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# Regional

## Affirmative action in higher ed sustained with caveats

The term affirmative action was first used in an executive order by President John F. Kennedy in 1961. The motivation was to favor members of a disadvantaged group that historically suffered from discrimination due to oppression of any kind. This concept has been employed in many spheres and one of those has been to promote diversity in higher education on the basis that many universities have effectively discriminated against admitting and/or promoting minorities.

Two weeks ago the U.S. Supreme Court announced a decision on affirmative action that originated in higher education. The 4-to-3 decision reaffirmed the University of Texas's admission policies that include race and ethnicity as one of the factors in considering students' applications.

To understand the significance of this decision for higher education we have to go back to 1997. Then the Texas legislature established that Texas applicants were to be admitted at public universities automatically if they were in the top (roughly 10 percent) of their graduating high school class. Since many high schools in Texas are in fact segregated (over half of Hispanic students and 40 percent of black students attend schools with 90 to 100 percent minority enrollment), students from Texas who did not make the 10 percent cut, as well as students from elsewhere, are considered for admission based on many other factors including – but not exclusively – race and ethnicity. Many other institutions of higher education in the U.S., both public and private, have similar standards.

College admissions based on affirmative action have been contested in the courts in the past. For example, in 2003 in *Grutter v. Bollinger* (regarding

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the University of Michigan Law School admissions standards) the U.S. Supreme Court endorsed such programs. Writing for the majority, Justice Sandra Day O'Connor said that she expected that 25 years from then affirmative action programs would no longer be necessary.

The case on which the U.S. Supreme Court made the decision last month was a challenge by a student, Abigail Fisher, who sued the University of Texas at Austin in 2008 for its admissions program that denied her admission. She claimed that UT discriminated against her for being white. Ms. Fisher has since graduated from Louisiana State University.

And this was not the first time the Supreme Court heard this case. The first time was in 2013 when Fisher appealed a decision by the U.S. Court of Appeals for the Fifth Circuit, which found the University of Texas not guilty of discriminatory practices. Then the U.S. Supreme Court sent the case back to the appeals court telling them to revisit the case using more scrutiny. The appeals court effectively affirmed its prior decision and Fisher appealed that judgment once again to the Supreme Court.

Last month's decision to uphold the admissions policies at UT

had Justice Anthony M. Kennedy writing for the majority. The decision came as a surprise since Kennedy himself had hinted when the case was

argued last December that it might be sent back again to the appeals court.

Many expected that even after the death of Justice Antonin Scalia – who always opposed affirmative action policies – the court would strike down UT's admissions policies given that Justice Elena Kagan had recused herself because while being the U.S. Solicitor General, she had submitted a brief supporting the university. Her recusal left just seven justices to decide the case with Kennedy, who had never voted in support of affirmative action policies.

Although this decision has been heralded as a victory for affirmative action advocates, the wording of the decision makes clear that it is not an absolute endorsement of such policies. Kennedy wrote that the Austin campus has an "ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies" and needed to "continue to use data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary."

Therefore, although the U.S. Supreme Court has affirmed the constitutionality of a race-conscious approach in university admissions and that universities have a compelling interest in achieving the social and educational benefits that flow from a racially and ethnically diverse student body, this is not a blanket support for admissions policies that include race and ethnicity.

Yet, this decision is a good one for higher educa-

tion's bottom line: revenues from enrollments. One of the least discussed reasons why institutions of higher education want to widen their admissions net is because their enrollments are declining. It also helps them deflect the increasing racial tensions on campuses by showing that they are more diverse.

Although colleges and universities are right to say that diverse campuses help to prepare their graduates to succeed in a diversified world, it is also true that they are failing to live up to their words when it comes to their leadership. According to a recent study by the American Council on Education, colleges and universities have decreased the number of minorities leading them. This is true even for minority-serving institutions. If universities want to attract more minority students, they should have more minorities in leadership positions.

Finally, equal access opportunities are not just about race but are also a matter of socio-economic standings. With a diminishing middle class, higher education institutions should also look at creating more admission opportunities for the less financially privileged groups – regardless of race. After all, from an economic viewpoint there are more things in common between poor white and poor black Americans than between poor and middle class blacks. Only then can we say that colleges and universities are fulfilling their rhetoric of fairly representing the demographics of the nation.

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