Handout C

Fisher v. University of Texas and Affirmative Action in American Colleges

Starting in the mid-1990s, the University of Texas at Austin had a two-tiered admissions policy for undergraduate applications. The top tier was linked to the Top Ten Percent Law. Under this law, all Texas high school students in the top 10 percent of their high school class are assured admission into any public university in the state. The majority of the University of Texas's entering freshmen come from this first admissions tier.

For all other applicants, the university applies a separate admissions criteria. These applicants are in the second tier. Admissions counselors evaluate a number of factors in the second tier, including standardized test scores, personal essays, examples of leadership, work experience, and race and ethnicity.

Abigail Fisher

Abigail Fisher, a white Texan, applied to the University of Texas at Austin in 2008, when she was a senior in high school. Fisher was not in the top 10 percent of her high school class. Her application was evaluated under the second tier of the admissions policy. The university denied her admission, and Fisher sued the university. She claimed that the university's consideration of race improperly influenced the outcome of her application.

Fisher argued that Texas's top tier approach to undergraduate admissions — the Top Ten Percent tier — already achieved diversity in the classroom. Therefore, consideration of race in the second tier admissions policy was unnecessary.

The University of Texas responded that the diversity gained from the Top Ten Percent tier is largely due to racial segregation in Texas public school districts. By adding more variety *within* minority groups at the university, the second tier of the university's admissions approach supplies an extra degree of diversity to the student body.

Both the district court and the court of appeals agreed that the two-tiered admissions policy did not violate the equal protection clause of the 14th Amendment. Fisher appealed the lower courts' rulings to the Supreme Court, which accepted review of the case.

Fisher v. University of Texas

Writing for a 7-1 majority in 2013, Justice Anthony Kennedy stated that the academic and professional benefits that arise from a diverse classroom are still a compelling government interest. Additionally, racial preferences are still constitutionally permissible in some contexts.

Justice Kennedy instructed public universities, however, to consider race-neutral paths to achieve diversity. The *Bakke* case had asserted that race-conscious policies were permissible only if they were able to achieve a compelling state interest "with greater precision than any alternative means."

According to the *Fisher* majority, a race-conscious admissions approach must be "necessary" for a university to achieve diversity. And no other "workable race-neutral alternatives" can be available to achieve diversity.

The Supreme Court remanded (sent back) the case to the lower federal court. The Supreme Court argued that the lower court improperly deferred to the university's judgment that it had made a good faith effort in narrowly tailoring its admissions procedure. The Supreme Court argued that federal courts have a duty to determine whether racial preferences in the particular university are "essential to its educational mission."

In their concurring opinions, Justice Scalia and Justice Thomas argued that all racial preferences in higher education admissions decisions are indefensible under the 14th Amendment.

Justice Ginsburg provided the lone dissent in *Fisher*. In her opinion, she asserted that the University of Texas's two-tiered admissions approach ought to be deemed constitutionally appropriate.

Practical Consequences of *Fisher*

In many ways, the *Fisher* decision represents a judicially moderate opinion. Instead of attacking the controversial topic of affirmative action head-on, the court focused on questions of judicial procedure and keeping precedents intact. The University of Texas even responded, "Today's ruling will have no impact on admissions decisions we have already made or any immediate impact on our holistic admissions policies."

Many legal scholars believe, however, that the *Fisher* decision will make universities even more leery about how they use racial preferences in admissions decisions. Universities may feel pressured by conservative voters and legal groups about the empirical justification for racial preferences. And universities likely may begin emphasizing applicants' socioeconomic status and family data in order to achieve greater diversity.

After *Fisher*, lower courts will not be able to defer to a university's assessment that its own admissions formula is necessary to achieving a compelling interest using narrowly tailored means. Courts now must discern the necessity of race-conscious policies, case-by-case.

In 2016, the Supreme Court once again heard the case of *Fisher v. Texas*. This time, the federal court of appeals had reaffirmed the lower court's ruling that the admissions policy was constitutional. In a 4-3 decision, the Supreme Court decided that the use of race as a factor in the admissions process did not violate the equal protection clause of the 14th Amendment.