**Background Reading for Presentation on the Legal Rights of Students to Access Education for Racial Minorities at the University of Sao Paulo.**

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***Fisher v. University of Texas* and the Next Round of Challenges to Race-Conscious Admissions Programs**

“In order to get beyond racism, we must first take race into account” (Justice Harry Blackmun in *Regents of the University of California v. Bakke*, 1978, p. 407)

**Introduction**

Race remains salient in our education system. After 200 years of slavery of African Americans and the marginalization of other groups, it is not surprising that some populations remain underrepresented in the American higher education system. The U.S. Census Bureau has documented this underrepresentation of racial minorities in colleges and universities across the U.S. (Richards, 2011) and many universities have attempted to remedy this problem through affirmative action or race-conscious admissions programs. When employing a race-conscious admission or affirmative action plan, university officials take race into account when assembling their student bodies. Such policies have attracted legal attention over the years, including examination by the U.S. Supreme Court. The U.S. Supreme Court sorts out many important educational policy matters and has certainly offered guidance in this area. In the most recent case to address affirmative action policies in education, the U.S. Supreme Court found the University of Texas’ race-conscious admissions policy to be constitutional (*Fisher v. University of Texas*, 2016). This article examines the *Fisher* (2016) decision. It analyzes how this decision impacts future race-conscious admissions plans in universities and discusses what legal challenges could be expected in the future. In order to set the context, the current debate, legal background, earlier court opinions and relevant literature are briefly highlighted. The *Fisher* opinion is particularly significant not only because it validated existing legal doctrine, but because it reaffirmed that race-conscious admission plans in higher education are still possible.

**Current Debates Involving Race-Conscious Admissions**

Affirmative action or race-conscious admissions programs have generated controversy (see Donnor, 2015). Proponents of these policies argue that working and understanding people with different backgrounds prepares students for a diverse world. They contend that there are many benefits from interacting with classmates from different backgrounds and it enhances the learning environment in many ways (author, 2003, 2005, 2013; American Council on Education & American Association of University Professors, 2000; Logan, Minca, & Adar, 2012; Orfield & Frankenberg, 2013; Pitt & Packard, 2012).

Some also suggest that affirmative action programs help level the playing field and attempt to make up for years of discriminatory practices in schools. Specifically, the effects of inadequate funding for public schools in low income communities certainly impacts that pipeline of minorities into higher education; these inequities in the education system quiety privilege white students and those from advantaged backgrounds (American Social Science Researchers, 2012; Association of American Law Schools, 2011). These inequities start at an early age; minority students are often more concentrated in high poverty schools (see Saporito & Sohoni, 2007). Race-conscious admissions try to address some of these disparities (see Chang, 2011). Others argue however that race-conscious programs stigmatize students and harm the racial climate on campus. Opponents also posit that race-conscious plans undermine basic meritocratic values and disfavor certain minority groups, such as Asian-Americans (see Brandeis Center for Human Rights Under Law, 2012). Oftentimes, those opposed to affirmative action policies contend that race is too heavily weighted (see Nagai, 2006) or that the U.S. Constitution is colorblind (*Fisher v. Texas*, 2016, Thomas dissenting). As a result, race-conscious or affirmative action programs continue to be legally challenged and the *Fisher* decision is the most recent example (see Hannah-Jones, 2016).

Admissions programs are often challenged when they consider race but at the same time there are other factors often considered in admission that receive much less attention. In addition to GPA and test scores, some universities consider a variety of factors such as the rigor of courses taken in high school, personal essay quality, residency in underrepresented regions, leadership and service activities, *athletic expertise*, socio-economic status, *if your parent dontated money*, or *if you are a legacy* [emphasis added]. While at first glance it may appear that when race is considered students of color are given unfair advantages in admissions, but a more nuanced examination highlights that these other admissions factors may also give an unfair advantage. It is indeed curious as to why some of these other factors are not as widely discussed. For example, with regard to legacies, Kahlenberg (2010) found that nearly three-quarters of research universities use legacy preference policies in admissions. According to Kahlenberg, legacies are likely to be wealthier and whiter than the rest of the student body. In fact, an Office for Civil Right (OCR) investigation into legacies at Harvard University revealed that legacies oftentimes have lower credentials than others, and that they were admitted at twice the rate of non-legacies (Schmidt, 2010).

A 2005 study found that being a legacy raised a student’s potential to be admitted by almost 20% within the 19 selective universities included in the study (Golden, 2010). Espenshade, Chung and Walling (2004) reported that while Hispanic students receive an equivalent of 185 extra SAT points in admissions and African Americans receive an extra 230 points, legacies receive 160 points (on a 1400 point scale). Espenshade and Chung (2005) contend that elite universities often permit legacy preferences but yet the race-conscious admissions policies remain the most controversial.

Likewise, student athletes have also been found to raise a student’s potential to be admitted into a university. For example, at some Ivy League institutions, athletes can account for 20% of the class and as a group often have lower test scores and GPAs than other students in the class (see Bowen & Levin, 2003; New, 2014). Indeed, allowing admission preferences for athletic ability or a parent’s alma matter are merely a different type of affirmative action. As discussed below, the legal analysis when considering race is different from the analysis when considering legacy.

**Legal Background**

When admissions policies are challenged in court, race would be subject to a different analysis than athletic ability, for example. Specifically, state-sponsored racial classifications are considered suspect classifications and are subject to strict scrutiny review (see Deo, 2014; U.S. Dep’t of Justice, 2011). In order to set the context for analyzing the legal issues surrounding race conscious admissions programs, it is important to understand how the courts apply the Equal Protection Clause and Title VI of the Civil Rights Act of 1964 apply to this issue. The Equal Protection Clause of the Fourteenth Amendment states “No State shall … deny to any person within its jurisdiction the equal protection of the laws” (U.S. Const. amend. XIV, §1), requiring that similarly situated individuals be treated the same (*City of Cleburne v. Cleburne Living Center*, 1985). The Equal Protection Clause was drafted by Congress during Reconstruction to ensure that African Americans were treated equally under the law. Given patterns of past discrimination, courts have interpreted the Equal Protection Clause as requiring the state to provide more justification for the use of some classifications of individuals than others. In other words, the Court has employed different levels of scrutiny for different classes of people (*see* *Grutter v. Bollinger,* 2003). There are three levels of judicial scrutiny (i.e., strict scrutiny, mid-level scrutiny, and rational basis). For example, race falls under strict scrutiny, which requires both a compelling governmental objective and a demonstration that the classification is necessary to serve that interest.

The next level is intermediate scrutiny, which is the standard used when the government makes sex-based classifications (*Mississippi University for Women v. Hogan*, 1982). The government must demonstrate that the classification based on sex serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. For example, it would be easier to justify a program focused on enrolling women in engineering schools than one focused on enrolling racial minorities because of the lower level of scrutiny assigned to sex. The third level of judicial scrutiny is referred to as rational basis review, which requires a legitimate government objective with a minimally rational relation between the means and the ends (Rapp, 2009). Government classifications based on disability, for example, falls under this level of scrutiny. It should be noted that the level of scrutiny applied to the classification does not turn on whether the purpose of the classification is benign or malicious.

Title VI of the Civil Rights Act of 1964 covers discrimination based on race, color, and national origin. It applies to any program or activity receiving federal financial assistance. When a program is found to have discriminated, the federal agency that provides the assistance can initiate fund termination proceedings or can refer the matter to the Department of Justice for appropriate legal action. Also, in order to obtain monetary damages under Title VI, the plaintiff must demonstrate that the institution that received federal funds intentionally violated Title VI. Whereas the Equal Protection Clause would not apply to private schools because there is no state action, Title VI applies to those private institutions that receive federal funding.

To be certain, several significant changes in public schools are a result of federal law and constitutional provisions (see Lamiell, 2012). For example, federal civil rights laws have lifted barriers for not only minorities (Title VI) but for individuals with disabilities (i.e., Individuals with Disabilties of Education Act) and females (Title IX of the Education Amendments of 1972) in public schooling. Likewise, major federal court opinions have interpreted the U.S. Constitution to protect students’ rights in education (e.g., *Brown v. Board of Education*, *Tinker v. Des Moines*). There is no doubt that laws and court opinions influence educational policy matters and this is especially the case with race-conscous or affirmative action programs in universities.

**Selected Past Affirmative Action Cases in Higher Education**

This section highlights four earlier race-conscious admissions cases that reached the Supreme Court. These earlier opinions provided important precedent for the Court in the recent *Fisher* case. The Supreme Court’s first decision addressing a university’s consideration of race as part of its admissions program was decided in 1978 (*University of California Regents v. Bakke*). The plaintiff was a white male who had been rejected by the University of California Davis Medical School. He filed a lawsuit, arguing that the medical school’s use of race in its admissions programs violated the U.S. Constitutions Fourteenth Amendment’s Equal Protection Clause, among other claims. The highly divided Court held that the University’s program was unconstitutional. Importantly, however, the Court stated that race could be considered as one of many factors in admissions. In so doing, the Court granted deference to the University, and noted that “good faith on the part of the university should be assumed absent a ‘showing to the contrary’” (p. 318).

Although Justice Powell agreed that diversity could be considered a compelling government interest, he did find that the University’s admissions policy was not narrowly tailored. According to Justice Powell, the plan was not tailored enough because minority student admissions were considered separately and the school was perceived as admitting a fixed number of minority students. He asserted that the medical school’s quota system, which reserved a specified number of seats for minorities, did not further the goal of diversity because he envisioned the term “diversity” to encompass more than just race. After *Bakke*, schools and universities were still unclear about what was legally permissible when considering race. The Court did, however, suggest that racial classification to remedy past instance of discrimination may not be permissible. According to Justice Powell, a “university’s broad mission [of] education is incompatible with making the judicial, legislative, or administrative findings of the constitutional or statutory violations necessary to justify remedial racial classifications (p. 308-09). Two cases from the University of Michigan in 2003 provided further clarity the diversity rationale.

In *Grutter v. Bollinger* (2003)*,* Justice O’Connor wrote for the majority upholding the University of Michigan law school’s admissions program because it considered the applicant’s characteristics, including race, holistically in the admissions process. After the Court found that diversity was compelling, it next addressed whether the law school’s program was narrowly tailored. The Court noted that when race-based action is necessary to further a compelling governmental interest, this action will not violate the Equal Protection Clause as long as the narrow-tailoring requirement is also satisfied. According to the Court, narrow tailoring does not require that every conceivable race-neutral policy must be attempted before an affirmative action program is adopted. Rejecting the race neutral percentage plan arguments advocated by the United States, the Court reasoned that the United States did not explain how such plans would work at the graduate school level. The Court further rejected the percentage plans because “they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university” (p. 340).

In its analysis, the Court dismissed the Chief Justice’s argument that the law school is attempting to achieve “racial balancing” in trying to attain a critical mass of minority students. In response to this argument, the majority asserted that there is no quota because the number of underrepresented minority students “[enrolled in] law school differs substantially from their representation in the applicant pool and varies considerably for each group from year to year” (p. 336). Thus, the law school’s policy was narrowly tailored because its affirmative action program considered many factors in addition to race when admitting students.

The *Gratz v. Bollinger* (2003) opinion was issued the same day as *Grutter*, but in this case the majority struck down the undergraduate affirmative action program because it was not narrowly tailored. With Justice Rehnquist writing for the majority, the Court held that the admissions program in the College of Literature, Science and the Arts automatically distributed twenty points to every single applicant from an “underrepresented minority” group. The Court reasoned that Justice Powell’s opinion in *Bakke* emphasized taking a more holistic approach to admissions. Specifically, the Court stressed that Justice Powell’s reasoning would not permit any single characteristic to automatically ensure an identifiable contribution to a university’s diversity. The undergraduate’s program of automatically distributing twenty points was not flexible. As a result, the undergraduate program was found to violate the Equal Protection Clause.

As noted in *Grutter,* the Court defined how race-conscious university admissions programs must be designed to be narrowly-tailored – as articulated in *Bakke* they cannot be a quota system that insulates certain applicants from competition with others based on race or ethnicity. The law school’s admissions program in *Grutter* satisfied *Bakke’s* distinction of recognizing race or ethnicity only as a “plus” among other characteristics, even if the school’s goal was to attain a critical mass of underrepresented minority students. The law school considered each applicant as an individual, looking at how each may contribute to the diversity of the schools instead of in a more rigid way. Within these two decisions, the Supreme Court clarified that having a diverse student body is a compelling interest. The Court dispelled the notion that diversity in education had been foreclosed, either expressly or implicitly, by its affirmative action decisions since *Bakke*.

There have been many articles discussing affirmative action in the legal literature but only a few articles in the education literature that use legal analysis to discern the implications for universities Many studies both grounded in law and education have examined the benefits of diversity and the impact affirmative action plans have had on diversity levels. This article is a legal analysis for educators that focuses on the implications for school personnel in light of the recent *Fisher v. University of Texas* decision. There is currently no article in the education literature that examines the legal and educational policy implications of this June 2016 Supreme Court opinion. It should be noted that this article is specifically written for a non-legal audience. The research is especially timely because it provides an in-depth legal examination of the Court’s most recent affirmative action decision and discuss what to expect in future cases. The implications of these findings are important for educators who are interested in learning the legal landscape of race-conscious admissions after *Fisher* and what to expect with future litigation.

**Methods**

There have been many instances when court decisions had an impact on important educational policy matters. Whether through desegregation decisions (*Brown v. Board of Educ.*, 1954), the rights of English language learners (*Lau v. Nichols*, 1974), or by providing greater access to students with disabilities (*Board of Educ. v. Rowley*, 1982), courts have brought about social change (see Rosenberg, 2008). Specifically, because law influences educational policy matters (Chemerinsky, 2003; Superfine, 2009), a legal analysis was conducted to learn what the recent *Fisher* opinion means for universities that hope to use race-conscious admissions policies to increase student body diversity. Specifically, the article uses legal research methods (First, 2006; Lee & Adler, 2006; Russo, 2006; Schimmel, 1996) to analyze the June 2016 *Fisher v. University of Texas* (2016) decision. Russo (2006) explains legal research methodology as “. . . a form of historical-legal research that is neither qualitative nor quantitative . . . it is a systemic investigation involving the interpretation and explanation of the law” (p. 6). According to Beckham et al. (2005), this method combines elements of legal reasoning with an evolutionary perspective on the genesis and development of particular issues relevant to education. Beckham and his colleagues contend that our understanding of the law is perpetually transformed through the adjudication of new cases.

In order to construct this legal analysis, the following documents were examined and coded:

1. Federal District Court Decision (2008)

2. Fifth Circuit Court of Appeals Decision (2011)

3. U.S. Supreme Court Decision (*Fisher* I) (2013)

4. Fifth Circuit Court of Appeals Decision (2014)

5. Briefs, Pleadings, and Motions

6. U.S. Supreme Court Decision (*Fisher* II) (2016)

In total, over 1000 documents were analyzed for the purposes of this study. The court opinions were first coded in the following way: the legal claims were identified (i.e., Equal Protection Clause, Title VI), the Plaintiff’s and the Defendant’s arguments were listed, and the case outcomes were included. In addition to coding whether the Plaintiff wins or loses, the legal precedent relied upon in the case was coded as well (e.g., *Bakke*, *Grutter*, other federal circuit court opinions). By coding the documents this way, I was able to analyze all of the complex legal arguments involved and how the courts applied past precedent. This analysis also permitted me to learn how this most recent decision impacts affirmative action plans in universities and what legal challenges could be expected in the future.

**Findings**

In 2008, two white students applied for admission to the University of Texas-Austin and were denied. They filed suit, arguing that the university engaged in racial stereotyping and discriminated against them based on their race in violation of the Equal Protection Clause of the Fourteenth Amendment. In order to increase racial and ethnic diversity at the University, in 1997, the state legislature created a plan where 10% of each graduating class in Texas high schools would be accepted at the University of Texas. The university admitted about 81% of the freshman class under this plan in 2008. Those students who did not fall within the top 10% of their graduating high school class, could still enter a separate application pool where university officials would consider other factors (e.g., special talents, race, leadership qualities). This admissions policy has led to increased enrollment for black and Latino students (see *Fisher v. Texas*, 2016).

While proponents argue that the top 10% plan is useful, it does not permit universities to consider the unique qualities of an individual. For example, due to highly segregated K-12 schools in Texas, minorities in less competitive school districts could receive an unfair advantage. To illustrate, a minority student who actually has a much stronger application (higher test scores, GPA, better written personal statement) might be in the top 20% of his class and not be admitted under the 10% policy. This student who has a lot of potential would be denied because he attended a very competitive and high achieving high school. At the same time, a minority student in a very low performing school with a much weaker application would be admitted if he was in the top 10% of his class. Thus, in addition to the more rigid 10% plan, flexible and holistic process was designed for university officials to consider such imperfect situations and assemble a class that advances its educational goals, including diversity. The university believed that its plan aligned with the Supreme Court’s earlier ruling in *Grutter v. Bollinger* (2003).

The lead plaintiff in this case, Abigail Fisher, was in the top 12% of her high school class and was considered within this pool for admission. She had a 3.59 GPA and an 1180 on the SAT. The 25th and 75th percentile of the incoming class scored between 1120 and 1370 on the SAT. Ms. Fisher also participated in her high school orchestra, math competitions, and Habitat for Humanity. The second plaintiff eventually withdrew from this case.

**Previous History of *Fisher v. University of Texas***

The federal district court upheld the University’s admissions policy, finding that it was consistent with the holding in *Grutter v. Bollinger* (2003). The Fifth Circuit Court of Appeals affirmed this decision and a request by Fisher for an *en banc* review (e.g. a request to have the case reheard in front of all active judges in that circuit) was denied. The U.S. Supreme Court decided to hear the case and issued an opinion in 2013. In a 7-1 decision, the Supreme Court vacated the Fifth Circuit’s opinion and sent the case back to the lower court with instructions to more carefully analyze the University’s admissions policies (*Fisher I*). The Court needed the university to demonstrate that its admissions plan was narrowly tailored to obtain the education benefits of diversity. In this opinion, Justice Kennedy posited that “[a]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect” (p. 2419).

In a dissenting opinion, Justice Ginsburg asserted that she would have affirmed the Fifth Circuit’s decision and upheld the University’s plan. She stressed that universities should not be blind to the country’s discriminatory past and that the state’s ten percent policy drew students from racially segregated schools. The Fifth Circuit reheard this case on remand and again held in favor of the University. The majority ruled that race can be used a one part of a holistic admissions program when it cannot otherwise achieve diversity. The Fifth Circuit denied to rehear the case *en banc*. Fisher appealed to the U.S. Supreme Court and it agreed to hear the case again.Justice Ginsburg argues that the Texas plan to take students from roughly the top 10 percent of each of the state’s public high schools was adopted with the state’s racially segregated neighborhoods and schools “front and center stage.” So while she applauded the court’s decision not to “cast off the equal protection framework” laid out in the Grutter case, “it stops short of reaching the conclusion that framework warrants.” She would have, she said, affirmed the judgment of the court of appeals. Justice Ginsburg argues that the Texas plan to take students from roughly the top 10 percent of each of the state’s public high schools was adopted with the state’s racially segregated neighborhoods and schools “front and center stage.” So while she applauded the court’s decision not to “cast off the equal protection framework” laid out in the Grutter case, “it stops short of reaching the conclusion that framework warrants.” She would have, she said, affirmed the judgment of the court of appeals. Justice Ginsburg argues that the Texas plan to take students from roughly the top 10 percent of each of the state’s public high schools was adopted with the state’s racially segregated neighborhoods and schools “front and center stage.” So while she applauded the court’s decision not to “cast off the equal protection framework” laid out in the Grutter case, “it stops short of reaching the conclusion that framework warrants.” She would have, she said, affirmed the judgment of the court of appeals.

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In June 2016, in a 4-3 decision, the U.S. Supreme Court upheld the University of Texas’ race-conscious admissions policy; it found no violation of the Equal Protection Clause (*Fisher II*). Justice Kagan recused herself from this decision because she was involved with this issue when she served as the U.S. Solicitor General. Justice Kennedy wrote the opinion, which was surprising to many because he has never before voted to uphold a race-conscious admission plan before.

The Court ruled that the University presented sufficient evidence that its ten percent policy was not adequate to meets its diversity goals and that race could be considered as part of a broader assessment of qualifications. The Court articulated a few controlling principles to be considered when determining the constitutionality of a university’s race-conscious admissions policy. First, “[r]ace may not be considered [by university officials] unless the admissions process can withstand strict scrutiny,” which requires university officials to clearly demonstrate that its “purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary. . to the accomplishment of its purpose” (p. 2208). Also, after a university gives “a reasoned, principled explanation” for its plan, deference must be given “to the University’s conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals” (p. 2208). This deference is not absolute; the majority highlighted that universities maintain a duty to constantly review and refine their affirmative action policies, requiring “periodic reassessment of the constitutionality, and efficacy, of its admissions program” (p. 2210). It also warned that the university “should remain mindful that diversity takes many forms” and refrain from rigid racial classifications (p. 2210).

The Court further clarified that the compelling interest that justifies consideration of race in college admissions policies is not an interest in enrolling a certain number of minority students. Instead, a university may implement a race-conscious admissions program as a means of obtaining the educational benefits that flow from student body diversity. Justice Kennedy observed that “[a] university is in large part defined by those intangible ‘qualities which are incapable of objective measurement but which make for greatness,’” and that “[c]onsiderable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation’s education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity” (p. 2214). The majority stressed that when considering race in admissions, it should be a “factor of a factor of a factor” (p. 2207).

It is important to note that the majority highlighted that the University of Texas’ program is unique from other affirmative action policies because “it combines holistic review with a percentage plan” (p. 2208). Significantly, the majority referred to the University’s approach as “sui generis,” which means that it is one-of-a-kind. The fact that the University first attempted race neutral measures and then carefully considered a race-conscious plan appeared to be an important factor in the decision. The Court asserted that “[t]he component of the University’s admissions policy that had the largest impact on petitioner’s chances of admission was not the school’s consideration of race under its holistic-review process but rather the Top Ten Percent Plan” (pp. 2208-09).

Justice Alito wrote a dissenting opinion that was joined by Justices Thomas and Roberts. In this 51-page dissent, Justice Alito argued that the university did not specifically identify the interests that its consideration of race should serve; Texas did not demonstrate the need for a race-conscious policy. He also posited that university officials were given too much deference. Justice Alito gave the example of Asian-American students to highlight the potential for discrimination against other groups when affirmative action plans are in place. Justice Thomas wrote a one-page dissent emphasizing his belief that all affirmative action programs are unconstitutional. He wrote that “[t]he Constitution abhors classifications based on race 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” (p. 2423). In the end, the Court upheld the principles set forth in *Bakke*, *Grutter* and *Fisher I* with perhaps requiring a more exacting standard for universities that consider race in admissions.

**Discussion and Implications**

Although *Fisher* (2016) reaffirmed *Bakke*, *Grutter* (2003) and *Fisher* (2013), it does provide a more detailed blueprint to universities that wish to adopt race-conscious plans. For example, Laurence Tribe, Loeb University Professor and professor of constitutional law, commented that

. . . *Fisher v. Texas* means that race-conscious affirmative action programs in higher education will be upheld as long as they follow the Court's guidelines for avoiding crude racial quotas and for fine-tuning those programs over time on the basis of intelligently articulated educational philosophies targeting the many dimensions of diversity, as Harvard’s programs of affirmative action have taken great care to do…. What some feared (and others hoped) would be the death knell for affirmative action in colleges and universities has instead become a new lease on life for affirmative action and a blueprint to follow going forward. Quite apart from the way today’s decision will be of help to Harvard in fending off the pending attack on its admissions policies, this is a huge national landmark for racial inclusion, all the more significant because of the bullet the nation dodged. . . (Bolotnikova, 2016, p. 1).

Indeed, this straight-forward opinion validated existing precedent. The majority clearly permits educational institutions to adopt affirmative action programs that meet constitutional requirements.   Justice Kennedy suggested that the university’s goals were clear and that they advanced a compelling interest. The university also was able to demonstrate that the Ten Percent Plan did not produce meaningful diversity. The opinion also signals that universities and schools get some leeway to implement programs that work for them. However, at the same time, the opinion stresses that universities and schools must seriously consider and continuously monitor their race-conscious admissions plan. If circumstances change, the university may need to modify its plan. In *Fisher* (2016), the record indicated that the University of Texas took a very careful and thoughtful approach when creating and monitoring its race-conscious plan. For example, the administration held interviews and conducted data reviews of the plan. Other universities would be wise to take note. Justice Kennedy included serious language about the need for universities to provide evidence for why their plan is necessary and narrowly tailored but at the same time suggests that universities know their practice better than courts. When employing a race-conscious plan, the Court continued to stress that the careful review of the uniqueness of the applicant is necessary.

The court stressed preference for race-neutral policies and stressed that when no “workable race-neutral alternatives” would achieve the same educational benefits of diversity, a race-conscious plan could be justified (p. 2218). Some scholars argue that admission officers can use socio-economic status (SES) or other means to achieve desirable levels of diversity. The idea is that there are a higher percentage of minorities from low-income families. Advocates also argue that these types of plans are more legally viable. Specifically, unlike race, socio-economic status does not fall under strict scrutiny review. As such, admissions officers only need to demonstrate a legitimate governmental objective with a minimally rational relation between the means and the ends when considering a student’s socio-economic status in admissions. In other words, legally, it is a much easier standard to satisfy.

Kahlenberg (2015) contends that while law schools are relying on race to create diversity, they do not pay close enough attention to socio-economic status. He cites that at the top twenty law schools, the vast majority of law students come from the top socioeconomic half of the population (89 percent for African Americans and 63 percent for Latinos) (see also, Bazelon, 2013; Carnevale & Strohl, 2011). Others argue, however, that assembling a more socioeconomically diverse student body does not always result in racial diversity. Krueger et al. (2006) observed that “[t]he correlation between race and family income, while strong, is not strong enough to permit the latter to function as a useful proxy for race in the pursuit of diversity” (p. 309).

Some studies have raised concerns that socio-economic status will not be as effective in creating a racially and ethnically diverse class (see Alon, 2015; Reardon et al., 2015). Howell (2010) predicts a 10% decrease in minority enrollment at selective schools if universities may no longer consider race in admissions. For example, California universities may no longer consider race in admissions as a result of state ballot initiative. After this initiative, minority enrollment at the state’s selective schools dropped; African American enrollment at UC-Berkeley fell from 7% to 3% (Association of American Law Schools, 2015). The consensus among much of this research is that attaining racial diversity at top schools would be difficult if universities resorted to only considering SES as opposed to race. Likewise, at the University of Michigan, after Proposal 2, which prohibited considering race in admissions, enrollment for African American students decreased by over 25% and Latino enrollment fell by 20% (American Social Science Researchers, 2012). Others cite research to the contrary. For example, one study revealed some success in maintaining or increasing enrollment of African-American or Hispanic students after strategies targeting SES were adopted (Potter, 2014). Others cite to the University of Colorado’s admissions formula that increased racial and ethnic diversity when preference was given to those students from socioeconomically disadvantaged backgrounds (Gaertner, 2014).

Also, private educational institutions would not be directly bound by the Equal Protection Clause because they are not state actors, but many private schools and universities accept federal financial assistance and are therefore constrained by Title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d et seq.). Further, the reach of this decision does not extend to states that prohibit the consideration of race in admissions, such as California’s Proposition 209.

Finally, although this decision is a win for affirmative action proponents, the decision is narrow. As noted, the Court found that the University of Texas’ program was unique, which suggests that context matters. While universities will be able to use *Grutter* and *Fisher* as blueprints, they would be wise to justify their unique circumstances for using a race-conscious plan.

***Future Litigation: What Should We Anticipate Next?***

There are a few areas to watch moving forward. To be certain, there will likely be a new frontier of legal challenges. Even though universities were given some leeway in designing narrowly tailored race-conscious admissions plans, admissions factors will continue to be under the microscope. Further, although *Fisher* was a narrow decision, it will still likely affect other affirmative action decisions such as the challenges discussed below.

Roger Clegg, the president of the Center for Equal Opportunity, said that “[t]he court’s decision leaves plenty of room for future challenges to racial preference policies at other schools” (Liptak, 2016, p. 1). Even before *Fisher* was decided there were lawsuits filed against Harvard and the University of North Carolina-Chapel Hill. Likewise, a complaint was filed with the U.S. Departments of Education and Justice against Brown, Yale, and Dartmouth in 2016 because of their race-conscious admissions plans.

In the recent lawsuits filed at both Harvard and at the University of North Carolina Chapel Hill, plaintiffs claim that the affirmative action plans in place there discriminate against high achieving whites and Asians (Plowman, 2014; *Students for Fair Admissions v. President & Fellows of Harvard College; Students for Fair Admissions v. UNC*, Complaint, 2014). In both lawsuits, the Students for Fair Admissions filed the lawsuit but there are anonymous high achieving applicants who were rejected identified in the lawsuits. These anonymous applicants were allegedly denied because of the race conscious admissions policies.

At UNC, in the complaint the white plaintiff alleges that the average high-school GPA and SAT scores for Asian-American and white students are 4.57 and 1375 whereas the scores for African-American, Hispanic and American Indian/Alaska Native are 4.40 and 1269 (*Students for Fair Admissions v. UNC*, Complaint, 2014, p. 19). In the Harvard suit, the plaintiffs alleged that Harvard’s affirmative action program used illegal quotas, employed racial balancing, and that Asian-American students are held to a higher standard (*Students for Fair Admissions v. President & Fellows of Harvard College*, 2017). In the Harvard complaint, the plaintiffs also discusses that legacy preferences and the children of large donors should be eliminated because these legacy and donor spots preference white, wealthy applicant and disadvantage minority applicants and applicants from low socioeconomic households. While the focus in the Harvard complaint is that the current policies discriminate against Asian-American students, the UNC cases highlights the negative impact the admissions policy has on both African-American and Asian-American applicants. The plaintiffs would like to see a new plan in place that is similar to the University of Texas’ top ten percent plan. They contend with the ten percent plan in place, minority enrollment would dramatically increase. They argue that race is the dominant factor in the UNC admissions process and that it should move to a more race neutral approach.

The basic argument in both cases is that these admissions program do not satisfy strict scrutiny requirements. They argue that the Supreme Court has failed to end racial bias in affirmative action programs and they want to see earlier affirmative action decisions such as *Bakke* and *Grutter* overruled. Although the plaintiffs agree that racial diversity at university campuses is important, they also contend that race-neutral alternatives should be employed. Although the *Fisher* (2016) case was narrow, it will still impact these cases. Specfically, Harvard and UNC will certainly need to demonstrate that they follow the Court’s guidelines of carefully reviewing the admissions program to ensure that race is considered flexibly and that an individualistic review of applicants takes place. They would be wise to follow Tribe’s (2016) advice and demonstrate how over time admissions plans were refined to target the different dimensions of diversity. Both of these lawsuits were put on hold to await the resolution of the *Fisher* (2016) case. The Harvard and UNC cases are now moving forward. Although they are only in federal district courts at the time, the plaintiffs appear to be building a case that may eventually reach the Supreme Court.

In 2016, more than 130 organizations representing Asian-American interests requested that the Departments of Education and Justice examine Yale, Brown and Dartmouth’s admissions practices that they believe may discriminate against well-qualified Asian-American applicants (Belkin, 2016). The organizations highlight data from the U.S. Department of Education to demonstrate that Asian-American applicants need to score 140 points higher than a White student, 270 points higher than a Hispanic student and 450 points higher than an African American student in order to have the same chance at admission. They argue that these institutions are engaging in racial quotas and caps to create their ideal racial balance. They compare this alleged practice with the Chinese Exclusion Act or the internment of Japanese Americans during World War II (Belkin, 2016; Fuchs, 2016). Similar complaints have been filed with the Departments and will no doubt continue in the post-*Fisher* era.

In addition to the litigation and complaints to the Departments of Education and Justice, groups opposed to affirmative action policies will continue to target other areas. To be certain, litigation has not been the only method for challenging race-conscious admissions plans.  Affirmative action programs have also been challenged through state ballot initiatives and legislation. For example, as mentioned, Proposition 209 in California, was a proposal to amend the state constitution to forbid any consideration of race or ethnicity in public decision-making, including admissions to state universities.  California voters adopted Proposition 209, and the recent *Fisher* decision does not impact Proposition 209. Although *Fisher* was a win for affirmative action, the battle is clearly not over in the courts, the departments, or in the state houses.

**Conclusion**

Given the current inequities that continue to exist in education, race still matters in this country. Although universities will still be able to address this issue through race-conscious policies, there are limitations. Specifically, universities will likely need to demonstrate that their admissions program do not produce enough diversity through race neutral approaches and why a racially diverse student body helps the institution meet its educational mission. Although the Court noted that the *Fisher* decision is somewhat limited to the distinctiveness of the University of Texas’ admissions program, the opinion does provide important guidance to universities regarding the criteria that will be applied in evaluating race-conscious admissions programs. The Court’s ruling clarifies that the bigger the role race plays in an admissions system, the more suspect the system will be. While this case offers important guidance to university officials, it will likely not end the legal battles over race-conscious plans.

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