Case in Point - A Review of Fisher v. The University of Texas at Austin

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Since 1950 The University of Texas at Austin (UT) has been the focus of three landmark cases concerning race-based admissions; Sweatt v. Painter (1950), Hopwood v. Texas (1996), and most recently Fisher v. The University of Texas at Austin (Fisher v. UT), where the Supreme Court voted 7-1 to vacate and remand the case to the Fifth Circuit Court of Appeals ("Fisher v. University of Texas at Austin : SCOTUSblog," 2013). In July 2014, the U.S. Fifth Circuit Court of Appeals upheld the UT admissions policy with a 2-to-1 decision (Abigail Fisher v. State of Texas, 2014). This article will review the UT race-based admissions policy, demographics from the 2008 entering class (when Fisher applied), Supreme Court case, and admissions implications after the final verdict.

**UT Admission Policy**

After the Hopwood ruling, applications from ethnically diverse students declined sharply (Healy, 1997). In response, the Texas Legislature passed HB 588 in the 75th Legislative Session, establishing what is referred to as the top 10% law ("75(R) HB 588 Enrolled version," 1997). This law required Texas public colleges and universities to admit first-time freshmen if they graduated in the top 10% of their graduating class. In 2009, an amendment to this bill allowed UT to cap the automatically admitted students (those graduating in the top 10%) to 75% of the incoming class omitting some students in the top 10% ("81(R) SB 175 - Enrolled version - Bill Text," 2009). The amendment affected admissions in the 2011-2012 academic, after Fisher had applied for the class of 2008.

UT has a holistic admissions process for students who rank outside the 10% automatic admit, international students, and out-of-state students. There are three main areas of the holistic review: academic achievement, personal achievement, and special circumstances. Examples of special circumstances include consideration for at-risk variables such as socioeconomic, single parent family, primary language at home, and race and ethnicity ("Application review," 2013).

**Abigail Fisher**

Fisher was a 2008 graduate of Sugarland High School, where she finished in the top 12% of her class. Fisher “dreamed of going to UT ever since the second grade. My dad went
there, my sister went there…it was a tradition I wanted to continue” (Abigail Fisher vs. University of Texas at Austin, 2012). Additionally, Fisher claimed classmates that were not white gained admission into UT with lower class rank and test scores. Fisher and a co-plaintiff (who has dropped the case) where chosen by the Project for Fair Representation and anti-affirmative action activist Edward Blum, who is paying all legal fees (Smith, 2010).

Fall 2008 Class

In the year Fisher was applied to UT, 3590 students were non-automatic admits (outside the top 10%). As shown in Table 1, the largest demographic of that group were whites (60%), and they were the only demographic that raised percentage points compared to the top automatic admits (top 10% enrollment) which was 48%. Blacks were 6% of the automatic admits while Hispanic was 42%. In the more holistic view of admissions, they were 4% and 11% respectively.

Table 1.
Comparison of Race/Ethnicity of Automatic Admits and other Enrolled Freshmen Summer/Fall 2008

<table>
<thead>
<tr>
<th>Race</th>
<th>Automatic Admits</th>
<th>Other Admits</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>N</td>
<td>%</td>
<td>N</td>
</tr>
<tr>
<td>AMERICAN INDIAN</td>
<td>30</td>
<td>0%</td>
<td>20</td>
</tr>
<tr>
<td>ASIAN AMERICAN</td>
<td>1744</td>
<td>19%</td>
<td>565</td>
</tr>
<tr>
<td>BLACK</td>
<td>582</td>
<td>6%</td>
<td>146</td>
</tr>
<tr>
<td>FOREIGN</td>
<td>234</td>
<td>3%</td>
<td>302</td>
</tr>
<tr>
<td>HISPANIC</td>
<td>2218</td>
<td>24%</td>
<td>403</td>
</tr>
<tr>
<td>WHITE</td>
<td>4440</td>
<td>48%</td>
<td>2142</td>
</tr>
<tr>
<td>Not Reported</td>
<td>5</td>
<td>0%</td>
<td>12</td>
</tr>
<tr>
<td>Total</td>
<td>9253</td>
<td>100%</td>
<td>3590</td>
</tr>
</tbody>
</table>

Note. Adapted from “Student Profile Admitted Freshman Class of 2008,” 2008, by The University of Texas at Austin.

Supreme Court

Influential organizations such as the Ivy League, The College Board, and 57 fortune 100 businesses filed a total of 73 briefs in support of UT. One brief is from the family of Heman Sweatt, the Plaintiff of the 1950 Supreme Court case challenging UT’s Law School admissions policy. Fisher had 17 briefs filed on her behalf, and there were two briefs filed in support of either party (“VPLA | Fisher vs. Texas,” 2012).

In October 2012, the Supreme Court heard the case of Fisher v. UT concerning affirmative action and admissions to UT. June 24, 2013, by a 7-1 vote, the Supreme Court vacated and remanded the case to the Fifth Circuit Court of Appeals. The high court concluded the lower courts did not give the policy enough scrutiny and recommended the

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case should be retried. (“Fisher v. University of Texas at Austin : SCOTUSblog,” 2013). The transcript of the trial only mentioned Abigail Fisher’s name 4 times. The only comment of substance about Fisher was from the UT attorney who said “Ms. Fisher would not have been admitted to the fall 2008 class at University of Texas no matter what her race” (Fisher v. The University of Texas at Austin, 2012, p. 54). This trial was not about Fisher, but about the philosophical differences of using race as a factor in the admissions process.

**Fifth Circuit**

On July 15, 2014, the U.S. Fifth Circuit Court of Appeals filed their decision, voting 2-to-1 to uphold the UT admissions policy (Abigail Fisher v. State of Texas, 2014). Fisher and Blum, the director of Project on Fair Representation, have both said they plan to appeal the decision (Schmidt, 2014). Fisher has the option to appeal the Fifth Circuit again; however, they do not have to rehear the case. Her case could also be appealed to the Supreme Court where they could decide to rehear the case a second time (“Race in Admissions at the U. of Texas,” 2014). There is currently no court date to rehear the case.

**If Fisher Wins**

A court finding in Fisher’s favor will force UT to change the admissions policy, but the state law guaranteeing admissions for student graduating in the top 10% of their class would not be affected. The 2009 amendment to HB 588 that allows UT to cap automatic admits at 75% of the freshman class, also has a provisions to remove the waiver if a court or governing body does not allow race to be a factor in admissions (“75(R) HB 588 Enrolled version - Bill Text,” n.d.). Based on current law, UT could be required to only admit only top 10% students. According to The Texas Higher Education Coordinating Board’s Institutional Resume for UT, white students made up 48.5% of the campus population in fall 2013 (Texas Higher Education Coordinating Board, 2013), which is consistent with the class of Fall 2013 at 46%. According to the enrollment data, white students represented 60% of all students admitted with the holistic review and only 39% of the automatic admits. If UT is required to admit only the top 10% of public high school graduates, it is possible fewer white students will be admitted.

UT has always claimed a one-dimensional view of diversity does not provide the diverse campus experience they are seeking. Their admissions policy incorporates several factors to cast a wider view of diversity. According to court briefs, race-neutral admissions relying on just the top 10%, would lead to a 3% decrease in the of the African American students in the freshman class (Abigail Fisher V. the University of Texas at Austin, 2013). Additionally, institutional research showed ethnic minorities felt isolated on campus and perceived 1000s of classes with no Hispanic or African-American students (Abigail Noel Fisher and Rachel Multer Michalewicz v. University of Texas at Austin, 2010).

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If UT Wins

The impact of a UT victory is difficult to predict. Would other schools be more inclined to consider diversity as a factor in admissions, or would they be afraid to be the next school targeted for a lawsuit? November 17, 2014, two suits were filed against Harvard and the University of North Carolina at Chapel Hill. There are a few notable differences in these potential cases. Historically, private schools like Harvard have been absent from the landmark admissions cases. The Harvard case also claims Asian-Americans are discriminated against and more recent trials have been focused on the discrimination of white applicants. The plaintiff for both of the cases are not individual student, but the newly formed Students for Fair Admissions (SFFA). The SFFA encourages students to join by providing name, contact information, school that “rejected” the student, and some basic credentials of the student.

Unless courts stop hearing cases, this topic will continue to be debated in the halls of justice.

Conclusion

The University of Texas at Austin is once again in the middle of a civil rights and higher education debate in this third landmark case. When Abigail Fisher was denied admissions to UT she sued the university claiming her race was a factor. Appealing the case all the way to the Supreme Court, her lawyers largely focused on the concept of critical mass and not Fisher. The Supreme Court vacated the decision back to the Fifth Circuit Court of appeals to apply more scrutiny to the UT admissions policy. The original decision in favor of UT was upheld by a 2-to-1 vote, and now UT awaits the next steps while the newly formed Students for Fair Admissions is the plaintiff for two new cases against Harvard and University of North Carolina at Chapel Hill.

References


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Fisher v. The University of Texas at Austin, No. 11-345 (The Supreme Court October 10, 2012).


