

Ahead of Fisher Showdown, Experts Defend Affirmative Action

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As the Supreme Court of the United States again prepares to consider arguments in *Fisher v. The University of Texas at Austin* today, the arguments will be presented amid a national environment that seems to have proven that race is still very much a factor on campuses across the country.

In a climate in which a proliferation of protests by students of color on campuses across the country — and a lawsuit in the state of Maryland against the state for maintaining separate and unequal systems of education for the Black students in the state — are shedding light on the persistent discrimination of students of color, the *Fisher* case outcome is even more critical for the future of educational opportunities for non-White students.

Dr. Stella M. Flores, an associate professor of higher education at New York University Steinhardt School of Culture, Education, and Human Development, said that it's telling that "students are protesting in states where the use of race-conscious policies is generally allowed and the resulting outcomes of representation on student bodies, faculties and administration, is still one that causes concern and other feelings of discontent."

The growing unrest across the country points to the fact that students and faculty of color are still not treated or seen as equals, many say. Thus, the elimination of race as a consideration in hiring and admissions on the grounds that there has been significant enough progress made on achieving diversity without specific race-conscious policies is simply untrue, said Erwin Chemerinsky, founding dean at the University of California, Irvine School of Law, during a debate last week hosted by Intelligence Squared U.S. and the National Constitution Center.

"We cannot discuss affirmative action outside of the context of American history," he said. "Throughout American history, there have been separate and unequal schools based on race, and that's not a thing from long ago.

"Just a couple of decades ago, Harvard professor Christopher Jencks found that an average 20 percent less is spent on an African-American child's elementary and secondary school compared to a White child's elementary and secondary school," Chemerinsky continued. "Today, about 90 percent of the

students in private schools are White. The reality is that race matters enormously in how all of us experience society.”

Deborah N. Archer, a professor of law at New York Law School and amicus counsel in *Fisher*, agreed, saying, “To assess the impact of race-conscious admissions programs, we must first acknowledge the critical factors that contribute to any alleged Black or Latino underperformance in the classroom. And those include racial discrimination. They include discrimination by professors. They include inadequate K-12 education systems. They include stereotype threat.”

Flores said it is important to recognize not only the impact of historic disenfranchisement of students of color on majority campuses, but present displays of discrimination and injustice along the lines of race playing out all across the country.

“Student and faculty discontent around diversity has been present for a while, but the window to address race publicly is made more possible with the nation’s public struggle with evidence around the treatment of Black males by law enforcement through new forms of technology,” Flores said.

But as institutions continue to struggle to provide welcoming spaces for these students, a bevy of campus incidents points to the continued relevance of race. Many agree that to deny the use of race as a factor in admissions is to deny that race plays an important part in student identity and campus climate.

“We couldn’t possibly offer each student individualized holistic review without giving some consideration to race, especially when an applicant has indicated that race is important to their own sense of self-identity, their own sense of who they are,” Archer said. “For that student who says their race is important, it’s critical to understanding their achievements, their accomplishments and their perspectives.”

Chemerinsky has seen firsthand how the elimination of affirmative action policies have actually led to a reversal of any gains achieved on diversity.

“Every Supreme Court case to consider the issue has held that affirmative action by college universities is constitutional. The Supreme Court for decades has said that colleges and universities have a compelling interest in a diverse student body,” Chemerinsky said. “This has had a tremendous beneficial effect. It’s reduced the unfortunate legacy of racial discrimination in this country. It’s enhanced the education of countless students.

“Proposition 209 has substantially reduced diversity in the University of California [system] — especially [at UC] Berkeley and UCLA,” he continued, referencing the California law that eliminated affirmative action policies in public employment, contracting and education in the state. “There’s still fewer African-American students at UCLA than there were prior to 1996, when Proposition 209 was adopted.”

At The University of Texas at Austin, Chemerinsky pointed out, “They look at race as one of many factors in admissions.

“In addition to grades and test scores and two letters of recommendation, race is just one of six factors, and yet doing that, together with taking the top 10 percent of high school [students] across the state, meant there was a 20 percent increase in African-American students, a 15 percent increase in Latino students,” he said.

Flores said, “Ending the use of race as a factor of consideration won’t fix societal problems around equity, but not having it will create barriers to diversification problems elite colleges and universities are still struggling to address in a context where race is allowed as a consideration.

“Imagine addressing student and alumni concerns about isolation, stereotype and exclusion when institutions have lost their most successful lever to even bring diversity to the table,” she said.

Archer agreed, saying, “The gap between the performance of some minority students and some White students is quite troubling, but race-conscious admissions programs are not the cause of those troubles,” she added.

For Flores, it is obvious that limiting the experiences and opportunities for students to grow and thrive as total beings — inclusive of their racial identities — impacts their future experiences.

“Who we are or are not able to become in the classroom plays a role in who we are in the streets with neighbors as well as strangers in our lives,” she said. “If there are no spaces for [students and faculty of color] to discuss this and the proper training for faculty and institutional leaders to address this together, more discontent is likely to occur.”