Past as Prologue in the Affirmative Action Jurisprudence of the Supreme Court: Reflections on Fisher v. University of Texas

David L. Gregory

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SUPREME COURT: REFLECTIONS ON FISHER V. UNIVERSITY OF TEXAS

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ABSTRACT

Fisher v. Texas is the latest, and not the last, word of the Supreme Court on
Affirmative action. Fisher has endorsed the operation of affirmative action in higher
education and employment. After forty years of contentious litigation in more than a
dozen highly-charged cases, the near-unanimous Fisher Court undoubtedly
understands the operational parameters of affirmative action.

The Fisher Court is approaching the mid-point of Justice O'Connor's 25 years to
reach the utopian end of affirmative action. Perhaps the loudest silence in the Court's
recent history was the complete absence of any reference to Justice O'Connor's 25
years chronology.

Affirmative action is not a perfect methodology; rather, it is a flawed theory.
But, given the deeply embedded racism and the hyper-utility of higher education as
the gatekeeper to professional employment, affirmative action is the indispensable
mechanism to provide the rough justice of pragmatic political proportionality.
Essentially, the kaleidoscopic panorama of racial groups in the understandably fair
share of the tangible benefits accompanying professional employment, which in turn,
is predicated on successful higher education. If too large a racial group is
marginalized for too long, the social, political and economic consequences could be
catastrophic.

Ergo, the role and the reality of affirmative action as redistribution tool for the
foreseeable future. Rather than its demise, Fisher may have solidified affirmative
action for well more than the next 25 years. Affirmative action is perhaps the most
effective instrument for periodically recalibrating pragmatic, political, proportionality.
No other policy instrument has a proven track record. Affirmative action is utilized at
many levels. Thus far, there has been no effective equivalent.

Although Fisher v. Texas left unanswered some important questions about the
status of affirmative action, the case still made important contributions to the
country’s equal protection jurisprudence. The Fisher decision is significant in at least
five different ways. First, Fisher further constrains the idea of “narrow tailoring”.
Next, Fisher practically disincentives universities from using race-conscious
admissions policies. Third, Fisher is similar to Adarand because it involves tightening
of a key part of equal protection analysis. In addition, the Fisher decision might
indicate how the court will rule in forthcoming affirmative action decision, Schuette v.

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*The Dorothy Day Professor of Law; Executive Director, The Center for Labor and
Employment Law; St. John’s University School of Law; 8000 Utopia Parkway, Queens,
N.Y. 11439. Telephone Number 718-990-6019. Email: gregoryd@stjohns.edu; JSD
1987, Yale Law Schoo.
Coalition to Defend Affirmative Action. Finally, Fisher is an important milestone on the 25 year journey towards the end of affirmative action.