



**The Potential Impact of
Fisher v. University of Texas at Austin
on University Admissions**

Prepared by

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for the Minority Corporate Counsel Association

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Note from the President & CEO

The recent U.S. Supreme Court decision in the case of *Fisher v. University of Texas at Austin*, 570 U.S. ___ (2013) presented new challenges for proponents of diverse and inclusive recruiting practices and will likely impact the educational and employment pipelines well into the future. The Minority Corporate Counsel Association (MCCA) is pleased to present this White Paper, which serves to provide a thorough analyses of the decision and a practical examination of Fisher's impact on recruiting efforts at two distinct junctures of the pipeline into the legal profession, namely to higher education and the workforce.

The lawyers at Jenner & Block, have a history of direct involvement with Fisher and related cases. Through this collaboration we have brought to bear the firm's experience in the analysis of the critical earlier segment of the pipeline, namely recruiting at the college and university, as well as, law school level. As we continue to navigate the ever-changing landscape of Affirmative Action decisions, we hope you will find this work not only enlightening, but also of practical benefit. We are sincerely grateful to Jenner & Block for developing and writing this White Paper. Special appreciation is due its authors **David W. DeBruin**, **Matthew S. Hellman**, and **Caroline M. DeCell**. We also thank Dr. Arin Reeves who provided guidance to MCCA on this project.

Joseph K. West
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I. Introduction

A decade ago, the Supreme Court held that the educational benefits of student body diversity can justify the consideration of race in university admissions.¹ Those “benefits are substantial,” the Court explained: student body diversity not only fosters cross-racial understanding and appreciation, but also contributes to a rich and dynamic learning environment.² Furthermore, the Court continued, those “benefits are not theoretical but real.” Citing an amicus brief submitted on behalf of major American businesses by Jenner & Block, the Court noted that “the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints.”³

The Supreme Court declined to revisit that holding in a much anticipated decision handed down last Term. In *Fisher v. University of Texas at Austin*,⁴ a surprisingly broad majority of seven justices (of eight participating) joined an opinion reaffirming the basic premises of the Court’s prior affirmative action decisions. The Court ultimately vacated and remanded in *Fisher*, emphasizing that strict scrutiny required the lower courts to make an independent assessment — and not defer to the university — about whether the program was narrowly tailored to obtain the benefits of diversity. But the Court’s reaffirmation of the fundamental point that diversity is a compelling state interest was welcome news to those who believe that the benefits of diversity are no less “substantial” and “real” today than they were a decade ago.

¹ *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003).

² *Id.* at 330–31.

³ *Id.* (citing Brief for 3M et al. as *Amici Curiae*, at 5).

⁴ 570 U.S. ___, No. 11-345, slip op. (U.S. June 24, 2013).

Fisher's ultimate ramifications — both for the particular program at issue in that case, and for the Court's affirmative action jurisprudence — remain to be seen. In *Fisher* itself, the University of Texas has stated that it has no plans to change its admissions policies. Whether or not it will have to may depend on the record it presents to the lower court on remand. And as for the future of affirmative action at the Court, while *Fisher* is not a substantial step backwards, it also not a clear step forward. As another group of major American businesses argued in an amicus brief filed in connection with *Fisher*, their interest in the benefits of diversity — and, by extension, the state's — has become even more compelling over time.⁵ Yet the Supreme Court has long anticipated the day when race-conscious admissions policies will no longer be necessary to achieve diversity in higher education. Therefore, it is critical for all those who agree that such diversity remains an important yet elusive objective to take proactive steps to achieve that objective.

⁵ Brief for Fortune-100 and Other Leading American Businesses as *Amici Curiae* in Support of Respondents 6, *Fisher*, No. 11-345, at 6.

II. Early Decisions Regarding Diversity-Based Admissions

A. *Regents of the University of California v. Bakke*

The Supreme Court first addressed the constitutionality of race-conscious admissions policies in higher education in 1978. In *Regents of the University of California v. Bakke*,⁶ the Court considered a challenge to the University of California Medical School's admissions program, which reserved sixteen of one hundred seats for members of racial or ethnic minorities. The Court held that this program violated the Constitution's Equal Protection Clause, though no opinion garnered a majority. The controlling opinion, authored by Justice Powell, established that strict scrutiny applies to race-based classifications adopted by state universities, for whenever state decisions "touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest."⁷

Justice Powell identified one such interest in "the attainment of a diverse student body,"⁸ explaining that "the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation of many peoples."⁹ Nonetheless, he concluded that the Medical School's admissions program failed strict scrutiny. Unlike programs in which racial or ethnic background merely constituted a "plus" in the holistic review of an applicant's file, the Medical School's program amounted to a quota system, which impermissibly

⁶ 438 U.S. 265 (1978).

⁷ *Id.* at 299.

⁸ *Id.* at 312; *see id.* at 314.

⁹ *Id.* at 313 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)) (internal quotation marks omitted).

excluded non-minority applicants from competition for sixteen seats in the incoming class.¹⁰ Therefore, the program was not narrowly tailored to serve the state's compelling interest in broader student diversity.

B. *Grutter v. Bollinger* and *Gratz v. Bollinger*

The Court did not revisit the issue until 2003, when it affirmed the principles articulated in Justice Powell's *Bakke* opinion in a pair of cases addressing the University of Michigan's undergraduate and law school admissions criteria. In *Grutter v. Bollinger*,¹¹ the Court narrowly upheld, in a five-four decision, the University of Michigan Law School's admissions policy. That policy called for a flexible assessment of the applicant's test scores, GPA, personal statement, and letters of recommendation, as well as an essay describing the ways in which an applicant would contribute to the diversity of the Law School.¹² Although it expressed a commitment to racial and ethnic diversity, the policy did not limit the kinds of diversity contributions that would receive weight in admissions decisions.¹³

Writing for a majority comprised of Justices Stevens, Souter, Ginsburg, Breyer, and herself, Justice O'Connor reviewed the Law School's admissions policy under strict scrutiny. She reaffirmed that "student body diversity is a compelling state interest that can justify the use of race in university admissions."¹⁴ She further adopted Justice Powell's understanding that quota systems are not narrowly tailored to serve that interest. To meet the narrow tailoring prong of the strict scrutiny test, she explained, an admissions policy must instead afford "truly individualized consideration," which "demands that race be used in a flexible, nonmechanical

¹⁰ *Id.* at 317, 319.

¹¹ 539 U.S. 306 (2003).

¹² *Id.* at 315.

¹³ *Id.* at 316.

¹⁴ *Id.* at 325.

way.”¹⁵ Finding that the Law School policy required an individualized, holistic assessment of each applicant,¹⁶ and that the Law School had sufficiently considered race-neutral alternatives,¹⁷ Justice O’Connor concluded that the policy was narrowly tailored to serve the Law School’s interest in student body diversity. Accordingly, she upheld its constitutionality.

Chief Justice Rehnquist dissented, joined by Justices Kennedy, Scalia, and Thomas. Characterizing the Law School’s admissions policy as a thinly veiled quota system, he would have held it unconstitutional.¹⁸ Justices Kennedy, Scalia, and Thomas each authored separate opinions as well. Justice Kennedy argued that the majority had applied less than strict scrutiny in upholding the policy, “confus[ing] deference to a university’s definition of its educational objective with deference to the implementation of this goal.”¹⁹ Agreeing with Chief Justice Rehnquist that the Law School’s implementation of its admissions policy approximated impermissible racial balancing, he, too, would have invalidated it.²⁰ Justice Thomas would have categorically prohibited the consideration of race in admissions decisions. He saw no distinction between “benign” and invidious discrimination: “The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all.”²¹ In his view, whatever the educational benefits of diversity were, they could not qualify as a

¹⁵ *Id.* at 334.

¹⁶ *Id.* at 337.

¹⁷ *Id.* at 339–40.

¹⁸ *See id.* at 379, 386 (Rehnquist, C.J., dissenting).

¹⁹ *Id.* at 388 (Kennedy, J., dissenting).

²⁰ *Id.* at 389.

²¹ *Id.* at 353 (Thomas, J., concurring in part and dissenting in part).

sufficiently compelling interest to support race-based admissions decisions under strict scrutiny.²²

The same day she delivered the opinion holding the University of Michigan’s law school admissions policy constitutional in *Grutter*, Justice O’Connor joined a majority opinion holding its undergraduate admissions policy unconstitutional in *Gratz v. Bollinger*.²³ Unlike the open-ended law school admissions policy, the undergraduate admissions policy operated on a 150-point scale and automatically awarded certain minority applicants twenty points.²⁴ Concluding that this policy denied applicants an individualized assessment, the Court held it failed to meet strict scrutiny.²⁵

III. Fisher v. University of Texas at Austin

A. Factual and Procedural Background

In 1997, the Texas state legislature adopted what became known as the “Top Ten Percent Law.”²⁶ This law guaranteed admission to any state college, including the University of Texas at Austin, to all students graduating in the top ten percent of their high school class in Texas.²⁷ Although the law did not provide for explicit consideration of race, it was intended to increase minority enrollment.²⁸ And because of segregation patterns in housing and school enrollment, it had that effect: before its adoption of race as an admissions factor, the University’s entering class was 4.5% African American and 16.9% Hispanic. For this reason, the Top Ten Percent Law

²² *See id.* at 356–57.

²³ 539 U.S. 244 (2003).

²⁴ *Id.* at 255.

²⁵ *Id.* at 271.

²⁶ Tex. Educ. Code Ann. § 51.803 (West 2009).

²⁷ *See Fisher*, No. 11-345, slip op. at 3.

²⁸ *Fisher*, No. 11-345, slip op. at 2 (Ginsburg, J., dissenting).

became a common point of comparison in the evaluation of other states' race-conscious admissions policies.

After accepting students under the Top Ten Percent Law, the University filled the remaining seats in its incoming class by reference to a numerical "Academic Index," which measured applicants' testing scores and high school performance, and a holistic "Personal Achievement Index," which reflected applicants' various experiences, awards, and activities. Once an applicant was scored under these two indices, they were plotted on a grid for purposes of comparison with other applicants; applicants falling beyond a certain point on that grid were admitted, and the rest were not.

Despite the increase in student body diversity attributed to the Top Ten Percent Law, the University determined that it had failed to achieve a "critical mass" of diverse students, at least in certain programs. Therefore, following the Supreme Court's decisions in *Grutter* and *Gratz*, it began including race as an explicit consideration under the Personal Achievement Index. As with other factors within that index, the University assigned race no specific point value.²⁹

The University denied Abigail Fisher, a white applicant, admission to its incoming class of 2008. Claiming that the University's consideration of race in admissions decisions violated the Equal Protection Clause, Fisher sued. The district court granted summary judgment to the University, and the Court of Appeals for the Fifth Circuit affirmed. Citing *Grutter*, the Fifth Circuit accorded the University a degree of deference not only in its identification of a compelling interest in the educational benefits of diversity, but also in its determination that the consideration of race in its admissions decisions was narrowly tailored to serve that interest.³⁰ In

²⁹ *Fisher*, No. 11-345, slip op. at 4.

³⁰ *See id.* at 6, 11.

applying strict scrutiny, the court remained “mindful of a university's academic freedom and the complex educational judgments made when assembling a broadly diverse student body.”³¹

The Supreme Court granted Fisher’s petition for review, and it held oral argument in October 2012. Yet the Court did not issue its opinion until late June 2013, raising significant speculation about the likely outcome of the case. Many observers expected the Court to overturn *Grutter*, given the changes in the Court’s composition over the past decade. Justice O’Connor, the swing vote between the *Grutter* and *Gratz* decisions, had retired, along with Justice Stevens; their respective replacements, Justice Alito and Chief Justice Roberts, were both staunch critics of race-conscious programs. Justice Kennedy, now the swing vote on the Court, had dissented in *Grutter*. Additionally, Justice Kagan recused herself from *Fisher* because of her involvement in the case as Solicitor General prior to her nomination to the Supreme Court. It seemed plausible, if not likely, that five out of the eight justices hearing the case would reject *Grutter*’s holding that a state had a compelling interest in the educational benefits issuing from student body diversity. Conversely, the Court could have reaffirmed *Grutter* and upheld the University’s admissions policy. In view of the personnel changes noted above, however, few observers expected this outcome. Finally, the Court could have reaffirmed *Grutter* while striking down the University’s admissions policy on the grounds that the Top Ten Percent Law achieved sufficient diversity without explicit consideration of race. Such a ruling would have comported with *stare decisis* but signaled to universities an expectation that they would employ race-conscious admissions policies only as a last resort to achieve diversity.

³¹ *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213, 234 (5th Cir. 2011).

B. The Supreme Court's Decision

The Court did none of the above. It neither reaffirmed nor overturned *Grutter*, and it neither upheld nor invalidated the University's admissions policy. Instead, holding that the Fifth Circuit misapplied strict scrutiny in reviewing the policy, the Court vacated the decision and remanded for further consideration.³² Writing for a surprising seven-to-one majority, Justice Kennedy took *Bakke*, *Gratz*, and *Grutter* "as given for purposes of deciding this case."³³ He thus accepted *Grutter*'s holding that the educational benefits flowing from a diverse student body qualify as a compelling interest capable of justifying consideration of race in admissions decisions.³⁴ He further accepted the Fifth Circuit's deference to the University's decision to pursue that interest, so long as the University provided a "reasoned, principled explanation" for that decision.³⁵

Once the University established its pursuit of a compelling interest, however, it should have received no further deference. At that point, Justice Kennedy explained, the University bore the burden of demonstrating that its admissions policies assure an individualized assessment of each applicant.³⁶ Additionally, "strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."³⁷ The Fifth Circuit thus erred in conducting its narrow tailoring inquiry "with a degree of deference to the University."³⁸ Justice Kennedy therefore vacated its decision, but remanded to the Fifth Circuit to assess whether, for purposes of summary

³² *Fisher*, No. 11-345, slip op. at 2.

³³ *Id.* at 5.

³⁴ *Id.* at 6–7.

³⁵ *Id.* at 9.

³⁶ *Id.* at 10.

³⁷ *Id.* at 11.

³⁸ *Id.*

judgment, the University had offered sufficient evidence to “prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity.”³⁹

Justices Scalia and Thomas wrote concurring opinions, adding that they would have overturned *Grutter* had Fisher so requested. Echoing his dissent in *Grutter*, Justice Thomas expounded at length his objection to the Court’s recognition of diversity-related educational benefits as a compelling state interest. He suggested that invocation of that interest mirrors the arguments put forward to justify segregation,⁴⁰ and that racial preferences based on that interest only stigmatize the minorities they purportedly benefit.⁴¹

Justice Ginsburg alone dissented. She first called attention to the motivations behind and context surrounding the Texas state legislature’s adoption of the Top Ten Percent Plan.⁴² She then argued that the University’s admissions policies satisfied strict scrutiny because race was a only one “factor of a factor of a factor of a factor” in the overall assessment of each applicant.⁴³

C. Subsequent Proceedings

The case is currently on remand to the Fifth Circuit. Both parties have submitted filings to the court,⁴⁴ while the University continues to defend its admissions policy as fully consistent with the standards established in *Bakke* and *Grutter*.⁴⁵ The University requested that the Fifth Circuit remand the case to the district court for further development of a factual record; Fisher

³⁹ *Id.* at 13.

⁴⁰ *Fisher*, No. 11-345, slip op. at 5–14 (Thomas, J., concurring).

⁴¹ *Id.* at 17–20.

⁴² *Fisher*, No. 11-345, slip op. at 2 (Ginsburg, J., dissenting).

⁴³ *Id.* at 3.

⁴⁴ See Proposed Schedule for Supplemental Briefing and Response to Appellee’s Statement Concerning Further Proceedings on Remand, *Fisher v. University of Texas at Austin*, No. 11-345 (U.S. June 24, 2013).

⁴⁵ See *University of Texas at Austin President Responds to Supreme Court Ruling*, U. TEXAS AT AUSTIN (June 24, 2013), <http://www.utexas.edu/news/2013/06/24/university-of-texas-at-austin-president-responds-to-supreme-court-ruling/>.

objected, arguing that the Supreme Court explicitly remanded the case to the Fifth Circuit so it could correctly apply strict scrutiny in reviewing the summary judgment record before it. The Fifth Circuit has yet to rule on these filings, leaving the outcome of the case undecided.

IV. The Implications of *Fisher*

A. The Decision's Direct Impact

In significant part, *Fisher* did little to change or clarify the law as it stood following *Grutter*. Despite the changes in the Court's composition since *Grutter* and calls to reject or limit the doctrine, the educational benefits of student body diversity remain a compelling interest that may justify consideration of race in university admissions, provided showings that such consideration is only one part of an individualized assessment of each applicant, and that race-neutral alternatives are inadequate to serve that interest. Nonetheless, Justice Kennedy's opinion may signal an expectation that universities should bear a greater evidentiary burden in justifying race-conscious admissions policies in the future. Justice Kennedy emphasized that strict scrutiny "imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."⁴⁶ Whether a university must be able to identify failed attempts to achieve diversity through race-neutral means, or whether it need only explain the likely ineffectiveness of such alternatives, is a question left open to the lower courts.

In the meantime, like the University of Texas, other universities are standing by their race-conscious admissions programs. For example, Lee Bollinger — who, as the former president of the University of Michigan, was the named defendant in *Grutter* and *Gratz* — has stated that Columbia University, where he is currently president, will be "will be legally prepared

⁴⁶ *Fisher*, No. 11-345, slip op. at 9.

to defend the constitutionality of its admissions policies, even given the perhaps-heightened standard of the *Fisher* decision.”⁴⁷

A related case pending before the Supreme Court this Term may afford the Court another opportunity to clarify, or restrict or reject, the doctrine set forth in its affirmative action precedents. Following *Grutter*, a voter referendum in Michigan led to a state constitutional amendment barring the use of race- or sex-based criteria in admissions decisions. In *Coalition to Defend Affirmative Action v. Regents of the University of Michigan*,⁴⁸ an en banc panel of the Sixth Circuit held that this state constitutional prohibition violates the Fourteenth Amendment because it “reorders the political process in Michigan in a way that places special burdens on racial minorities,” making it more difficult for a university to take into account race (as allowed by *Grutter*) than other discretionary factors, such as legacy preferences.⁴⁹ The Supreme Court granted certiorari on a petition from the Michigan Attorney General, Bill Schuette, in March 2013.⁵⁰ Whereas *Fisher* presented the question of whether the University’s may consider race in admissions consistent with the Equal Protection Clause, however, *Schuette* presents the question of whether a state may *ban* the consideration of race in admissions consistent with the Equal Protection Clause. These questions reflect but do not necessarily implicate one another. If it were to conclude that the Michigan ban is permissible but not required under the Equal Protection Clause, the Court could reverse the Sixth Circuit decision without addressing the core issues at stake in *Grutter* and *Fisher*.

⁴⁷ Joy Resmovits, *Fisher v. University of Texas at Austin Decision: Lee Bollinger Sees Namesake Precedent Still Standing*, TheHuffingtonPost.com (June 24, 2013), http://www.huffingtonpost.com/2013/06/24/fisher-v-university-of-texas-at-austin-decision_n_3434696.html.

⁴⁸ 701 F.3d 466 (6th Cir. 2012) (en banc).

⁴⁹ *Id.* at 477.

⁵⁰ *Schuette v. Coal. to Defend Affirmative Action*, 701 F.3d 466 (6th Cir. 2012) (en banc), *cert. granted*, 81 U.S.L.W. 3327 (U.S. Mar. 25, 2013) (No. 12-682).

B. Broader Themes Emerging from Cases Addressing Diversity-Based Admissions

One clear theme to emerge from *Grutter* and *Fisher* is the broad support for diversity in universities, including from American businesses, among others. Jenner & Block filed amicus briefs on behalf of major American businesses in both *Grutter* and *Fisher*. The briefs not only voiced support for that goal, but also explained the unique value individuals educated in diverse settings bring to their future employers. Those individuals are more likely to facilitate new and creative approaches to problem-solving, develop products that appeal to a variety of consumers, work easily with diverse people around the world, and decrease incidents of bias and stereotype. In *Grutter*, the Court cited the corporate amicus brief authored by Jenner & Block for these propositions, and in *Fisher*, the Court continued to reaffirm these themes that are so important to American business. If, following *Fisher*, the courts scrutinize diversity-based admissions policies more closely, evidence of the kind presented in these amicus briefs will become all the more significant. Therefore, businesses and other organizations should continue to amass data reflecting the need for and value of people educated in diverse environments.

Finally, the Court has long anticipated the day when race-conscious admissions policies will no longer be considered necessary to achieve the educational benefits of diversity in higher education. In *Grutter*, Justice O'Connor remarked:

It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.⁵¹

In emphasizing the rigor with which courts must apply strict scrutiny in reviewing race-conscious admissions policies, Justice Kennedy may have sought to hasten the day when racial

⁵¹ *Grutter*, 539 U.S. at 343.

preferences are no longer considered necessary to achieve diversity among student bodies. Because there is no guarantee that race-based criteria will still be permissible ten or even five years from now, it is critical — at least for those who agree that diversity in higher education remains a significant yet elusive goal — to take proactive steps to ensure diversity at all levels of higher education, including law and business schools. Such individuals and organizations could, for example, work to provide greater support and wider educational opportunities for younger students; help to connect college students with internships geared toward professional schools; and ensure that their organizations recruit from a broad range of undergraduate and post-graduate institutions. In addition to guarding against any decline in diversity that might follow the future invalidation of race-conscious admissions policies, these efforts could help to address Justice Thomas’s concern that affirmative action in higher education, at least standing alone, actually harms minority students by placing them in universities where they are “overmatched” and may, as a result, learn less and suffer greater stigma than they would elsewhere.⁵²

⁵² See *Fisher*, No. 11-345, slip op. at 17–19 (Thomas, J., dissenting).



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