



LATINO POLICY & ISSUES BRIEF

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THE UNITED STATES SUPREME COURT'S RULING IN *FISHER V. TEXAS* IMPLICATIONS FOR LATINOS AND HIGHER EDUCATION

Robert Chao Romero and Marcia V. Fuentes

In its recent ruling in *Fisher v. Texas*, the U. S. Supreme Court upheld race-based affirmative action in university admissions in theory, but opened the door to future constitutional challenges.¹ This policy brief analyzes the *Fisher* case and discusses its policy ramifications for Latinos and higher education.

THE CASE

Plaintiff Abigail Noel Fisher brought her lawsuit against the University of Texas at Austin on April 7, 2008, in the Western District Court of Texas.² Fisher, who was denied admission to the class entering in the fall of 2008, claimed that the race-conscious admissions policies of U.T. Austin violated her constitutional rights according to the Equal Protection Clause of the Fourteenth Amendment.

Fisher, a white female, graduated from Stephen F. Austin High School in Sugar Land, Texas, with a grade point average of 3.59. She took the Scholastic Assessment Test (SAT) twice—scoring 1170 on her first attempt and 1180 on her second. Significantly, she ranked in the top 12 percent of her graduating class.

Rachel Multer Michalewicz, who was also denied admission to the same class, was added as a co-plaintiff on April 17, 2008.³ Also a white female, Michalewicz graduated from Jack C. Hays High School in Buda, Texas, with a 3.86 grade point average. She scored

1290 on the SAT and was at the top 11 percent of her graduating class.

Admission to the University of Texas is based on a stepped process. The “Top Ten Percent Law” (HB 588), enacted by the Texas state legislature in 1997, guarantees admission to all Texas students who graduate in the top 10 percent of their high school class. To fill the rest of the slots allocated for Texas residents, admissions personnel employ two additional measures: the Academic Index (AI), and the Personal Achievement Index (PAI).⁴ AI is calculated based on high school class ranking, successful completion of college preparatory curriculum, and standardized test scores. PAI evaluates the following factors: personal essays, leadership experience, extracurricular activities, awards and honors, work history, service to the school or community, and special circumstances such as socioeconomic status. In 2004 the university added race and ethnicity to the “special circumstances” category.⁵ Fisher and Michalewicz did not qualify under the Top Ten Percent Law, and their applications were then denied based on their AI and PAI scores.

LEGAL ISSUES

Fisher and Michalewicz claimed that their constitutional right to equal protection had been violated because the PAI explicitly considers race/ethnicity. In order for its race-conscious admissions policy to be found constitutional, the University of Texas was required to prove that its policy was justified by a compelling governmental interest and was narrowly tailored. Since plaintiffs did not challenge the university’s stated compelling interest in the benefits associated with educational diversity, the main focus of contention was whether the PAI portion of the admissions policy was narrowly tailored.

The district court turned to the United States Supreme Court precedent of *Regents of the University of California v. Bakke* (1978) and *Grutter v. Bollinger* (2003).⁶ In *Bakke* and *Grutter* the Supreme Court held that educational diversity represents a compelling interest. In *Grutter*, the Supreme Court further ruled that race-conscious admissions programs are considered narrowly tailored if they provide individualized and holistic consideration of every applicant. Although race may be explicitly considered as one factor in admissions decisions, racial considerations may not rise to the level of being a decisive factor. Moreover, according to the court, quotas are always unconstitutional.

In a direct challenge to *Grutter*, *Fisher* and *Michalewicz* contended that race should not be allowed as a specific factor in university admissions decisions *if race-neutral alternatives are available*. According to the plaintiffs, the race-conscious admissions policy of the University of Texas was not narrowly tailored because race-neutral policies (such as the Top Ten Percent Law) that could effectively increase student body diversity were available. This reasoning was so clearly at odds with the Supreme Court's holding in *Grutter* that it led the Texas solicitor general to famously comment, "If the plaintiffs are right, *Grutter* is wrong" (Parilo 2006).

The judge, Sam Sparks, did not allow the case to move forward to trial, ruling in favor of the University of Texas's motion for summary judgment. Following this loss *Fisher* and *Michalewicz* challenged the lower court ruling in the Fifth Circuit Court of Appeals. On January 18, 2011, the ruling was unanimously upheld by the appellate court's four-judge panel.⁷ *Fisher* subsequently appealed to the Supreme Court and was granted certiorari on February 21, 2012.

THE COURT'S DECISION

The Supreme Court issued its decision in *Fisher* on June 24, 2013.⁸ In a 7-1 ruling, the Supreme Court vacated the decision of the lower court and ordered

the case remanded to the Fifth Circuit Court of Appeals. Rather than address the substantive legal issues raised by the case, however, the Supreme Court remanded the case on the grounds that the appellate court had failed to properly apply the legal test of "strict scrutiny." Specifically, the Supreme Court held that the appellate court erred in *deferring* to the University of Texas's judgment that its admissions program was "narrowly tailored" and "necessary" for the promotion of student body diversity. The appellate court had additionally erred in giving deference to the university's consideration of race-neutral policies. The opinion, written by Justice Anthony Kennedy, states that the appellate court should have verified that it was "necessary" for the university to use race to achieve "the educational benefits of diversity": "Strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."⁹

POLICY IMPLICATIONS

In basing its ruling on such narrow grounds, the Supreme Court upheld, in theory, the constitutionality of race-based affirmative action in university admissions.¹⁰ This is good news for Latinos in higher education because race-based affirmative action has been an important tool in the promotion of Latino educational achievement, especially at elite colleges and universities (Barreto and Pachon 2003).

Although on the surface this appears to be good news for advocates of affirmative action, a close reading of Kennedy's opinion reveals that the case may have opened the door to future constitutional challenges. The opinion might be read to imply that the explicit consideration of race may not always be necessary to achieve the educational benefits of diversity when effective race-neutral alternatives are available. Kennedy seems to hint that the Top Ten Percent Law is an effective race-neutral policy that produces high levels of diversity and,

therefore, that the race-conscious AI-PAI portion of the admissions procedure is not necessary or narrowly tailored: "The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."¹¹

Kennedy also cites statistics that appear to demonstrate that the University of Texas had greater success in promoting racial diversity when it implemented solely race-neutral admissions policies than when it utilized race-conscious policies. He notes that in the fall of 2004, before race and ethnicity were added as special circumstances to the PAI, the entering class was "4.5% African-American and 16.9% Hispanic." In contrast, in the fall of 1996, before the implementation of the race-neutral Top Ten Percent Law—when race was explicitly considered in addition to academic achievement—the entering class was "4.1% African-American and 14.5% Hispanic."¹²

These statistics, coupled with the opinion's strong emphasis on the viability of race-neutral alternatives, seem to indicate that Kennedy believes that the explicit consideration of race/ethnicity is not necessary for the promotion of a diverse student body at the University of Texas. If interpreted in this manner by the Fifth Circuit Court of Appeals on remand, Kennedy's opinion may provide legal justification for the outlawing of race-conscious admissions policies. In turn, such a decision by the appellate court could embolden opponents of affirmative action to raise similar lawsuits in other jurisdictions throughout the country.

Fortunately, social scientists have persuasively refuted the notion that race-neutral admissions policies such as the Top Ten Percent Law are just as effective as race-based affirmative action in promoting student body diversity. Angel L. Harris and Marta Tienda have specifically examined the negative impact of the Top Ten Percent Law on Latino representation at the University of Texas,

and they demonstrate that race-conscious admissions policies are the most efficient means of diversifying college campuses, especially in highly segregated states like Texas (Harris and Tienda 2012).

Other scholars have similarly highlighted the negative impact that race-neutral admissions policies have had on Latino representation in the public university systems of California, Washington, and Florida (Barreto and Pachon 2003; Brown and Hirschman 2006; Colburn, Young, and Yellen 2008). These various studies establish that the explicit consideration of race/ethnicity is indeed “necessary” for the promotion of meaningful diversity in public colleges and universities in the United States.

As we wait for the Fifth Circuit Court of Appeals to issue its new ruling in the *Fisher* case, it makes sense to continue to promote Latino educational achievement by implementing a mixed strategy of race-conscious and race-neutral policies. As long as race-based affirmative action in university admissions is still the law of the land, we should continue to use it as an important tool for improving Latino representation in higher education. But we should not stop there. It is also important to consider other strategies such as increased support and funding for outreach programs that target underrepresented Latino populations (Lomibao, Barreto, and Pachon 2003). These outreach efforts, moreover, should encompass K-12 and community college levels.

Another viable strategy is to increase the cultivation of college-going cultures

at underresourced high schools with significant Latino populations. This approach has a proven track record of success and has the added benefit of being relatively inexpensive. A buttressing of financial aid programs is also important to support the matriculation and graduation of the many Latino students who are admitted to elite colleges and universities every year but whose success is undermined by their low-income background (Harris and Tienda 2012).

NOTES

This policy brief is excerpted from Robert Chao Romero and Marcia V. Fuentes, *Fisher v. Texas: A History of Affirmative Action and Policy Implications for Latinos and Higher Education*, CSRC Research Report No. 17 (Los Angeles: UCLA Chicano Studies Research Center Press, 2013), available in PDF format at www.chicano.ucla.edu.

1. *Fisher v. University of Texas at Austin et al.*, U.S.____ (2013). In its ruling the court used the term *race* loosely to include both race and ethnic origin. For discussion, see *SCOTUSblog*, <http://www.scotusblog.com>.
2. *Fisher v. University of Texas at Austin et al.*, 645 F. Supp. 2d 587, 590 (W.D. Tex. 2009).
3. Michalewicz dropped out after the appeal.
4. The Top Ten Percent Law and the individualized review (AI and PAI) were devised to comply with the ruling in *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).
5. The University of Texas proposed this revision in June 2004, following the ruling in *Gutter v. Bollinger*, 539 U.S. 306 (2003). The policy took effect for the class entering in the fall of 2005.
6. *Regents of the University of California v. Bakke*, 438 U.S. 265, 305 (1978); *Gutter v. Bollinger*.
7. *Fisher v. University of Texas at Austin et al.*, 631 F.3d 213.
8. *Fisher v. University of Texas at Austin et al.*, U.S.____ (2013).
9. *Ibid.*, 11.

10. Although race-conscious admissions policies in public universities are legally permissible according to *Fisher*, they are not constitutionally required. California, Michigan, Washington, Florida, New Hampshire, Arizona, and Nebraska have passed voter referendums banning race-based affirmative action in higher education, and all have been consistently upheld by federal courts.

11. *Fisher v. University of Texas at Austin et al.*, U.S.____ (2013), 10.

12. *Ibid.*, 3.

WORKS CITED

- Barreto, Matt A., and Harry Pachon. 2003. *The Reality of Race Neutral Admissions for Minority Students at the University of California: Turning the Tide or Turning Them Away?* Claremont, CA: Tomás Rivera Policy Institute.
- Brown, Susan, and Charles Hirschman. 2006. “The End of Affirmative Action in Washington State and Its Impact on the Transition from High School to College.” *Sociology of Education* 79: 106–30.
- Colburn, David, Charles Young, and Victor Yellen. 2008. “Admissions and Public Higher Education in California, Texas, and Florida: The Post-Affirmative Action Era.” *InterActions: UCLA Journal of Education and Information Studies* 4, no. 1: article 2. <http://www.escholarship.org/uc/item/35n755gf#page=21>
- Harris, Angel L., and Marta Tienda. 2012. “Hispanics in Higher Education and the Texas Top Percent Law.” *Race and Social Problems* 4, no. 1: 57–67.
- Hart, Melissa. 2013. “Fisher Commentary: Everyone Wins, Everyone Loses.” *SCOTUSblog*, June 25. <http://www.scotusblog.com/2013/06/fisher-commentary-everyone-wins-everyone-loses>
- Lomibao, Stephanie, M. A. Barreto, and H. P. Pachon. 2004. *The Reality of Race Neutral Admissions for Minority Students at the University of California: Turning the Tide or Turning Them Away?* Los Angeles: Tomás Rivera Policy Institute.
- Parilo, Michelle. 2012. “Non-Strict Strict Scrutiny: The Fifth Circuit and the *Gutter* Standard in *Fisher v. University of Texas at Austin*.” *Boston College Journal of Law and Social Justice* 32: 35–45.

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ISSN: 1543-2238.

Editor: Chon A. Noriega

Senior Editor: Rebecca Frazier



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