

***After Fisher: What the Supreme Court's Ruling
Means for Students, Colleges, and the Country***

Constitutional Findings of the Ruling and Implications for Civil Rights

Theodore M. Shaw, J.D.

University of North Carolina School of Law at Chapel Hill

Fisher II is a victory for proponents of diversity and affirmative action. Colleges and universities can continue to consider race as a factor in admissions where necessary to provide opportunities for students from underrepresented groups. Over a period of almost 40 years the Supreme Court has repeatedly upheld the right of colleges and universities to pursue enrollment of diverse classes of students. Diversity and affirmative action remain alive in higher education, repeatedly sustained and even strengthened by the Supreme Court.

Equal Protection Clause and Compelling State Interest

- The University of Texas' consideration of race in pursuit of diversity, notwithstanding its "Ten Per Cent Plan," does not violate the Fourteenth Amendment's Equal Protection Clause.
- The UT admissions policy, in which race was a "factor of a factor of a factor," did not discriminate against Fisher.
- Upon consideration of the Supreme Court's decision in *Fisher I*, which emphasized the duty of the Fifth Circuit Court of Appeals to apply rigorously the "strict scrutiny" standard required under the Equal Protection Clause to race conscious measures, UT demonstrated its compelling state interest in pursuit of diversity.

Well-reasoned, Principled Explanations Matter

- A university's admissions policy that includes consideration of race in order to achieve diversity is entitled to some, but not complete, deference.
- A university should engage in regular evaluation of data and consideration of student experience, and tailor its approaches in light of changing circumstances, to ensure that race plays no greater role than is necessary to meet its compelling interest.
- Student diversity helps to break down racial stereotypes, promotes better understanding of people of different races, promotes better learning outcomes, and prepares students for an increasingly diverse workforce and society. A university's goals must not be "elusory or amorphous"; they must be sufficiently measurable to permit judicial scrutiny.
- UT's educational values, which included the destruction of stereotypes, the promotion of cross-racial understanding, the preparation of its student body "for an increasingly diverse work force and society, and the cultivation of a set of leaders with legitimacy in the eyes of the citizenry," were concrete and precise goals.
- While demographics alone are not dispositive, they may have some value as a gauge of a university's ability to enroll students who can offer under-represented perspectives.

- Once a university gives “a reasoned, principled explanation” for its decision, 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.”

Obligations of Universities

- As set forth in *Grutter*, narrow tailoring does not require exhaustion of every conceivable race-neutral alternative or that a university choose between maintaining a reputation for excellence and fulfilling a commitment to provide educational opportunities to members of all racial groups.
- An admissions system that applies holistic review of applicants, and which does not mechanically assign points but rather treats race as a relevant feature within the broader context of a candidate’s application, as in *Grutter v. Bollinger*, satisfies constitutional review.
- “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.”
- A university has an ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.