Acad. Quest. (2013) 26:403–410
DOI 10.1007/s12129-013-9385-0

After *Fisher*: Academic Review and Judicial Scrutiny

George R. La Noue

Published online: 11 October 2013

Expecting that the Supreme Court in *Fisher v. University of Texas at Austin* would find (probably) that the use of racial considerations in UT's admission process was unconstitutional or (possibly) uphold that process, many commentators decided that the actual Court decision was a "punt."[1] By a 7-to-1 vote, the justices sent the case back to lower courts to be reargued under the clearer guidelines articulated in the *Fisher* opinion. So nothing was immediately settled.

As football fans know, a punt can be merely an exchange of field positions, without advantaging the offense or defense. Or, a punt can be a "coffin corner" kick in which the offense is pinned back near its own goal line, often with disastrous consequences. Rarely, a punt can be run back the other way for a score. Consequently, when a punt occurs, what happens next can be decisive. This article will examine the post-*Fisher* options open to college and university faculty and others who wish to limit campus use of racial preferences.

Most Supreme Court cases involving racial preferences and their impact on nonminorities have resulted in closely divided votes. Conservative justices opposed the preferences in one bloc, while liberal justices found ways to uphold them in another bloc. Swing or moderate justices—Powell, O'Connor, and Kennedy—controlled the outcome in these cases by

[1]Fisher v. University of Texas at Austin, 133 S.Ct. 2411 (2013).

George R. La Noue is professor of political science and professor of public policy at the University of Maryland Baltimore County, Baltimore, MD 21250; glanoue@umbc.edu. He also has worked for the U.S. Equal Opportunity Commission, the U.S. Department of Labor, the U.S, Office of Civil Rights in the Department of Education, and the U.S. Commission on Civil Rights. He has been a trial expert in more than twenty-five federal cases opposing discrimination in employment and public contracting.

condemning racial preferences in general, but opening small doors for their carefully limited use.[2] What actually happened was that too often the exception to the general rule became the common practice. Since the higher education establishment is overwhelmingly committed to "diversity and inclusion,"[3] the use of racial preferences will continue, unless actions are taken to see that *Fisher*'s general rule requiring a compelling interest and narrow tailoring when race affects a student's admissions is enforced.

The Court's general rule against the use of racial classifications in admissions also impacts university decisions about financial aid, employment, contracting, and housing. The rule will not only apply to public campuses, which are governed by the Fourteenth Amendment's Equal Protection Clause, but also to private institutions that receive public funding and are bound by Title VI of the Civil Rights Act of 1964. The future questions for the judiciary will turn on the application of those central legal principles to specific campus policies.

In *Fisher*, the Court created an unusual coalition of seven justices (four conservative, two liberal, and one moderate)[4] to affirm the strict scrutiny test for evaluating the use of racial classifications and to condemn the deferential posture of the lower courts who reviewed the UT admissions process. Invoking the concept of strict scrutiny, however, will not lead to any inevitable outcome, and changing ingrained patterns in higher education about the use of racial classifications may take decades. So as a practical matter, we may be in for an extended period of academic review before there are definitive results from judicial scrutiny. This article will explore how faculty can play a role in that review.

Step 1: Read the *Fisher* Decision

In *Fisher*, the Court did not reconsider its previous acceptance of considering race in admissions, if a university could show a diverse student

[2]Powell, Regents of the University of California v. Bakke, 438 U.S. 238 (1978); O'Connor, City of Richmond v. Croson, 488 U.S.469 (1989) and Grutter v. Bollinger, 539 U.S. 306 (2003); Kennedy, Parents Involved in Community Schools v. Seattle School District No.1, 127 S.Ct.2738 (2007).

[3]The term "higher education establishment" is not just a figure of speech. See, for example, the full-page *Chronicle of Education* post-*Fisher* advertisement placed by thirty-eight higher education associations, "Diversity in Higher Education Remains an Essential National Priority," July 19, 2013, http://chronicle.texterity.com/chronicle/20130719a?pg=11#pg11. The ad talks about the benefits of diversity, but of course does not mention which or how many non-diverse students should be discriminated against to achieve those "benefits."

[4]Justices Alito, Roberts, Scalia, and Thomas are generally considered to be conservatives regarding the use of race. Justices Breyer and Sotomayor are liberal, and Justice Kennedy is the moderate who wrote the opinion.

body had educational benefits. What it did do was to affirm that the university would at all times bear the burden of proof for such race-based policies and to outline more clearly the obligations of lower courts in examining evidence about such policies.

The Court vigorously affirmed the strict scrutiny test, which means that race-based policies must have a compelling interest and be narrowly tailored. It reiterated: "Any official action that treats a person differently on account of his race or ethnic origins is inherently suspect."[5] The Court accepted the idea that some judicial deference is appropriate to the general policy of seeking a diverse student body, but nevertheless required that "a reasoned, principled explanation for that academic decision" must exist.[6] In evaluating whether the actual admissions plan is narrowly tailored, universities are entitled to no deference, however, and the Court specifically criticized the lack of scrutiny in the lower courts regarding UT's admissions process that gave the university its initial victory. If sued, universities will have to demonstrate to a court whether each applicant has been evaluated as an individual where "race or ethnicity [is not] the defining feature of his or her application."[7] Lower courts were also instructed to give "close analysis to how the process works in practice."[8] Universities also bear "the ultimate burden of demonstrating, before turning to racial classifications, that available, workable, race-neutral alternatives do not suffice."[9]

Many of the arguments in the higher education community for supporting racial preferences on campuses were explicitly rejected in the thirteen-page *Fisher* decision. Under the Fourteenth Amendment and Title VI, students of any racial or ethnic background are entitled to equal treatment. The Court reaffirmed, "It is therefore irrelevant that a system of racial preferences in admissions may seem benign."[10] Nor can a university make decisions based on race because it seeks to remedy discrimination. The Court said a campus does not have the capacity to make the "judicial, legislative or administrative

[5] *Fisher*, 133 S.Ct. at 2419.

[6] *Id.*

[7] *Id.* at 2420.

[8] *Id.* at 2421.

[9] *Id.* at 2420. For a discussions of race-neutral alternatives prepared by the U.S. Department of Education, Office for Civil Rights, see *Race-Neutral Alternatives in Post-Secondary Education: Innovative Approaches to Diversity*, March 2003, http://www2.ed.gov/about/offices/list/ocr/edlite-raceneutralreport.html and *Achieving Diversity: Race-Neutral Alternatives in American Education*, 2004, http://www2.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html.

[10] *Fisher*, 133 S.Ct. at 2417, quoting *Bakke*.

findings of constitutional violations necessary to justify remedial racial classifications."[11] Nor can a university use its admissions process to create racial and ethnic proportional representation. The Court held:

> A university is not permitted to define diversity as "some specified percentage of a particular group merely because of its race or ethnic origin." "That would amount to outright racial balancing which is patently unconstitutional." Racial balancing is not transformed from "patently unconstitutional" to a compelling state interest simply by relabeling it "racial diversity."[12]

The commonplace concept of redressing imbalances for "underrepresented" groups that exists in various forms in university policies is thus suspect.

The Court did not even deign to discuss whether a campus could use racial preferences to satisfy external political demands that were probably a causal factor in Texas. Such a rationale would have no constitutional validity at all.

Step 2: Determine What Use of Racial Classifications Currently Exists on a Campus

In the modern university the use of race often takes place regarding admissions, financial aid, support of student groups, employment, housing, and contracting decisions. The *Fisher* decision cites precedents from a number of these fields to support its conclusion showing that constitutional law about the use of race is interrelated. Thus, if a campus could not justify the use of race in admissions, it is doubtful it could justify the use of race in its financial aid or employment decisions either.

Often campuses hide their use of race by using the terms "diversity" or "inclusion" as semantic covers. These policies may, in fact, be race-neutral and not governed by strict scrutiny, but if race plays any role in decisions, then strict scrutiny applies. For example, post-doctoral programs exist that favor "individuals who are committed to diversity in the academy" and who are "members of groups that historically have been underrepresented in the professoriate." Strict scrutiny would apply to the latter criteria, but maybe not to the former, since persons of many backgrounds may believe in "diversity." An individual campus, however, would have a difficult time convincing a judge that

[11] *Id.*

[12] *Fisher*, 133 S.Ct. at 2418 also, quoting *Bakke*, *Grutter*, and *Parents Involved*.

it had a compelling interest in remedying historic underrepresentation of any group (since its efforts would be a drop in the bucket and proportional representation is not a legitimate goal anyway). Further, if it defined "members of groups" in the traditional affirmative action categories, it would face a narrow tailoring challenge (since diversity must encompass much more than those categories).

Finding out how a campus actually uses race may not be easy. In the post-*Fisher* strict scrutiny universe, however, the actual use of race by any campus cannot be kept in secrecy. Interviewing faculty members who sit on admissions or other pertinent committees might be revealing. An inquiry to the administration from the faculty senate might be effective. A formal letter to the campus attorney or relevant administrators might be productive. If necessary, a letter to regents or trustees might cause a useful discussion. Requests to a state attorney general or the U.S. Office of Civil Rights might lead them to make further inquiry. Finally, state institutions are generally obliged to respond to freedom of information (FOIA) requests.[13]

Step 3: Request Copies of the Documents Supporting Compelling Interest and Narrow Tailoring Basis for Race-Based Campus Policies

Assuming that the use of race by a campus can be identified, the next question is how does the campus know that it has a compelling interest and that its use is narrowly tailored? General statements by politicians, national associations, or campus figures will not suffice. If sued, the campus will have to provide empirical evidence that can be defended against attacks by the plaintiff's experts.

For example, when the Supreme Court first applied the strict scrutiny standard to the use of race in public contracting in *City of Richmond v. Croson* (1989),[14] Justice O'Connor held that race could only be used in the "the extreme case," where "some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."[15] That led some governments to abandon contracting racial preferences, others to

[13]Lisette Garcia, "Getting Government Records: How to File a Successful Freedom of Information Act Request," *Insider* (Summer 2012): 26–30, http://www.insideronline.org/archives/2012/summer/FOIA.pdf.

[14]City of Richmond v. Croson, 448 U.S. 469 (1989).

[15]*Id.* at 509.

narrow tailor them, and still others to invest in "disparity studies" to justify the creation or maintenance of these programs. A new form of consulting grew up. Since *Croson* was decided, about 350 disparity studies have been completed, at a cost to the taxpayers of roughly $175 million. In reviewing these studies, courts, government agencies, and scholars have generally been highly critical.[16]

After *Gratz* and *Grutter* were decided in 2003,[17] it is probable that many campus attorneys advised administrators not to put anything in writing about campus processes using race.[18] After *Fisher*, which places the burden of proof clearly on the campus, that would be bad advice. While the necessity for the continuing use of race will need to be assessed periodically, the initial use must be based on whether a compelling interest exists at that moment. If race is used in multiple aspects of campus life, that will require multiple supporting documents because the same compelling interest will not exist for each aspect and narrow tailoring will be different as well.

Campuses will have to decide whether their compelling interest/narrow tailoring studies will be contracted out or done with university personnel. That will create an interesting dynamic. Some on campus may object to contracting out these six-figure ongoing studies, but if they are done on campus, they may be subject to the review and methodological criticisms normal to academic life. The issue then will not be whether diversity is a good goal, but the methodological issues existing in the studies.

This research will have to confront difficult questions. What groups will need to be measured to determine appropriate "representation"? Are the traditional affirmative action groups sufficient? Are those categories that assume, for example, that Samoans, Sri Lankans, and South Koreans all are just "Asians" sufficient? Or if the issue is diversity, will those categories need to be broken down so that Asians will no longer always be "overrepresented"? How will the

[16]See for example, U.S. Commission on Civil Rights, *Disparity Studies as Evidence of Discrimination in Federal Contracting: Briefing Report* (Washington, DC: U.S. Commission on Civil Rights, 2006), http://www.usccr.gov/pubs/DisparityStudies5-2006.pdf.

[17]Gratz v. Bollinger, 539 U.S. 244 (2003) and Grutter v. Bollinger, 539 U.S. 306 (2003).

[18]This advice was contrary to that from the College Board. See Arthur L. Coleman and Scott R. Palmer, *Admissions and Diversity after Michigan: The Next Generation of Legal and Policy Issues* (New York: The College Board, 2006), http://www.collegeboard.com/prod_downloads/diversitycollaborative/acc-div_next-generation.pdf. See also George R. La Noue, "Michigan's Homework Assignment," *Academic Questions* 18, no. 2 (Spring 2005): 49–56, and George R. La Noue and Kenneth L. Marcus "'Serious Consideration' of Race-Neutral Alternatives in Higher Education," *Catholic University Law Review* 57, no. 4 (Fall 2008): 992–1044.

concept of critical mass be defined and measured? Is the number of students necessary to achieve a critical mass the same for every group?

The use of racial preferences in selective universities, where they are most common, creates winners and losers in the zero-sum admissions game. To answer narrowly tailored issues, campuses will need to know how many applicants are affected by the use of race and what their backgrounds are. Otherwise the campus and the reviewing court could not know whether the process is actually producing the constitutionally protected goal of educational diversity or is serving an illegitimate purpose. If examination shows very few students are affected, then the question is whether the use of race is worth it. If many students are affected, then the university's legal and political burden will escalate.

What are the measurable educational benefits to achieving a particular critical mass? What race-neutral programs should be tried first to achieve the diversity benefits and how should their effects be measured? This is just the beginning of the list of issues that will have to be researched if a campus chooses to use race as a decision-making factor.

Step 4: Create an Appropriate Public Discussion of Race-Preferential Policies

When discussions of the use of race on campus were exclusively under the diversity/inclusion mantra promoted by administrators with budgetary and personal stakes in those goals, hard questions were often suffocated and many faculty wanted to avoid the subject. After *Fisher*, there are sound legal grounds for asking these questions. Indeed, the failure to ask them may subject a campus to unnecessary legal action and a loss of public support. Public opinion polls show that most Americans oppose the use of racial preferences. A post-*Fisher* Gallup Poll showed 67 percent of Americans who were asked a nuanced question still opposed considering race in admissions,[19] while a pre-*Fisher* *Washington Post* ABC poll showed 76 percent opposition to a more straightforward question about the use of race in admissions.[20] When the details about the use of preference in campus admissions and the weight that they carry are made public, support for those policies may further decline.

[19]"Gallup: Most Oppose Use of Race in Admissions," *Inside Higher Education*, July 25, 2013, http://www.insidehighered.com/quicktakes/2013/07/25/gallup-most-oppose-use-race-admissions.

[20]Scott Clement, "Wide Majority Opposes Race-Based College Admissions Programs, Post-ABC Poll Finds," *Washington Post,* June 11, 2013, http://articles.washingtonpost.com/2013-06-11/politics/39907625_1_college-admissions-federal-benefits-gay-married-couples.

I am by no means suggesting that *Fisher* can provide a quick fix. Opposition to its emphasis on individual rights and equal protection in the higher education establishment is widespread and tenacious. If the establishment prevails, the embedded standard for admissions and employment will be proportional representation for the affirmative action groups. Individuals will either be under- or overrepresented depending on the group identities assigned to them. On the other hand, if faculty ask the right questions, obtain and critique the compelling interest/narrow tailoring documents, and bring the discussion to the public, some campuses may act in more race-neutral ways. If litigation occurs, existence of these documents will speed up the process and make it less costly to both sides. Courts will have the benefit of a more informed campus debate. It will be helpful for judges to know there is actually a diversity of opinion about the use of race on campus.