

Achieving Diversity Post-Fisher

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Voluntary Affirmative Action in Higher Education

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Relevant Laws – Higher Education

- *U.S. Constitution, 14th Amendment*: “No state shall ... deny to any person within its jurisdiction the equal protection of the laws”
- *Title VI, Civil Rights Act of 1964*: “No person ... shall, on the ground of race color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”
- *42 U.S.C. § 1981*: “All persons ... shall have the same right ... to make and enforce contracts ” regardless of race

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Grutter / Gratz Decisions - 2003

- *Grutter v. Bollinger*, 539 U.S. 306 (2003):
 - Caucasian female, who had been denied admission to the U of Michigan Law school, sued over use of race in its admissions process
- *Gratz v. Bollinger*, 539 U.S. 244 (2003)
 - Two Caucasian students, who had been denied admission to University of Michigan’s undergraduate program, challenged the use of race in the admission process

Grutter / Gratz Decisions (2003)

- Main Holdings:
 - Race decisions in admissions are reviewed under “strict scrutiny” standard
 - “Context matters” and student body diversity is a compelling interest
 - “Critical mass” needed to achieve educational benefits of diversity
 - Race-conscious policy must be “narrowly tailored” to achieve compelling interest

Grutter / Gratz Decisions (2003)

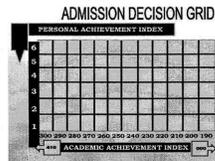
- Narrowly Tailored:
 - Each applicant must receive individualized consideration
 - Holistic review and expansive view of diversity
 - No quotas and race cannot be a defining feature
 - Institution must give “serious, good faith consideration” to “workable race-neutral alternatives”
 - Race-conscious measures must not “unduly burden” individuals outside the favored groups; and
 - Policy must be reviewed periodically and limited in duration

Fisher v. University of Texas (2013)

- Abigail Fisher, a Caucasian female, was denied admission to University of Texas at Austin in 2008 and sued
- TX's admission process:
 - Top 10% law grants automatic admission to all TX students in top 10% of high school graduating class
 - Other applicants reviewed based on Academic Index (AI) and Personal Achievement Index (PAI) scores

U of Texas - Admissions Matrix

- Academic Index
 - High school rank and standardized test scores
- Personal Achievement Index
 - Essays, leadership, awards/honors, work experience, extracurriculars
 - Special circumstances, including socioeconomic status, family status, and race



Fisher – Lower Court Rulings

- District Court Grants Summary Judgment to U of Texas
 - Admission plan modeled after *Grutter* so lawful
- Fifth Circuit Affirmed
 - U of Texas had a compelling interest in diversity and program was narrowly tailored
 - “University’s educational judgment in developing diversity policies is due deference.”
 - Critical mass is tied to the educational benefits that diversity is designed to produce

Strict Scrutiny / The Means

- Means must be “necessary” and “narrowly tailored”
- Institutions not entitled to any deference on “narrowly tailored” issue
- Court must conduct independent review
 - were nondiscriminatory alternatives considered?
 - are there race-neutral alternatives that could accomplish goals?
- Burden of proof is on institutions

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What’s Next?

- New analysis with same end result?
- Remand to trial court?
- Beginning of end for affirmative action?
- Buy time for another Obama appointee?

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Higher Ed Hypotheticals

- An employer asks the Career Services Office to promote and/or create a diversity program targeting minority students. What is the best way for the Career Services Office to handle that request?
- How should a Career Services Office use social media to promote diversity programs?

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Voluntary Affirmative Action in Employment

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Relevant Laws – Employers

- Federal, state and local employment discrimination laws
- No discrimination based on race, color, national origin or other legally protected class status
- Apply to applicants and employees

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Legal Standards for Voluntary Affirmative Action

- Proof of a conspicuous imbalance in traditionally segregated job categories
 - Some Circuit Courts of Appeal require proof of a conspicuous racial imbalance in the employer's workforce
- The program must be reasonably related to its remedial purpose.
 - Can't unnecessarily trammel rights of the majority
 - Goal can be to attain, but not maintain, diversity
 - Cannot be indefinite in length

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What about Legal Employers?

“We have a diversity scholarship for law students. Does *Fisher* affect that?”

“We have a pipeline program where we hire diverse high school and college students interested in law school as summer interns.”

“We have a summer reception and panel for diverse students to learn about life in Big Law.”

What about Legal Employers?

- “We sponsor a summer program for ethnically diverse law students to work with us and our clients.”
- “We target schools specifically because of their diversity.”
- “We sponsor activities with the ethnically diverse law students association.”
- “We need law schools to support our access to ethnically diverse law students”

What about Legal Employers?

- “We have programs that are ethnic specific. They are to increase our representation for specific groups. They are designed to increase the pool of applicants. Is that okay?”
- “We have affinity groups. These groups are arranged around specific ethnicities, gender, sexual orientation and disability. Is that okay?”

Implications and Practical Tips

- To engage in voluntary affirmative action measures, should have a written plan that:
 - Analyzes and confirms a compelling interest in diversity
 - Articulates the goals (not quotas) of program
 - Discusses means of accomplishing goals; what race-neutral alternatives were considered; why alternatives were unworkable; and why race-conscious measures are necessary

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Implications and Practical Tips

- Limit duration of plan and review plan regularly
 - Have goals been met?
 - Do the race-conscious measures continue to be the only means of achieving goals?

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Implications and Practical Tips

- Consider all the areas where affirmative action may be occurring
 - Admissions
 - Study abroad programs, internships, other programs
 - Scholarships

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Implications and Practical Tips

- Train personnel involved in decision-making
 - Admissions recruiters and decision-makers
 - Scholarship, internships, study abroad, other program personnel
 - Hiring recruiters and decision-makers
 - Search committees

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- Questions?

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