use of racial preferences. The Supreme Court should rule in favor of Abigail Fisher and hold that this rationale does not survive strict scrutiny and that discriminating on the basis of race in college admissions for any reason is a violation of equal protection.

A Brief History of Racial Preferences Jurisprudence

In 1978, the Supreme Court—in *Regents of the University of California v. Bakke*—reviewed the discriminatory admissions program used by the University of California–Davis Medical School (UC–Davis). At that time, the school used a two-track system for admissions, with 84 out of 100 seats filled based on the applicant's merit and 16 set aside for "preferred" minorities. As described in another Heritage paper:

> [Allan] Bakke just missed making the cut. The remaining 16 seats were reserved for the disadvantaged, but in practice, "disadvantaged" always meant members of racial minorities. Bakke could have been the fatherless son of an illiterate washerwoman and it would not have mattered: Because he was white, he did not qualify.
>
> It is worth pointing out that at UC–Davis Medical School, race was no mere tiebreaker in otherwise close cases. Bakke had a college grade point average (GPA) of 3.46 and an undergraduate science GPA of 3.44 ... as well as a commendable record of volunteer emergency room service at a local hospital, where he frequently worked late into the night with victims of car accidents and street fights. By contrast, the average "disadvantaged track" admittee in 1973 had a college GPA of 2.88 and an undergraduate science GPA of 2.62.[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 racially discriminatory 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, unfortunately 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]

It was not until 2003 that the Supreme Court revisited the issue of racial preferences in college admissions in a pair of cases from the University of Michigan challenging the institution's law school and undergraduate admissions policies. In *Grutter v. Bollinger*, challenging the law school's purported use of racial quotas, the school claimed its goal was reaching a "critical mass" of diversity on campus.[6] The admissions data showed that the school maintained separate admissions criteria based on race and admitted preferred minorities "in proportion

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

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] In his dissent, Justice Clarence Thomas disagreed, 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 an applicant's race could not be squared with strict scrutiny review.

Thus, these two decisions underscore that the Court was not issuing a blanket endorsement of race-based admissions; any consideration of race must be carefully and narrowly crafted and executed. One of the central tenets of *Grutter* requires that, before putting a thumb on the race scales, 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 do not need to 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 only on the margin; it may not be the decisive factor in admissions.

In the real world, however, few competitive universities have ever implemented race-neutral programs to replace racial preferences. Moreover, universities are anything but transparent about their admission process. Some universities, including Yale, have even been destroying their admissions records to avoid having to disclose the criteria such as race and other standards they use to determine admissions.[14]

Texas College Admissions: The Top 10 Percent Law

Before *Grutter* was decided by the Supreme Court, the U.S. Court of Appeals for the Fifth Circuit reviewed the race-based admissions policy at Texas's state law school. In the 1996 case *Hopwood v. Texas*, the court ruled that the law school's overt use of race was constitutionally impermissible.[15] The school's admissions policy involved sorting applicants into three categories ("presumptive admit," "presumptive deny," and "discretionary") based on scores combining the applicants' GPA and LSAT scores ("TI score").

The minimum TI score for each category varied depending on the applicant's race or ethnicity. For

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. *Plaintiff in Harvard University Admissions Lawsuit Objects to Destruction of Student Records at Yale Law School*, PR Newswire (March 19, 2015), http://www.bizjournals.com/prnewswire/press_releases/2015/03/19/DC59476; Joseph Pomianowski, *Yale Law School Is Deleting Its Admissions Records, and There's Nothing Students Can Do About It*, New Republic (March 16, 2015), http://www.newrepublic.com/article/121297/yale-law-deletes-admissions-records-congress-must-fix-ferpa.
15. 78 F.3d 932 (5th Cir. 1996).

example, black and Mexican-American applicants needed a composite score of 189 to be presumptively admitted, whereas white and non-preferred minorities needed a 199 TI score.[16] As the court detailed in its opinion:

> [B]ecause the presumptive *denial* score for whites was a TI of 192 or lower, and the presumptive *admit* TI for minorities was 189 or higher, a minority candidate with a TI of 189 or above almost certainly would be *admitted*, even though his score was considerably below the level at which a white candidate almost certainly would be *rejected*. Out of the pool of resident applicants who fell within this range [189-192], 100% of blacks and 90% of Mexican Americans, but only 6% of whites, were offered admission.[17]

The school's administrators justified lowering standards for preferred minorities by arguing this was necessary to achieve a diverse student body, to lessen the perception that the school was a "hostile environment" for minorities, and to address present effects of past discrimination.[18] The school had a special subcommittee that reviewed only preferred minorities' applications, and it maintained waiting lists for admission that were segregated by race.

Four white applicants who were denied admission sued the law school. The Fifth Circuit ruled in their favor, concluding that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[19] Further, the court noted, "preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake."[20] None of Texas's justifications satisfied strict scrutiny review—that the use of race was narrowly tailored to further a compelling state interest—so state-funded universities in Texas were no longer permitted to use race as a factor in admissions decisions.

Following this decision, the Texas legislature passed the Top 10 Percent Law in 1997. Students who graduated in the top 10 percent of Texas high schools would be automatically admitted to state-funded colleges and universities.[21] This boosted minority enrollment, 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."[22] Faulkner added that by 1999, enrollment levels for blacks and Hispanics had returned to the levels before the *Hopwood* decision; further, 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.[23]

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, the university began subjecting applicants to a "holistic review" 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.

Fisher's First Trip to the Supreme Court

Abigail Fisher, a white Texas resident, did not graduate in the top 10 percent of her high school class,

16. *Id.* at 936.
17. *Id.* at 937.
18. *Id.* at 952.
19. *Id.* at 940 (internal citations omitted).
20. *Id.* (internal citations omitted).
21. Tex. Educ. Code Ann § 51.803 (West 2009).
22. Larry Faulkner, *The 'Top 10 Percent Law' Is Working for Texas* (Oct. 19, 2000), *available at* https://www.utexas.edu/student/admissions/research/faulknerstatement.html.
23. *Id.*

so her application for admission to UT–Austin was in competition with candidates who received racial preferences. 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 that had been set in 2003 in the *Grutter* decision.

In an opinion written 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.[24] Under narrow tailoring, the school's use of race must have been "necessary...to achieve the educational benefits of diversity."[25] In other words, there must be "no workable race-neutral alternative" that would produce such benefits.[26]

The first *Fisher* opinion stressed that courts must look at *actual* evidence and not "simple...assurances of good intention" from the university.[27] In a concurring opinion, Justice Thomas argued that "only a social emergency rising to the level of imminent danger to life and limb" might be a compelling enough interest to justify racial discrimination.[28] He 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."[29]

Thus, Abigail Fisher's case returned to the Fifth Circuit so that court could examine the evidence supporting the university's justification for its racially discriminatory 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. 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.

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*, 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,

> [S]urprisingly, [the university had] 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]

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, the lack of evidence produced by the university to justify its discriminatory admissions policy "compels the conclusion" that it "does not survive strict scrutiny."[33] Fisher asked the full Fifth Circuit to rehear the case. But in a brief order that provided no explanation for its decision, the court announced that the judges voted 10 to 5 not to rehear the case.

24. Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2420-21 (2013).
25. *Id.* at 2420.
26. *Id.*
27. *Id.* at 2421.
28. *Id.* at 2424 (Thomas, J., concurring).
29. *Id.* at 2432 (Thomas, J., concurring).
30. Fisher v. University of Texas at Austin, 758 F.3d 633, 673 (2014) (Garza, J., dissenting).
31. *Id.* at 661–662.
32. *Id.* at 662.
33. *Id.*

Admissions Scandal at the University of Texas

Since the Fifth Circuit issued its decision, a scandal at the University of Texas has revealed that university officials had another, secret admissions process that they never revealed to the courts, raising a serious ethical issue about the university's lack of candor and honesty to the tribunal. The Board of Regents of the University of Texas system commissioned an outside investigation by Kroll, Inc., an international investigative consulting firm, which issued a devastating and highly critical report in February 2015 on the undisclosed admissions process.[34]

The investigation revealed that university officials regularly overrode the "holistic review" to allow politically connected individuals, such as state legislators and members of the university's Board of Regents, to get family members and other friends admitted. Kroll found that many of these students were admitted "despite grades and test scores substantially below the median for admitted students."[35]

In fact, the admission rate for applicants under this secret review was 72 percent, while the admission rate for students through the "holistic review" was only 16 percent. In 29 percent of the cases Kroll reviewed, "the files suggest that ethnic, racial, and state geographical diversity may have been an important consideration," making race and ethnicity an even more important factor in these "secret" admissions than in the holistic administration process.[36] Kroll concluded that the files confirmed that particular applicants were "admitted at the request of the President [of UT–Austin] over the assessment of the Admissions Office."[37]

Thus, the bad faith of UT–Austin administrators in failing to tell the truth about the admissions policy the first time around could be an unexpected factor in the Supreme Court's reconsideration of the issue.

Fisher Returns to the Supreme Court

The Supreme Court agreed to rehear the case in its 2015–2016 term and oral arguments are scheduled for December 9, 2015. Fisher argues that even though the university has the burden of demonstrating why it needs to use race in making admissions decisions, it has never done so. More than 80 percent of minority enrollees for the 2008 freshman class (the class for which Abigail Fisher applied) were admitted through the Top 10 Percent Plan, which suggests the use of racial preferences in the "holistic review" is unnecessary.[38]

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.[39] Fisher maintains that the university's newly asserted interest in "qualitative" diversity cannot survive strict scrutiny review. She further contends that the school has failed to produce evidence demonstrating why its use of race is "compelling," despite being required to articulate the reason for its use of race "at the time it ma[de] the decision to use racial preferences—not nine years after the policy change and four years into litigation."[40] Though Fisher is not asking the Supreme Court to completely ban the use of racial preferences, she is asking the Court to hold UT–Austin to the constitutional standard of strict scrutiny, which should not be "strict in theory but feeble in fact."[41]

While there has been a lot of media attention focused on Fisher's case, the impact of the Court's decision—however it rules—on schools across the country may be limited given Texas's unique Top 10 Percent Plan. On the other hand, a finding against UT–Austin that it failed to produce evidence that justified its racial preference policy and that the policy was narrowly tailored will put schools on notice that they cannot simply claim such a

34. Kroll, University of Texas at Austin – Investigation of Admissions Practices and Allegations of Undue Influence, Final Report to the Office of the Chancellor of The University of Texas System (Feb. 6, 2015), http://content.utsystem.edu/sites/utsfiles/news/assets/kroll-investigation-admissions-practices.pdf.

35. *Id.* at 60.

36. *Id.* at 62.

37. *Id.* at 62–63.

38. Brief for Petitioner at 10, Fisher v. University of Texas at Austin, No. 14-981.

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

40. Brief for Petitioner at 21.

41. *Fisher*, 133 S. Ct. at 2421.

program is needed without providing proof—the days when courts simply deferred to the judgment of school administrators will be over. Such a result could be of great importance since there are lawsuits already pending in federal district courts that challenge the racially discriminatory admissions policies of Harvard and the University of North Carolina–Chapel Hill (UNC).[42]

The Harvard suit 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 racist quotas and caps that Ivy League schools put on the number of Jewish students they would admit in the 1920s.[43] The plaintiffs in the case against UNC point out that the university did a study that showed that if the school dropped its racial preference policy and switched to a top 10 percent plan like Texas, the number of minorities would actually increase. The advocacy group involved in bringing these lawsuits is also interviewing students who claim they were rejected due to the discriminatory admissions policies of the University of Wisconsin, the University of Minnesota, and the University of Tennessee for potential lawsuits.[44]

The Sad Consequences of Racial Preferences

In addition to the constitutional problem (and fundamental fairness issue) with allowing racially discriminatory admissions by colleges and universities, there is a practical problem: growing evidence that such policies actually harm minority students. As Gail Heriot, a commissioner on the U.S. Commission on Civil Rights, summarizes:

> Mounting empirical research shows that race-preferential admissions policies are doing more harm than good. Instead of increasing the numbers of African Americans entering high-status careers, these policies reduce those numbers relative to what we would have had if colleges and universities had followed race-neutral policies. We have fewer African-American scientists, physicians, and engineers and likely fewer lawyers and college professors.[45]

When schools "relax their admissions policies in order to admit more underrepresented minority students," those students end up "concentrated at the bottom of the distribution of entering academic credentials at most selective college and universities."[46] Any student, regardless of his or her race, "whose entering academic credentials are well below those of the average student in a particular school will likely earn grades to match."[47]

These students are far less likely to succeed in school, making it far less likely that they will pursue careers in their chosen profession and far more likely that they will switch to an easier major, or worse, drop or flunk out of school. This is a particular problem in the hard sciences, where the students "who fail to attain their goal of a science or engineering degree are disproportionately students whose entering academic credentials put them toward the bottom of their college class."[48] Furthermore, this perverse acceptance of racially discriminatory admissions policies has also led to individuals faking one race or another to gain admission at certain schools.[49]

42. Jeffrey Scott Shapiro, *Harvard, UNC Sued Over Race-Based Admissions Policies*, Wash. Times (Nov. 18, 2014), http://www.washingtontimes.com/news/2014/nov/18/harvard-unc-sued-over-race-based-admission-policie/.
43. Malcolm Gladwell, *Getting In – The Social Logic of Ivy League Admissions*, New Yorker (Oct. 10, 2005), http://www.newyorker.com/magazine/2005/10/10/getting-in.
44. Shapiro, *supra* note 42.
45. Heriot, *supra* note 1, at 1.
46. *Id.* at 5.
47. *Id.*
48. *Id.* at 6 (citing Rogers Elliott et al., *The Role of Ethnicity in Choosing and Leaving Science in Highly Selective Institutions*, 37 Res. Higher Educ. 681, 700 (1996)).
49. *See* Vijay Chokal-Ingam, *Why I Faked Being Black for Med School*, N.Y. Post (April 12, 2015), http://nypost.com/2015/04/12/mindy-kalings-brother-explains-why-he-pretended-to-be-black/.

Thus, the Supreme Court should revisit its past decisions allowing the use of racial preferences in college admissions.[50] A majority of the Supreme Court justices have questioned the continued legitimacy of racial preferences, and 12 years ago, in *Grutter v. Bollinger*, Justice O'Connor wrote: "We expect that 25 years from now, the use of racial preferences will no longer be necessary...."[51] Justice O'Connor was wrong 12 years ago when she sanctioned their use, albeit under supposedly limited circumstances and for a possibly limited amount of time. Such preferences are nothing more than a euphemism for government-sanctioned discrimination, and cannot be reconciled with the principle of equal protection embodied in the Fourteenth Amendment.

As Chief Justice John Roberts said, "Racial balancing is not transformed from 'patently unconstitutional' to a compelling state interest simply by relabeling it 'racial diversity.'... The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[52]

It is time for the Supreme Court to finally put that principle in place by banning racial preferences and other discriminatory practices in college admissions.

*—**Hans A. von Spakovsky** is Manager of the Election Law Reform Initiative and Senior Legal Fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. **Elizabeth H. Slattery** is a Legal Fellow in the Meese Center.*

50. There also are options for Congress and the states to eliminate racial preferences, or at least require schools to disclose whether or how race and ethnicity factor into admission decisions. *See* Roger Clegg, Hans von Spakovsky, and Elizabeth Slattery, *What Congress Can Do to Stop Racial Discrimination*, Heritage Foundation Legal Memorandum No. 120 (April 7, 2014), http://www.heritage.org/research/reports/2014/04/what-congress-can-do-to-stop-racial-discrimination; Roger Clegg and Hans von Spakovsky, *What States Can Do to Stop Racial Discrimination*, Heritage Foundation Legal Memorandum No. 113 (Feb. 11, 2014), http://www.heritage.org/research/reports/2014/02/what-states-can-do-to-stop-racial-discrimination.
51. *Grutter*, 539 U.S. at 343.
52. Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 732, 748 (2007).