The U.S. Supreme Court's Decision in *Fisher v.*

The U.S. Supreme Court's recent decision regarding the consideration of race in college and university admissions in *Fisher v. University of Texas at Austin* was one of the most anticipated rulings from the October 2012 term. In this article, the authors provide an overview of the key Supreme Court decisions that preceded and informed the Court's ruling in *Fisher*, as well as discuss the *Fisher* case itself and its potential implications.

BY SCOTT WARNER, PETE LAND, AND KENDRA BERNER

University of Texas at Austin

What It Tells Us (and Doesn't Tell Us) About the Consideration of Race in College and University Admissions and Other Contexts

During the time leading up to the U.S. Supreme Court's ruling in *Fisher v. University of Texas at Austin*, there was a great deal of analysis and speculation about how the Court might resolve the case.

Many in the higher education community feared that the Court might overturn its 2003 decision in *Grutter v. Bollinger*, which held that institutions of higher education could consider race as one of many diversity factors in admissions decisions to further their interest in obtaining the educational benefits that flow from a diverse student body. At the same time, lawyers and non-lawyers alike have been wondering how the decision in *Fisher* would impact the consideration and use of race in other settings outside of higher education.

Now that the Court has handed down the *Fisher* decision, some questions have been answered but many still remain. For example, we now know that the Court affirmed perhaps the most fundamental aspect of its 2003 ruling in *Grutter*: that the educational benefits associated with having a diverse student body are a "compelling interest" that colleges and universities can seek to attain through the consideration of race as one of many diversity factors. The *Fisher* Court also emphasized, however, that any consideration of race must be "narrowly tailored" to promote diversity and that higher education institutions are subject to the same "strict scrutiny" standard that other entities must satisfy to establish that their consideration of race passes constitutional muster. Because the Supreme Court remanded the *Fisher* case to the U.S. Court of Appeals for the Fifth Circuit for further consideration of whether the University of Texas at Austin's consideration of race was "narrowly tailored," it remains to be seen whether the institution's race-conscious admissions practices will be upheld. It also remains to be seen how the *Fisher* decision and any subsequent rulings in the *Fisher* case will be applied to admissions programs at other higher education institutions, as well as to institutions and employers outside of higher education.

Grutter and *Bakke*: The Precursors to *Fisher*

The two cases that lay the foundation for the Supreme Court's decision in *Fisher* are *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and *Grutter v. Bollinger*, 539 U.S. 306 (2003). Although they reached different results, both cases strictly scrutinized race-conscious admissions policies and found that the universities' stated objective of achieving student body diversity was a compelling interest. In *Bakke*, the Supreme Court ruled that a quota system that insulated minority applicants from competition with nonminority applicants was unconstitutional because it was not narrowly tailored. In *Grutter*, the Supreme Court reached the opposite conclusion. In that case, the Court held that the University of Michigan Law School's individualized and holistic assessment of applicants that included consideration of diversity contributions (including but not limited to an applicant's race) as a "plus factor" was narrowly tailored and thus constitutional.

The Court in *Fisher* clearly stated that it was following *Grutter*, and it affirmed that higher education institutions have a compelling interest in attaining a diverse student body. Although the University of Texas at Austin's consideration of race was modeled on the admissions process upheld in *Grutter*, Justice Anthony Kennedy, writing for the majority in *Fisher*

and echoing his dissent in *Grutter*, nonetheless found that the Fifth Circuit had failed to subject the admissions policy to the narrow tailoring analysis required under strict scrutiny. To understand the potential impact of the *Fisher* decision, it is first important to examine more closely the legal principles that framed the *Bakke* and *Grutter* decisions.

The "Strict Scrutiny" Test

When courts review whether a law or government policy involving the consideration of race complies with the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, they apply an analysis termed "strict scrutiny." The same analysis applies to both public and private institutions alike under Title VI of the Civil Rights Act of 1964. The strict scrutiny analysis applies whether the policy at issue relates to university admissions, employment, or government contracting. "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."[1] Such strict scrutiny requires that laws and policies that differentiate between people based on race are "constitutional only if they are narrowly tailored to further compelling governmental interests."[2]

Regents of the University of California v. Bakke

In *Bakke*, the University of California Medical School set up parallel admissions tracks for minority and nonminority applicants. All students were evaluated based upon their grade point average, MCAT score, grades in science courses, letters of recommendation, extracurricular activities, and an interview. But 16 of the 100 seats in the incoming class were reserved for racial minorities, thus isolating those applicants from competition with nonminority applicants.[3]

Justice Lewis Powell, writing for a splintered Court, determined that although the university's program was ostensibly benign, "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." Justice Powell thus evaluated the university's stated purposes for considering an applicant's race to determine whether any of them constituted a compelling justification that could survive strict scrutiny if narrowly tailored. The University of California offered four reasons that it claimed were compelling: (1) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession"; (2) "countering the effects of societal discrimination"; (3) "increasing the number of physicians who will practice in communities currently underserved"; and (4) "obtaining the educational benefits that flow from an ethnically diverse student body."[4]

Justice Powell rejected the first three proffered reasons because: (1) "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake"; (2) the university was not in a position to find and remedy constitutional or statutory violations; and (3) there was a lack of evidence that minority medical school students would in fact go on to practice in underserved communities. With respect to the fourth stated purpose, however, Justice Powell articulated a constitutionally compelling interest to allow consideration of race in the higher education context as follows:

> [A]ttainment of a diverse student body clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. ...
>
> It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.[5]

Despite his identification of a compelling interest, Justice Powell rejected the university's use of a quota to achieve its diversity goal. At the same time, he pointed to the admissions program used by Harvard College as an example of the permissible use of race in college admissions. Under Harvard's plan, diversity operated as a plus for applicants who met initial academic criteria. Justice Powell noted approvingly that the program "treats each applicant as an individual in the admissions process." He also stated that such consideration of race would not be assumed to be a cover for a quota system, but opined instead that "good faith would be presumed in the absence of a showing to the contrary"[6]

Grutter v. Bollinger

Twenty-five years later, the Supreme Court considered the use of race in university admissions again in *Grutter*. The University of Michigan Law School's admissions program at issue in *Grutter* was modeled on the Harvard program endorsed by Justice Powell, and Justice Sandra Day O'Connor's opinion for the *Grutter* majority closely follows the reasoning set forth by Justice Powell in *Bakke.* The Michigan Law School's admissions policy aspired to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." The Michigan Law School did not restrict the types of diversity contributions eligible for consideration but also affirmed its "longstanding commitment" to racial and ethnic diversity.[7]

Looking to Justice Powell's recognition in *Bakke* of a university's academic freedom to choose its students and pursue the goal of attaining a diverse student body, Justice O'Connor determined that the "Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." This, she explained, "is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." And quoting from *Bakke*, Justice O'Connor noted that "our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that 'good faith' on the part of a university is 'presumed' absent 'a showing to the contrary.'"[8]

Turning to the narrow tailoring analysis, and again relying on *Bakke*, the majority in *Grutter* found that "a university may consider race or ethnicity only as a 'plus in a particular applicant's file'" and that an "admissions program must be 'flexible enough to consider all pertinent elements of diversity in light of the particular qualifica-

tions of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.'" The *Grutter* Court held that in light of the law school's individualized consideration, the law sschool's goal of attaining a "critical mass" of minority students was not equivalent to a quota.[9]

Finally, and as *Fisher* has now highlighted, Justice O'Connor explained that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," but instead, necessitates "serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks." Indeed, as the *Grutter* majority emphasized, "[s]trict scrutiny is not 'strict in theory, but fatal in fact.'"[10]

Chief Justice William Rehnquist penned a dissenting opinion, joined by Justice Antonin Scalia, Justice Clarence Thomas, and notably, Justice Kennedy. Chief Justice Rehnquist, parsing the Michigan Law School's admissions statistics, rejected the Law School's claimed critical mass objective, finding instead that the admissions program was "a naked effort to achieve racial balancing." Specifically, he noted that during the years in question, the number of Native American students admitted fluctuated between 13 and 19, the number of admitted African-American students ranged from 91 to 108, and the number of Hispanic students admitted varied from 47 to 56. The Chief Justice observed, "one would think that a number of the same order of magnitude would be necessary to accomplish this same purpose [of achieving a critical mass] for [all groups]." In other words, if the Michigan Law School's real purpose was to "ensure that these minority students do not feel isolated or like spokespersons for their race; to provide adequate opportunities for the type of interaction upon which the educational benefits of diversity depend; and to challenge all students to think critically and reexamine stereotypes," Chief Justice Rehnquist questioned why half as many Hispanics and one-sixth as many Native Americans would be needed as African-Americans.[11]

The Michigan Law School's admissions policy aspired to "achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." The Michigan Law School did not restrict the types of diversity contributions eligible for consideration but also affirmed its "longstanding commitment" to racial and ethnic diversity.

Further, Chief Justice Rehnquist noted that Hispanics and African-American applicants with similar LSAT scores and GPAs were admitted to Michigan Law School at vastly different rates, without explanation from the law school. And, finally, charting the percentage of Native Americans, Hispanics, and African-Americans in the applicant pool as compared to the percentages in the admitted students pool, he found the correlation "far too precise" to demonstrate individualized consideration rather than racial balancing. Chief Justice Rehnquist thus determined:

> [The] Law School has offered no explanation for its actual admissions practices and, unexplained, we are bound to conclude that the Law School has managed its admissions program, not to achieve a "critical mass," but to extend offers of admission to members of selected minority groups in proportion to their statistical representation in the applicant pool. But this is precisely the type of racial balancing that the Court itself calls "patently unconstitutional."[12]

Significantly for purposes of his opinion for the majority in *Fisher*, Justice Kennedy joined Chief Justice Rehnquist's dissent in *Grutter* and also wrote separately to further emphasize his view that the Court had failed in *Grutter* to apply the strict scrutiny standard required by *Bakke*. Presaging his later decision for the majority in *Fisher*, Justice Kennedy stated that "[i]n the context of university admissions the objective of racial diversity can be accepted based on empirical data known to us, but deference is not to be given with respect to the methods by which it is pursued."[13]

Also looking to the Michigan Law School's admissions numbers, Justice Kennedy found the consistency in the number of admitted applicants from various minority groups "require[d] the Law School either to produce a convincing explanation or to show it has taken adequate steps to ensure individual assessment," which it had failed to do. Justice Kennedy concluded that "[w]ere the courts to apply a searching standard to race-based admissions schemes, that would force educational institutions to seriously explore race-neutral alternatives. The Court, by contrast, is willing to be satisfied by the Law School's profession of its own good faith."[14] As explained below, Justice Kennedy's dissent in *Grutter*, as well as his agreement with the views of then-Chief Justice Rehnquist in the *Grutter* case, informed his opinion on behalf of the *Fisher* majority.

Fisher: The Supreme Court's Decision and Those of the Lower Courts That Preceded It

The Supreme Court's Decision in Fisher*: A Brief Overview*

In a 7-1 decision (in which Justice Elena Kagan did not participate), the Supreme Court ruled in *Fisher v. University of Texas at Austin* that the Fifth Circuit incorrectly applied the strict scrutiny standard in deciding that the University of Texas at Austin's consideration of race in its undergraduate admissions process was legally permissible.[15] Although many anticipated a significant adjustment of existing law regarding race-conscious admissions practices, the Supreme Court declined to overrule its previous decisions that have allowed institutions of higher education to consider race as one of several factors in seeking to achieve the educational benefits of diversity. Indeed, the *Fisher* decision clarified that, at least in the higher education context, schools may exercise their academic judgment to determine that achieving the educational benefits of diversity is a sufficiently compelling objective to justify the consideration of race as one of many diversity factors in conducting a holistic review of applicant files during the admissions process. The *Fisher* decision also emphasized, however, that institutions

may only pursue such an objective using means that are narrowly tailored to meet it. And narrow tailoring requires consideration of race-neutral alternatives.

Writing for the majority, Justice Kennedy explained that it was not enough for courts to ask whether a college or university acted in "good faith" in its consideration of race. Instead, like other racial classifications, the majority opinion in *Fisher* stressed that the consideration of race by colleges and universities must be reviewed under the same strict scrutiny test that applies in other contexts. The strict scrutiny test applies to public institutions and to private institutions that receive federal financial assistance.[16] As noted above, this test requires institutions of higher education to (1) demonstrate a compelling government interest; and (2) show that the means used to achieve that interest are narrowly tailored. As a result of its decision in *Fisher*, the Supreme Court remanded the case to the Fifth Circuit and instructed the Court of Appeals to "assess whether the University has offered sufficient evidence [to] prove that its admissions program is narrowly tailored to meet the educational benefits of diversity."[17]

The Fifth Circuit's Decision in Fisher*: How Much Deference Should Be Afforded to the University's Race-conscious Admissions Policy?*

In reaching the decision that the Supreme Court reviewed in *Fisher*, the Fifth Circuit upheld the district court's grant of summary judgment in favor of the University of Texas at Austin. In its opinion, the Fifth Circuit described the history of the university's admissions policies in some detail.[18] After *Bakke*, the University of Texas employed a race-conscious admissions policy for many years. Those race-conscious polices came to end in 1996, when the Fifth Circuit ruled in *Hopwood v. Texas* that diversity in education was not a compelling interest that could justify the consideration of race in university admissions.[19] After *Hopwood*, the university adopted various policies that were facially race-neutral in an effort to attract and enroll minority students. As the Fifth Circuit noted, however, "[d]espite these efforts, minority presence at UT decreased immediately."[20]

In 1997, the Texas legislature enacted a law mandating that all Texas high school students in the top 10 percent of their class be admitted to any Texas state university. This law, known as the "Top 10 Percent Law," is relevant to *Fisher* because it was one of the race-neutral alternatives that the University of Texas had been using, along with the consideration of race, to promote its interest in attaining the educational benefits of diversity. As the Fifth Circuit explained in its opinion, during the first year it was in effect, the Top 10 Percent Law increased African-American student enrollment from 2.7 percent to 3.0 percent and Hispanic enrollment from 12.6 percent to 13.2 percent. Over time, both the number and percentage of students in these minority groups increased such that in the last class admitted prior to the Supreme Court's 2003 decision in *Grutter* 4.5 percent of the students were African-American, 16.9 percent were Hispanic, and 17.9 percent were Asian-American.[21]

The University of Texas at Austin adopted the undergraduate admissions program at issue in *Fisher* following the Supreme Court's decision in *Grutter*, which held that advancing the educational benefits of diversity was a compelling interest and that the consideration of race in the University of Michigan's law school admissions program was narrowly tailored to meet that objective.[22] In the wake of *Grutter*, the University of Texas at Austin evaluated its then-current admissions policies and practices and conducted two studies to assess whether it was advancing its interest in student diversity by enrolling a critical mass of underrepresented minority students. Based upon the results of these studies, the university determined that it had not yet enrolled a critical mass of such students and began considering race as one of many diversity factors in making admissions decisions. The policy does not identify a date by which the university will stop considering race in admissions. Instead, the university periodically reviews the necessity of considering race every five years and considers whether race-neutral alternatives would suffice in allowing the university to achieve its student-diversity goals. The Fifth Circuit found that, using this race-conscious approach, the enrollment of African-American students doubled from 165 students to 335 students (as compared to 275 under the pre-*Grutter* admissions policy) and Hispanic enrollment increased approximately 1.5 times from 762 students to 1,228 students (as compared to 1,024 pre-*Grutter*). The enrollment of Asian-American students also increased by approximately 10 percent from 1,034 students to 1,126 students.[23]

Because Fisher and the other plaintiffs who challenged the university's race-conscious admissions practices are Texas residents, the Fifth Circuit's decision (and the Supreme Court's decision) focused on those practices as they relate to in-state applicants. For such applicants who were not in the top 10 percent of their high school class, the university evaluated the following combination of academic criteria (using a numerical "academic index") and non-academic criteria (using a separate numerical "personal achievement index"): grade point average, standardized test scores, high school class rank, required essays, and a "personal achievement score" based upon an evaluation of the entire application file. The personal achievement score included a "special circumstances" component that could take into account an applicant's race, socioeconomic status, high school, and other "intangible factors." Under

For in-state applicants who were not in the top 10 percent of their high school class, the University of Texas at Austin evaluated the following combination of academic criteria and non-academic criteria: grade point average, standardized test scores, high school class rank, required essays, and a "personal achievement score" based upon an evaluation of the entire application file, including a "special circumstances" component that could take into account an applicant's race, socioeconomic status, high school, and other "intangible factors."

the university's admissions policy challenged in *Fisher*, neither race nor any other factor was considered separately or assigned separate numerical values. Instead, each applicant file was evaluated as a whole, and race was considered as one of many factors in reviewing each file. Although university admissions representatives were aware of each applicant's race, the university did not monitor the racial composition of the students who were admitted during the admissions process. As described by the Fifth Circuit:

> [G]iven the mechanics of UT's admissions process, race has the potential to influence only a small part of the applicant's overall admissions score. The sole instance when race is considered is as one element of the personal achievement score, which itself is only a part of the total [Personal Achievement Index]. Without a sufficiently high [Academic Index] and well-written essays, an applicant with even the highest personal achievement score will still be denied admission.

Nonetheless, as the Fifth Circuit noted, the district court still found that race "'is undisputedly a meaningful factor that can make a difference in the evaluation of a student's application.'"[24]

After readily finding that the University of Texas at Austin "undoubtedly has a compelling interest in obtaining the educational benefits of diversity[,]" the Fifth Circuit noted that the university's practice of considering race "summons close judicial scrutiny." In examining the means by which the university had sought to achieve the educational benefits of diversity, the Fifth Circuit focused on the judicial deference that it believed should be afforded to a university's academic decision making. Notably, not only did the Fifth Circuit decide that it should defer to the university's determination that the educational benefits of diversity were a goal worth pursuing, but it also afforded deference to the university with regard to whether the manner in which it chose to achieve that objective was narrowly tailored for purposes of strict scrutiny:

> Narrow tailoring, a component of strict scrutiny, requires any use of racial classifications to so closely fit a compelling goal as to remove the possibility that the motive for the classification was illegitimate racial stereotype. Rather than second-guess the merits of the university's decision, a task we are ill-equipped to perform, we instead scrutinize the university's decisionmaking process to ensure that its decision to adopt a race-conscious admissions policy followed from the good faith consideration *Grutter* requires. We presume the university acted in good faith, a presumption [Fisher and the other plaintiffs-appellants] are free to rebut.[25]

Thus, in the Fifth Circuit's view, although strict scrutiny applied to the university's race-conscious admission program, courts should show significant deference to higher education institutions in both adopting and implementing race-conscious admissions policies. In upholding the university's race-conscious admissions policy, the Fifth Circuit rejected arguments that the university (1) had engaged in unconstitutional "racial balancing" in promoting its goal of achieving a diverse student body; (2) had not adequately considered available race-neutral alternatives; and (3) had already achieved a "critical mass" of minority students using race-neutral means like the Top 10 Percent Law.[26]

The Parties' Arguments to the U.S. Supreme Court.

In challenging the Fifth Circuit's decision, Fisher made the following arguments. First, without asking the Supreme Court to overrule *Grutter*, Fisher argued that the University of Texas at Austin was not actually pursuing the type of compelling interest in promoting diversity recognized in *Grutter*. Rather, Fisher accused the university of engaging in simple racial balancing. Fisher also contended that the university's asserted interest in diversity at the classroom level—as opposed to seeking diversity only among the student body as a whole—was not a compelling interest that could justify the consideration of race.[27]

Second, Fisher contended that the university had not provided a strong basis in evidence that its consideration of race was necessary to enroll a critical mass of minority students. In so doing, Fisher urged the Supreme Court to adopt the "strong basis in evidence" test that the Supreme Court had applied in cases involving the consideration of race outside of the education setting.[28] Third, Fisher advanced several reasons why she believed the university's consideration of race was not narrowly tailored to meet its objectives, even assuming those objectives qualified as a compelling interest. For example, she contended that the university's consideration of race led to only minimal increases in minority student enrollment, demonstrating that exclusively race-neutral approaches would have worked "about as well" as considering race. Fisher also argued that the university's stated interests in achieving diversity at the classroom level or demographic representation could never meet the narrow tailoring requirement of strict scrutiny. Fisher further argued that the university's use of race was overinclusive (and therefore not narrowly tailored) because Hispanics should not be considered underrepresented in Texas.[29]

Fourth, Fisher contended that the Fifth Circuit's "comprehensive deference" to the university under what she described as a "novel good faith standard" was erroneous. In so doing, Fisher stressed that strict scrutiny was the correct standard and that, under that standard, courts should in no way defer to an institution of higher education's assertion that its use of race is narrowly tailored to achieve the educational benefits of diversity. Of particular importance given the focus of Justice Kennedy's majority opinion in *Fisher*, Fisher argued that the Fifth Circuit's refusal to second-guess the merits of the university's decision that available race-neutral alternatives were not sufficient to achieve diversity was inconsistent with the applicable strict scrutiny test.[30]

The University of Texas at Austin countered with a number of arguments of its own. First, the university argued that its admissions policy was modeled on the types of policies that the Supreme Court had approved since *Bakke*, including the University of Michigan Law School policy at issue in *Grutter*.[31] Second, the university disputed Fisher's assertion that it was engaged in "racial balancing" on the grounds that the university did not have any established numerical or other quantitative goal or target relating to the enrollment of minority students.[32] Third, the university asserted that the Top 10 Percent Law did not preclude the university from considering race as part of its admissions process because that law did not allow for the nuanced, holistic assessments that *Grutter* authorized and because the university had adequately considered various race-neutral alternatives.[33]

Fourth, the university advanced an interpretation of the modest impact that consideration of race had on minority enrollment

squarely at odds with the interpretation offered by Fisher: that the modest manner in which race had impacted the admissions process was a "constitutional virtue, not a vice" in that it demonstrated that the use of race was narrowly tailored.[34] Fifth, the university argued that, despite Fisher's contentions to the contrary, its decision to add race as a factor in its admissions program was intended to advance the same "broad diversity interest" that the Supreme Court had found to be compelling in *Grutter* and *Bakke*.[35] Finally, the university argued that the Fifth Circuit had actually applied the appropriate strict scrutiny test in ruling in the university's favor, claiming that the Fifth Circuit did not defer to the university's belief that its use of race in admissions was narrowly tailored.[36] Sixth, the university contended that there was no reason to consider overruling previous Supreme Court precedent authorizing the limited consideration of race in university admissions.[37]

Back to the Supreme Court's Decision: *Grutter* and *Bakke* Are Good Law, but "Strict Scrutiny" Means Strict Scrutiny

Given the analysis conducted by the Fifth Circuit and the district court in ruling in the university's favor and the range of arguments advanced by the parties in their briefs, there were any number of issues upon which the Supreme Court could have focused in reaching a decision. One key issue was how the Supreme Court would evaluate the University of Texas at Austin's consideration of race given that, unlike the University of Michigan (whose admissions practices were the subject of the *Grutter* and *Gratz* decisions), the University of Texas is subject to a race-neutral statute like the Top 10 Percent Law. The Supreme Court left this issue (among others) unanswered in remanding the *Fisher* case to the Fifth Circuit for further proceedings.

Significantly, the majority in *Fisher* confirmed many of the key principles that underlie the Supreme Court's previous decisions in *Grutter* and *Bakke*[38], including the fact that "obtaining the educational benefits of student body diversity is a compelling state interest that can justify the use of race in university admissions." As the Court explained in *Fisher*, the *Grutter* decision "upheld the use of race as one of many 'plus factors' in an admissions program that considered the overall individual contribution of each candidate." The *Fisher* Court also contrasted the facts at issue in *Gratz v. Bollinger*, the 2003 companion case to *Grutter* involving the University of Michigan's undergraduate admissions program, in which the Court determined that automatically awarding a certain number of points to applicants from certain racial groups was not constitutional.[39] Like the admissions program approved in *Grutter*, the University of Texas at Austin did not assign a specified number of points to applicants based upon their race, but, according to the *Fisher* majority, race was still a "meaningful factor."

The *Fisher* Court thus emphasized that race may be considered only if the admissions program under review can meet the constitutional strict scrutiny test. In other words, a college or university must demonstrate both that its "purpose or interest is both constitutionally permissible and substantial, and that its use of [race] is necessary ... to the accomplishment of its purpose." Although the Supreme Court confirmed that higher education institutions are entitled to deference with regard to the importance of the educational benefits of having a diverse student body, the majority in *Fisher* stressed that institutions of higher education face a substantial burden in showing that their consideration of race in the admissions process is narrowly tailored to meet that objective. In so doing, the *Fisher* majority rejected the standard used by the Fifth Circuit; namely, whether the university's use of race as a factor in the admissions process was made "in good faith." Instead, even if an institution decides that diversity is a sufficiently important interest, there still must be "a further judicial determination" that the means used to achieve diversity are "narrowly tailored" to meet that objective.[40]

In more practical terms, this means that admissions standards must be designed to ensure that each applicant is evaluated on an individual basis, rather than allowing an applicant's race or ethnicity to be the "defining feature" of his or her application. The judicial review required by *Fisher* also means that the courts must assess whether it is "necessary" for an institution to use race to attain the educational benefits of diversity or whether such benefits could be achieved without considering race. As Justice Kennedy explained on behalf of the majority, strict scrutiny does not allow courts simply to defer to a college or university's "serious, good faith consideration of workable race-neutral alternatives." Rather, courts must "examine with care" race-neutral alternatives in determining whether consideration of race is actually necessary.[41]

Only Justice Ginsburg believed that the Fifth Circuit had properly determined that the University of Texas at Austin's consideration of race was narrowly tailored to obtain the educational benefits of diversity. As Justice Ginsburg wrote in her dissent, she determined that the Fifth Circuit properly adhered to the Supreme Court's previous rulings in *Bakke* and *Grutter* and that the Fifth Circuit's ruling in favor of the University of Texas at Austin "merit[ed the Court's] approbation." Of particular note, in reaching her decision, Justice Ginsburg disagreed with the majority with regard to whether the "Top 10 Percent Law" was actually race-neutral:

> I have said before and reiterate here that only an ostrich could regard the supposedly neutral alternatives as race unconscious. ... Texas' percentage plan was adopted with racially segregated neighborhoods and schools front and center stage. ... It is race-consciousness, not blindness to race, that drives such plans. As for holistic review, if universities cannot explicitly include race as a factor, many may "resort to camaflouge" to "maintain their minority enrollment."

The six other justices who joined in Justice Kennedy's opinion for the majority apparently did not share Justice Ginsburg's view that options "'that candidly disclose their consideration of race [are] preferable to those that conceal it.'"[42]

Thus, the *Fisher* majority has affirmed that colleges and universities should be afforded some level of deference in assessing whether the educational benefits of diversity are an objective worth pursuing, while suggesting that those same institutions will be afforded less deference in evaluating whether the means used to achieve that objective are narrowly tailored. Indeed, the Court specifically stated that "[t]he higher education dynamic does not change the narrow tailoring analysis of strict scrutiny applicable in other contexts." In the end, the Court stressed that the burden rests on institutions to demonstrate that race-neutral alternatives are not adequate to achieve the educational benefits of diversity. In so doing, the *Fisher* Court emphasized that institutions of higher education will not be afforded deference with regard to the issue of whether the means used to achieve diversity are narrowly tailored to meet that objective.

In deciding *Fisher*, the majority cited only once (but did not discuss) the Supreme Court's 2007 decision in *Parents Involved In Community Schools v. Seattle School District No. 1*, in which the Court ruled that the compelling interest in advancing the educational benefits of diversity recognized in *Grutter* was limited to the higher education context and, therefore, did not apply to the consideration of race by elementary and secondary schools.[43] Although the *Parents Involved* decision limited the permissible uses of race in the K-12 context, only Justice Kennedy's majority opinion in *Fisher* echoes his concurring opinion in *Parents Involved* and his dissenting opinion in *Grutter* with regard to the issue of narrow tailoring by stressing that race neutrality should be part of the strict scrutiny analysis, regardless of the context.

What remains to be seen is precisely how far the University of Texas at Austin and other institutions of higher education will have to go to demonstrate that race-neutral alternatives or other means are not adequate to permit colleges and universities to achieve a sufficient level of diversity. In addition, in their concurring opinions, Justice Scalia indicated and Justice Thomas flatly stated that they would overturn *Grutter* if given the opportunity.[44] The extent to which their views could influence any subsequent decision of the Supreme Court in *Fisher* also remains unclear.

Each college or university whose admissions policy is challenged can expect to face a heavier burden to justify the need for race-conscious policies on its campus and the manner in which its policy considers the race of applicants to survive strict scrutiny.

The Implications of the *Fisher* Decision

The precise impact of the *Fisher* decision on the viability of existing race-conscious college and university admissions processes is not entirely clear. On one hand, *Fisher* emphatically confirmed that higher education institutions can continue to consider race in admissions if their process for doing so satisfies certain standards. Any institution that decides that diversity is a compelling educational interest is also entitled to deference from the courts with respect to that decision. These portions of the *Fisher* decision represent a clear victory for colleges and universities, which feared that the high court might rule that any consideration of race in admissions programs unlawful.

At the same time, however, other aspects of the *Fisher* ruling could make it more difficult for schools to rely on judicial approval of their specific method of directly considering race in admissions for two principal reasons. First, the directive that courts must perform a "searching examination" of whether such plans are "narrowly tailored" and must *not* afford higher education institutions any deference in that assessment means that courts will have to review and evaluate carefully the details of race-conscious admissions programs on a case-by-case basis. As a result, each college or university whose admissions policy is challenged can expect to face a heavier burden to justify the need for race-conscious policies on its campus and the manner in which its policy considers the race of applicants to survive strict scrutiny. Given the limitations on judicial deference articulated by Justice Kennedy in *Fisher*, one can expect that courts will more expansively question the judgments of higher education institutions based upon the specific circumstances of a particular institution's student body, the demographics of its applicant pool, and the details of its admissions process and experience.

Second, the *Fisher* Court's emphasis on the showing that institutions must make to demonstrate that race-neutral alternatives would not create sufficient diversity within their student body establishes another key factual issue that could lead courts to conclude that race-conscious admissions policies are unlawful. To make such a determination, courts are likely to examine (1) the history of each institution's admission procedures, (2) evidence of the extent to which the institution has recently considered race-neutral options, and (3) in light of such factors, the extent to which the specific race-conscious procedure applied at the institution in question is necessary to achieve the educational benefits of diversity. These issues likely will require courts to make additional factual determinations in assessing admissions policies. This, in turn, will offer lower courts further opportunities to exercise judicial discretion, as opposed to applying a standard that defers to the educational judgments of colleges and universities with respect to the narrow tailoring component of strict scrutiny.

There also remain, after *Fisher,* many questions regarding the core components of any effort to achieve the objective of a diverse student body and the educational benefits that go along with it. These include:

- What constitutes a sufficiently diverse student body to render direct consideration of the race of applicants unnecessary and thus unlawful?
- Can institutions compare the percentage of admitted students of a particular race to the percentage of the applicant pool or the percentage break-down of citizens in the relevant population?
- How can an institution demonstrate that considering race or ethnicity does not render that factor a defining factor of an individual's application?
- How can an institution show that race-neutral alternatives would be insufficient if the ultimate goal of diversity cannot be reduced to percentages or other numeric measures?
- How much must a race-neutral option cost to be "intolerably" high, and is an institution entitled to any deference regarding whether the cost of race-neutral measures is too high?
- Can institutions justify race-conscious policies by pointing to decreased diversity of student bodies at other institutions that have removed such policies, such as schools in states that have barred the consideration of race in admissions?

The combination of these unresolved questions, along with the increased opportunity for judicial review of the manner in which institutions seek to attain student body diversity under *Fisher,* could generate more legal challenges to race-conscious admissions policies at colleges and universities. Those opposing affirmative action include organizations that are well-funded and that can be

expected to direct their resources to mount additional challenges to race-conscious admissions policies. In addition to ongoing litigation in the *Fisher* case itself, additional lawsuits may be initiated and continue after the *Fisher* case itself is resolved on remand. Litigants on either side of the affirmative action debate may seek opportunities for rulings from different courts that could interpret *Fisher*'s standards in unique, potentially contradictory ways, depending on the details of a particular institution's history and policies.

To help prepare for and defend against such legal challenges, higher education institutions would be well-served by carefully examining their existing policies and considering (or reconsidering) race-neutral alternatives in a systematic, documented way. Documenting such efforts should prove extremely helpful to institutions in satisfying their burden under *Fisher* to "demonstrate, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."[45] Moreover, those who oppose race-conscious plans are likely to use the absence of such documentation as evidence of a failure to heed *Fisher*'s warning regarding the importance of taking race directly into account only as a last resort, after considering race-neutral alternatives.

Examples of race-neutral alternatives that have been considered by various institutions include: basing decisions on applicants' socioeconomic status, admitting a certain percentage from each high school in the state (i.e., Texas's Top Ten Percent Law), removing any preference for "legacy" students, enhancing recruitment of and financial aid programs for financially challenged students, establishing partnerships with K-12 schools in locations with populations more likely to enhance diversity, and facilitating community college transfers.[46] Some schools with race-conscious policies have already conducted studies to calculate how a "race-blind" process would have reduced the diversity of their incoming classes.[47] Conducting such a study and/or compiling the results from other institutions' studies could help demonstrate the expected impact that removing race as a consideration might have on diversity at a particular institution. Furthermore, even schools that have considered race-neutral alternatives in the relatively recent past should consider re-examining them after *Fisher* and documenting that they have done so.

All such consideration of existing plans, and any potential adjustments to those plans, should assess each admissions process within an institution on a case-by-case basis. Admissions decisions are often rendered differently among one institution's multiple undergraduate schools, graduate schools, programs, or other subdivisions, and the historic applicant pools for each subset of students considered for admission may be quite varied and unique. Given *Fisher*'s emphasis on "narrowly tailoring" with regard to any direct consideration of race, the necessity for doing so should be analyzed for each academic program that has its own admissions decision making process.

The reach of *Fisher*'s application of strict scrutiny to the consideration of race in admissions may also extend beyond college and university admissions and higher education, more generally, and into the employment and government contracting contexts. Among other things, the *Fisher* decision highlighted the unique importance of diversity in higher education, but it also noted that certain aspects of the "strict scrutiny" standard (namely the narrow tailoring analysis) apply in the higher education setting in essentially the same manner as they have been applied in other contexts, such as employment and government contracting. To the extent an employer considers achieving workplace diversity as a corporate or business goal, either on its own or in response to client concerns or interests, *Fisher* thus reinforces that efforts to achieve greater racial diversity will be reviewed under a stringent strict scrutiny standard. Indeed, the *Fisher* majority opinion specifically referenced previous Supreme Court decisions involving racial preferences or the consideration of race in making employment decisions and awarding government contracts.[48] To the extent lower courts interpret *Fisher* to establish greater burdens to justify consideration of race in other contexts outside of higher education, such interpretations could also impact judicial assessment of employers' affirmative action plans. Moreover, federal government contractors with affirmative action obligations under the Office of Federal Contract Compliance Programs rules and regulations should follow the *Fisher* case and its progeny for developments that could impact hiring practices subject to those requirements.

To be sure, there is uncertainty surrounding how the *Fisher* case will be resolved on remand, how the Supreme Court will evaluate that case if it comes before the Court again, and how *Fisher* will be applied both in the higher education setting and in other contexts. Nonetheless, *Fisher* has reaffirmed the Supreme Court's decisions in *Bakke* and *Grutter*, thus providing that race can still be considered in college and university admissions if done so in a narrowly tailored manner. The outcome of further litigation in the *Fisher* matter and in other cases applying the Supreme Court's recent ruling in that case will hopefully clarify some of the unanswered questions that remain. ⊙

Scott Warner is a partner in the Chicago office of Franczek Radelet P.C., where he focuses his practice on representing both private and public institutions of higher education in a wide range of governance, faculty, student, and general employment matters. Earlier in his legal career, Warner served as assistant and associate general counsel at Northwestern University. Pete Land is also a partner in Franczek Radelet's Chicago office, where he represents private and public sector higher education and business clients in a wide array of litigation and counseling matters, with an emphasis on employment law. Earlier in his career, Land was a partner in Babbitt, Land & Warner LLP. Kendra Berner is an associate at Franczek Radelet P.C., where she represents a wide range of educational institutions, including public school districts, charter schools, private schools and higher education institutions, in a variety of education law matters. Prior to joining Franczek Radelet, Kendra served as an assistant attorney general at the Office of the Attorney General for the District of Columbia.

Endnotes

[1]*Bakke*, 438 U.S. at 291 (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944)).

[2]*Grutter*, 539 U.S. at 326.

[3]*Bakke*, 438 U.S. at 273-74.

[4]*Id.* at 291, 305-06.

[5]*Id.* at 307, 310, 312, 315.

[6]*Id.* at 316, 318-19.

[7]*Grutter*, 539 U.S. at 315-16.

[8]*Id.* at 328, 329 (quoting *Bakke*, 438 U.S. at 318-19).

[9]*Id.* at 334 (quoting *Bakke*, 438 U.S. at 315), 335-36.

[10]*Id.* at 326 (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S.200, 237 (1995)), 339.

[11]*Id*. at 379, 380-81 (Rehnquist, C.J., dissenting).

[12]*Id.* at 382-83, 386.

[13]*Id.* at 387 (Kennedy, J., dissenting).

[14]*Id.* at 388, 391, 394.

[15]570 U.S. ___, No. 11-345 (June 24, 2013) Slip Opinion.

[16]Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*.

[17]*Fisher*, *supra* n. 15, at 13.

[18]*Fisher v. Univ. of Texas at Austin,* 631 F.3d 213, 222-226 (5th Cir. 2011).

[19]*Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

[20]*Fisher*, 631 F.3d at 223-224.

[21]*Fisher*, 631 F.3d at 223-224.

[22]*Grutter*, 539 U.S. 306.

[23]*Fisher*, 631 F.3d at 225-226.

[24]*Id.* at 228-230.

[25]*Id.* at 231-232.

[26]*Id.* at 235-246.

[27]*Fisher, supra* n. 15, Brief for Petitioner at 26-30.

[28]*Id.* at 31-37.

[29]*Id.* at 37-47.

[30]*Id.* at 47-52. *See also id.* at 47-57.

[31]*Fisher, supra* n. 15, Brief for Respondents at 23-28.

[32]*Id.* at 28-31.

[33]*Id.* at 31-36.

[34]*Id.* at 36-38.

[35]*Id.* at 38-46.

[36]*Id.* at 47-50.

[37]*Id.* at 50-54.

[38]*Bakke*, 438 U.S. 265.

[39]*Gratz v. Bollinger*, 539 U.S. 244 (2003).

[40]*Fisher*, *supra* n. 15, at 9-11.

[41]*Id.* at 10-11.

[42]*Fisher*, *supra* n. 15, at 2-4 (Ginsburg, J., dissenting) (internal citations omitted).

[43]*Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007).

[44]*Fisher*, *supra* n. 15, at 1 (Scalia, J., concurring); *id.* at 1-20 (Thomas, J. concurring).

[45]*Fisher, supra* n. 15, at 11.

[46]For a discussion of race-neutral alternatives adopted in states that have legislatively banned consideration of race in admissions, *see A Better Affirmative Action: State Universities that Created Alternatives to Racial Preferences*, Richard D. Kahlenberg, Halley Potter, Century Foundation Report (October 3, 2012), *available at* tcf.org/work/education/detail/a-better-affirmative-action-state-universities-that-created-alternatives-to (last visited July 10, 2013).

[47]For a copy of a study conducted at the University of North Carolina-Chapel Hill, *see* Charles Daye, et al., *Does Race Matter in Educational Diversity? A Legal and Empirical Analysis, available at* ssrn.com/abstract=2101253. For a copy of a study conducted at the University of Maryland, *see Does Socioeconomic Diversity Make a Difference? Examining the Effects of Racial and Socioeconomic Diversity on the Campus Climate for Diversity,* Julie J. Park, Nida Denson, and Nicholas A. Bowman, *available at* aer.sagepub.com/content/50/3/466.abstract (last visited July 10, 2013).

[48]*Id.* at 8, 11.

TAKE FLIGHT continued from page 46

questions, and acquisitions of knowledge and skill.).

[25]*See* Carpenter, *supra* note 9. *See also Jim Moliterno Answers Questions on W&L's 3L Program; Supplies Additional Data on W&L*, The Legal Whiteboard (Feb. 13, 2013), www.lawprofessors.typepad.com/legalwhiteboard/2013/01/biggest-legal -education-story-of-2013.html (commenting on The New Third Year at Washington & Lee School of Law).

[26]*The incomparable co-op: Four full-time work experiences. Countless opportunities*, Northeastern Univ. Sch. of Law, www.northeastern.edu/law/experience/co-op/index.html (last visited May 30, 2013).

[27]*See* Cornell University School of Law's Lawyering Program, www.lawschool.cornell.edu/academics/lawyeringprogram/(last visited May 31, 2013; *See also* University of Montana, Fundamental Lawyering Program, umt.edu/law/students/academicprograms/courseofferings/LawyeringFundamentalsProgram.php (last visited May 31, 2013).

[28]*Id.*

[29]Paul S. Farber, *Adult Learning Theory and Simulations—Designing Simulations to Educate Lawyers,* 9 Clinical L. Rev. 417 (2002).

[30]Deborah L. Rhode, *Legal Education: Rethinking the Prom, Reimagining the Reforms*, 40 Pepp. L. Rev. 437, 448-49, 456-57 (2013) ("Only 3 percent of schools require clinical training, and a majority of students graduate without it.").

[31]Stuckey, *supra* note 2, at 190 (The process of providing services to under-represented segments of society helps develop positive professional characteristics.).

[32]Deborah Maranivell, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. Legal Educ. 51, 57-58 (2001) (It is important to incorporate "experiential learning approaches into the traditional doctrinal curriculum." By doing this, students' passion for the legal profession can be cultivated and encouraged.).