Fisher v. University of Texas at Austin is a case before the Supreme Court regarding whether the University’s use of race in undergraduate admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment.

**Factual Background**

Abigail Noel Fisher, a white student from Texas, applied for admission to the 2008 freshman class at the University of Texas at Austin (“UT”). The University of Texas at Austin, prompted by the 2003 Supreme Court decision which ruled that racial diversity was a valid goal in undergraduate admissions so long as it was not the decisive factor, had adopted an admissions policy with race as a contributing factor. The overall goal of UT’s admissions policy was to create a “critical mass” of minority students. The policy considers race as one part of an applicant’s personal achievement index alongside his/her academic index, which takes into account the applicant’s class rank, grades, and standardized test scores. No specific point advantage is given to a minority applicant, and no quota has been set for the number of minorities admitted. As a result of this policy, UT Austin is ranked sixth in the nation in providing undergraduate degrees to minority students.

Texas resident students in the top 10% of their high school class are automatically granted admission under the state-mandated “Top Ten Percent Plan,” which was passed by the legislature in 1997 after the federal courts struck down a race-conscious admissions policy. This plan filled more than 81% of the vacancies in the 2008 freshman class. Fisher, with a 3.59 GPA and 1180 combined SAT score, was not in the top 10% of her class, and thus her application was considered based on a holistic, multi-factor personal achievement index. The personal achievement index was factored into the admissions process to reflect that grades and test scores only demonstrate part of the student’s ability to succeed. It takes into account a wide variety of individual characteristics including leadership potential, extracurricular activities, community service, work experience, family, socioeconomic background, household languages, and race.

Fisher was denied admission in the incoming class, but was offered admission into the Coordinated Admissions Program (“CAP”), which allows Texas residents to transfer after completing 30 credits with a 3.2 GPA at a participating school. Fisher declined the CAP offer and enrolled and graduated from Louisiana State University. Fisher claimed that she was denied admission to UT because of her race, and she sued the university, claiming that any consideration of race in university admissions violates the Equal Protection
Clause of the Fourteenth Amendment.

**U.S. District Court**
The U.S. District Court heard the case in 2009 and upheld the constitutionality of the university’s admission policy, holding that the holistic review process is narrowly tailored to further the school’s compelling interest in having a diverse student body.

**Fifth Circuit Court**
The case was then appealed to a three-judge panel of the Fifth Circuit, which affirmed the district court decision and upheld UT’s admissions policy. The Fifth Circuit Court held that the court had correctly applied the constitutional standards that the Supreme Court had upheld in the Michigan Law School case *Grutter v. Bollinger*. Fisher then tried to have the case reconsidered by the full Fifth Circuit Court, but lost.

The Supreme Court heard oral argument in the case on October 10th.

**Fourteenth Amendment, Equal Protection Clause**
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added)

**Related Cases**
In the following three cases, the Supreme Court identified the acceptable guidelines for which universities could consider race in admissions policies.

The Supreme Court held 5-4 that considering race as an applicant’s profile served the state’s compelling interest in achieving diversity, including seeking a critical mass of minority students, at the University of Michigan Law School. The Supreme Court held that racial diversity is a valid goal in higher education, and that college officials may try to advance that goal so long as race is not a decisive stand-alone factor.

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1 In 2011, Texas Legislature passed a law to amend the Top Ten Percent admissions policy to cap it at 75%.
The Supreme Court struck down the mechanics of Michigan’s undergraduate admissions policy, which awarded predetermined point allocations to minorities to ensure diversity in admissions, holding that such a point system prohibited applicants from being individually assessed and therefore was unconstitutional. The Court held that the policy automatically awarded bonus points to minorities and thus lacked individualized review.

In a landmark decision, the Supreme Court held 5-4 that the “racial-set-aside” admissions policy at the University of California, Davis Medical School which set aside a certain number of seats in the incoming class for minority students violated the Equal Protection Clause.

Issues

Educational benefits of diverse student populations

In Grutter, the Supreme Court recognized the educational benefits of a diverse student body which helps prepare students to live and work in an increasingly racially and culturally diverse society. The Court held that universities should be able to assemble diverse student populations because it improves the quality of the educational process in that it adds unique perspectives which would otherwise be absent from the classroom. A diverse student body fosters community and provides students with a variety of viewpoints, trains them to become leaders in an increasingly diverse workforce, and cultivates civic engagement to become leaders and inspire others within their communities. Additionally, an increased number of minority students on campus and in classrooms helps alleviate isolation issues that may cause minority students to fail or drop out.

Defining and implementing diversity policies

Fisher, in her brief, addressed the two standard tests for policies based on race: whether the admissions policy demonstrates a “compelling state interest” to meet the strict scrutiny test, and also whether the use of race in admissions policies was “narrowly tailored” to serve that interest. In this case, she argued that UT Austin failed to meet both tests.

Justice Kennedy, dissenting in Grutter, said that the court should have done more to define how race could be used in admissions, and believed the policy that Michigan used to be insufficiently narrowly-tailored. The University of Texas, in its brief to the Supreme Court, distinguishes its admissions policy from the one used by Michigan Law School in that the racial composition of the incoming class is not monitored by the university, and race is not a single or predominant factor in the admissions process.
Race neutral policies are not enough to generate a diverse student body

Given the racial makeup of Texas public high schools, more than half of all Latino students and 40 percent of black students attend high schools that are predominantly minority students. Therefore, the Top Ten Percent Plan provides the University of Austin an increased number of minority students from these schools.² However, UT believed that the number of minority students admitted through this Plan did not result in a sufficiently diverse student body. The university believed that it could recruit more diverse students if it considered race as a factor in the holistic application approach, so it used the Supreme Court decision in Grutter as a model to create an admissions formula. Like Michigan Law School, UT sought to achieve a “critical mass” of minority students, to provide a diverse educational experience for the future leaders that they were educating. Fisher claims that the Top Ten Percent Plan, despite being race-neutral, when combined with the race-conscious “personal achievement” formula to fill the rest of the class, is unconstitutional.

Socio-economic status

Some opponents of using race in admissions decisions have argued that universities are free to examine whether students are economically disadvantaged, as that is not a protected category under the Fourteenth Amendment; therefore, one cannot sue claiming he or she has been discriminated against because of his/her economic status. In the U.S., there is a correlation between income and race, so that favoring applicants with low incomes would tend to help Blacks and Hispanics, though the correlation is far from perfect. Thus, these critics of affirmative action argue colleges have a way of diversifying the student body that cannot be constitutionally challenged. Supporters of affirmative action say the correlation is not sufficient and, beyond that, is not the best way of getting the kind of diversity in the student body that they seek. That, they say, can only be done through an individual evaluation of each applicant, with race as one of the criteria.

Effect of eliminating affirmative action on diverse admissions

After Bakke, states were encouraged but not required to adopt race-conscious admissions policies, and colleges and universities broadly implemented them. In states that forbid these policies, including California, enrollment of minority students dropped. When UT added race into its admissions formula, enrollment of African Americans increased 25%, and Latino enrollment increased 17%.

Many believe that if the Supreme Court decides to implement a nationwide ban on race-conscious admissions, thus effectively ending affirmative action, the number of Black and Hispanic applicants will

² The 2004 freshman class of UT Austin, in the last year before the race-conscious admissions policy was implemented was 4.5% African American, 16.9% Hispanic, and 17.9% Asian-American in a class of 6,796 students.
decline significantly\(^3\), which will have a far-reaching impact on the professional success of these minority groups. On the other hand, in her opinion in *Grutter*, Justice O’Connor said that the Court expects that 25 years from now the use of racial preference should no longer be necessary.

**Mismatch Theory: affirmative action is harmful to diverse students**

Some opponents of affirmative action hold that affirmative action in admissions is harmful to minority students, who would be better served in less-selective schools. The “mismatch theory” states that as a result of affirmative action, Black and Hispanic students are entering schools where their credentials place them at the bottom of their class, and that their low grades result in lowered ambitions, and fewer Blacks and Hispanics entering the profession.

\(^3\) Howell, Jessica *Assessing the impact of Eliminating Affirmative Action in Higher Education*, 28 J. Labor Econ. 113, 116
**Individuals recording police activity**

Thirty-eight states allow individuals to record police activity in public, so long as it does not physically interfere with law enforcement activity. Twelve states (California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington) require the consent of all parties to record a conversation, but all but two states (Massachusetts and Illinois) have an “expectation of privacy provision” that courts have ruled does not apply to on-duty police or anyone in public. Therefore, the law protects individuals recording police activity in public in forty-eight states.

The Department of Justice position is that such recording is permissible so long as it does not physically interfere with the police performing their duties. While federal courts have mostly held that videotaping police operations in public is a First Amendment right, courts have not yet analyzed what videotaping might be considered, or what constitutes filming the police “in public.” It is also not clear what the police can do with a recording they seize for legitimate reasons, notably if there are circumstances where the police can view or confiscate a recording without warrant in the interest of public safety.

*ACLU v. Alvarez (2012)*

Illinois has the most rigid and controversial eavesdropping laws in the U.S., making it a felony to record “all or any part of any conversation” unless all parties consent. While normally a class 4 felony, it is elevated to a class 1 felony when one party is a law-enforcement official carrying out his duties, punishable by 4 to 14 years in prison. In 2010, ACLU brought a case against the Cook County State Attorney’s Office for prosecuting ACLU staff members who were recording police activity as part of their “police accountability program,” which was intended to make information about police activity available to the public, so as to detect police misconduct and help advocate for improved police practices. The district court granted the government’s motion to dismiss the case, and the ACLU appealed to the Seventh Circuit. The Seventh Circuit Court ruled that the eavesdropping statute does not apply to police performing their duties in public and that using the wiretap law to prohibit recording police in public “restricts far more speech than necessary to protect legitimate privacy interests.”

*Kelly v. Borough of Carlisle, 622 F.3d 248 (2010)*

In May 2007, Brian Kelly was arrested for violating the Pennsylvania Wiretapping and Electronic Surveillance Control Act after recording a police officer during a traffic stop in which he was a passenger, because he had not notified the officer that he was recording the stop. The charges were dropped, but Kelly sued the officers
for violating his First and Fourteenth Amendment Rights. The Third Circuit held that it was not clearly established that a citizen had a First Amendment right to videotape police officers exercising their duties on public property.

**Issues**

*Right of police to seize recordings and recording devices*

In May 2010, Christopher Sharp sued the Baltimore police when police officers seized and deleted the contents of his cell phone after he recorded the forcible arrest of his friend. In January 2012, the United States Department of Justice filed a Statement of Interest in the matter, encouraging the Court to recognize the First Amendment rights of citizens to record police activity in public, and also acknowledging that police violate the First and Fourteenth Amendment rights of individuals when they seize and destroy recordings without a warrant or due process. The Department of Justice stated that the right of people to videotape police is “firmly rooted in long-standing First Amendment principles.” However, according to the Department of Justice, that right is limited by the requirement that the person making the video not interfere with police activity; for example, he or she should not “engage in actions that jeopardize the safety of the officer, the suspect, or others in the vicinity, violate the law, or incite others to violate the law.”

**Related Cases**

*Commonwealth v. Hyde (2001)*

In 1999, Michael Hyde was convicted of violating Massachusetts’ wiretapping law when he secretly recorded Abington police during a traffic stop. After stopping Hyde for a loud muffler and a missing license plate light, police testified that Hyde became angry and belligerent. He later produced the audiotape to support his claim that the police had abused him, but the court upheld his conviction on the grounds that secretly recording police violates the wiretapping law. Massachusetts is the only state to uphold a conviction for recording on-duty police, given that the defendant failed to inform the police that he was recording them.

*Glik v. Cunniffie (2007)*

Boston lawyer Simon Glik was arrested after using his cell phone to record the police forcefully arresting a suspect on Boston Commons. The U.S. Court of Appeals for the First Circuit unanimously ruled in favor of Glik, and held that Glik had a clearly-established constitutionally protected right to videotape police carrying out their duties in public. The City of Boston awarded Glik $170,000 in damages and legal fees.

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4 *Sharp v. Baltimore City Police Department*, Statement of Interest of the United States
Maryland v. Graber (2010)

A Maryland judge dismissed wiretapping charges against a motorcyclist who recorded, via a camera attached to his helmet, his arrest in which officers approached him and pulled a gun on him. Graber posted the video online, and was then arrested for violating Maryland’s Wiretap Act, which requires the consent of all parties where there is a reasonable expectation of privacy. The judge held that the conversations between individuals and police during a traffic stop are not private.

Illinois v. Allison (2011)

Michael Allison was charged with violating the Illinois Eavesdropping Act for recording a police officer when he secretly recorded multiple encounters with public officials including police officers, employees in the city attorney’s office, and the judge presiding over his case, in connection with a citation for keeping an abandoned vehicle on his property. For violating the eavesdropping law, Allison faced up to 75 years in prison. An Illinois judge ruled the state law unconstitutional and dismissed the charges against him.

Videotaping by police

Improving Citizen Confidence in Police & Ensuring Police Safety

In response to allegations of biased policing and to ensure public confidence in the police, many police departments have deployed in-car video cameras to record traffic stops and other encounters with the public. The Department of Justice’s Office of Community Oriented Policing Services created the In-Car Camera Incentive Program, which would provide financial support to state police and highway patrol agencies so that they could implement in-car cameras. Now more than 72% of state police and highway patrol vehicles are equipped with in-car cameras.

In-car cameras and other methods of police surveillance as they carry out their responsibilities can help to ensure officer safety on the job. Additionally, recording police activity provides opportunities for training and evaluation purposes, and also provides police officers with backup, so they do not need to rely on memory when writing reports and preparing for trial. Such taping also serves the purpose of protecting those who are stopped from possible abusive conduct by the police.

Police tapes can also be useful in collecting information regarding national security.

Accountability/ Videotaping of interrogations
Twenty states and the District of Columbia require that interrogations for certain crimes be recorded. Recording interrogations enhances the ability of police to capture valuable information and help prevent wrongful convictions. Lawyers for defendants believe this protects defendants from being coerced into confessing or making statements against their interest.
New York State has one of the strictest approaches to juvenile defendants, trying 16 and 17 year olds as adults, regardless of the crime committed. New York and North Carolina are the only states that try 16 and 17 year old defendants as adults. Thirty-seven states and the District of Columbia have set the age of criminal responsibility at 18, and eleven states at 17.

In 2011, New York State Chief Judge Jonathan Lippman proposed a plan that would transfer jurisdiction for youth accused of less serious crimes to Family Courts, while continuing to prosecute violent juveniles as adults in the criminal courts. Judge Lippman’s proposal would include a pilot program of adolescent criminal courts, where 16 and 17 year old defendants would still be processed in the adult court system, but where judges would handle the cases as if they were in Family Court. Judges in this program would be trained to implement a Family Court intervention/rehabilitation approach, to afford nonviolent youth the benefits of Family Court adjudication, including a sealed record when appropriate. Judges in this program would be trained “to understand the legal and psychosocial issues involving troubled adolescents and would be familiar with the broad range of age-appropriate services and interventions designed specifically to meet the needs and risks posed by these young people.”

When the New York State Family Court Act was enacted in 1962, the age of 16 was selected as the age of criminal responsibility as a temporary measure when the Legislature could not agree on an age, until public hearings could be held and additional research presented, but was never changed.

In 2010, 45,873 youth ages 16 and 17 were arrested in New York State, and the majority of arrests were for nonviolent crimes. In the last few years, the number of youth incarcerated in New York has dropped from more than 2,200 to fewer than 700, and of the 605 incarcerated youth, 212 were for adult crimes.

Under current law, a 16 or 17 year old is placed in the adult criminal justice system regardless of what he or she is charged with, which could include shoplifting, vandalism, causing a disturbance, underage drinking, and possession of marijuana. The juvenile offender is not treated or rehabilitated through the array of social service programs that are available only through the Family Court, or given a community service sentence. Once out of the system, juvenile offenders have conviction records that have lasting effects on their ability to obtain employment and education opportunities, as well as housing and military service.

5 Chief Judge Lippman Address, February 2012
6 New York State Division of Criminal Justice Services Statistics
Age of responsibility

Nationwide, legislators have determined the age of responsibility in a variety of areas (see below).

<table>
<thead>
<tr>
<th>Civil Responsibility</th>
<th>Age in NY</th>
<th>Age outside of NY</th>
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<tbody>
<tr>
<td>Driving</td>
<td>16-17 (permit w/ regulations); 18</td>
<td>16</td>
</tr>
<tr>
<td>Sign contracts</td>
<td>18</td>
<td>18 in 47 states, 21 in MS</td>
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<tr>
<td>Voting</td>
<td>18</td>
<td>18</td>
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<tr>
<td>Draft/Military Service</td>
<td>17 w/ parental consent; 18 w/o</td>
<td>17 w/ parental consent; 18 w/o</td>
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<td>Buying alcohol/cigarettes</td>
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<td>Buying a gun</td>
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Related Cases

In re Gault, 387 U.S. 1 (1967)
This landmark Supreme Court case established due process rights for juveniles, including the right to counsel. Prior to this, it was not understood that juveniles were entitled to due process rights, even though they would be incarcerated for long periods.

The Supreme Court, in a 5-4 decision, held that executing juveniles violates the Eighth Amendment ban on cruel and unusual punishment, suggesting that “standards of decency” have evolved, making the death penalty a disproportionate punishment for minors. The decision superseded the 1969 decision in Stanford v. Kentucky, which allowed the death penalty for offenders who were at least 16 years of age at the time of the crime. The Court in Roper determined that juveniles are less culpable, less mature and less responsible than adults. The Court held that young offenders need to be treated differently than adults, as their transgressions are not as “morally reprehensible as that of an adult.”

The Supreme Court, in a 6-3 decision, abolished juvenile life-without-parole sentences in non-homicidal cases, holding that life sentences for crimes other than murder violates the Eighth Amendment’s ban on cruel and unusual punishment. Terrance Graham, at the age of 17, was arrested in connection with a home invasion at gunpoint. Six months prior, he had served one year in county jail and was sentenced three years probation in connection with an armed robbery in Jacksonville, Florida with three other youth. Graham had

7 Office of Children and Family Services Statistics
no prior offenses and never received services within the juvenile justice system. A trial judge tried Graham as an adult and imposed a life sentence without parole on Graham for violating his probation.

Issues
In 2011, Executive Director of the New York Center for Juvenile Justice Michael Corriero issued a report “Judging Children as Children: Reclaiming New York’s Progressive Tradition,” which outlines many of the issues raised by the manner in which New York State treats juvenile offenders.

Youth accountability & the adolescent brain
Scientific research has shown that youth brains are not fully matured, specifically the areas of the brain that govern judgment and impulse, which do not mature until well into their twenties. Thus, juvenile offenders may not be capable of controlling criminal behavior or understanding the consequences of their behavior in the way that adult offenders can. Chief Judge Lippman noted that teenagers have difficulty with impulse control, resisting outside influences and peer pressure. In New York State, 16 and 17 year olds are unable to vote, buy alcohol or cigarettes, see an R-rated movie without adult permission, and serve in the military – given their lack of maturity and judgment – yet are treated as adults in the criminal justice system.

Youthful offender status
Some argue that New York’s system of adjudicating minors takes into account the adolescent brain’s lack of maturity and judgment by offering Youthful Offender Status. Youthful Offender Status is a special status that can be granted by a judge in the adult system (Criminal Court) to a person under the age of 18 who has no prior felony convictions or Youthful Offender adjudications. With Youthful Offender Status, the criminal conviction is overturned and a youthful adjudication is given. As a result, the offender has a lessened sentence and does not have a criminal record. This status takes into consideration the age of an offender and considers the offender’s altercations with the law “youthful mistakes.” In 2010, 94% of 16 and 17 year olds who were arrested and processed in criminal court received dispositions with no criminal record.

Effect of criminal record on juvenile offenders
Youth who are convicted for nonviolent crimes will receive a criminal record, which will affect their education and employment opportunities, and even access to housing, in the future. Family Court proceedings help to avoid these collateral consequences that will affect juvenile offenders. Through the Family Court system, non-violent youth offenders can be “adjusted” by probation – if the youth offender complies with the conditions of his/her probation, which may include curfews, letters of apology, and social

8 Neurological brain imaging studies used in the Roper v. Simmons.
9 Correrio, p. 1422-23
services, the case is closed and sealed, so that it is not on the offender’s criminal record but is available only to law enforcement officials and related agencies. There is no equivalent to probation adjustment in the adult courts (though there are ways of having certain convictions sealed, and alternatives to incarceration (see below)). Chief Judge Lippman notes that a lack of criminal record will increase the chances of producing gainfully employed citizens, rather than producing an “unemployed, welfare-dependent person who gets caught in the revolving door of the criminal justice system.”

_alternative-to-incarceration programs_
Currently, Criminal Court judges may apply alternative-to-incarceration programs, which are provided to reduce pretrial detention and incarceration. Specialized programs geared towards juveniles can include youthful offender/juvenile offender services, residential programs that provide addiction services, and community service programs for non-violent offenders.

_Trying youth as adults: recidivism and public safety_
Studies have shown that youth who are incarcerated are more likely to commit crimes again, re-offend sooner, and go on to commit violent crimes and felony property crimes at a higher rate than those who go through the Family Court system. For youth offenders in New York State who are incarcerated, there is an 89% recidivism rate for boys and an 81% recidivism rate for girls.

_What is a deterrent, specifically with repeat offenders?_
Prison may be the appropriate course for juveniles who cannot be rehabilitated, specifically individuals with history of abuse and other sociological issues. Others argue that prison hardens juvenile offenders, and the environment that they are exposed to makes them more likely to commit future crimes.

Public safety is an issue, and some argue that the current system properly responds to the need to protect communities from individuals who commit crimes, and that the Juvenile Justice system does not adequately handle individuals who have committed serious crimes and might be likely to do so again.

_Cost of transferring youth to juvenile courts_
Alternatives to incarcerating youth would be costly. Many have expressed concern over the costs of transferring youth defendants to Family Courts, when the court system is already financially burdened. Chief Judge Lippman’s plan would call for an increase in the number of Family Court judges, more community service options, and staffing that would require a significant increase of costs to the court system. As the State is still facing budget problems, there is a question whether expanding the Juvenile Justice system is the best use of scarce resources, which could, for example, be used to improve education.