

## Legal Update

### *Fisher v. University of Texas Case Summary*

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Federal circuit upholds University of Texas race-conscious admissions policy as necessary and appropriate to further compelling interests associated with a diverse student body.

On January 18, 2011, a three-judge panel of the Fifth Circuit Court of Appeals ruled unanimously in *Fisher v. University of Texas* that the University's challenged admissions policy, which included consideration of race as part of a holistic assessment of applicants, was lawful. Applying the U.S. Supreme Court's 2003 decision in *Grutter v. Bollinger*, which upheld the University of Michigan law school's race-conscious admission policy, the Fifth Circuit panel 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."

The central issue in the case, however, had less to do with the challenged policy's adherence to a Michigan-like model, and more to do with whether UT *needed* a race-conscious admissions policy in the first place. The question of necessity was central to the case because the University of Texas's consideration of race was part of a policy adopted years after passage of the State's "Top Ten Percent Law," under which the top 10% of each high school class was guaranteed admission to UT. That facially race-neutral law had been enacted to "increase minority enrollment" as a large, if not primary, purpose.

#### **Relevant Facts**

Two Texas residents, both white women, who were denied undergraduate admission to the University of Texas at Austin (UT), filed suit alleging that UT's admissions policy discriminated against them on the basis of race. The challenged race-conscious portion of the larger UT admissions policy, which considers race as one of many factors for admission, was implemented in 2004, largely in response to *Grutter*. Though the challenged portion was enacted relatively recently, a historical review of UT's admissions process reveals a longstanding, institutional commitment to student diversity, including racial diversity, to serve UT's stated goal to "produce graduates who are capable of fulfilling the future leadership needs of Texas."<sup>1</sup>

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<sup>1</sup> The circuit court observed, "This objective calls for a more tailored diversity emphasis. In a state as racially diverse as Texas, ensuring that graduates learn to collaborate with members of racial groups they will encounter in the workplace is especially important."

To analyze the challenged portion of the admissions policy, the circuit court examined the larger admissions policy at UT, which reflected the following parameters and elements:

- UT allots 90% of all freshman seats to Texas residents.
- Texas's Top Ten Percent Law (Law) mandates that Texas high school seniors in the top 10% of their classes be automatically admitted to any Texas state university. (In 2008, 81% of the entering UT class was admitted under the Law, accounting for 88% of the seats allotted to Texas residents.)
- Remaining Texas residents compete for admission based on Academic and Personal Achievement Indices. The Academic Index (AI) formula uses standardized test scores and class rank; some applicants score high enough on AI to receive admission on that basis alone. The Personal Achievement Index is based on three scores – two essays and a personal achievement score.
- The personal achievement score is designed to recognize qualified applicants whose merit was not fully reflected by the AI. As part of the personal achievement score, UT admissions staff members consider the applicant's leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community service. Additionally, the personal achievement score considers "special circumstances," including the socioeconomic status of the applicant or his high school, the applicant's family status and responsibilities, the applicant's standardized test scores compared to her high school's average, and – beginning in 2004 – the applicant's race.<sup>2</sup> No element of the personal achievement score is considered separately or given a separate numerical value. Additionally, UT does not monitor the aggregate racial composition of the admitted applicant pool during the admissions process.

Reviewing UT admissions, the Fifth Circuit determined that UT evaluates each applicant "using a holistic, multi-factor approach, in which race is but one of many considerations."

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Notably, UT's mission-based commitment to diversity has been reflected in institutional policies and programs beyond admissions, including targeted scholarship programs, expanded outreach efforts to high schools in underrepresented areas of the state, and focused additional attention and resources on recruitment in low-performing schools.

<sup>2</sup> Before including race in the "special circumstances" consideration, UT commissioned two studies to determine whether it was enrolling a critical mass of underrepresented minorities. The first study determined that minority students were significantly underrepresented in undergraduate classes of "participatory size" (defined by UT as having between 5 and 24 students). The second reported that minority students felt isolated and insufficiently represented in classrooms. Following more than a year of study, UT adopted the policy to include race and now formally reviews the race-conscious measure every five years.

## The Circuit Court's Holding

The federal circuit upheld the UT challenged policy in *Fisher* based on the "compelling" ends and the admissions policy design that the court viewed as appropriate ("narrowly tailored") to achieve those goals. Specifically, the court concluded:

- The University sought to achieve educational benefits that were "essential to its mission"—including those associated with promoting cross-racial understanding, preparing students to function in a multi-cultural workforce, and cultivating leadership. Those goals were distinguished from the pursuit of racial balancing or efforts to ensure that the University's population "directly mirror[ed] the demographics of Texas"—either of which would have been viewed as unlawful (and quota-like) had they served as the basis for the University's policy.
- The University appropriately "devoted special attention to those minorities that were most significantly underrepresented on its campus" inasmuch as a "critical mass" of those students (in order to achieve the educational benefits of diversity) had not been achieved.
- The University of Texas' decision to "reintroduce race-conscious admissions" (after the *Grutter* Court rejected *Hopwood's* decision that the educational benefits of diversity could not justify race-conscious admissions policies) was the product of "serious, good faith consideration" as required by *Grutter*—"studied, serious and of high purpose, " in the court's view.
- The University appropriately tailored its admissions policy "to consider all pertinent elements of diversity in light of the particular qualifications of each applicant" and "gave appropriate attention to those educational benefits identified in *Grutter* without overstepping any constitutional bounds." While the Top Ten Percent Law undermined the University's claims that it had not yet achieved critical mass, the University could show that it had not achieved critical mass for individual groups, demonstrating that it had given "appropriate consideration to whether aggregate minority enrollment transl[ate]d into adequate diversity in the classroom."

## The Circuit Court's Analysis

In evaluating the race-conscious policy, the Fifth Circuit traced the strict scrutiny analysis employed by the Supreme Court in *Grutter*. Under strict scrutiny review, a policy that considers race or ethnicity must serve a compelling government interest and must be narrowly tailored to achieve that interest. Courts employ the strict scrutiny analysis, considered the most stringent test, when analyzing policies that are race-conscious, because policies that classify persons on the basis of their race are inherently constitutionally suspect.

Applying the *Grutter* opinion, the circuit court identified the following three compelling educational objectives served by student diversity:

- 1) *Increased perspectives* that improve the quality of the educational process of teaching and learning by ensuring experiences, outlooks, and ideas that enrich the classroom,
- 2) *Professionalism* by better preparing students for work and citizenship in an increasingly diverse workforce that values both exposure to widely diverse people and cross-racial understanding, and
- 3) *Civic engagement* to cultivate a set of legitimate leaders of all races and maintain a visibly open path to leadership for individuals of all races through access to higher education.

Likewise, UT's *2004 Proposal to Consider Race and Ethnicity in Admissions*, which incorporated the findings of two studies that led to the institution's adoption of the challenged portion of the admissions policy, concluded that diverse student enrollment results in a robust exchange of ideas, breaks down stereotypes, promotes cross-racial understanding, and prepares students for an increasingly diverse workforce and society – and the circuit court observed that these reasons "mirror those approved by the Supreme Court in *Grutter*."

The court next analyzed whether UT's policy was narrowly tailored to achieve these compelling goals. It determined that UT was not engaged in racial balancing, a patently unconstitutional exercise; rather, "UT's system was modeled after the *Grutter* program" because UT employed a flexible, holistic approach to consider pertinent elements of diversity – with attention to its particular institutional mission and the community it served.

Evaluating the interplay between the race-conscious policy and Texas's Top Ten Percent Law, the court agreed with the plaintiff-appellants that the Law's "substantial effect on aggregate minority enrollment at the University...places at risk UT's race-conscious admissions policies" because the Law might serve as an effective-race-neutral alternative to the race-conscious policy at issue. Ultimately, however, the court concluded that the Law was not a sufficient race-neutral alternative to disqualify the race-conscious policy at this time. The court first noted that it was difficult to quantify the increases in minority enrollment attributable to the Law. Further, the circuit court observed that the Court in *Grutter* held that percentage plans were not a workable race-neutral alternative because "they may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university."<sup>3</sup>

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<sup>3</sup> The court also contended that the Law negatively impacted minority students, who nationally have lower standardized test scores, in the second decile of their classes at competitive high schools.

One of the three circuit judges declined to join those portions of the opinion that discussed the validity or wisdom of the Law, stating that the panel had not been briefed on those subjects.

Additionally, in its evaluation of critical mass, the circuit court distinguished the aggregate number of underrepresented minorities (which "may be large," as impacted by the Law) with the enrollment statistics for individual minority groups when UT decided to implement the race-conscious portion of the admissions policy. The court found that UT acted with "appropriate sensitivity to these distinctions."<sup>4</sup>

The Fifth Circuit panel thus found that UT's race-conscious admissions policy satisfied strict scrutiny. Specifically, it held that the admissions policy served compelling interests and that UT's procedures were narrowly tailored to achieve those interests. However, the court was reserved in its holding, noting at the outset of the opinion that the Top Ten Percent Law "casts a shadow on the horizon" for the race-conscious policy and in its conclusion, cautioning that "we cannot bless the university's race-conscious admissions program in perpetuity."<sup>5</sup>

### **A Noteworthy "Special Concurrence"**

In a lengthy special concurrence, Judge Garza agreed with the opinion insofar as it complied with *Grutter* but opined that *Grutter* had been incorrectly decided—and called on the U.S. Supreme Court to overrule it. Regarding the compelling interest component of strict scrutiny, Judge Garza contended that *Grutter's* identification of educational benefits of diversity rested on hypothesis, speculation, and intuition, which cannot satisfy strict scrutiny analysis. He

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<sup>4</sup> The majority opinion recognized that institutions of higher education need not determine critical mass by aggregating all minority groups in the student body but rather might adopt a more nuanced approach. For example, considering whether critical mass of each minority group has been achieved in particular disciplines, in addition to whether such critical mass has been achieved in the student body as a whole, fits well with *Grutter's* articulation of the requirement to narrowly tailor a race-conscious policy to achieve educational goals. College students have important, albeit different, educational experiences in the classroom and in extracurricular and living activities. Yet some disciplines do not interact broadly with others. Achieving critical mass of a particular minority group in certain disciplines may not provide important educational experiences for students in other disciplines. Whether critical mass in the student body is enough or whether consideration of critical mass in certain disciplines also may be necessary to achieve desired educational outcomes depends on the particular educational mission of a college or university and the manner in which it delivers its educational programs.

The issue of critical mass was, notably, one on which the U.S. Supreme Court majority in *Grutter* did not devote substantial attention. In contrast, the *Grutter* dissenters devoted substantial attention to the issue, articulating major concerns regarding the University of Michigan's relevant policy and its application. See Coleman and Palmer, *Admissions and Diversity after Michigan: The Next Generation of Legal and Policy Issues*, Chapter 4 (College Board, 2006).

<sup>5</sup> This caution is reminiscent of Justice O'Connor's reflection in *Grutter* that, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today." *Grutter*, 539 U.S. 306, 343 (2003). The UT court's concern may be for the shorter term, however.

therefore concluded that the Supreme Court's "failing" was that "it approved the use of race in university admissions as a compelling state interest at all."<sup>6</sup>

Next, on the narrow tailoring component, Judge Garza found that *Grutter* set a "peculiarly low bar" for universities to show serious good-faith consideration of race-neutral alternatives and made impossible a court's review of the narrow tailoring requirement by "reward[ing] admissions programs that remain opaque." On this point, he framed the relevant constitutional inquiry as one about whether a challenged race-conscious policy "meaningfully furthers its intended goal of increasing racial diversity." Here, Judge Garza observed that UT's enrollment numbers belied the contention that the race-conscious policy was effective in accomplishing its claimed compelling interest as UT appeared capable of enrolling 96% of African-American and Hispanic students through race-neutral means.<sup>7</sup> Judge Garza also commented that higher education does not have a monopoly on furthering the societal goals of fostering participation in America's citizenry and faith in our leaders.<sup>8</sup>

Nonetheless, because UT had complied with *Grutter's* "amorphous, untestable, and above all, hopelessly deferential standard," Judge Garza joined the majority and upheld the UT policy. As an undisguised appeal to the Supreme Court, Judge Garza contended, "The Supreme Court has chosen this erroneous path and only the Court can rectify the effort."

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<sup>6</sup> The concurring opinion does not acknowledge what the majority opinion and a number of U.S. Supreme Court cases, including *Grutter*, consider key: that providing broad diversity in the student body of institutions of higher education is critical to the quality of the educational experience for all students, regardless of race, in an increasingly diverse and global society.

<sup>7</sup> In contrast, the majority opinion noted that the policy "has produced noticeable results." The court observed that the 2008 student enrollment included 335 black students and 1,228 Hispanic students – in contrast to only 275 black students and 1,024 Hispanic students in 2004, the last year the Top Ten Percent Law operated without the race-conscious portion of the admissions policy. The majority opinion also noted that minority students admitted under the Law, which mandates only general admission, rather than admission to certain programs or majors, "remain clustered in certain programs, limiting the beneficial effects of educational diversity."

<sup>8</sup> However, while higher education does not hold a monopoly on the means to achieve these goals, the concurrence appears to give short shrift to longstanding Supreme Court jurisprudence, recently but not uniquely endorsed by Justice O'Connor in *Grutter*, that recognizes the special societal role of institutions of higher education. *Grutter*, 539 U.S. at 331-32 (e.g., "[U]niversities... represent the training ground for a large number of our Nation's leaders.>").

## About the Authors

**Arthur L. Coleman** is a managing partner and co-founder of EducationCounsel LLC. With extensive background in providing legal, policy, strategic planning, and advocacy services to educators throughout the country, Mr. Coleman addresses issues of access, accountability and completion in elementary, secondary and post-secondary education. Mr. Coleman served as Deputy Assistant Secretary of the U.S. Department of Education's Office for Civil Rights from June 1997 until January 2000, following his three-and-a-half year tenure as Senior Policy Advisor to the Assistant Secretary for Civil Rights. Mr. Coleman's responsibility for the development of federal civil rights policy in education and enforcement of relevant federal laws centered on issues relating to standards reform, test use, students with disabilities, English language learners, affirmative action, desegregation, sexual and racial harassment, and gender equity in athletics. Mr. Coleman is an honors graduate of Duke University School of Law and a Phi Beta Kappa graduate of the University of Virginia. Mr. Coleman is the Chairman of the Board of Directors for the Institute for Higher Education Policy and a former member of the Advisory Board for the Alliance for Excellent Education. He is also a member of the National Association of College and University Attorneys and the National School Boards Association Council of School Attorneys.

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## About the Project

EducationCounsel has been working with the College Board's Access and Diversity Collaborative, providing policy and legal guidance on key issues of education reform since 2004.