



**Diversity in the Balance, Part II:  
Key Steps for Higher Education Institutions to Consider in  
Preparation for the U.S. Supreme Court's Decision in  
*Fisher v. University of Texas***

**March 2013**

*The 2012-13 term of the U.S. Supreme Court is the third term in a decade in which the Court will have addressed issues of race in education. This frequency is striking given that prior to 2003, a quarter of a century had passed since the Court considered the lawfulness of the consideration of racial preferences in education. With the Court poised to expand upon its recent rulings—*Grutter v. Bollinger* and *Gratz v. Bollinger* in 2003; and *Parents Involved in Community Schools v. Seattle School District* in 2007—this two-part series ***Diversity in the Balance*** provides in Part I an overview of the current case before the Court and key education arguments pressed by the dozens of education institutions and organizations that have filed supportive briefs on behalf of the University of Texas, which may inform institutional perspectives regarding policy-related strategies; and in Part II more concrete guidance regarding prospective steps that institutions may consider during the months in which the Court is preparing its decision.*

On October 10, 2012, the United States Supreme Court heard oral arguments in a challenge to the University of Texas at Austin's admissions policy, which includes a consideration of race as part of a holistic assessment of applicants. Lower federal courts, applying the Supreme Court's 2003 decision of *Grutter v. Bollinger* (which affirmed the lawfulness of the University of Michigan law school's race-conscious admission policy and held that the educational benefits of diversity can justify the limited consideration of race when making admissions decisions), upheld the challenged undergraduate admissions policy, finding that it "map[ped] on *Grutter*" in its evaluation of each application, "using a holistic, multi-factor approach, in which race [was] but one of many considerations."<sup>1</sup> The Supreme Court's decision to take the *Fisher v. University of Texas* case likely signals its intent to reassess issues of race-conscious policies and practices in higher education raised in the *Grutter* decision.

While it is impossible to predict how the Supreme Court ultimately will rule (an opinion is anticipated in spring 2013), it is unlikely that the Court will not, in some meaningful fashion, expand on the principles and/or alter the requirements of *Grutter*. This policy paper provides

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<sup>1</sup> See *Fisher v. Univ. of Texas*, 644 F.3d 301 (5th Cir. 2011). For a summary analysis of the January 18, 2011, opinion of the Fifth Circuit Court of Appeals, see Coleman and Lipper, *Legal Update: Fisher v. University of Texas Case Summary*, available at [http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/fisher\\_v\\_univ\\_texas\\_final.pdf](http://diversitycollaborative.collegeboard.org/sites/default/files/document-library/fisher_v_univ_texas_final.pdf).

institutions of higher education with actionable guidance regarding how to plan strategically for the *Fisher* decision.

### ***History and Context***

In 2003, the Supreme Court's *Grutter v. Bollinger* and *Gratz v. Bollinger* decisions affirmed that the educational benefits of diversity could justify limited race-conscious admissions practices. Previously, a majority of the Court had expressly blessed the consideration of race in the admissions selection process only to remedy prior, unlawful discrimination, reflecting a focus on numbers and inputs. In 2003, the Court recognized that the consideration of race, as one of many aspects of student diversity, could be justified by the educational benefits of diverse learning environments that are experienced by all students, a decidedly outcomes-focused perspective.

The Court reached this decision applying the most rigorous standard of judicial review, the strict scrutiny standard, which is used to review policies or practices that distinguish individuals based on race or ethnicity (race- or ethnicity-conscious policies or practices). To satisfy strict scrutiny, an institutional policy must serve a "compelling interest" and be "narrowly tailored" to achieve that interest. In 2003, the Court affirmed that a university's interest in promoting the educational benefits of a diverse student body was sufficiently compelling to justify the consideration of race or ethnicity in a higher education setting. Narrow tailoring requires that the means used to achieve the end must "fit"; courts consider whether race- or ethnicity-conscious practices are sufficiently flexible (for example, there are no quotas or set-asides for racial minorities); whether the institution can demonstrate the necessity of using race or ethnicity (including evidence that viable race-neutral alternatives have been considered and, as appropriate, evaluated); and whether the burden placed on non-beneficiaries of any racial or ethnic preference is sufficiently minimal or diffuse.

The Court will apply the strict scrutiny legal test when it examines the University of Texas at Austin's admissions policy this term. In anticipation of a decision in *Fisher*, colleges and universities proactively can apply existing legal guidance to examine their current policies and practices, both to ensure they are on solid educational and legal footing and to prepare for the Court's decision.

### ***Strategic Steps to Prepare for Fisher***

To prepare for *Fisher*, your institution should develop or update a management plan associated with the review and evaluation of all diversity-related policies and programs that may be implicated by the Court's decision in *Fisher*. The purpose of this review and assessment should be to achieve clarity regarding educational goals and objectives and the ways in which institutional policy is designed to advance those goals and objectives. This process of review and evaluation not only makes good educational sense; it also is required under existing federal law where an institution maintains race- or ethnicity-conscious policies.

As you execute your plan, ensure that institutional leadership and counsel are included, with multiple perspectives at the table. A multidisciplinary management team often can exercise meaningful oversight, delegating review and preliminary program and policy descriptions by school, department, or program (as relevant/appropriate). All relevant policies and programs (outreach, recruitment, admission, financial aid/scholarship, academic or student support, etc.) should be inventoried to set the stage for any necessary action in the wake of the Court's decision. The practical steps that follow can inform and shape strategic thinking, risk/benefit analyses, and policy directions.

### *Inventory Your Policies and Practices*

The execution of a management plan begins with the assembly of information on all diversity-related policies and programs, spanning all facets of enrollment management, academic affairs, and student affairs as well as privately funded and institution-administered programs. This inventory exercise provides the institution with the opportunity to determine whether its diversity-related policies are implemented effectively to advance materially the school's efforts to reach stated goals. Ultimately, it can encourage greater institutional coherence and connectivity as leadership examines the degree to which discrete policies align with each other, profit from synergies and avoid inefficiencies, and reaffirm the institution's commitment to student diversity.

### *Collect Evidentiary Support*

As discussed above, race- and ethnicity-conscious policies will only survive under strict scrutiny if the justifications for those policies are well-developed and supported by appropriate evidence. Thus, as you assemble and inventory relevant policies and programs, you also should consider the evidentiary basis that justifies any race- and ethnicity-conscious practices. Consider here any proclaimed needs or goals for broad student diversity to achieve educational excellence. Now, look at the body of evidence that supports the use of race- or ethnicity-conscious policies and practices to reach those goals and assess whether and how you might build a more substantial evidentiary basis over time, grounded in institutional data as well as social science research.

Relevant avenues for evidence collection include student and faculty surveys, interviews, and assessments; analysis linking diversity experiences on campus to desired educational outcomes; and assessment of external benefits and alumni experiences. Potential evidence

#### **KEY EVIDENCE**

Evidence should be assessed to answer questions like the following:

- What evidence suggests that policies have met (or are advancing) desired goals?
- What evidence suggests that policies merit reconsideration?
- What information suggests that policies may (or may not) be appropriately aligned—with each other, or with your mission?
- Based on your review, can you conclude that your consideration of race in each policy is yielding intended benefits, even as it is as limited as it needs to be, consistent with your goals?

includes mission and related policy statements, social science research, institution-specific data, anecdotal information regarding institutional experiences, and periodic assessments of practices.

#### **KEY POINTS OF EVALUATION**

- Do you have clearly defined educational goals associated with diversity policies, and can you define success with respect to these goals?
- How clear and consistent are your policies? Are important terms appropriately used and defined?
- Are your policies and programs effectively implemented and materially advancing efforts to reach stated goals?

#### Evaluate Policies and Programs

Next, your institution should evaluate the policies and programs inventoried and existing evidentiary support for race- and ethnicity-conscious practices. Policies and programs should be assessed individually and collectively. Here, the institution examines whether the evidentiary basis supporting its goals is reflected in the design and implementation of its policies and programs – is each diversity-related policy (particularly those that are race- and ethnicity-conscious) necessary? Are they sufficiently flexible? What impact are they having toward achievement of goals?

Attention must be paid to whether race- and ethnicity-conscious policies are needed to achieve institutional goals or whether viable, neutral alternatives could suffice to reach objectives. This

includes an assessment of the adequacy of investment around inclusive outreach and recruitment practices that attempt to generate additional applicant interest (including, where appropriate, through pipeline programs and outreach to community colleges), removal of barriers on campus, and other neutral alternatives that the school uses first to determine that race-conscious approaches still are necessary.

Where the institution determines that race- or ethnicity-neutral alternatives are insufficient for achieving institutional goals, the institution should assess whether its use of race and ethnicity is limited and appropriately refined so that application of policies reflects a flexible and holistic lens. Further, race-conscious policies must be examined in light of changing circumstances, mission-driven aims, and results.

#### Take Action

Your institution should be prepared to modify policies and practices to ensure that they materially advance goals in educationally appropriate and legally sustainable ways. Your internal assessment, described above, as well as circumstances that may be changed by the Court's opinion could necessitate certain policy and practice changes.

In addition to this internal-facing work, the institution also must consider outreach to and engagement with relevant stakeholders including alumni, the general public, employers,

government actors, and civil rights and community-based organizations. Consensus-building in the court of public opinion is vital. Public/stakeholder engagement has a significant bearing on effective policy development. Stakeholder engagement can provide greater clarity on goals and values and offer transparency regarding institutional processes (e.g., being categorically clear that students admitted are qualified to perform, with no dual standards in gauging likely success).

In sum, linking access and diversity initiatives with core educational goals (as well as larger economic, national security, and civic interests) – rather than treating diversity as tangential or an "add-on" – serves the institution's interest by encouraging greater coherence and alignment on campus and by strengthening core messaging about broad institutional aims and educational objectives. Goals associated with access and diversity should be fully integrated into broader institutional aims and seen as part and parcel of core educational objectives.

### ***Conclusion***

A continuing focus on ends and means – the clarity of institutional goals and the strategies undertaken to achieve them – is the foundation upon which educationally sound and legally compliant policies can be developed. Key policy and legal questions ultimately must be posed in light of all relevant evidence related to institutional policies and programs as a foundation for mitigating legal risk and achieving educational success.

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