

## Fisher v. University of Texas

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*WRITER'S COMMENT: When Dr. Marlene Clarke assigned us a legal argument for a civil case still being litigated, one immediately came to my mind: Fisher v. University of Texas. I first came across the case on social media through the "Stay Mad Abby" hash tag, so I admittedly formed a strong opinion in favor of the University and its affirmative action policy. However, to prepare for the assignment, several colleagues and I put together a presentation in which we were required to argue for both the plaintiff and defendant, using precedent cases to support our arguments. It was difficult at first to formulate an argument for the plaintiff when we were so adamantly in favor of the defendant, but once we suppressed our bias, I realized how valuable it is to empathize with the opposition. Though it did not change my ultimate opinion, presenting the case from both sides forced me to fully understand the opposing arguments, which allowed me to strengthen my own arguments for the defense in this piece.*

*INSTRUCTOR'S COMMENT: In Legal Writing, I ask students to choose a case currently before the Supreme Court and write legal arguments in response to it, choosing and applying precedent cases to persuade the Court to rule in their client's favor. Mariel worked on Fisher v. University of Texas, an affirmative action case that I knew would interest the class but that could also raise the emotional level of the discourse if the argument wasn't grounded in the law. But Mariel presented the case so professionally that there was no room for vitriol. Deeply grounding her argument in solid research and careful thought, she takes us through the precedent cases with a striking attention*

*to detail and to the claims that her opponents would make, and she rebuts those opposing claims emphatically and logically. What's even more impressive is that, in the tradition of the best legal jurists, Mariel manages to write her legal argument without succumbing to the temptation to write in legalese. Hers is clearly a stellar argument, one that future UWP 104B students can look to as a model. And it reveals just how talented a lawyer Mariel will one day become.*

*— Marlene Clarke, University Writing Program*

## Fact Summary

Plaintiff Abigail Fisher, a Caucasian woman, applied to the University of Texas at Austin in 2008. Since the implementation of Texas House Bill 588 in 1997, the University has guaranteed admission to Texas students who graduate in the top 10% of their high school. For applicants below the top 10%, the University evaluates their Academic Index (AI) and Personal Achievement Index (PAI). The AI score is a calculation of the applicant's standardized test scores and high school rank. The PAI score takes into consideration the applicant's extracurricular activities, awards and honors, and "special circumstances," such as socioeconomic status, family status, and race.

In 2008, there were 29,500 applicants for the incoming freshman class, which had a capacity of 6,800. Plaintiff graduated from Stephen F. Austin High School in the top 12% of her high school class, so she competed for the remaining seats not yet filled by applicants in the top 10% who were guaranteed admission. She had a grade point average of 3.59 and an SAT score of 1180 (on the 1600 scale). She was ultimately denied admission to the University. One African American and four Latino applicants were admitted with lower AI and PAI scores than Plaintiff. 42 Caucasian applicants with similar or lower scores were also admitted. Furthermore, 168 Black and Latino applicants with similar or higher AI and PAI scores compared to Plaintiff were denied admission. Plaintiff sued the University of Texas on grounds that the consideration of race in the admissions process violates the Equal Protection Clause of the Fourteenth Amendment. Defendant contended that the use of race in the admissions process passes strict scrutiny, as it is a narrowly tailored

method of achieving a compelling governmental interest. The United States District Court heard the case in 2009 and found for Defendant. The case was appealed to the U.S. Court of Appeals for the Fifth Circuit, which affirmed the original decision. Plaintiff appealed the decision again, and the Supreme Court agreed to hear the case in 2012.

On June 24, 2013, the Supreme Court vacated the Fifth Circuit decision in favor of Defendant and remanded the case in a 7-1 decision because the lower court had failed to apply a standard of strict scrutiny. In 2014, the Fifth Circuit again found for Defendant, and Plaintiff appealed the decision. The case was reargued before the Supreme Court on December 9, 2015.

**A. Defendant's consideration of race in the undergraduate admissions process does not violate Plaintiff's Fourteenth Amendment right to equal protection under the law.**

The Equal Protection Clause of the Fourteenth Amendment prohibits states from denying citizens within their jurisdiction equal protection under the law. To prevail in cases brought under this clause, Plaintiffs must prove the state discriminated against them on the basis of race, gender, or another differentiating factor to deny them equal opportunity.

Courts have found in violation of the Equal Protection Clause cases where Caucasian applicants were denied admission to a university while comparatively under-qualified minority applicants were admitted solely because of their racial background. Such was the case in *Gratz v. Bollinger*, where Jennifer Gratz and Patrick Hamacher, both Caucasian, were denied admission to the University of Michigan. Gratz had a high school GPA of 3.8 and ACT score of 28; Hamacher had a GPA of 3.0 and an ACT score of 28. Despite their academic achievements, they were denied admission because they received less points on their application than minority applicants, to whom the University automatically awarded 20 points simply for being a member of a minority group. With 100 points guaranteeing admission, this system made it more likely for minority applicants to be admitted over equally or more qualified Caucasian applicants such as Gratz and Hamacher. For that reason, the Court ruled that the University's affirmative action policy violated the Fourteenth Amendment right of Caucasian applicants to equal protection under the law.

Plaintiff in the instant case argues that, like Gratz and Hamacher, she

too was denied admission because the University of Texas discriminated against her as a Caucasian applicant. This conclusion is drawn from the fact that one African American and four Latino applicants with lower Academic Index and Personal Achievement Index scores were admitted. However, Plaintiff omitted the fact that 44 Caucasian applicants with similar or lower scores were also admitted, which contradicts her point that the five minority students were admitted only because of their race. Additionally, 148 black and Latino students with higher AI and PAI scores than Plaintiff were denied admission. Thus, there is no basis to Plaintiff's argument that minority applicants were unjustly admitted instead of her on the basis of race, when minority applicants who were technically more qualified than Plaintiff were also denied admission. The Court should therefore not find that the Defendant violated Plaintiff's equal protection right on the basis of race.

Furthermore, Courts have found for plaintiffs in cases where they would have been admitted to a university had an affirmative action policy not been imposed. In *Hopwood v. Texas*, Cheryl Hopwood was denied admission to the University of Texas Law School. Hopwood had a 3.8 GPA and an LSAT score of 39, which corresponded to a score of 199 on the University's Texas Index, placing her at the threshold of presumptive admission for white applicants (199.5). However, African American and Mexican American applicants needed only 189 points - 10.5 points fewer than Caucasian applicants - to be admitted. The Court found for Hopwood because the difference in standards resulted in a higher acceptance rate of preferred minorities to the exclusion of non-preferred minorities and Caucasian applicants such as Hopwood who would have otherwise been admitted.

Plaintiff in the case at bar will argue that just as Hopwood was at the threshold of presumptive admission, she was in the top 12% of her high school class, 2% away from guaranteed admission. However, because she was not in the top 10%, the University considered her application according to a different standard – not of race, but of academic and personal achievement. Though Plaintiff's 3.59 GPA was above average for high school students who did not graduate in the top 10% of their class, she scored an 1180 on the SAT, well below the average score of 1285 for other non-Top 10% freshman (Powers 5). While Hopwood was an academically qualified applicant who was unjustly denied equal opportunity solely on the basis of race, Plaintiff cannot argue she was

denied admission due to her race because, considering her Academic Index, it is not certain that she would have been accepted had race not been a factor. Thus, Defendant did not violate Plaintiff's right to equal protection under the law because her race was not the definitive reason she was denied admission.

While giving minority applicants an advantage for their racial background is unconstitutional, the consideration of race in addition to other factors does not constitute discrimination against white applicants. In *Grutter v. Bollinger*, Barbara Grutter applied to law school at the University of Michigan with a 3.8 GPA and an LSAT score of 161, but was denied admission. She argued the University violated her right to equal protection by considering race in its admissions process, but the Court found the University's policy lawful because it had considered race as a "plus factor" and not as a restrictive quota. The University did not define campus diversity solely in terms of race, but rather considered other factors in addition to race. Just as in *Grutter*, race is one of many factors in UT Austin's holistic admissions process based on the Academic Index and Personal Achievement Index. Plaintiff argues that the five minority students who were admitted with lower AI and PAI scores were admitted solely because they are African American and Latino, while she was denied admission because she is Caucasian. However, though race was a factor, it was simply a "considered" factor parallel to an applicant's state residency and status as a first generation student. Meanwhile, standardized test scores, application essay, extracurricular activities, talent, volunteer work, and work experience were labeled as "important" factors; rigor of secondary school record and class rank were "very important" factors (Fisher 7-8). Therefore, Defendant's admissions policy did not violate Plaintiff's right to equal protection because race was a mere plus factor in the overall application process, which alone was not enough to deny her admission.

The facts of the case at bar indicate that minority applicants were not admitted over Plaintiff solely on the basis of race. Moreover, because the University considered various factors in addition to race as part of a holistic admissions process, Plaintiff cannot prove she was denied admission because of her race alone. Thus, the Court should find that the University did not violate Plaintiff's right to equal protection under the law.

**B. Defendant's undergraduate admissions policy with regards to race is narrowly tailored.**

In cases assessing the constitutionality of a law, the Court must apply a standard of strict scrutiny. To pass a standard of strict scrutiny, a law must be narrowly tailored to further a compelling governmental interest without infringing on other rights. The Supreme Court has upheld diversity on university campuses as a compelling state interest. To prevail, Plaintiffs must prove the Defendants' consideration of race was not narrowly tailored for its intended interest.

In previous cases concerning the constitutionality of affirmative action, Courts have ruled that quotas are not narrowly tailored methods of achieving racial diversity. In *Regents of the University of California v. Bakke*, the UC Davis Medical School reserved 16 out of 100 seats for minority applicants. This meant that if 84 academically qualified applicants of any racial group were already accepted, but the seats reserved for minorities had not yet been filled, Caucasian applicants such as Bakke were summarily denied admission despite their academic qualifications, solely because of their race. The Court thus found racial quotas to be too broad because they led to the acceptance of under-qualified applicants due to their racial background at the expense of academically qualified Caucasian applicants. In the case at bar, on the other hand, UT Austin does not indicate a specific number of racial minorities who should be accepted into their institution. Plaintiff will argue that although the University has not implemented racial quotas, it maintains a system of quantifiable preference with regards to race that acts as a quota by increasing the chances of minority applicants being accepted over Caucasian applicants. However, the University does not reserve seats for preferred minority applicants, and so it does not limit the seats available for academically qualified applicants of other racial backgrounds. Thus, unlike the UC Davis Medical School's admissions policy, UT Austin's admissions policy with regards to race is narrowly tailored.

Courts have also found that admissions policies that award minorities a fixed numerical advantage over white applicants are not narrowly tailored. Such was the case in *Gratz v. Bollinger*, when the University of Michigan awarded 20 points to applicants if they belonged to a racial minority group. A perfect SAT score, on the other hand, earned an applicant a mere 12 points. 100 points guaranteed admission, so race constituted 20 percent of the points needed for acceptance,

considered more important than scholastic aptitude. The Court ruled the point system was unconstitutional because it gave racial minorities an excessive advantage, thereby disadvantaging white applicants solely because of their race. In the instant case, UT Austin does not use a point system in which they award racial minorities a fixed numerical advantage over white applicants. Plaintiff may argue that the consideration of race still gives minority applicants an advantage over white applicants, but minority applicants are not automatically awarded a set number of points towards acceptance without taking into consideration their Academic Index (high school rank and SAT scores) and Personal Achievement Index (awards and honors, extracurricular activities, family status, etc.). The Court should therefore not find fault with the UT Austin admissions policy, as it does not give racial minorities a significant advantage over their white counterparts.

Furthermore, it is not narrowly tailored to hold minority applicants and Caucasian applicants to different admissions standards. In *Hopwood v. Texas*, the law school at the University of Texas held African American and Mexican American applicants to a different standard when evaluating their Texas Index, a calculation of their GPA and LSAT scores. The presumptive admit score for African Americans and Mexican Americans (189) was 3 points fewer than the presumptive deny score for white and non-preferred minority applicants (192). The Court ruled it was unconstitutional to impose lower benchmark scores for preferred minorities as a means to increase campus diversity because the point system was inherently unequal, making it more difficult for non-preferred minorities and Caucasian applicants to achieve admission. In the case at bar, UT Austin no longer holds minority applicants to a different standard; it is only when applicants are virtually equal competitors that their race becomes a determining factor. This policy does not allow under-qualified minority applicants to gain admittance over well-qualified Caucasian applicants, as all other factors are equal except their race. Therefore, UT Austin's policy with regards to race is narrowly tailored because it does not hold minority applicants to a different standard that would allow them discriminatorily higher rates of acceptance over their Caucasian applicants.

Since *Hopwood*, UT Austin has implemented House Bill 588, which guarantees admission to Texas high school students who graduate in the top ten percent of their class. For students who fall outside of the

top ten percent, race is considered as a “plus factor” in addition to other factors in the admissions process. This was found in *Grutter v. Bollinger* to be a constitutional means of achieving campus diversity. In the precedent case, the Court ruled that the consideration of race in the University of Michigan Law School’s admissions process was acceptable because the University did not define diversity solely by race. This meant an applicant’s race was not the only form of diversity that weighed substantially in the admissions process. Plaintiff in the case at bar will argue that unlike the University of Michigan, UT Austin identifies race as category on a checklist during the admissions process, thus making it a predominant factor and not a plus factor as it was in *Grutter*. However, race still plays a small role in a holistic admissions process. There are 6 main categories in UT Austin’s admissions checklist, and one of those categories is broken up into 7 sub-categories - one of which is race. Race is 1/7th of 1/6th of the categories considered for acceptance, meaning that race is merely 2.38% of the overall application. Because an applicant’s race constitutes such a small percentage in comparison to other factors in the admissions process, the Court should find that the Defendant’s consideration of race in the admissions process is narrowly tailored.

The University of Texas at Austin does not employ racial quotas, different standards for minority applicants, or a point system that automatically awards racial minority applicants with a fixed numerical advantage. Rather, the University simply considers race as a plus factor in addition to academic and personal achievement factors. Thus, the Court should find the University’s admissions policy narrowly tailored for its intended interest in achieving a diverse student body.

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