You Thought Things Were Settled?
Legal Updates, Policy Implications, and New Professional Development Resources on Diversity

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Session Overview

I. Legal and Policy Landscape

II. Current Developments, Big Issues

III. Current Developments, Bigger Issues

IV. Conclusion

V. Tools You Can Use: Navigating the Terrain of Law, Policy, and Research
I. Legal and Policy Landscape
General Overview

Major Points of Legal Action

Remedying Unlawful Discrimination

- Federal requirement for de jure higher education systems and institutions to eliminate vestiges of discrimination

- Movement from traditional legal "remedial" focus to more open-ended goals (’70s forward...)
  - Elimination of societal discrimination
  - Elimination of discrimination, broadly

- Federal agency and court action regarding race-conscious practices, including
  - Podberesky v. Kirwan (4th Cir. 1994)
  - Hopwood v. Texas (5th Cir. 1996)

Pursuit of Educational Benefits of Diversity

- Bakke (1978)
  - Powell: Obtaining educational benefits of diversity is a "permissible goal for an institution of higher education"

- Federal agency and court action, including
  - Hopwood v. Texas (5th Cir. 1996) vs. other federal circuits


- Parents Involved in Community Schools (2007)
  - Louisville and Seattle School Districts

- Fisher v. Texas (5th Cir. 2011)
  - Movement toward U.S. Supreme Court
General Overview

Strict scrutiny is the legal test used by courts to evaluate action taken by all public institutions and all private institutions that receive federal funds when they treat persons differently because of their race, ethnicity, or national origin.

The strict scrutiny standard establishes two key questions that must be addressed when pursuing race-/ethnicity-conscious practices:

1. Is there a **compelling interest** that justifies the practice? (the ends/goals)

2. Is the practice in question **narrowly tailored**? (the means to realize the goals)
   a. Are race-conscious measures **necessary** to achieve goals?
   b. Does the use of race-conscious measures have consequential impact, advancing goals?
   c. Is the policy **well calibrated** so that it is neither over- not under-inclusive?
      - Is the use of the policy flexible?
      - What is the impact of the policy on equally-meritorious, non-qualifying candidates?
   d. What is the **process of review** and refinement over time and is there an end in sight?
General Overview

The Emerging Composition of the U.S. Supreme Court...

2003

GRUTTER MAJORITY (2003)

GINSBURG
STEVENS
SOUTER
BREYER
O'CONNOR
KENNEDY
REHNQUIST
SCALIA
THOMAS

GRATZ MAJORITY (2003)

2011

GRATZ MAJORITY (2003)

GINSBURG
KAGAN
SOTOMAYER
BREYER
ALITO
KENNEDY
ROBERTS
SCALIA
THOMAS

PICS V. SEATTLE S.D. MAJORITY (2007)
General Overview

Voter Initiatives to Eliminate Consideration of Race, Ethnicity, Gender
Diversity Defined

Diversity goals should be:

- Institution specific and mission central.
- Educationally focused—relation to precisely the kinds of outcomes the institution seeks and complementary to other core academic/education goals.
  - Note alignment between 21st Century educational excellence benchmarks and those associated with diversity: enhanced critical thinking, collaboration skills, etc.
- Inclusive of multiple dimensions of diversity, which may include an array of characteristics, background experiences, and academically focused metrics.
- Well-defined and operationalized, with clear bases upon which to gauge success over time.

Diversity goals may intersect with key access, equal opportunity, and remedial aims.
Educationally sound and legally defensible race-/ethnicity-conscious practices must be the product of a well-designed, institutionally aligned, and integrated process.
II. Current Developments and Big Issues: What *Fisher* Means

Issue One: The Question of Necessity and Impact

Issue Two: Critical Mass Means What????

Issue Three: How Much Deference and What Kind of Evidence?
Fisher v. University of Texas (5th Cir. 2011)

At the Appellate Court Level...

- 5th Circuit panel (of 3) unanimously concludes that University of Texas race-conscious admissions policy comports with Grutter and is lawful.

- Major issue addressed: Whether UT's consideration of race was necessary—as required for narrow tailoring/strict scrutiny—in light of the effect of the State's "Top Ten Percent Law," which had resulted in increased minority enrollment.

  - Panel special concurrence (Judge Garza): Overrule Grutter!
  - En banc court splits (9-7) over whether to re-hear case and on the question of whether consideration of race is necessary.
Fisher v. University of Texas (5th Cir. 2011)

Key Issues

1. Necessity and Impact
2. Critical Mass
3. Deference and Evidence
Background: Necessity and Impact

Out of the Closet

- The issue of necessity—to justify race-, ethnicity-, or gender-conscious-action has historically focused on how significant the gap or deficit to be filled is, and how that may justify such conscious action.

- In 2007, for the first time, the U.S. Supreme Court squarely addressed a different dimension of that question—one that had been present in past opinions, but addressed only in passing, if at all:
  - In *PICS v. Seattle Schools*, the Court ruled that the consideration of race was not "necessary" given its "minimal effect" on student diversity.
    - Seattle: 52 students affected; Jefferson County: 3% of all school assignments affected
    - VS.
    - University of Michigan: law school more than tripled minority representation with race-conscious admissions program...from 4 to 14.5% of the entering class
Issue One: Necessity and Impact

- **Key Issue:** The material impact of the consideration of race—relevant to the necessity prong of narrow tailoring.

**Majority View**

- The race-conscious policy has "produced noticeable results"—increasing African American enrollment by 60/Hispanic enrollment by 204, when compared to pre-policy numbers.

- The race-conscious policy is important in ways that transcend whole institution numerical analysis—e.g., minority students remain "clustered" in certain programs and majors, which the Top 10% Law can't address.

**Dissenting View (incl. Garza)**

- 19% of entering class is subject to the race-conscious policy

- >20% of entering freshmen are already African-American/Hispanic

- Policy affects "no more than a couple hundred" out of more than 6000 new students

- Contrast to *Grutter*, where consideration of race was "indispensable in more than tripling minority representation...from 4 to 14.5%"

- Rejects educational benefits at classroom/discipline level
**Background: Critical Mass**

**Key Policy Parameters from Grutter**

- **Directly linked with educational goals**
  - Not to assure “some specified percentage of a particular group merely because of race or national origin,” but to achieve “the educational benefits that diversity is designed to produce.”

- **Premised on the need to attract sufficient numbers of underrepresented students that will advance educational goals—based on institution-specific research and data**
  - To ensure the “presence of ‘meaningful numbers’...of ‘students from groups which have been historically discriminated against.....’ and who are “particularly likely to have experiences and perspectives of special importance to [its] mission.” An individual assessment that includes but is not limited to race and gender of the individual.

- **Not defined with reference to rigid, numerical targets or goals (no quotas!)**
  - Not the equivalent of seeking a “specific number of students of particular races” or seeking “a hard and fast number” of students.

- **One objective among many other (sometimes competing) enrollment management objectives**
Background: Critical Mass

Striking the Balance

III-Defined & Amorphous | Critical Mass | Quotas

NO! | YES! | NO!
Background: Critical Mass

Social Science Research...and the Law

• The Numbers...
  – 11-17% of class = underrepresented minority students: University of Michigan Law School Draft Policy (subsequently redacted) [Grutter]
  – 10% of class = female cadets: District court view regarding “critical mass” that might be achieved at VMI, sufficient “to provide the female cadets with a positive educational experience.” [U.S. v. Virginia]

• BUT...it’s really more than the numbers...
  – “[T]here is no identifiable magic number that signals that there is ‘enough’ racial diversity in the student composition....” [Chang et al., 2002]
  – Critical mass is ultimately defined with reference to the particular setting in which race-based assumptions dissipate, behaviors shift, and a more robust learning environment is established.
Majority View

✓ Notes that *Grutter* defined critical mass "by reference to the educational benefits that diversity is designed to produce," while University discussed concept as "inward-facing...focus[ing] on the functioning of the student body"

✓ Finds that University acted with "appropriate sensitivity" in not looking at the aggregate minority enrollment but at enrollment statistics for specific groups

✓ Blesses University's focus on critical mass at the undergraduate classroom level, focusing on classes of "participatory size," noting that Top Ten Percent Law results in minority students being clustered in certain programs

Dissenting View (incl. Garza)

✓ Judge Garza warns against examining critical mass through a "major-by-major" or "classroom-by-classroom" lens

✓ Dissent in denial of en banc rehearing: "[T]he panel appears to countenance an unachievable and unrealistic goal of racial diversity at the classroom level to support the University’s race-conscious policy."
Critical Mass

Key Issues

• The relevant unit of evaluation
  • By discipline, other meaningful unit...

• The relevant populations to assess
  • Individual minority groups vs. URMs

• Qualitative and quantitative evaluations over time
Grutter Dissent: Critical Mass

The Constancy in Admit Percentages of URM Students

- 1987: 0%
- 1988: 5%
- 1989: 10%
- 1990: 15%
- 1991: 20%
- 1992: 25%
- 1993: 0%
- 1994: 5%
- 1995: 10%
- 1996: 15%
- 1997: 20%
- 1998: 25%

Year
The Correlation Between Admitted Students and Applicant Pool of URM Students

<table>
<thead>
<tr>
<th>Year</th>
<th>% of applicants who were African American</th>
<th>% of applicants who were Hispanic</th>
<th>% of applicants who were Native American</th>
</tr>
</thead>
<tbody>
<tr>
<td>1995</td>
<td>9.7%</td>
<td>5.1%</td>
<td>1.1%</td>
</tr>
<tr>
<td>1996</td>
<td>9.3%</td>
<td>5.1%</td>
<td>1.1%</td>
</tr>
<tr>
<td>1997</td>
<td>9.3%</td>
<td>4.8%</td>
<td>1.1%</td>
</tr>
<tr>
<td>1998</td>
<td>9.6%</td>
<td>4.2%</td>
<td>1.1%</td>
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<tr>
<td>1999</td>
<td>9.7%</td>
<td>4.5%</td>
<td>1.0%</td>
</tr>
<tr>
<td>2000</td>
<td>9.5%</td>
<td>4.4%</td>
<td>1.0%</td>
</tr>
</tbody>
</table>

% of applicants who were African American
% of applicants who were Hispanic
% of applicants who were Native American
Are There Different CM Ranges for Different Subgroups?

- % of admitted applicants who were African American
- % of admitted applicants who were Hispanic
- % of admitted applicants who were Native American
Background: Deference and Evidence

The *Grutter* Standard

**On strict scrutiny:** All racial classifications are subject to strict scrutiny; they must be narrowly tailored to serve compelling interests. This requires "searching judicial inquiry" into the justification for such classifications, as well as an inquiry into the means by which policy objectives are pursued.

**On deference:** "The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."

Issue Three: Deference and Evidence

Majority View

✓ Strict scrutiny with its narrow tailoring requirement "is a given"
✓ "We...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."
✓ Rejects assertion that Grutter permits deference only to university's judgment that diversity has educational benefits and extends deference to university's assessment of whether it has attained critical mass of a racial group and whether race-conscious efforts are necessary to achieve that end.

Dissenting View (incl. Garza)

□ "Grutter counsels no deference on whether racial preference is necessary to further a diversity goal or on the means by which diversity is pursued."
  - Judge Garza, special concurrence

□ "Reasonable minds may indeed differ on the extent of deference owed to universities in the wake of Grutter, but the panel’s effective abandonment of judicial strict scrutiny in favor of 'deference' at every step of strict scrutiny review contradicts Grutter and Parents Involved."
  - Chief Judge Jones, dissenting in denial of en banc rehearing
Deference and Evidence

...and back to the Supreme Court?

*Fisher* Petition for a Writ of Certiorari

- "The Fifth Circuit’s wholesale deference to UT’s 'good faith' diversity judgments shifts responsibility for ensuring equal protection from the courts to university administrators."

- "Neither *Grutter* nor any other decision condones such unlimited deference."

- "To be sure, *Grutter* affords a measure of deference in defining a university’s *educational* interest in diversity. But *Grutter* excluded racial balancing from that deference...And *Grutter* counsels no deference on whether racial preference is necessary to further a diversity goal or on the means by which diversity is pursued."
## Deference and Evidence

Use Evidence to Justify Existence of Race-Conscious Policies and Programs

### Core Elements of Proof
- Educational Rationale
  - Aligned with mission/goals
- Theory of Action
  - Connecting policy design with goals
- Policy Design and Implementation
  - Effectively resourced
  - Likely to succeed

### Kinds of Evidence
- Mission and related policy statements
- Social science research
- Institution-specific data, research & information aligned with social science research
- Anecdotal/other information regarding institutional experience
- Periodic assessment of premises, based on enrollment management practices

### ALL: Based on evidence
Key Questions

- Do race-conscious policies, in combination with other policies:
  - Achieve goals?
    - Use of race materially advances achievement of goals
    - No less restrictive use of race is possible
      - No viable race-neutral alternatives
  - Reflect minimal consideration of race, given goals?
    - Appropriately flexible in application
    - Minimal adverse impact on non-preferred students

- Are race-conscious policies, in combination with other policies, rigorously reviewed with an end goal in sight?
  - Policies reviewed and evaluated, annually, including focus on race-neutral strategies that might work
  - Data analysis
III. Current Developments and *Bigger* Issues

A. Fisher: *Grutter* to be Overruled?

B. Coalition to Defend Affirmative Action: State Voter Initiatives Unconstitutional?
"I concur in the majority opinion, because, despite my belief that Grutter represents a digression in the course of constitutional law, today's opinion is a faithful, if unfortunate, application of that misstep. The Supreme Court has chosen this erroneous path and only the Court can rectify the error."

- Judge Garza's special concurrence, Fisher v. Univ. of Texas (5th Cir. Jan. 18, 2011)
"The Court should grant review to clarify or reconsider *Grutter* to the extent it can be read to justify [the University of Texas's] use of race in admissions...

If the panel's reading of *Grutter* is correct, *Grutter* should be clarified or reconsidered to restore the integrity of the Fourteenth Amendment's guarantee of equal protection."

- Petition for a Writ of Certiorari (Sept. 15, 2011)
Grutter to be Overruled?

Why It Shouldn’t Be: The Law of the Land - Settled Expectations

When weighing whether to overrule a previous case, the Supreme Court considers whether....

• Its rule has been found unworkable
• The rule could be removed without serious unfairness to those who have relied upon it or significant damage to the stability of the society governed by it
• Intervening years have left the rule outdated, discounted by society
• The initial facts that led to the rule have so far changed as to render the central holding irrelevant or unjustifiable in dealing with the issue it addressed

✓ Reaffirmed by the Supremes in Parents Involved, 2007: ALL NINE!
✓ Relied upon by lower courts
✓ Followed with rigor by higher education institutions
  ➢ College Board's Access and Diversity Collaborative... and more...
State Voter Initiatives Overturned?
## Federal-State Issues

### Voter Initiatives Valid? A Tale of Two Circuits

California voters in 1996 and Michigan voters in 2006 passed state constitutional amendments banning the states' public colleges from giving preferential treatment based on "race, sex, color, ethnicity or national origin."

<table>
<thead>
<tr>
<th>California</th>
<th>Michigan</th>
</tr>
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<tbody>
<tr>
<td>In 1997, Ninth Circuit panel upholds ban.</td>
<td>On July 1, 2011, the Sixth Circuit (in a 2-1 panel) strikes down ban.**</td>
</tr>
<tr>
<td>Equal Protection Clause of Fourteenth Amendment (EPC) doesn't protect &quot;preferential treatment&quot;—only &quot;equal treatment&quot;</td>
<td>Violates EPC under political restructuring theory—by altering political process on racial basis and placing impermissible burden on minorities</td>
</tr>
<tr>
<td>Political process not burdened on basis of race when preferential treatment impacted</td>
<td>Minorities must affect a constitutional amendment (the highest procedural barrier) to change the ban, while other admissions policies may be changed without such a hurdle</td>
</tr>
<tr>
<td>&quot;Stacked deck&quot; programs (such as &quot;race-based affirmative action&quot;) grant &quot;preferential treatment,&quot; unlike &quot;reshuffle programs&quot; (like school desegregation) which provide &quot;equal treatment.&quot;</td>
<td>**Rehearing en banc granted on September 9, 2011</td>
</tr>
</tbody>
</table>
Federal-State Issues

Political Restructuring Doctrine of the Fourteenth Amendment

Rule: Majority cannot manipulate legal channels in a manner that places unique burdens on racial minorities.

Two Supreme Court cases:

• *Hunter* (1969) - Court rejects amendment to city charter that required step of voter referendum to implement "fair housing" laws regarding race and religion discrimination, where other changes to housing laws required only a city council vote. [8-1 decision]

• *Seattle School District* (1982) - Court strikes down referendum that effectively abolished districts' voluntary busing plans designed to promote racial integration but allowed busing for other reasons [5-4 decision]
IV. Conclusion
Takeaways...

1. Never lose sight of goals
   - You win with clear, educationally-grounded goals
   - You lose with amorphous and unclear goals

2. Never take you eyes off the ball, even when you think the final buzzer has sounded.
   - Law changes over time
   - Developments regarding key evidence (data, research, experience) should inform policy judgments—good yesterday is not necessarily good tomorrow

3. Proactive engagement is a must.
   - Embrace a forward- and outward-looking posture
   - Engage with unlikely stakeholders, in addition to the usual suspects
V. Navigating the Terrain of Law, Policy, and Research: Tools You Can Use

A. Discussion of Available Tools

B. Professional Development Video Series (viewing)
Available Tools


3. Professional Development Video Series (2011...)
   A. Access and Diversity and the Law: Understanding the Legal and Policy Fundamentals
   B. From Law to Policy Development: Setting the Stage for Action
Available Tools

1. **Diversity Defined: How Do I Know it When I See It?**
   - Toolkit, Tools 1-4

   - Toolkit, Tool 3

3. **Critical Mass: What is It?**
   - *Next Generation, Chapter 4*
   - Toolkit, Tools 3 and 5

   - Toolkit, Tools 5 and 7
Contact Information

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