Texas awaits verdict that may tear up rules on race

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By **Chris Parr**

Affirmative action judgment could have repercussions across US. Chris Parr reports

The US Supreme Court will this year deliver its verdict on *Fisher v The University of Texas at Austin* - the first time in a decade that the court will rule on the issue of race in the university admissions process.

The plaintiff, 22-year-old Abigail Fisher, who is white, claims that she was denied admission to the university in 2008 because, in some cases, the institution's admissions assessment process takes into account - among a range of factors - ethnicity.

This, the university argues, is a legal practice intended to promote the educational benefits of a racially diverse university.

The case is further complicated by the state of Texas' so-called "top 10 per cent rule", which means that public universities in Texas are required automatically to admit roughly the top 10 per cent of high-school graduates, regardless of race.

Around 80 per cent of university students, and the vast majority of minority students, are admitted via this process. This means the *Fisher* case questions only the system used by the University of Texas at Austin to recruit the remaining 20 per cent of its student body.

Despite this, the outcome of the case could have far-reaching implications for higher education institutions both in Texas and more widely across the US. For example, shortly after the Supreme Court last ruled on higher education affirmative action, upholding the use of race in the University of Michigan Law School's admissions process in 2003, Texas took the step of including ethnicity as a factor in its own admissions system.

In the *Fisher* case, the court could opt again to uphold the way in which the University of Texas recruits students, which would maintain the status quo and have few knock-on effects. However,

it could rule that the use of race to assess incoming students is no longer necessary in Texas specifically, because the 10 per cent rule is already responsible for recruiting the vast majority of its minority students. Alternatively, the court could send out a statement that affirmative action is in itself outdated, which might prompt universities in other parts of the US to reconsider their own admissions policies.

Effective action

Joseph Hotz, professor of economics at Duke University, North Carolina, has undertaken research into the impact of the removal of affirmative action policies, looking particularly at California, which banned affirmative action in 1996. He believes that if the court rules against its use, a more effective admissions system might evolve.

"There's a growing disillusionment with affirmative action - a weariness of it - and that's because it couldn't live up to the claims of what it was going to be and what it was put out there to do; the idea that we could change these generations in a very short period of time," he says.

He warns that the debate in the US has become polarised. "What happens in this area is you go to extremes. You take a position. So you say 'I'm opposed to affirmative action' and you read selectively a whole bunch of evidence that's not nearly as clear-cut as you want it to be. On the other side you might be an affirmative action fan," he says.

"But rather than worry about affirmative action, let's look at what the overall objective is, and that's improving graduation rates, especially of minorities - improving those students being successful in majors that they want to succeed in.

"There are ways we can take more intelligent strategies for improving those rates, which will be slower than we would like, but in the long run I think they will bring results."

Such strategies could include the University of Texas' own Intellectual Entrepreneurship programme, which - among a wide range of community engagement activities - organises for new undergraduates to be mentored by the university's graduate school students and also arranges visits to local schools to encourage potential students to think about what they want from higher education.

Of the 2012 undergraduate IE cohort of 140 students, a third are Hispanic, compared with a university-wide figure of 18 per cent. Similarly, although only 4.5 per cent of University of Texas students are African American, 16 per cent of IE students have an African-American background.

Richard Cherwitz, founder and director of the IE programme, believes that the prevalence of under-represented students taking part in the programme allows young people of all backgrounds to discuss the implications of university, helps ensure they end up on the right course and, ultimately, increases both the number of minority students wishing to attend university and their graduation rates.

Dangerous precedent

However, although schemes such as IE have proved successful in engaging minorities, many people harbour concerns that if the court rules against the University of Texas at Austin, it will set a dangerous precedent that could reduce the number of ethnic minority students in higher education across the US.

Kevin Brown, law professor at the University of Indiana and an expert on affirmative action policy, explains: "The percentage of blacks nationwide is about 12 per cent and we probably only have about 6 per cent black students - so if that's too high a percentage because too much weight is being given to race and ethnicity then you can probably figure that the 6 per cent might fall to 4 or 3 per cent.

"With Hispanic Latinos, although their figures are going to rise because their [population is] going to rise, it would mean there will be a reduction in [the number] enrolled in selective higher education institutions."

It is widely believed that this split in opinion regarding the need for affirmative action policies extends to the members of the Supreme Court, and the expected outcome of the case is far from clear.

In the 2003 University of Michigan case *Grutter v Bollinger*, the court concluded that colleges and universities should have control over their admissions policies, ruling that the use of affirmative action was constitutional. It built on a series of historical rulings that have kept control over academic decisions in the hands of universities.

The court also accepted that a "critical mass" of students from ethnic backgrounds was necessary to ensure that minority students "do not feel isolated or like spokespersons for their race", and to provide "adequate opportunities for the type of interaction upon which the educational benefits of diversity depend".

Professor Brown says: "Taking just the top 10 per cent plan, Texas was admitting 22 to 23 per cent black and Latinos in its freshman class. So the argument is if that's enough to have a critical mass."

However, since the *Grutter* ruling, the make-up of the court has changed, and many believe that the deciding vote in the *Fisher* case will be that of Justice Anthony Kennedy, who, although a conservative by nature, has shown himself willing to listen to arguments for affirmative action.

"You have four justices [out of nine] very much against affirmative action, [who] would very much like the opportunity to strike any consideration of race [from] the admissions process," Professor Brown says.

"Then you have four justices who are strong supporters of affirmative action, who would no doubt uphold what the University of Texas does. So the opinion is likely to be written by Justice Kennedy."

Gregory Vincent, vice-president for diversity and community engagement at the University of Texas, believes that the court will uphold the university's approach.

"One aspect that the case addresses is the issue of institutional academic freedom - the idea that an institution has the right to decide who is admitted as long as it doesn't violate any laws," he says. "My hope is that the Supreme Court upholds this principle."

The court's verdict is expected in the first half of the year.

chris.parr@tsleducation.com.