



***After Fisher: Significance
and Strategies for Employers***

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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.

We have partnered with Morgan Lewis & Bockius to develop a cogent analysis of the case and provide guidance to legal employers on the post-Fisher landscape and its impact on the future of the employment pipeline. 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 Morgan Lewis & Bockius for developing and writing this White Paper. Special appreciation is due its authors **Allyson Ho**, **Larry Turner**, **Ara Tucker**, and **Erin Hendrix**. We also thank Dr. Arin Reeves who provided guidance to MCCA on this project.

Joseph K. West
President & CEO,
Minority Corporate Counsel Association
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Overview

For the first time in a decade, in 2013 the United States Supreme Court addressed a challenge to the use of race in a college's admissions strategy. The case, *Fisher v. University of Texas at Austin*, 570 U.S. ___ (2013),¹ kept many people from a variety of professions and industries on the edge of their seats as they waited for the Court's ruling. The Court's ruling, however, left many asking, "What does this mean?" and "What next?"

At its essence, the *Fisher* case involved two white women who sued the University of Texas at Austin (the "University") after being denied admission. They claimed that the University's admission policy discriminated against them. One of the two women, Abigail Fisher ("Fisher"), pursued the matter up to the Supreme Court.

While reasonable minds may disagree on what will come next, all appear to agree on three points:

1. The Court preserved the legal analysis addressing the use of race in higher education admissions;
2. The Court acknowledged that some deference is appropriate for a court's compelling interest analysis; and
3. The Court stressed the significance of workable race-neutral alternatives for a court's narrow-tailoring analysis.

This paper focuses on the aftermath of *Fisher* for litigation strategists and employers and includes considerations for organizations looking to employ pipeline initiatives as part of their overall diversity and inclusion strategy.

Fisher: What Next?

The Supreme Court did not rule on the University's plan—it simply remanded the case so that the courts below could evaluate the plan under what the Supreme Court identified as the proper legal standard. The parties are now disputing before the U.S. Court of Appeals for the Fifth Circuit how that evaluation should proceed and in what forum.

The University has asked the Fifth Circuit to remand the case to the district court for further proceedings, while Fisher has objected and is arguing that the Supreme Court's mandate requires the Fifth Circuit simply to apply the proper legal standard to the existing summary judgment record. The Fifth Circuit has not yet ruled on the parties' requests, so the ultimate determination of the merits of the University's plan remains pending.

¹ Due to the time lag between the release of the *Fisher* decision, the Printing Office's publication of *Fisher*, we have intentionally cited the case as *Fisher v. University of Texas at Austin*, 570 U.S. ___ (2013), because the case does not have an official United States Reports cite.

Beyond *Fisher*: Litigating Affirmative Action Going Forward

The Supreme Court has twice now confirmed that diversity in higher education is a compelling interest, and that reviewing courts must strictly scrutinize the means chosen to further that interest. As a result, litigation going forward is likely to be very plan specific and fact oriented. For one thing, that means it will be important for institutions that use race as a factor to secure the educational benefits of diversity to be able to “show their work,” so to speak, in order that reviewing courts can assess that their plans have been thoughtfully and carefully implemented to comport with the governing legal standards.

Another result of *Fisher*'s ruling from a litigation standpoint is that legal challenges may be unlikely to resolve on summary judgment and instead will proceed to trial (as in the recent Proposition 8 constitutional challenge in California). *See, e.g., Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).² To the extent that happens, the litigation is likely to become more expensive and protracted.

Much will depend on how the Fifth Circuit ultimately decides to handle the *Fisher* case procedurally, how the Fifth Circuit analyzes the specifics of the University's plan, and what conclusions the Fifth Circuit ultimately reaches about the constitutionality of the University's plan. Although not binding in other jurisdictions, the Fifth Circuit's handling of *Fisher* may serve as a bellwether of how challenges will be litigated and resolved going forward.

Exploring the Legal Landscape After Fisher and Its Significance for Employers

After *Fisher*, the legal precedents of *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) (Powell, J.), and *Grutter v. Bollinger*, 539 U.S. 306 (2003) (O'Connor, J.), remain intact: Securing the educational benefits of diversity in higher education *can be* a compelling governmental interest. The questions raised by *Fisher* primarily involve the narrow-tailoring requirement of strict scrutiny – in particular, what is required by the Supreme Court when it stated that lower courts must be satisfied that “no workable race-neutral alternatives would produce the educational benefits of diversity.” *Fisher*, 570 U.S. at *2.

Fisher also may have implications for government action that, although it does not distribute benefits or burdens by race, is nonetheless race-conscious in the aggregate (such as some school redistricting plans). Likewise, other cases pending in federal court continue to shape affirmative action jurisprudence and the permissibility of race-conscious initiatives. This Section examines race consciousness in recent affirmative action jurisprudence following *Fisher* and the potential impact of other federal case law on race-conscious policies and initiatives, and the importance of a pipeline in light of this impact.

² This case later appeared before the Supreme Court as *Hollingsworth v. Perry*, 570 U.S. ____ (2013). *See supra* FN 1.

Affirmative Action, Race-Conscious Policies, and Race-Neutral Initiatives

School Assignment Plans: Rational Basis Review or Strict Scrutiny?

In 2007, the Supreme Court held that the race-based student assignment plans adopted by the school boards at issue (i.e., Seattle, Washington; Washington, D.C.; and Louisville, Kentucky) to promote racial integration did *not* survive strict scrutiny because they were not narrowly tailored, thereby violating the Equal Protection Clause. *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797-98 (2007). Justice Kennedy concurred in the judgment, but wrote separately from the majority to affirm the importance of racially integrated elementary and secondary schools and to explain that in his view “avoiding racial isolation” and “achiev[ing] a diverse student population” in secondary schools are compelling interests. *Id.* (Kennedy, J., concurring).

In the wake of *Parents Involved*, school districts have been successful in defending their redistricting plans using school attendance zone lines. In fact, after questioning whether the Supreme Court even required the district court to apply strict scrutiny to a school board’s decision to consider racial demographics when making rezoning decisions, the Third and Fifth Circuits have both confronted challenges to two school districts’ drawings of attendance zones in *Student Doe I v. Lower Merion School District*, 665 F.3d 524 (3d Cir. 2011) (“*Lower Merion*”), and *Lewis v. Ascension Parish School Board*, 662 F.3d 343 (5th Cir. 2011) (“*Lewis*”).

In 2009, the Lower Merion School District in Montgomery County, Pennsylvania adopted a redistricting plan that redrew the attendance boundaries for the two district high schools. Nine African-American students filed a complaint, alleging that the school district discriminated against them based on their race, taking away their choice to attend either of the two district high schools. The district court, applying a rational basis review, stated that a basic principle underlying the case was that “pure ‘racial balancing’ at the high school level, standing alone, would be improper, but that considering racial demographics alongside numerous race-neutral, valid educational interests . . . has never been unconstitutional.” *Student Doe I v. Lower Merion Sch. Dist.*, No. 09-2095, 2010 WL 2595278, at *2 (E.D. Pa. June 24, 2010). Accordingly, the district court concluded that the school district did not unconstitutionally discriminate on the basis of race and held that the redistricting plan did not violate the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. The students appealed.

The Third Circuit, in an opinion authored by Judge Greenaway, affirmed the district court’s order, holding that a rational basis review was the appropriate standard to apply, and upheld the constitutionality of Lower Merion’s school assignment plan. The Third Circuit emphasized that the school district’s attendance-zone plan, which took neighborhood racial demographics into account but did not assign individual students on the basis of race, did not implicate a strict scrutiny test. On March 13, 2012, the students filed a petition for a writ of certiorari. On June 18, 2012, the Supreme Court denied that petition.

In 2011, the Fifth Circuit faced a challenge to a similar school assignment plan in Donaldsonville, Louisiana.³ The plaintiffs sued the Ascension Parish School Board, claiming that it discriminated against minority students by placing more at-risk students into their schools. The district court found that the adopted plan was facially race-neutral, and that plaintiffs had not presented competent evidence that the school board possessed the requisite discriminatory motive for the disparate impact resulting from the plan. Applying a rational basis test, the district court held that there was a legitimate governmental interest in alleviating school overcrowding. The Fifth Circuit, however, agreed with the plaintiffs and reversed the lower court's decision:

We find the court's analysis troubling for two reasons. First, it is unclear how, on the record before us, the court could make a factual finding as a matter of law about the Board's lack of discriminatory purpose. Second, the court's assumption that it might be justifiable to use racially-based decisions for the "benign" purpose of maintaining post-unitary "racial balance" among the schools in the system is at least in tension with the Supreme Court's decision in *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*.

Lewis, 662 F.3d at 349.

Although the majority implied that strict scrutiny might be the appropriate standard of review given the school board's alleged "racial-balanc[ing]," it declined to "parse *Parents Involved* further," since it concluded that there was a genuine factual dispute regarding whether the Board acted with a discriminatory purpose and whether the adopted plan had a discriminatory impact. *Id.* The Fifth Circuit thus remanded the case for further factual development regarding whether the school board intended to use racial classifications and whether its actions had a discriminatory effect, noting that "[u]nder the state of this record, we cannot determine whether the district's plan must be subjected to strict or rational basis scrutiny." *Id.* at 344.

The District Court for the Middle District of Louisiana has yet to rule on what constitutional test to apply to the school board's assignment plan. Upon remand, the district court reassigned the case to Chief Judge Jackson. Discovery was extended for the purpose of taking the deposition of one of the plaintiffs who reached the age of majority during the litigation.

In July 2013, the parties both moved for summary judgment. *See Lewis v. Ascension Parish Sch. Bd.*, No. 3:08 CV 00193 (M.D. La. July 2013) (Dkt. Nos. 107, 108, 117). The plaintiffs argue that the school board's plan was motivated by race, and accordingly strict scrutiny should apply, rendering the plan unconstitutional. *Id.* (Dkt. No. 107 at 8). Conversely, the school board argues that the plaintiffs do not have Article III standing, and that a rational basis review should apply, relying on *Lower Merion*, 665 F.3d at 536, *cert. denied*, 132 S. Ct. 2773 (2012), because the adopted plan is facially race-neutral and was enacted with no discriminatory purpose or impact.

³ It is important to note, as further explored in this Subsection, that there currently is no conflict between the Third and Fifth Circuits. As outlined below, while the Third Circuit expressly adopted a rational basis review, the Fifth Circuit remanded the case for "[f]urther factual development" to ascertain whether strict scrutiny or rational basis review would apply. *Lewis*, 662 F.3d at 344.

Currently, the parties are still involved in summary judgment briefing, and the court is not expected to make a decision before September 2013.⁴

Some opine that the voluntary integration plans in *Lewis* and *Lower Merion* are remarkably similar. See Rebecca M. Abel, *Drawing the Lines: Pushing Past Arlington Heights and Parents Involved in School Attendance Zone Cases*, 2012 B.Y.U. Educ. & L.J. 369, 373 n.21 (2012). Naturally, then, this begs the question: Will the District Court for the Middle District of Louisiana adopt the Third Circuit's holding in *Lower Merion* and apply a rational basis review to the assignment plan in *Lewis*?

Regardless, the Third Circuit demonstrates that diversity *can be* considered to assess the impact of various alternatives on education without implicating a strict scrutiny test. Here, the appellate court described the issue in *Lower Merion*⁵ as follows: If the goal of the government is to increase diversity, and if the means chosen to advance that goal are entirely race neutral, then strict scrutiny is not triggered. The question posed by *Lower Merion* and *Lewis*—left open by *Parents Involved*—is what standard should apply to government efforts that fall between these two situations? That is, what standard should be applied to school plans that may consider race in the aggregate, but do not allocate benefits and burdens on the basis of race? This will likely be the next frontier, shaping our nation's race-conscious jurisprudence.⁶

State Efforts to Limit or Prohibit Preferences in College and University Admissions

On March 25, 2013, the Supreme Court granted certiorari in *Schuette v. Coalition to Defend Affirmative Action*, No. 12-682, 2013 WL 1187585 (Mar. 25, 2013) (“*Schuette*”). See Supreme Court of the United States Docket for *Schuette v. Coalition to Defend Affirmative Action* (“*Schuette* Docket”), available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-682.htm> (last visited Sept. 9, 2013).^{7, 8} This case concerns whether an amendment to a state's constitution that prohibits race- and sex-based discrimination and

⁴ Currently, *Daubert* motions are pending before the court. See, e.g., Dkt. No. 147 (Sept. 6, 2013).
⁵ See also *Spurlock v. Fox*, No. 12-5978 (6th Cir. May 10, 2013) (A three-judge panel ruled that a Tennessee school district's student assignment plan does not violate African-American students' Fourteenth Amendment equal protection rights. The panel concluded that the plan does not classify students by race, and that there was no segregative intent that would have shown de jure segregation. Applying a rational basis review, it found that the district had provided a legitimate state interest for the plan, namely to address the problem of school building underutilization.).

⁶ The evolution of redistricting cases may inform federal courts' approach to school rezoning or reassignment plans. Cf. *Shaw v. Reno*, 509 U.S. 630 (1993) (concluding that a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though *race neutral* on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and the separation lacks sufficient justification); but see *Bush v. Vera*, 517 U.S. 952 (1996) (strict scrutiny does not apply merely because redistricting is performing with consciousness of race, and does not apply to all cases of intentional creation of majority-minority districts).

⁷ Case formerly known as *Coalition to Defend Affirmative Action v. Regents of Univ. of Michigan*, 652 F.3d 607 (6th Cir. 2011), *superseded on reh'g en banc*, 701 F.3d 466 (6th Cir. 2012).

⁸ Justice Kagan took no part in the consideration of the decision of the motion or the petition.

preferential treatment in public university admission⁹ decisions violates the Equal Protection Clause of the Fourteenth Amendment.

In response to the *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003) (“*Gratz/Grutter*”) decisions, in 2006 Michigan legislators prepared and introduced ballot initiative “Proposal 2” (also known as the “Michigan Civil Rights Initiative”) to amend its constitution.¹⁰ The plaintiffs immediately filed suit to challenge the amendment’s constitutionality after it was adopted by a 58-42 margin. The District Court for the Eastern District of Michigan concluded that the amendment did not violate the Equal Protection Clause, but a Sixth Circuit panel reversed, and a rehearing en banc was granted.

The Sixth Circuit applied the “political process doctrine,” which bars laws that make it more difficult for minority groups to secure certain types of legislation. The Sixth Circuit held that the amendment violated the Equal Protection Clause because it (1) targeted a program that inured primarily to the burden of the minority and (2) reordered the political process in a way that placed special burdens on racial minorities.

The Sixth Circuit relied on the Supreme Court’s decisions in *Hunter v. Erickson*, 393 U.S. 385 (1969) (holding that an amendment to the Akron, Ohio City Charter preventing the City Council from implementing any ordinance dealing with racial, religious or ancestral discrimination in housing without the approval of the majority of the city’s voters violated the Equal Protection Clause), and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) (holding that a state initiative prohibiting school boards from requiring any student to attend a school other than the geographically nearest or next nearest school, but that contained exceptions permitting school boards to assign students away from their neighborhood schools for virtually all purposes required by their educational policies except racial desegregation, created an impermissible racial classification in violation of the Equal Protection Clause).

After granting certiorari, the Supreme Court scheduled *Schuette*’s oral argument for October 15, 2013. See *Schuette* Docket, available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/12-682.htm> (last visited Sept. 9, 2013).

⁹ While the amendment also prohibits discrimination or preferential treatment in government contracting and public employment, the issue before the Supreme Court is limited to preferential treatment in the context of public education.

¹⁰ Other states that have adopted similar constitutional amendments include Arizona (Ariz. C. Art. 2 § 36 (2009)), California (Cal. C. Art. 1 § 31 (1996)), Nebraska (Neb. Rev. Stat. C. Art. I § 30 (2008)), Oklahoma (Okla. Const. Art. 2 § 36A (2012)), and Washington (RC Wash. 49.60.400 (1998)). Moreover, the Michigan Civil Rights Initiative was the brainchild of Ward Connerly, a Regent of the University of California, who led the State of California to ban affirmative action with a statewide action (i.e., Section 31) in 1996. In *Coalition to Defend Affirmative Action v. Brown*, 674 F.3d 1128 (9th Cir. 2012), California high school and college students made a contemporary challenge to the constitutional amendment, Section 31. The Ninth Circuit, however, granted summary judgment for the defendants, concluding that it was bound by its earlier precedent in *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (holding that Section 31 was constitutional under both a conventional equal protection analysis and a political-structure equal protection analysis). The plaintiffs did not petition the Supreme Court for certiorari.

The *Fisher* (and the Potential *Schuette*) Effect: Transcending the University Level and the Implication for Affirmative Action and Race-Conscious Policies, Generally

Fisher and *Schuette* raise related, but fundamentally different, issues: While *Fisher* focuses on the specifics of the University's consideration of race in its admission policy, *Schuette* involves an affirmative step by the State of Michigan to prohibit its public colleges and universities from using race (or sex) as a factor in choosing the incoming class of students.¹¹

On one hand, *Fisher* is a narrow decision. Although *Fisher* presented the Supreme Court with an opportunity to reevaluate and change the use of race-conscious university admissions policies and to reexamine its holding in *Grutter*, and, if it decided to do so, change its position, the Supreme Court declined to do so. Instead, the Court reaffirmed its prior precedents, reiterated that strict scrutiny is the proper standard, and remanded for reconsideration of the University's plan under that standard. Nevertheless, the *Fisher* ruling demonstrates that universities (and potentially other organizations instituting race-based policies) should be prepared to demonstrate why those policies are necessary to achieve the benefits of diversity – in particular, why race-neutral alternatives would be unworkable (or insufficient) to achieve those benefits.

Schuette, on the other hand, has the potential to have a broader, more expansive impact on affirmative action because it involves a state action to deny its public colleges and universities any right to use race as a factor in selecting its student body. Even in the event of an expansive decision reversing the Sixth Circuit in *Schuette*, it is unlikely that the Supreme Court will overturn *Grutter* for several reasons. First, the issue presented in *Schuette* does not present an opportunity for the Court to reexamine *Grutter* in the same way *Fisher* did. Indeed, there is no specific race-conscious admission policy at issue in *Schuette*. Furthermore, *Schuette*'s petition for certiorari to the Supreme Court actually suggests that the state's position complies with the holding in *Grutter*, and argues that it is the Sixth Circuit's holding that *conflicts* with *Grutter*. See *Grutter*, 539 U.S. at 342 (calling for a “logical end point” to “all governmental use of race”).

Additionally, the Court did not wait for an outcome in *Fisher* to grant *Schuette*'s certiorari petition, which highlights the distinctions between the issues presented in *Fisher* and *Schuette*. Finally, Justice Kagan's recusal presents the possibility that the Court may divide four to four, leaving the Sixth Circuit decision intact.

After *Fisher* and in anticipation of *Schuette*, diversity and the constitutionality of race-based and race-conscious initiatives remain central concerns in the legal, business, and social landscapes. Not only public universities but also public and private organizations continue to examine their policies and initiatives to ensure compliance with legal mandates. Notably, the development of a pipeline as a means to achieve diversity is more important than ever.

Beyond *Fisher*: Broader Implications

In *Bakke*, Justice Powell articulated for the Supreme Court the importance of a pipeline: “The

¹¹ Although Proposal 2 also banned the use of race as a factor in the state's employment policies and in public contracting, the decision dealt only with the way the proposal affected public education.

Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" 438 U.S. at 312 (Powell, J.) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).

Likewise, many institutional sectors in the nation acknowledge the intrinsic value of developing a pipeline of diverse talent, concurring with what higher education has done to assemble racially and culturally diverse enrollments. Indeed, while 17 briefs were filed in support of Petitioner Fisher, 73 briefs were filed in support of Respondent University of Texas.¹²

Specifically, amicus briefs filed on behalf of the University of Texas emphasized the importance of a pipeline and the benefits of diversity—*both* essential to student success in the 21st century. Some of these briefs are excerpted below.

See Brief of Amici Curiae Fortune 100 and Other Leading American Businesses in Support of Respondents, No. 11-345, 2012 WL 3218831, at *2 (Aug. 13, 2012):

Amici have found through practical experience that a workforce trained in a diverse environment is critical to their business success. *Amici* are dedicated to promoting diversity as an integral part of their business, culture, and planning . . . The only means of obtaining a properly qualified group of employees is through diversity in institutions of higher education, which are allowed to recruit and instruct the best qualified minority candidates and create an environment in which all students can meaningfully expand their horizons.¹³

See also Brief of Amici Curiae of the College Board and the National School Boards Association in Support of Respondents, No. 11-345, 2012 WL 3540403, at *3 (Aug. 13, 2012):

From the elementary to postsecondary context, where the establishment of a sufficiently diverse learning environment is often essential to educational success, race and ethnicity still matter. The American workplace is diverse and global, and . . . the nation's future depends on ensuring that pathways exist that exhibit such diversity.

Brief of Amici Curiae of Association of American Medical Colleges in Support of Respondents, No. 11-345, 2012 WL 3308291, at *12, *27 (Aug. 13, 2012):

¹² Similarly, 75 amicus briefs were filed with the Supreme Court in *Gratz/Grutter* in support of the University of Michigan by scores of professional associations; universities, colleges, law schools and national educational organizations; retired medical leaders; Fortune 500 corporations; and more than 14,000 law school students, among others.

¹³ The *Fisher* Fortune 100 amicus brief, which included amici such as, AOL, Inc., Procter & Gamble and Exelon Corp. is a reprise of one filed nearly 10 years earlier in support of the respondents in *Gratz/Grutter*. The companies identified the ability to hire graduates from diverse campus environments as a business and economic imperative. Brief of Amici Curiae 65 Leading American Businesses in Support of Respondents, Nos. 02-241, 02-516, 2003 WL 399056 (Feb. 18, 2003). The *Gratz/Grutter* amicus brief was filed on behalf of 65 businesses, which included The Coca-Cola Company, KPMG Int'l for KPMG LLP, Northrop Grumman Corporation, and Alliant Energy Corporation, among others.

[A] diverse student body helps to promote the empathy, emotional intelligence, and cultural competence required of physicians and other health care professionals” and . . . “[p]ipeline programs, which seek to encourage underrepresented minorities to pursue a medical education at a young age, have had promising preliminary results.

Brief of Former Commissioners and General Counsel of Federal Communications Commission and the Minority Media and Telecommunications Council as Amici Curiae in Support of Respondents, No. 11-345, 2012 WL 3527851, at *3-4 (Aug. 13, 2012):

Diversity in the media, in turn, contributes to the robust exchange of ideas that is critical to civic engagement in the Country. But the possibility of building an inclusive public dialogue capable of engaging an increasingly diverse Country would itself be imperiled if the Nation’s colleges and universities – the pipeline for opportunity in the mass media and the trainers of future media programmers and journalists – were themselves hamstrung in their efforts to further the compelling governmental interest in diversity in higher education.

The need for a more robust talent pool for all industries and professions is very clear, particularly in the profession charged with speaking for those who need help in speaking for themselves – the legal profession.

Pipeline Initiatives in a Post-Fisher World

The Importance of a Robust Talent Pipeline – By the Numbers

As business becomes increasingly global and technology is bridging continents, the United States is experiencing rapid demographic shifts including moving toward a minority majority. However, despite these changes on the global and national stages, racial and ethnic diversity within the legal profession in the United States continues to lag. In the recent *Institute for Inclusion, the Legal Profession Review 2012: The State of Diversity and Inclusion in the Legal Profession Demographic Summary*, Elizabeth Chambliss provides some stark demographic realities including:¹⁴

- Minority representation among lawyers is lower than minority representation in most other management and professional jobs. According to the Department of Labor, minority representation among lawyers was 12.7 percent in 2011, compared to 26.4 percent among accountants and auditors, 36.5 percent among software developers, 28 percent among physicians and surgeons, and 22 percent within the management and professional labor force as a whole.

¹⁴ See *Demographic Summary*, Elizabeth Chambliss, IILP Review 2012: The State of Diversity and Inclusion in the Legal Profession (2012).

- In 2011, minority women composed only two percent of law partners nationally and even this figure is skewed upward by a few standout cities. In many cities, minority women's representation among partners hovers closer to one percent.
- The pace of African-American entry into the profession has slowed in recent years. In 2011 and 2012, African-Americans made up 7.1 percent of law students, compared to around 7.5 percent in the mid- to late 1990s. Asian-American representation among law students has also dropped after decades of steady gains.
- Initial employment patterns for white and minority law graduates have converged since the late 1990s, except for judicial clerkship rates, where divergence has increased. This overall convergence masks significant differences between racial and ethnic groups. For instance, African-Americans and Native Americans continue to be significantly less likely than other groups to enter private practice, whereas Hispanics and Asian-Americans are more likely than other groups, including whites, to do so. African-Americans are the most likely of all groups to enter government and public interest jobs.

In addition to underrepresentation of certain minority groups within the current attorney population, research has shown that entering the profession has become more challenging for some racial and ethnic groups. Consider the findings highlighted in *The Door to Law School*:¹⁵

- Based on data provided by the Law School Admissions Council covering 10 law schools entering class years, beginning with the fall 2000 entering class and ending with the fall 2009 entering class, the shut-out rate for every applicant group of color is higher than that of Caucasians, even for groups like Asian-Americans, whose LSAT scores are statistically indistinguishable from their Caucasian counterparts.
- When you compare the growth in enrollment of all students of color to the growth in enrollment of all students, African-Americans, Mexican-Americans, and Puerto Ricans have all lost ground in terms of proportional representation during the first decade of this century and at a time when there was a substantial increase in the number of available law school seats and slightly increasing or stable entrance credentials, at least among African-American and Mexican-American applicants.

The legal profession's pipeline begins much earlier than when people apply to law school, and therefore it will be important to also consider the state of educational attainment at earlier educational milestones and how to increase access and improve performance at those stages.

Moving the Needle

In light of the demographic realities set forth above, a number of organizations within the legal profession and in other corporate sectors are taking proactive steps to strengthen and diversify the talent pipeline, often under the umbrella of diversity and inclusion. As stated by NALP

¹⁵ See *The Door to Law School*, John Nussbaumer and E. Christopher Johnson, IILP Review 2012: The State of Diversity and Inclusion in the Legal Profession (2012).

Executive Director Jim Leipold in *How Leading Companies Are Prioritizing Diversity Early in the Pipeline*: “There’s a longstanding belief that intervening in the pipeline at any point is meaningful . . . NALP’s work has suggested that every organization that has a serious commitment to diversity in the legal arena needs to have pipeline projects as part of its multifaceted strategy.”¹⁶

The majority of the pipeline initiatives taking place within and geared toward the legal profession fall into the following buckets:

- **Monetary Awards:** A number of the diversity initiatives included in the NALP Member Diversity Initiatives Listing provide for financial support for law students to assist with tuition and other educational expenses.
- **Salaried Positions:** In many instances, a monetary award of the type described above is accompanied by a paid position in the sponsoring organization’s summer associate program or other employment opportunities in the organization, including internships for college students.
- **Educational Preparation/Exposure to the Legal Profession:** There are a number of programs designed to prepare students for legal careers at various points in their educational attainment, including LSAT preparation, law school preparation, and informational sessions focused on specific areas of practice. Some programs reach further down the pipeline and are aimed at college readiness and success.
- **Job Fairs/Career Advising:** In addition to traditional law school hiring, a number of law firms and corporations sponsor and/or source talent at job fairs for traditionally underrepresented groups. Some of these fairs also include career-advising sessions.
- **Partnerships:** Recognizing the benefit of collaboration in moving the needle, there are a number of partnerships taking place across the legal profession among law schools, law firms, corporate law departments, bar associations, and other organizations dedicated to advancing diversity in the legal profession.

Below are three examples of pipeline efforts directed at various points in the legal talent pipeline, with a focus on college through law school.

- **DiscoverLaw.org:** The Law School Admission Council developed the DiscoverLaw.org campaign to encourage racially and ethnically diverse students to discover career opportunities in law and choose paths in undergraduate school to help them succeed. With access to experts, inspiring stories about law school graduates, answers to frequently asked questions, and more, DiscoverLaw.org provides students with resources,

¹⁶ *How Leading Companies Are Prioritizing Diversity Early in the Pipeline*, InsideCounsel (May 2011), available at <http://www.insidecounsel.com/2011/05/01/how-leading-companies-are-prioritizing-diversity> (last visited Sept. 9, 2013).

tips, and tools on how to become competitive law school applicants. For more information, visit <http://www.discoverlaw.org/>.

- ***ABA Judicial Clerkship Program:*** The Judicial Clerkship Program is a joint effort of the ABA Council for Racial and Ethnic Diversity in the Educational Pipeline and the ABA Judicial Division with support from LexisNexis®. The multiday program partners up to 100 minority law students from across the country with judges and former law clerks. Attendees participate in panel discussions, research and writing exercises, and informal social events. These activities are designed to introduce and reinforce to the students the reasons for and values of pursuing a judicial clerkship. For more information, visit http://www.americanbar.org/groups/diversity/diversity_pipeline/projects_initiatives/judicial_clerkship_program.html.
- ***Leadership Council on Legal Diversity – Pipeline Committee:*** The Leadership Council on Legal Diversity (LCLD) is an organization of corporate chief legal officers and law firm managing partners dedicated to advancing diversity and inclusion in the legal profession. The Pipeline Committee is focused on empowering high-potential students at the university and law-school levels and equipping them for leadership careers in law. To date, the committee is engaged in a number of initiatives including the 1L Scholars Program, the LCLD Law School Mentoring Program, the LCLD/CLEO Pre-Law Workshops, and the SALT/LCLD Pipeline Partnership. For more information on the Pipeline Committee’s efforts, visit http://www.lclldnet.org/committees_pipeline.html.

As noted previously, because the legal talent pipeline depends on earlier educational and professional access and excellence, other efforts that are not directly aimed at improving the legal profession’s pipeline also have a positive impact. Many of these efforts fall into the following buckets:

- ***Community Philanthropy:*** A number of the Diversity Inc. Top 50 companies provide financial support to multicultural nonprofits, including those dedicated to improving educational access and professional opportunities such as the United Negro College Fund, the National Black MBA Association, the National Society of Hispanic MBAs, the American Indian Scholarship Fund, National Medical Fellowships, National Hispanic Corporate Achievers, ALPFA, INROADS, the Asian & Pacific Islander American Scholarship Fund, the National Association of Black Accountants, and Ascend.
- ***Leadership Engagement:*** Many Diversity Inc. Top 50 companies have CEOs and other top executives who are active on the boards of multicultural organizations.
- ***Engaging Employee Resource Groups:*** A number of the Diversity Inc. Top 50 companies rely in part on their employee resource groups to help increase diversity in their applicant pools.

Below are two examples of efforts directed at the broader talent pipeline.

- **Capital One – Capital One Financial Scholars Program:** The United Negro College Fund and Capital One Financial Corporation are providing an innovative new financial education program designed to empower tens of thousands of students with important money management skills at more than 50 historically black colleges and universities across the country. For more information, visit http://www.uncf.org/sections/News/SS_PressReleases/pressrelease_details.asp?prID=291
- **Procter & Gamble – Imagine a Future:** Procter & Gamble ignited the My Black Is Beautiful (MBIB) movement with the launch of its new initiative, Imagine a Future, to impact the lives of one million black girls over three years. MBIB teamed up with community-based organization BLACK GIRLS ROCK! and national educational leader United Negro College Fund to bring this initiative to life by providing purpose-inspired solutions that support young black girls in being their best and most beautiful selves. Tools and resources for the Imagine a Future initiative include scholarships, leadership camps for teen girls, online consumer-interactive tools, and, in summer 2013, a national broadcast premiere of the “Imagine a Future” documentary. For more information, visit http://www.myblackisbeautiful.com/get_involved/imagine_a_future.php.

Evaluating Programs and Measuring Success

With this brief discussion in mind and against the backdrop of the legal landscape after *Fisher*, as you evaluate current diversity pipeline initiatives and your strategy going forward, here are some considerations to keep in mind:

- How does our organization/unit define pipeline initiatives, including the target beneficiaries of our efforts?
- How do our pipeline efforts link to broader business objectives?
- Do we integrate our pipeline discussions/activities into our organization’s overall diversity and inclusion work, and if we do, are our pipeline efforts a key priority?
- Are our efforts enterprisewide or unit/market specific?
- Who are the key stakeholders within our organization and outside of the organization?
- What are the key metrics that we will use internally to demonstrate return on investment and success of our pipeline initiatives?
- How frequently will we evaluate our efforts and decide to change course if necessary?
- What are the key metrics that we will need from our pipeline partners/organizations to measure success during the course of our relationship?
- Is it possible to work with a pipeline partner/organization to design a customized program given our organization’s specific objectives?
- Do our pipeline initiatives provide an opportunity to meaningfully engage our existing talent?
- Have we reviewed our pipeline initiatives strategy with key stakeholders within the organization including our Chief Diversity Officer and the Legal Department?
- Are we current with respect to external developments such as judicial rulings that may impact how we talk about and act upon our organization’s commitment to diversity and inclusion?

Resources

In addition to the initiatives highlighted here, below are additional resources for identifying and supporting pipeline initiatives designed to increase diversity in the legal profession.

- ***NALP Member Diversity Initiatives***: A listing of diversity programs, initiatives, and events taking place across the legal profession maintained by NALP. Located at <http://www.nalp.org/memberdiversityinitiatives>.
- ***ABA/LSAC Pipeline Diversity Directory***: This directory is a searchable database of projects, programs, and initiatives that encourage and equip minority students to pursue legal careers. Located at <http://apps.americanbar.org/abanet/op/pipelndir/search.cfm>.
- ***Minority Corporate Counsel Association – Diversity Dollars***: The Diversity Dollars grant program supports initiatives and programs that further diversity in the legal profession including internships, scholarships, diversity-focused research or collection of best practices, and sponsorship of diversity programs or events. For more information, visit <http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=2353>.

Conclusion

As *Fisher* and other cases continue to wend their way through the judicial process, organizations looking to recruit and retain diverse talent pools will want to remain abreast of these developments, with a focus on how they may potentially affect the pipeline for talent and what interventions may be needed from an organizational standpoint to ensure a robust and growing pipeline at the various stages needed for organizational success.



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