FISHER V. UNIVERSITY OF TEXAS AND THE FUTURE OF DIVERSITY PROGRAMS

Gerard D. St. Ours
Associate General Counsel
The Johns Hopkins University
October 15, 2012

Rebecca Abelson
Law Fellow
Road Map

- What is the Current Law?
  - Review of Constitutional and Statutory Limitations on Use of Race in Admissions
  - Overview of Select Current Case Law: Grutter; Gratz
  - Summary of 2011 Joint Guidance from DOE/OCR

- Fisher v. University of Texas Austin
  - Procedural History
  - Facts
  - What is at Stake?

- Resources
Review: Constitutional and Statutory Limitations

- **Equal Protection Clause**
  - Provides that "no State shall... deny to any person within its jurisdiction the equal protection of the laws."

- **Title VII**
  - Prohibits discrimination in employment on the basis of race, gender, religion and national origin

- **Title VI**
  - Prohibits discrimination in any program that receives federal funds
Important Concepts in Affirmative Action Caselaw

- **Strict Scrutiny:**
  - “It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny. . . . ‘[R]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.’” *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S.Ct. 2738, 2751-52 (2007).

- **A university must be able to show that its consideration of race in admissions uses narrowly tailored measures that further compelling governmental interests.**
  - **Narrow tailoring:** Means for achieving the compelling interest must be specifically and narrowly framed to accomplish that purpose; race/ethnicity should only be considered to the extent necessary to promote that interest.
  - **Compelling interest:**
    - Achieving the educational benefits of a diverse student body;
    - Remedial justification (remedying the effects of past intentional discrimination)
Overview of Select Current Caselaw: 
Grutter v. Bollinger

- In 2003, the Supreme Court evaluated the University of Michigan Law School’s admissions program under the strict scrutiny standard of review, requiring that the Law School demonstrate that its admissions program was narrowly tailored to serve a compelling government interest (and holding that it was).

- The Supreme Court recognized that the benefits of student body diversity in institutions of higher education are “substantial” as well as “important and laudable,” and that one aspect of student body diversity can be racial.

- The Supreme Court held that attaining a diverse student body is a compelling interest in higher education and that this interest permits universities to adopt narrowly tailored race conscious programs in admissions.
Grutter (cont’d)

- The Court found that the University of Michigan Law School could seek a “critical mass” of students of underrepresented groups as part of its efforts to achieve student body diversity.

- To determine whether a race-conscious admissions policy is “narrowly tailored” to achieve diversity, the Supreme Court identified four principles:
  - Before using race as a factor in admissions decisions, an institution must conduct a serious, good faith review of workable race-neutral alternatives to achieve the diversity that it seeks.
  - The institution must design its admissions program to ensure a flexible, “highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”
  - The institution must allow each applicant to compete with every other applicant for every available opening and therefore did not unduly burden members of any racial group;
  - The admissions policy/program must be limited in time; subject to periodic review, and must cease considering race when no longer necessary to achieve diversity among students.
What is “Critical Mass”?

- In *Grutter*, the Court recognized that a critical mass of underrepresented students is necessary to achieve the educational benefits of diversity for all students. Why?: (1) dispel stereotypes, including that minority students share the same characteristic viewpoints; and, (2) ensure enough members of underrepresented groups to avoid isolation or the feeling they must be spokespersons for their race.

- Permits “some attention” to numbers, provided no fixed % and that no groups are insulated from comparison with all other candidates for the available openings within the school.
Overview of Current Caselaw: Gratz v. Bollinger

- **Gratz** was the companion case to **Grutter** which concerned Michigan’s consideration of race in undergraduate admissions
  - Michigan used a point system in its undergraduate admissions process that automatically awarded a certain number of points to every “underrepresented minority” applicant.
  - The Supreme Court struck down the University’s undergraduate admissions program because it was not sufficiently flexible, failed to provide for an individualized review of each applicant, and made the factor of race “decisive.”
Overview of Current Caselaw: 
*Parents Involved v. Seattle School District No. 1*

- In 2007, the Supreme Court considered the use of race as a factor in determining student placements in public high schools in Seattle.

- The Seattle School District used a system of assigning students to the city’s ten public schools by considering a number of factors, including race, and required that the racial composition of each school had to be within 10 percentage points of the School District’s overall racial balance.

- The Supreme Court held the Seattle School District’s system for assigning students to the city’s ten public high schools was unconstitutional:
  - The Plan was not narrowly tailored to achieve the School District’s stated goals;
  - The School District did not adequately consider race-neutral alternatives; and
  - Racial classifications were only to be used as a “last resort” to achieve a compelling government interest.
In December 2011, the DOE and DOJ jointly issued a Dear Colleague Letter and Guidance, titled “Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education,” which replaced the 2008 DOE Guidance on Use of Race in Admissions.

The Guidance sets out considerations for postsecondary institutions in their voluntary use of race to achieve diversity, and includes numerous examples of admissions procedures, “pipeline programs”, and recruitment and outreach activities that involve permissible considerations of race to pursue the institution’s compelling interest in achieving a diverse student body.
In acting to achieve diversity, a postsecondary institution:

- Must ensure that achieving diversity fits within the overall mission of the institution;
- May aim for a “critical mass” of underrepresented students;
- Should first consider whether it can meet its compelling interest in diversity by using race-neutral approaches;
  - In selecting among race-neutral approaches, the institution may take into account the racial impact of various choices.
  - An institution should consider approaches that take into account the race of students only in cases where race-neutral approaches would be “unworkable” – for example, because the race-neutral approaches are ineffective to achieve diversity, or because the race-neutral approaches would require the institution to sacrifice a component of their educational mission or priorities (i.e. academic selectivity).
- Should conduct an individualized, holistic review of all applicants, ensuring that no student is insulated, based on race, from comparison to all other applicants;
  - “An institution may assign different weights to different diversity factors based on their importance to the program. Race can be outcome determinative for some participants in some circumstances. But race cannot be given so much weight that applicants are defined primarily by their race and are largely accepted or rejected on that basis.”
- Should periodically review its programs to determine whether the use of racial classifications remains necessary.
Fisher v. University of Texas: Overview

- The University of Texas Austin uses the “Top Ten Percent Plan,” a legislatively-mandated requirement to guarantee admission to high school seniors graduating in the top 10% of every public high school in Texas (which has the effect of increasing minority admissions without using racial preferences) and uses race as a factor in admissions decisions for those that are not admitted under the Top Ten Percent Plan.

- In Fisher, two white applicants denied admission as undergraduates to UT Austin argue that the University had already allegedly achieved a “critical mass” of minority admissions by employing a race-neutral alternative (the Top Ten Percent Plan), and that it is impermissible for the University to use race as a factor in its other admissions decisions. The plaintiffs allege that the University’s objective is not “diversity”, but instead is impermissible “racial balancing” due to the University’s reference to state-wide demographics, and that the admissions plan is not narrowly tailored.
Fisher v. U. of Texas: Procedural History

- Two white Texas residents who were denied admission to UT Austin for the undergraduate class entering in Fall 2008 filed a lawsuit in federal district court in Texas in April 2008, alleging that UT Austin’s admissions policies discriminated against them on the basis of race.

- On August 21, 2009, the district court granted summary judgment in favor of UT Austin, ruling that UT Austin’s admission’s policies are narrowly tailored to further a compelling government interest, and denying the plaintiffs’ request to require UT Austin to re-evaluate the applicants for admission without considering race.

- The Fifth Circuit affirmed the District Court on January 18, 2011.

- The Fifth Circuit denied a petition for rehearing en banc on June 17, 2011.

- The Supreme Court granted certiorari on February 21, 2012.

- Oral argument was held before the Supreme Court on October 10, 2012.

- The Supreme Court could issue a decision at any time, but is expected to issue its decision in Spring of 2013.
Fisher v. U. of Texas: Plaintiffs

- Two white Texas residents, Abigail Fisher and Rachel Michalewicz, applied for undergraduate admission to UT Austin for the incoming class of 2008.

- Both women were denied admission.

- Neither was ranked in the top 10% of her graduating high school class.
Fisher v. U. of Texas: Admissions Policy

- UT Austin divides applicants into three pools: 1) Texas residents, 2) domestic non-Texas residents, and 3) international students.

- Texas residents are allotted 90% of all available seats. Admission for Texas residents is two-tiered:
  - UT Austin automatically admits applicants in the top ten percent of their high school class.
  - The remaining seats are filled on the basis of the Academic and Personal Achievement Indices.

- Admissions for non-Texas residents and international applicants are based only on their Academic and Personal Achievement Indices.
The Academic Index is a formula that uses standardized test scores and high school class rank.

The Personal Achievement Index is calculated from scores on two essays, as well as a personal achievement score, which is based on an assessment of the applicant’s leadership qualities, awards and honors, work experience, involvement in extracurricular activities and community service, and any “special circumstances,” which may include socio-economic status, family status and family responsibilities, the applicant’s standardized test score compared to the average of his or her high school, and (beginning after Grutter, in 2004), race.
Fisher v. U. of Texas (cont’d)

- UT Austin does not set any “target” or “goal” for minority admissions.

- The admissions file is evaluated as a whole to provide the fullest possible understanding of the applicant as a person and to place his or her achievements in context.

- Admissions officers undergo annual training by a nationally recognized expert in holistic scoring.
Fisher v. U. of Texas (cont’d)

- Race has the potential to influence only a small part of the applicant’s overall admissions score: Race is only considered as one element of the personal achievement score, which is only a part of the total Personal Achievement Index. Without a sufficiently high Academic Index and good essays, an applicant with even the highest Personal Achievement Index score will be denied admission.

- None of the elements of the personal achievement score – including race – are considered individually or given separate numerical values to be added together.

- UT Austin does not monitor the aggregate racial composition of the admitted applicants, and the admission decision for any particular applicant is not affected by the number of other students in the same racial group who have already been admitted that year.
Fisher v. U. of Texas (cont’d)

- UT Austin has not set a date on which it will end the use of race in undergraduate admissions.

- The University informally reviews its admissions procedures every year, and formally reviews its need to use race in admissions every five years.
JUSTICE ALITO: Well, I thought that whole purpose of affirmative action was to help students who come from underprivileged backgrounds, but you make a very different argument that I don't think I've ever seen before. The top 10 percent plan admits lots of African Americans -- lots of Hispanics and a fair number of African Americans. But you say, well, it's -- it's faulty, because it doesn't admit enough African Americans and Hispanics who come from privileged backgrounds. And you specifically have the example of the child of successful professionals in Dallas. Now, that's your argument? If you have -you have an applicant whose parents are -- let's say they're -- one of them is a partner in your law firm in Texas, another one is a part -- is another corporate lawyer. They have income that puts them in the top 1 percent of earners in the country, and they have -parents both have graduate degrees. They deserve a leg-up against, let's say, an Asian or a white applicant whose parents are absolutely average in terms of education and income?

MR. GARRE: No, Your Honor. And let me -let me answer the question. First of all, the example comes almost word for word from the Harvard plan that this Court in Grutter and that Justice Powell held out in Bakke.

JUSTICE ALITO: Well, how can the answer to that question be no, because being an African American or being a Hispanic is a plus factor.

MR. GARRE: Because, Your Honor, our point is, is that we want minorities from different backgrounds. We go out of our way to recruit minorities from disadvantaged backgrounds.

JUSTICE KENNEDY: So what you're saying is that what counts is race above all.

MR. GARRE: No, Your Honor, what counts is different experiences –

“What is the critical mass of African-Americans and Hispanics at the university that you are working toward?” Chief Justice Roberts asked a lawyer for the University of Texas at Austin. The chief justice never received a specific answer from the university’s lawyer or from one representing the federal government. . . . .

Had the lawyers responded to the chief justice by proposing a percentage goal, they would have run headlong into cases prohibiting quotas. In failing to offer a number, though, they left the court with very little to do in the face of precedents requiring judges to look closely whenever the government draws distinctions among people based on race.

“You won’t tell me what the critical mass is,” Chief Justice Roberts told the university’s lawyer, Gregory G. Garre. “How am I supposed to do the job that our precedents say I should do?”

- In the 2003 decision, Justice O’Connor wrote that she expected it to stand for 25 years. “I know that time flies,” Justice Stephen G. Breyer said on Wednesday, “but I think only nine of those years have passed.”

- By the conclusion of the argument, it seemed tolerably clear that the four members of the court’s conservative wing were ready to act now to revise the Grutter decision.

- The court’s more liberal members said there was no reason to abandon the earlier framework. “What is it we’re going to say here that wasn’t already said in Grutter?” Justice Breyer asked.
What is at Stake?

- Three Scenarios:
  - The Court rules against UT, overturns *Grutter* and holds that diversity is not a compelling interest that permits consideration of race in admissions (and other decisions); OR
  - The Court rules against (or in favor of) UT, but effectively narrows, without overturning, *Grutter*; OR
  - The Court rules in favor of UT without narrowing *Grutter*
If *Grutter* is Overturned... 

- Universities could no longer consider race in admissions in order to achieve diversity
- Use of “race neutral” means? (But what if done for purpose of increasing racial diversity?)
  - Overcoming economic or educational disadvantage/hardship
  - Students coming from economically or educationally underserved communities, or who have demonstrated leadership in such circumstances
  - Socio-economic factors
    - parents’ income or educational level
    - First generation college status
    - Region of residence during schooling (e.g., high school under court-ordered desegregation plan)
    - Pipeline programs; targeting school districts or high schools; retention efforts
Other rationales for race-conscious action?

- Remedying present effects of past discrimination by the university. This rationale has been accepted but difficult to prove and may cause the university to be vulnerable to discrimination claims.

- REJECTED: remedying societal discrimination

- REJECTED (in employment context): to provide role models

- REJECTED: to achieve racial balance
If UT loses (or wins) and *Grutter* is interpreted more narrowly . . .

- Institutions may need to reconsider their diversity initiatives, including admissions protocols and financial aid programs.
- Decision could impact 2013 admissions cycle, but unlikely given timing
- Institutions may need to do more to demonstrate its diversity rationale - i.e., show how diversity is intrinsic to its mission and beneficial to the educational experience of all students.
- Institutions may also need to show consideration of race-neutral alternatives prior to utilizing race-conscious methods.
Resources

- Joint DOE/OCR Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education (December, 2011): [http://www2.ed.gov/about/offices/list/ocr/docs/guidance-pse-201111.html](http://www2.ed.gov/about/offices/list/ocr/docs/guidance-pse-201111.html)


- The UT Austin maintains a website on Fisher v. UT Austin, including links to cases, amici briefs, etc., available here: [http://www.utexas.edu/vp/irla/Fisher-V-Texas.html#CaseLaw](http://www.utexas.edu/vp/irla/Fisher-V-Texas.html#CaseLaw)
Q & A/Discussion

Let’s Talk!