Supreme Court Docket Preview: Are Changes in the Offing?

By Charles J. Russo, J.D., Ed.D.

Two education-related cases continue to be topics of discussion at the Supreme Court.

During most Supreme Court terms, which begin on the first Monday in October and usually end in late June, the justices accept at least one case focused on education. Two cases before the current Court—*Fisher v. University of Texas* (2014) and *Friedrichs v. California Teachers Association* (2014)—have the potential to affect education significantly. Moreover, the sudden death of Supreme Court Justice Antonin Scalia on Saturday, February 13, 2016, may affect these and other cases, especially *Fisher,* considerably.

Making its second trip to the Supreme Court, *Fisher* reviews the use of race in higher-education admissions, a practice known as affirmative action or race-based admissions policies. Even though set in the context of higher education, *Fisher* is likely the more important and far-reaching of the two cases because its outcome has the potential to affect K–12 education with regard to student admissions and hiring.

Friedrichs examines whether unions may require nonmembers to pay fair-share fees, a prorated portion of dues, to contribute to the cost of collective bargaining, or whether doing so results in impermissible compelled speech and association in violation of the First Amendment. The way the Court answers *Friedrichs* could affect school board–employee relations as well as district finances if officials do not have to continue deducting fair-share fees from nonunion teachers' paychecks.

Although the cases are unrelated conceptually, coincidentally, after the Supreme Court conducted oral arguments in *Fisher* on December 15, 2015, its next scheduled session was to hear *Friedrichs* on January 11, 2016.

Fisher v. University of Texas

Fisher v. University of Texas was filed by two white female high school graduates who were denied entry to the university in the fall of 2008 under a policy admitting the top 10% of graduating classes. The plaintiffs alleged that Texas's Top Ten Percent Law—designed to increase minority enrollments by granting automatic admissions to students graduating in the top 10% of their classes—discriminated against them because of race in violation of their right to equal protection under the Fourteenth Amendment and federal statutes. Applicants who do not graduate in the top 10% of their class can still gain admission by scoring high in a process that evaluates their talents, leadership qualities, family circumstances, and race.

One of the students withdrew from the case, but Fisher, who was in the top 12% of her class, remained active in the case even though she attended, and graduated from, Louisiana State University.

Judicial History

In the initial round of litigations in *Fisher v. University of Texas* (2009), a federal trial court granted the university's motion for summary judgment because it was satisfied that the use of race in admissions was supported by a compelling interest that was narrowly tailored to achieve its desired end. On appeal, the Fifth Circuit (2011a, 2011b) relied on the same rationale, affirming that insofar as the university had not surpassed a critical mass of minority students that would have rendered race-based considerations unnecessary, the plan was constitutional.

The Supreme Court agreed to hear an appeal in what is known as *Fisher I* (2012), reversing in favor of the student in a 7–1

judgment. Writing for the Court, Justice Anthony Kennedy was joined by Chief Justice John Roberts along with Associate Justices Scalia, Clarence Thomas, Stephen Breyer, Samuel Alito, and Sonia Sotomayor. Justice Ruth Bader Ginsburg dissented. Justice Elena Kagan did not participate because she was involved in *Fisher I* while working as the federal solicitor general.

Justice Kennedy's opinion in *Fisher I* began by identifying the issue before the Supreme Court as to whether the Fifth Circuit followed "decisions interpreting the Equal Protection Clause of the Fourteenth Amendment . . ." (p. 2416). Having determined that the Fifth Circuit failed to apply strict scrutiny—the highest level of constitutional analysis under the Fourteenth Amendment's equal protection clause and the test most difficult for a state to meet—the Court reversed and remanded for further consideration.

Relying on the Supreme Court's own precedent in affirmative action cases, Justice Kennedy pointed out that "any official action that treats a person differently on account of his race or ethnic origin is inherently suspect" (p. 2419). In other words, even though the justices agreed that officials demonstrated that diversity was a compelling interest essential to the university's mission, the policy was subjected to strict scrutiny because the university failed to devise a plan narrowly tailored to achieve its goal without impermissibly using a race-conscious remedy.

Justice Kennedy explained that officials must demonstrate that "no workable race-neutral alternatives would produce the educational benefits of diversity" (p. 2420). Concluding that the Fifth Circuit failed to apply the proper standard, the Court reversed the panel's earlier order and directed it to apply a more stringent form of review.

In a one-paragraph concurrence, Justice Scalia (2013, p. 2422) largely reiterated his opposition to what he described as governmental discrimination based on race.

Justice Thomas's lengthy concurrence (p. 2422) would have overruled *Grutter v. Bollinger* (2003). In *Grutter*, the Supreme Court upheld the affirmative action admissions policy in the law school at the University of Michigan, noting that insofar as diversity is a compelling government interest, race could be used as a factor because the criteria were sufficiently narrowly tailored to achieve the compelling state interest of having a racially diverse student body. Justice Thomas joined the majority, agreeing that it correctly directed the Fifth Circuit to apply strict scrutiny on remand.

Justice Ginsburg's brief dissent maintained that insofar as she thought the Fifth Circuit correctly applied the Supreme Court's precedent, its judgment should have remained in place (*Fisher I*, p. 2432).

The teachers claimed that having to make financial payments to support the unions violated their rights to free speech and association because they had to submit to opt-out procedures to avoid making those contributions to nonchargeable union expenses.

On Remand

On remand, with one member of a three-judge panel in *Fisher I* (2014a) dissenting, the Fifth Circuit again deferred to the authority of university officials in upholding the admissions policy. The dissenter would have invalidated the admissions policy as insufficiently narrowly tailored to achieve its goal of diversity because it relied too heavily on race. The Fifth Circuit (2014b) rejected an appeal for a review by all of its members in an en banc hearing.

The Supreme Court accepted another appeal in what is now *Fisher II* (2015). As in *Fisher I*, Justice Kagan recused herself in *Fisher II*.

Friedrichs v. California Teachers Association

At issue in *Friedrichs v. California Teachers Association* (2014) is the status of fair-share fees that California state law, consistent with Supreme Court precedent, allows unions to charge nonmembers for expenses germane to collective bargaining. Under this law, nonmembers can petition the unions to opt out of the nonchargeable portion of the fair-share fees they pay by seeking rebates for costs not associated with bargaining.

Public school teachers who resigned their union memberships because they objected to paying the nonchargeable portion of agency fees—joined by the Christian Educators Association International, a nonprofit organization serving Christians working in public schools, which raised the same issue—challenged the constitutionality of fair-share fees. The teachers sued their local union and its officials as well at the National Education Association and the California Teachers Association. The teachers claimed that having to make financial payments to support the unions violated their rights to free speech and association because they had to submit to opt-out procedures to avoid making those contributions to nonchargeable union expenses.

A federal trial court in California, in a brief unpublished opinion, began by relying on *Abood v. Detroit Board of Education* (1977), the first dispute in K–12 schooling in which the Supreme Court allowed unions to collect fair-share fees from nonmembers to support collective-bargaining activities. The court also cited another case from California,

Mitchell v. Los Angeles Unified School District (1992), wherein the Ninth Circuit, following the lead of *Abood*, viewed the opt-out provision as constitutional because the First Amendment does not require an opt-in procedure for nonunion members to pay fees equal to the full amount of dues. The court thus granted the unions' motion for judgment on the pleadings, meaning that it found no reason for the dispute to head to trial.

In a brief, unpublished two-sentence opinion, the Ninth Circuit summarily affirmed in favor of the unions. The court ruled that "the questions presented in this appeal are so insubstantial as not to require further argument, because they are governed by controlling Supreme Court and Ninth Circuit precedent" (*Friedrichs* 2014, p. *1).

The teachers sought further review from the Supreme Court, which agreed to hear an appeal in *Friedrichs* (2015).

Reflections on *Fisher*

Fisher is the latest dispute in the more than 40-year history of affirmative action in higher education that began in 1974 with the Supreme Court's judgment in *De Funis v. Odegaard*. In *De Funis*, the justices sidestepped the claims of a white male law student who challenged the affirmative action policy at the University of Washington, rejecting his claim as moot insofar as he was in the final semester of his studies.

Illustrative of the impact of affirmative action in education, the Supreme Court upheld race-conscious admissions policies in medical (*Regents of the University of California v. Bakke* 1978) and law school (*Grutter v. Bollinger* 2003) admissions, but not for undergraduate programs (*Gratz v. Bollinger* 2002).

Further, in the first of two cases from K–12 education, the Court invalidated the use of race where it was the only criterion used in teacher layoffs (*Wygant v. Jackson Board of Education* 1989). The Court later rejected the use of race as a tiebreaker in assigning students to oversubscribed high schools as part of redressing educational equities in Louisville, Kentucky, and Seattle, Washington. The Court reasoned that the plans were invalid because officials in both districts not only failed to demonstrate how the use of racial classifications in the student assignment plans was necessary to achieve their desired goal of racial diversity but also overlooked alternative approaches (*Parents Involved in Community Schools v. Seattle School District No. 1* 2007a).

Fourteen years ago, in *Grutter v. Bollinger* (2002), Justice Sandra Day O'Connor's majority opinion suggested, without offering a justification for this time frame, that "[w]e expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today" (p. 343). In light of the Supreme Court's agreeing to review the way in which officials at the University of Texas applied the admissions policy, it remains to be seen whether that 25-year window Justice O'Connor described may be closing and, if so, what the justices may offer instead.

Reflections on *Friedrichs*

Having allowed unions to collect fair-share fees from nonmembers in *Abood*, the Supreme Court later reined in labor organizations by requiring their officials to account more carefully for how they spend funds on activities unrelated to bargaining. In fact, the Court limited the reach of unions by agreeing with nonmembers that requiring them to pay for positions they do not support and that are unrelated to bargaining violates their First Amendment rights to free speech and association.

Less than a decade after *Abood*, in *Chicago Teachers Union, Local No. 1, v. Hudson* (1986), the Supreme Court invalidated a rebate system because it created a risk that monies collected from nonmembers might have been temporarily used for union purposes.

In a dispute from Michigan involving a faculty union in a public college, a holding that has been applied in K–12 disputes (*Lehnert v. Ferris Faculty Association* 1991), the Court observed that unions could charge nonmembers for only those expenses germane to bargaining, such as publications addressing negotiations as well as teaching and education generally, professional development, and employment opportunities. The Court refused to permit the union to charge nonmembers for the costs of lobbying and general public relations activities.

Most recently, in a nonschool case from Illinois (*Harris v. Quinn* 2014), the Supreme Court's judgment could foreshadow further restrictions in *Friedrichs* over the ability of teacher unions to collect fair-share fees. Although stopping short of invalidating *Abood*, the Court decided that health care workers could not be compelled to pay fair-share fees to support union speech and expressive activities with which they disagreed.

Against this backdrop, *Friedrichs* has two potential major ramifications if the Supreme Court follows its post-*Abood* trend.

First, if the justices continue to restrict or eliminate the ability of unions to collect fair-share fees from nonmembers in the District of Columbia and in about half of the states allowing for this practice, then teacher unions would face the possible loss of significant amounts of revenues for nonbargaining activities, such as supporting political candidates and other noneducational initiatives.

Second, the possible elimination of or having restrictions placed on fair-share fees may encourage members to resign from their unions, thereby further weakening the position of

K–12 teacher unions. It bears watching for the impact that *Friedrichs* may have on K–12 teacher unions and their school systems.

Conclusion

The death of a sitting justice is uncommon, so when it does occur, it can have major consequences. Justice Scalia was a long-time critic of race-based admissions in higher education, and his death is likely to have a greater impact on *Fisher* than *Friedrichs* because he would, in all probability, have been in the majority if, as anticipated, a closely divided Supreme Court invalidated the affirmative action policy at issue (Barnes 2016). The upshot is that *Fisher* appears to be destined to end in a 4–4 plurality, meaning that without a clear majority, it is a deadlock that would leave the lower court order upholding the policy in place but not providing binding precedent as guidance. Thus, Justice Scalia's death will likely leave the status of race-based admissions unresolved and in need of additional litigation.

Justice Scalia's death is less likely to have as significant an impact in *Friedrichs* because, on the basis of oral arguments before the Court, commentators sensed that the issue of whether unions can continue to charge agency fees to nonmembers would not have hinged on a single vote, his or another justice's (Ahlquist 2016).

These two key education cases aside, with the Supreme Court just about evenly divided between, to use common labels, activist or liberal and originalist or conservative justices, Justice Scalia's death is likely to tip this delicate balance in many areas affecting American schooling and all areas of the broader society. It certainly bears watching to see who will be appointed in Justice Scalia's stead on the high court bench.

References

Abood v. Detroit Board of Education, 431 U.S. 209 (1977).

Ahlquist, J. 2016. SCOTUS looks at labor unions. Unions are worried. Here's why. Are union dues "political speech" when you work for the government? *Washington Post*, January 14.

Barnes, R. 2016. These are the key cases facing the Supreme Court after Scalia's death: An eight-member court could split on all of those issues. *Washington Post*, February 14.

Chicago Teachers Union, Local No. 1, v. Hudson, 475 U.S. 292 (1986), *on remand*, 922 F.2d 1306 (7th 1991), *cert. denied*, 501 U.S. 1230 (1991).

De Funis v. Odegaard, 416 U.S. 312 (1974).

Fisher v. University of Texas, 645 F. Supp.2d 587 (W.D. Tex. 2009), *aff'd*, 613 F.3d 213 (5th Cir. 2011a), *reh'g en banc denied*, 644 F.3d 301 (5th Cir. 2011b), *cert. granted*, 132 S. Ct. 1536 (2012), *rev'd and remanded*, 133 S. Ct. 2411 (2013), *on remand*, 758 F.3d 633 (5th Cir. 2014a), *reh'g en banc denied*, 771 F.3d 274 (5th Cir. 2014b), *cert. granted*, 135 S. Ct. 2888 (2015).

Friedrichs v. California Teachers Association, 2013 WL 9825479 (C.D. Cal. 2013), 2014 WL 10076847 (9th Cir. 2014), *cert. granted*, 135 S. Ct. 2933 (2015).

Gratz v. Bollinger, 539 U.S. 306 (2002).

Grutter v. Bollinger, 539 U.S. 306 (2003).

Harris v. Quinn, 134 S. Ct. 2618 (2014).

Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991).

Mitchell v. Los Angeles Unified School District, 963 F.2d 258 (9th Cir. 1992).

Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007a), *on remand*, 498 F.3d 1059 (2007b).

Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1989).

Charles J. Russo, J.D., Ed.D., is Joseph Panzer Chair of Education in the School of Education and Health Sciences (SEHS), director of SEHS's Ph.D. Program in Educational Leadership, and adjunct professor in the School of Law at the University of Dayton, Ohio. Email: crusso1@udayton.edu

State Funding for Education,

continued from page 34

- The formula has not changed to accommodate disproportionate increases in special education and health insurance, thus actual required expenditures for those two categories are significantly higher than planned and the money must come from the other seven categories, avoiding harm to classroom instruction to the greatest extent possible.
- Schools continue to demand additional funding in order to provide teacher and student coaching to excel on high-stakes exams.
- Public employees in Massachusetts, including most school personnel, belong to unions. Contracts dictate not only compensation and benefits, but terms of the working day, year, and to some extent, duties.
- Salaries are comparatively high, in part because Massachusetts has a high cost of living, and also because teachers are required to be certified in their instructional fields and must have or obtain a master's degree by the end of their fifth year as a teacher.
- Administrative and support staffs and services are being stretched past the breaking point.

Clearly there continue to be many challenges to reaching the goal of success for every student within the limits of available resources.

Students come to school with ever greater complexities in their own lives and in their educational needs. Increasingly in Massachusetts the schools are seen as the place where all needs—educational and beyond—must be met.

Gail M. Zeman is a consulting school business administrator and past president of the Massachusetts ASBO. Email: gailzeman@gmail.com