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Supreme Court must reconsider UT's admissions policy

By Ilya Shapiro

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Those who follow the college-admissions game have long suspected that race plays a larger role in the application process than administrators let on (and the Supreme Court has allowed). The University of Texas at Austin is no exception — and an explosive new report should give the high court all the more reason to again review the school's admissions policy

First, some history. Two years ago, in Fisher v. University of Texas at Austin, the U.S. Supreme Court on a 7-1 vote reversed a lower-court ruling that had allowed UT-Austin to use race in its admissions policy.

After holding that the university bore the burden of proving that its racial preferences were necessary and narrowly tailored, the court sent the case back to the U.S. 5th Circuit Court of Appeals.

The 5th Circuit had to determine whether UT-Austin had offered enough evidence to prove that its use of race was "narrowly tailored to obtain the educational benefits of diversity." (Recall that the school gets most of its students through its race-neutral "top 10 percent" plan — which offers admission to high school graduates in the top 10 percent of their class — then fills the remaining seats with a "holistic" rating that takes into account various additional factors.)

On remand, a split 5th Circuit panel once again sided with the university, holding that even if the top 10 percent plan already provided a "critical mass" of minority students, the use of racial preferences was necessary to achieve another, special kind of diversity. Judge Emilio Garza's dissent pointed out that the majority let the university get away with not actually proving anything approaching what the Supreme Court required.

And so Abigail Fisher, the white former applicant suing UT-Austin, has petitioned the high court to take her case again. In effect, she's asking the Supreme Court to enforce its own previous order.

She has a strong case. Instead of applying strict scrutiny to determine the validity of UT-Austin's racial classifications, the lower court deferred to the school's assertion that its "holistic review" program is carefully calibrated to attain a necessary measure of "qualitative" diversity.

Whatever that "qualitative" diversity is, the record shows that the university uses race in an ad hoc fashion, entirely divorced from its stated justification. The record actually understates the gulf between UT-Austin's actions and their asserted purpose.

While claiming to evaluate applicants on their academic and personal achievements, the school admitted substantial numbers of students who were flagged by its president for special treatment regardless of their "holistic" scores. Its own recently published report on this secret track of "holistic review" concluded that race and ethnicity were an "important consideration" in those decisions, which resulted in the admission of students with scores and achievements substantially below those of other applicants. In other words, UT-Austin uses race in ways that are precisely contrary to its stated aims, confirming that its newly minted "qualitative" diversity rationale is a pretext.

That conclusion is further confirmed by the university's public comments on the Fisher saga. UT-Austin President Bill Powers explained in an op-ed last year that consideration of race is important to attain demographic parity, overcome societal discrimination and combat misperceptions about the university's reputation — all of which the Supreme Court has said in no uncertain terms are forbidden purposes. Notably absent from his discussion is any mention of what the university's legal filings claim is its overriding purpose: the "qualitative" diversity.

The lower court failed to see through UT-Austin's pretext because it ignored the requirement of the Supreme Court's broader equal-protection jurisprudence that a "strong basis in evidence" must support the necessity of a governmental entity's use of racial classifications. The court said in the 1989 case of Richmond v. J.A. Croson Co. that absent such a showing, "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics."

Correcting this error is crucial to preventing the university's pretextual approach from becoming a model for other schools seeking to circumvent Supreme Court precedent — and ultimately the Constitution's prohibition on racial preferences.

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