

TOPIC:

FISHER V. UNIVERSITY OF TEXAS: KEEPING THE “STRICT” IN “STRICT SCRUTINY”

AUTHOR:

Len Niehoff is a Professor at the University of Michigan Law School and is Of Counsel to the law firm of Honigman, Miller, Schwartz, and Cohn, where he chairs the Higher Education Law practice. The views expressed here are his own.

INTRODUCTION:

In *Fisher v. University of Texas*, the Supreme Court of the United States considered, for the first time since its decisions in *Gratz* [\[1\]](#) and *Grutter* [\[2\]](#), the constitutionality of a race-conscious university admissions policy under the Equal Protection Clause of the Fourteenth Amendment.

In sum, the Supreme Court concluded that the lower courts had misinterpreted and misapplied the strict scrutiny standard; vacated the decision of the Fifth Circuit; and remanded the case so the lower courts could apply the correct standard to the University of Texas (UT) admissions program.

Along the way, the Court left intact the two central holdings of *Gratz* and *Grutter*: (a) that obtaining the educational benefits of student body diversity is a compelling state interest that can justify the use of race in university admissions and (b) that a university may consider the race of its applicants only in a manner narrowly tailored to achieve that compelling interest. But the Court also placed a conspicuous emphasis on the second of these holdings, stressing the highly demanding nature of the narrow tailoring inquiry and making clear that colleges and universities have their work cut out for them in defending the means by which they seek to achieve a diverse student body if they consider race in the process.

DISCUSSION:

I. Factual and Procedural Background [\[3\]](#)

Until 1996, UT—a highly selective state institution—made its admissions decisions using two factors.

First, for each applicant UT calculated an “Academic Index” (AI) based on that individual's high school class rank, standardized test scores, and high school curriculum. Second, in order to help the school achieve a diverse student body, UT considered the applicant's race.

Use of the second factor ended when the Fifth Circuit decided *Hopwood v. Texas*. [4] In *Hopwood*, the court struck down the application of race-based criteria in admissions decisions at the UT School of Law on the grounds that achieving a diverse student body was not a sufficiently compelling interest to satisfy strict scrutiny under the Equal Protection Clause. The breadth of the *Hopwood* ruling prompted UT (and other public institutions within the Fifth Circuit) to suspend their consideration of race in all admissions processes. As a result, minority presence at UT decreased immediately and significantly.

UT responded to the limitations imposed by *Hopwood* in a variety of ways. Beginning with the 1997 admissions cycle, UT began using a “Personal Achievement Index” (PAI) in conjunction with the AI. The PAI was less formulaic than the AI and helped the school identify students whose merit as applicants was not adequately captured in their class rank and test scores. Although facially race-neutral, many of the PAI factors tended to favor minority applicants. UT also created scholarship programs designed to increase yield among minority students, expanded its outreach to high schools in underrepresented areas of the state, and launched additional recruiting efforts at low-performing schools.

The Texas legislature also took measures to address the effects of *Hopwood*. In short order, the legislature adopted the “Top Ten Percent Law,” [5] which required Texas public universities to grant automatic admission to those Texas high school seniors who were in the top ten percent of their classes. [6] Although the Top Ten Percent Law was race-neutral, because of the racial and ethnic makeup of Texas high schools it had the effect of significantly increasing minority enrollment at UT.

In 2003, UT had the opportunity to reconsider its approach to admissions after the Supreme Court issued its decision in *Grutter v. Bollinger*. In *Grutter*, the Court held that admitting a racially and ethnically diverse student body was a compelling interest for a public university. The Court further held that the University of Michigan Law School had adopted a narrowly tailored approach to achieving this interest by including race as just one of many factors that it reviewed as part of a holistic, flexible, and individualized process that sought ultimately to admit a “critical mass” of minority students. [7] Because the Law School's policy advanced a compelling interest in a narrowly tailored way, the Court concluded that it passed muster under the Equal Protection Clause. [8]

At the direction of its Board of Regents, in August of 2003 UT launched two studies to determine whether it was enrolling a critical mass of minority students and, if not, whether it should adopt the type of admissions policy approved in *Grutter*. The resulting report identified significant minority underrepresentation in undergraduate classes and echoed *Grutter's* conclusions regarding the importance of a diverse educational environment. Ultimately, UT adopted a *Grutter*-style policy (i.e., one that includes race as one of many factors considered in the admission process), while continuing to follow the Top Ten Percent Law. Enrollment of minority students at UT increased modestly as a result.

Abigail Fisher, a Texas resident, applied for and was denied undergraduate admission to UT-Austin for the 2008 entering class. In April of 2008, she sued UT, alleging that these admissions policies violated her rights under the Equal Protection Clause and federal civil rights statutes and seeking damages and declaratory and injunctive relief. The District Court granted summary judgment to UT [9] and the Fifth Circuit affirmed. [10] In sum, both courts concluded that the UT admissions policies in question complied with *Grutter*. Fisher petitioned for certiorari, and the Supreme Court granted review. In a 7-1 decision, the Court vacated the decision of the Fifth Circuit and remanded the case. [11]

II. The Supreme Court Decision: Some Answers and Many Questions

Justice Kennedy delivered the opinion of the Court. [12] After a relatively short recitation of facts, the majority opinion recounted the Court's decisions in *Bakke*, *Gratz*, and *Grutter*. The Court stated that it would "take those cases as a given for purposes of deciding this case." [13]

The Court turned first to the principle, affirmed by those cases, that attaining the benefits of a diverse student body is a compelling state interest. The Court emphasized *Grutter's* holding that a university's "educational judgment that such diversity is essential to its education mission is one to which we defer," although the Court also cautioned that there should of course be "a reasoned, principled explanation for the academic decision." [14] The Supreme Court declared that the lower courts got this part right: "the District Court and Court of Appeals were correct in finding that *Grutter* calls for deference to the University's conclusion, 'based on its experience and expertise.'" [15]

The Court also concluded, however, that the lower courts erred in their understanding and application of the second component of the strict scrutiny test: narrow tailoring. The Court noted that the Fifth Circuit had largely left this issue to the University's discretion as well, limiting the inquiry to whether UT had acted in "good faith" in deciding to reintroduce race as a factor in admissions decisions. [16] The Court held that this deferential review was inconsistent with the "searching examination" required by strict scrutiny. [17] Indeed, the Court bluntly declared that "[o]n this point, the University receives no deference." [18]

This portion of the Court's opinion leaves room for disagreement and debate. On one hand, the Court stood by *Grutter's* holding that narrow tailoring "does not require exhaustion of every conceivable race-neutral alternative." [19] Furthermore, the Court acknowledged that "a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes." [20] And the Court reiterated the adage that strict scrutiny must not be "strict in theory, but fatal in fact." [21]

On the other hand, the Court made clear that strict scrutiny "must not be strict in theory but feeble in fact." [22] Consistent with this mandate, the Court observed that in this context narrow tailoring requires two showings. First, the university must demonstrate—and the reviewing court must "determine"—that "admissions processes 'ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application.'" [23] Second, narrow tailoring requires "that the reviewing court verify that it is 'necessary' for a university to use race to achieve the educational benefits of diversity. This involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications." [24]

Reasonable people can disagree about the practical implications of these rulings. For example, what sort of proofs will suffice for a college or university to show that the use of race is necessary? Is an empirical study required? If so, then how should such a study be designed and how firm do its conclusions need to be? If not, then what are the alternatives?

Because these rulings are rooted in *Bakke*, *Gratz*, and *Grutter*, it can be argued that any ambiguity that exists within this portion of *Fisher* was already present in that line of precedent. The Court in *Fisher* went on, however, to incorporate language from a case outside of that lineage, observing that "[i]f 'a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense . . . then the university may not consider race.'" [25]

Unfortunately, this statement amplifies the ambiguities and leads to additional uncertainty and

questions. What does “about as well” mean in this context? In determining whether the about-as-well standard has been satisfied, should the reviewing court consider the relatively small size of minority applicant pools—in other words, does it matter that an increase in minority enrollment that is modest numerically may be substantial proportionally? What is a “tolerable administrative expense” for these purposes? Is a university entitled to no deference whatsoever in its assessment of such costs—even though, like judgments regarding the value of diversity, this calculation seems to lie within the expertise of the institution and outside of the expertise of the courts?

The somewhat Delphic nature of *Fisher* is compounded by the fact that—although the opinion is shaped by the facts and prior proceedings of the case—the Court did not pass on the constitutionality of the UT program. So, for example, it is interesting that the Court’s brief factual recitation includes a discussion of the success that UT appeared to achieve under the Top Ten Percent Plan without considering race. [26] Yet it is hard to know what, if anything, to make of this. After all, the Court in *Grutter* was dismissive of percentage plans [27] and, for many institutions, an approach like the Top Ten Percent Law would be unworkable or would not yield the results seen at UT.

The Court concluded by vacating the judgment of the Fifth Circuit, which it found had “confined the strict scrutiny inquiry in too narrow a way by deferring to the University’s good faith in its use of racial classifications.” [28] The Court further decided that “fairness to the litigants and to the courts that heard the case requires that it be remanded so that the admissions process can be considered and judged under a correct analysis.” [29]

Justice Scalia, who had dissented in *Grutter*, filed a one-paragraph opinion in which he noted that *Fisher* had not asked the Court to overrule that case and so joined the majority opinion. Justice Thomas, another *Grutter* dissenter, filed a concurring opinion (substantially longer than that of the majority) stating that he would categorically bar the consideration of race in higher education admissions decisions. The lone dissenter, Justice Ginsburg, argued that the UT program complies with *Grutter* and that it was unnecessary to remand the case for further proceedings.

CONCLUSION:

Fisher provides definitive guidance on two fronts. First, *Grutter* remains the law of the land and a university can still have a compelling interest in achieving the benefits of a racially diverse student body. Second, a university has the burden of showing that it must consider race to achieve that interest; on this point, the university receives no deference. In this connection, educational institutions will have to continue to explore and assess race-neutral alternatives in order to defend the conclusion that is necessary for them to engage in the individualized consideration of race as approved in *Grutter*. These aspects of the opinion are clear; what is less clear is whether this amounts to a simple reiteration of *Grutter* or a toughening of the strict scrutiny standard as *Grutter* envisioned it.

As noted above, *Fisher* leaves a number of other questions unanswered as well. To what extent is the Court’s opinion driven by the layered and unique qualities of the UT plan and UT’s progress under the Top Ten Percent Law? When do the results of race-neutral plans get close enough to the results of race-conscious plans that the latter become impermissible? Will the Court’s tough language have any real impact on the results reached by lower courts? It can be argued, for example, that there may not be much practical difference between a court’s decision to “defer” to an institution’s “experience and expertise” regarding race-neutral alternatives (which the Court condemns) and a court’s decision to “take account” of an institution’s “experience and expertise” regarding those alternatives (which the Court permits). How will that play out in the lower courts?

The answers to these questions may come in a future case decided by the Supreme Court of the United States. Ironically, in light of the remand, that next case could even have a familiar name: *Fisher v. University of Texas*.

ENDNOTES:

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

[2.](#) *Grutter v. Bollinger*, 539 U.S. 306 (2003).

[3.](#) This statement of factual and procedural background summarizes information contained in the District Court, Fifth Circuit, and Supreme Court decisions, which include varying levels of detail.

[4.](#) 78 F.3d 932 (5th Cir. 1996).

[5.](#) TEX. EDUC. CODE § 51.803 (1997).

[6.](#) The Top Ten Percent Law does not apply to all programs and does not guarantee an applicant admission to their first-choice program. Nevertheless, in 2008 the Top Ten Percent Program accounted for eighty-one percent of the entering class overall.

[7.](#) The University of Michigan Law School's policy thus differed from the type of quota or "set-aside" program that the Court struck down in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) and the type of rigid point system that the Court struck down in *Gratz*, *supra*, note 1.

[8.](#) For more detailed analyses of *Grutter*, see, e.g., Harry T. Edwards, *The Journey from Brown v. Board of Education to Grutter v. Bollinger: From Racial Assimilation to Diversity*, 102 MICH. L. REV. 944 (2004); Special Issue: *Affirmative Action in the 21st Century: Reflections on Grutter v. Bollinger and Gratz v. Bollinger*, 30 HASTINGS CONST. L. Q. 425 (2003); Symposium, *On Grutter and Gratz: Examining "Diversity" in Education*, 103 COLUM. L. REV. 1588 (2003); and Neal Devins, *Explaining Grutter v. Bollinger*, 152 U. PA. L. REV. 347 (2003).

[9.](#) *Fisher v. Univ. of Tex. at Austin*, 645 F.Supp.2d 587 (W.D. Tex. 2009).

[10.](#) *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011).

[11.](#) Justice Kagan took no part in the consideration or decision of the case.

[12.](#) Chief Justice Roberts and Justices Scalia, Thomas, Breyer, Alito, and Sotomayor joined the opinion.

[13.](#) Slip Opinion at 5.

[14.](#) Slip Opinion at 9, quoting *Grutter*, 539 U.S. at 328.

[15.](#) *Id.* The Court also noted that the parties had not asked it to revisit that aspect of *Grutter's* holding.*Id.*

[16.](#) Slip Opinion at 11.

[17.](#) *Id.*

[18.](#) *Id.* at 10.

[19.](#) *Id.*, quoting *Grutter*, 539 U.S. at 339-340 (emphasis added in *Fisher*).

[20.](#) Slip Opinion at 10.

[21.](#) Slip Opinion at 13, quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995).

[22.](#) Slip Opinion at 13.

[23.](#) *Id.* at 10, quoting *Grutter*, 539 U.S. at 337.

[24.](#) Slip Opinion at 10 (citation omitted).

[25.](#) *Id.* at 11, quoting *Wygant v. Jackson Bd. Of Ed.*, 476 U.S. 267, 280 n. 6 (1986)(quoting Greenawalt, *Judicial Scrutiny of 'Benign' Racial Preferences in Law School Admissions*, 75 COLUM. L. REV. 559, 578-579 (1975)).

[26.](#) The Court noted that under the admissions program in place in 1996 (which considered race and preceded *Hopwood* and the Top Ten Percent Law), UT's entering freshman class was 4.1% African-American and 14.5% Hispanic. By comparison, in the last year under the post-*Hopwood* system that did *not* consider the race of applicants, the entering class consisted of 4.5% African American and 16.9% Hispanic students. Slip Opinion at 3.

[27.](#) *Grutter*, 539 U.S. at 339-340.

[28.](#) Slip Opinion at 12.

[29.](#) *Id.* at 13.

Permitted Uses of NACUANOTES Copyright and Disclaimer Notice

**NACUANOTES Homepage | NACUANOTES Issues
Contact Us | NACUA Home Page**

"To advance the effective practice of higher education attorneys for the benefit of the colleges and universities they serve."