A Supreme Challenge: Achieving the Educational and Societal Benefits of Diversity After the Supreme Court’s Fisher Decision

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This invited commentary provides a response to the U.S. Supreme Court’s decision in the case of Fisher v. University of Texas at Austin (2013). The author addresses the question regarding whether the newest decision about the use of affirmative action in higher education admissions raised the bar with respect to the legal doctrine of strict scrutiny, under which colleges and universities must justify their race-conscious decisions. He concludes that the Court maintained the status quo with regard to the compelling interest of diversity and the deference courts should give to institutions of higher education as experts regarding their own educational missions. The Court also reiterated earlier decisions requiring that race-conscious programs be “narrowly tailored” to achieve the educational benefits of diversity, while underscoring the need for institutions to consider race-neutral alternatives to meet this interest. Given the legal and social landscape today, colleges and universities must focus on the bigger question at stake: how to best ensure access and opportunity for individuals of all backgrounds so as to provide the educational benefits of diversity for all students and fulfill this aspect of their educational missions—therefore creating engaged citizens for an increasingly diverse democracy and global citizens who can compete in an increasingly interdependent worldwide economy.

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When the U.S. Supreme Court agreed to review the case of Fisher v. University of Texas at Austin (2013) less than a decade after it had issued its 2003 landmark rulings in the University of Michigan admissions decisions (Gratz v. Bollinger et al., 2003; Grutter v. Bollinger et al., 2003), many leaders in higher education were understandably nervous. Why would the Court take up another case on diversity and admissions so soon, when many institutions were still redesigning and evaluating programs to try to comply with the Court’s guidance in the Michigan cases? With the changed composition of the Supreme Court (with Justice O’Connor, the key swing vote in the Michigan cases, having been replaced by Justice Samuel Alito, for instance), could this signal an opportunity to revisit or reverse the fundamental principles set forth in Grutter? The oral arguments, focusing largely on questions such as critical mass, only further fueled speculation and concern on this front. When the Court held off on announcing the Fisher decision until almost the end of its term in late June 2013, the anxiety heightened even more.

After all the suspense, however, the Supreme Court issued a decision that was remarkable in some ways for its restraint and respect for precedent. Rather than creating a whole new set of rules, the Court instead chose to reiterate the Michigan precedents and instruct a lower court
to apply that precedent carefully and completely. To be sure, the Court expressed impatience with race-conscious programs and sent signals that such programs must meet a high burden to be legally justified, but that was in fact already the reality. Colleges and universities had already been following the Court’s guidance in *Grutter* for a decade, fashioning and examining policies to meet the standards articulated by the Court in that decision.

Although knowing that their work is cut out for them and that the scrutiny they face is perhaps greater than ever, institutions of higher education can at least breathe a sigh of relief in that the rules have not fundamentally changed just a scant 10 years after the Court’s landmark decisions in the Michigan cases. Real and lasting change with regard to student-body diversity through admissions policies and other initiatives takes substantial time and effort for any institution. From the perspective of the value and importance of precedent—and the need for institutions to be able to model and test policies over some extended period of time to see what works and what does not—it was noteworthy that the Court resisted the inclination to change course so quickly on an issue of such long-term national prominence.

Much of the public discussion since the *Fisher* decision came down has been about whether and to what extent it creates even higher burdens on colleges and universities seeking to justify race-conscious programs—that is, whether the Court moved from strict scrutiny to even stricter scrutiny in this regard. This is an interesting theoretical question that higher education leaders can debate in the abstract, and with which courts will undoubtedly wrestle in the years to come. But this narrow focus on the degree of scrutiny applied to race-conscious programs must not cause us to lose sight of a much more important question—that is, how can colleges and universities best ensure access and opportunity for individuals of all backgrounds so as to provide the educational benefits of diversity for all students and fulfill this aspect of their educational missions—therefore creating engaged citizens for an increasingly diverse democracy and global citizens who can compete in an increasingly interdependent worldwide economy? Even as institutions strive to understand and comply with the *Fisher* ruling, they must not get so distracted by the legal details and threats of litigation that they lose sight of the larger and more long-term access and educational challenges that led to the *Fisher* decision in the first place.

Let us start with what the Court did and did not do in the *Fisher* case. The case involved a challenge to the consideration of race as one of many factors in the University of Texas at Austin (UT-Austin) undergraduate admissions process. UT-Austin had reintroduced race as a factor after the Supreme Court’s *Grutter* decision made clear that diversity is a compelling interest in higher education, and that race can be one of many factors considered in admission to achieve the educational benefits of diversity—provided that certain standards are met under strict scrutiny (which applies to any consideration of race as a factor in an institutional program or policy). The consideration of race as a diversity-related factor came on top of the so-called “Texas Top Ten Percent Law,” under which students in the top 10% of their high school classes are guaranteed admission to the public university system if they comply with certain standards, (Texas House Bill 588).

The Supreme Court did not rule on the merits of the *Fisher* case; instead, it sent the case back to the appellate court below to reconsider in light of additional guidance from the Supreme Court. The Court said that it took the precedents of *Regents of the University of California v. Bakke* (1978), *Grutter*, and *Gratz* “as given for purposes of deciding this case” (p. 2417). The rest of the Court’s opinion purports to explain those precedents, rather than to undermine or undo them. The opinion was silent with regard to the university’s emphasis on its goal to achieve a “critical mass” of students from underrepresented groups (pursuant to earlier guidance in *Grutter*), which had been a key component of the discussion throughout the litigation until this point.

Justice Kennedy, considered to be the key swing vote on these issues after Justice O’Connor’s departure from the Court, wrote the majority opinion and was joined by six of the other seven justices who voted in the case. Only Justice Ginsburg dissented, on the grounds that the University of Texas had already met its burden and that no further review was necessary (Justice Kagan was recused because of her pre-
vious participation in the case as a government lawyer). Although some commentators have suggested that the Court intended *Fisher* to be a death knell for race-conscious programs and was merely passing the buck to lower courts to finish the job, the composition of the majority (which included Justices Breyer and Sotomayor), along with the plain language of the fairly short and succinct ruling, suggests instead that the decision was a compromise—one intended to provide some additional clarity to lower courts on how to understand and apply the Court’s existing precedent, rather than to fundamentally change course or reverse a landmark precedent that was only a decade old.

For many years, the most critical point in this line of cases for higher education leaders and lawyers has been the academic judgment that student body diversity constitutes a “compelling interest” in the context of higher education because of its educational value for all students. Major organizations representing institutions of higher education have consistently and repeatedly declared their support for this key educational concept (Washington Higher Education Secretariat, 2013). Employers in recent years have also acknowledged the importance of student body diversity in higher education, recognizing its linkage to the full development of human capital and therefore to the nation’s global competitiveness (American Association of Colleges and Universities, 2013). A large collection of higher education organizations summarized these educational and economic arguments in a recent statement published in major national newspapers after the *Fisher* decision, as follows:

A diverse student body enables all students to have the transformational experience of interacting with their peers who have varied perspectives and come from different backgrounds. These experiences, which are highly valued by employers because of their importance in the workplace, also prepare students with the skills they need to live in an interconnected world and to be more engaged citizens. Our economic future, democracy, and global standing will suffer if the next generation is not ready to engage and work with people whose backgrounds, experiences, and perspectives are different from their own. (Washington Higher Education Secretariat, 2013).

The Court’s reiteration of this foundational principle in *Fisher*, while hardly a ringing new endorsement of the concept, is nevertheless strikingly matter-of-fact and straightforward. The Court held that the university’s judgment that diversity is essential to its educational mission because of the educational benefits that flow from student body diversity “is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper” (p. 2419). The Supreme Court goes on to say that a court “should ensure that there is a reasoned, principled explanation for the academic decision,” and it says that the lower courts in *Fisher* correctly deferred to this conclusion of the University of Texas “based on its experience and expertise” (p. 2419).

This foundational principle is now firmly rooted and recognized as a matter of law, which represents an important evolution in our societal understanding of the importance of diversity within our institutions at all levels. Indeed, it was not that long ago (in the years between the 1978 *Bakke* decision and the 2003 Michigan decisions) that some legal experts debated whether and to what extent Justice Powell’s *Bakke* opinion established clear authority with regard to diversity as a compelling interest (see *Grutter v. Bollinger et al.*, 2003, p. 325). Although institutions must continue to develop and articulate “reasoned, principled explanation[s]” for diversity-based programs, they should be able to focus much of their educational research and legal efforts going forward on the efficacy of various methods of achieving the educational benefits of diversity.

This question of how to achieve the educational benefits of diversity—that is, the mechanics of how an institution achieves its compelling interest in diversity—is really the central focus of the Supreme Court’s guidance in *Fisher*. As the Court makes clear, under strict scrutiny, it is a difficult and nuanced question of “narrow tailoring” to ensure that any consideration of race is necessary and justifiable. But this is really not a new standard; the Court in *Grutter* stated that it was applying strict scrutiny to the “narrow tailoring” portion of its analysis at that time to the University of Michigan Law School’s admissions policy—and the Court thoroughly reviewed the implementation of that policy with regard to the tight fit required to meet the narrow tailoring aspect of strict scrutiny (pp. 333–334).

Narrow tailoring is inherently a case-by-case analysis that is highly dependent on the specific facts and circumstances facing a particular in-
stitution at a particular moment in time. Given the careful approach taken in Fisher, it seems unlikely that the Supreme Court can or will issue a sweeping opinion any time in the near future holding that all colleges and universities have sufficient race-neutral alternatives to achieve all of their diversity-related educational goals, in all of their programs. In Fisher, the Supreme Court even asserted that “a court can take account of a university’s experience and expertise in adopting or rejecting certain admissions processes” (p. 2420). This recognition of institutional experience and expertise should not be dismissed lightly, as it once again reminds courts that judges are not necessarily experts in educational policy. In light of Fisher, institutions would be well advised to articulate their experience and expertise in some manner with regard to admissions policies and processes (specifically with regard to how to achieve diversity in the student body), and to relate that experience and expertise to their statements of mission and values (Kane & Ryan, 2013; National Association of Diversity Officers in Higher Education, 2013).

With regard to narrow tailoring, the Court’s major point in Fisher, citing Grutter, is that institutions must give “serious, good faith consideration” to “workable race-neutral alternatives” (p. 2420). If an institutional policy is challenged in which race is a factor, a “reviewing court must ultimately be satisfied that no workable race-neutral alternatives would promote the educational benefits of diversity” (p. 2420). The Court states that if a race-neutral alternative would achieve the interest in diversity “about as well and at tolerable administrative expense,” then race cannot be considered (p. 2420).

What lessons can be drawn from the Court’s admonitions about narrow tailoring of programs and policies in which race is a factor? The Court has once again made clear (and in more stark terms than ever) that institutions face a substantial burden to demonstrate that they have seriously considered all possible race-neutral alternatives—although the Court stopped short of requiring that institutions first try and fail with all such alternatives if they can reasonably determine that such alternatives would not achieve the goal. It is possible to conduct studies using institutional data to eliminate some options at a particular institution, after all (e.g., because of the demographics of its applicant pool), or at least to conclude reasonably that these options alone would not replicate the results of a race-conscious approach. But relying on good faith is also not enough—the Supreme Court made clear that courts should not defer to an institution’s good faith alone on this front. Instead, an institution must be able to demonstrate that it has gone to the considerable trouble of identifying and analyzing the potential effectiveness of race-neutral alternatives.

So what are these potential alternatives? Through ballot initiatives or other means, the experiences in states that have already enacted prohibitions on the consideration of race in admissions provide some useful insights. The percentage plan approach used in Texas, in which a certain percentage of high school students are automatically accepted into a system or institution of higher education based on their class rank, is one alternative model that has been tried in several states. In Texas, for example, this approach was expected to produce some racial diversity within a system of public higher education because it was layered on top of a K-12 school system that features significant segregation by race to this day—and in a state whose large and diverse overall population and demographic patterns are such that entire school districts are majority White, Black, or Latino. That approach is clearly not viable in many other states that lack similar populations and demographic patterns. It is also patently unworkable for graduate schools or private institutions that draw from a national pool and which must also comply with the Court’s guidance under the Constitution, or under Title VI of the Civil Rights Act of 1964 (which applies similar standards to all institutions that receive federal financial assistance). Moreover, an institution might reasonably argue that the percentage plan approach crowds out other important educational interests by focusing so heavily on class rank to the exclusion of everything else. Thus, regardless of what one thinks about percentage plans from a public policy perspective, this approach is of limited applicability at best and is unlikely to meet the needs of most institutions.

If percentage plans are not the answer for most institutions, then what other race-neutral alternatives must be considered? The most frequently discussed alternatives include some consideration of the socioeconomic back-
grounds of applicants. These alternatives take on added urgency at a time when our national dialogue seems to be shifting gradually from race to socioeconomic disadvantage as the key form of inequality in society that inhibits social mobility (Kahlenberg, 2013). Universities have achieved varying degrees of success with nuanced admissions policies that take into account some combination of academic achievement and socioeconomic background. For example, the University of Colorado Boulder has developed statistical measures called the Disadvantage Index and the Overachievement Index to give students a leg up in the admissions process who come from backgrounds that affect their chances to enroll in college, and who have outperformed others from similar backgrounds so as to show evidence of talent, drive, and initiative (Gaertner & Hart, 2012). This program has helped the institution to improve both its socioeconomic and racial diversity.

If socioeconomic approaches are to have any chance of success, however, they require substantial resources. To be most effective, they must be coupled with outreach, recruitment, financial aid, and retention efforts. The human and financial resources needed to ensure that economically disadvantaged students can succeed once they are admitted require significant ongoing commitments.

It is a bit ironic that such approaches are being touted at the very time that many states have been disinvesting in public higher education—resulting in higher tuition and potentially decreased access for students from economically disadvantaged backgrounds. The Supreme Court in Fisher even said that race-neutral alternatives must come at “tolerable administrative expense,” which implies that sufficient resources are available to make them workable. Certainly many, if not most, selective institutions of higher education already have programs and policies in place to attract and enroll economically disadvantaged students—but these institutions are limited by very real resource constraints. Leaders in higher education should call upon the proponents of these sorts of race-neutral alternatives to speak up and support increased investment in public higher education—and particularly increased funding for need-based financial aid. It could benefit everyone if less time and effort was spent on litigation over race-conscious policies, and more resources were put into efforts to attract, support, and retain disadvantaged students of all backgrounds.

The same will be true when particular geographic areas are targeted in admissions, where such programs are race-neutral on their face but in fact are cognizant of racial demographic patterns in urban and rural areas. If students from such areas are from less privileged economic backgrounds, they too are likely to need extra resources in order to succeed and thrive in higher education.

A primary or exclusive focus on socioeconomic disadvantage as a race-neutral alternative to achieve diversity also assumes, however, a correlation between socioeconomic disadvantage and membership in historically underrepresented racial groups. It turns out, though, that there are lots of disadvantaged students of all racial backgrounds. Furthermore, many institutions would counter that race and socioeconomic status represent different facets of diversity. They might overlap, but they are not the same—and they do not necessarily produce identical benefits with regard to the value of diversity. If almost all of an institution’s students from certain historically underrepresented minority groups are drawn from disadvantaged socioeconomic backgrounds, for example—at the same time that the majority students on campus presumably are generally coming from more advantaged backgrounds—that sort of dichotomy can reinforce stereotypes rather than defuse them. Both race and class have played powerful roles for very long periods of time in our nation’s history in relation to the educational opportunities available to people, so it seems reasonable to assume that both types of factors might need to play some role in current diversity efforts.

Some commentators have argued that colleges and universities should concentrate on eliminating policies that operate in practice to the disadvantage of certain minority groups, even if they appear to be race-neutral on their face. So-called legacy preferences for relatives of alumni are a good example of such a policy (Kahlenberg, 2010). Indeed, it can easily be argued that such preferences, to the extent that they exist, are not based on definitions of individual merit. Institutions must carefully weigh their own histories and circumstances in making such determinations.
Institutions might also want to look carefully at how they calculate grade point averages from various school districts so as not to unduly disadvantage students from poor districts with more limited advanced-placement and college-level courses. Similarly, institutions can reexamine the extent to which they rely upon standardized test scores for admissions. The Court in *Grutter* made clear, however, that institutions do not have to sacrifice their overall emphasis on academic criteria, if doing so would dramatically lower the academic quality of admitted students (p. 340). Although most institutions claim to care deeply about diversity, they also care about their academic reputations and rankings—and the heavy reliance of college ranking systems on grades and test scores has in some ways undercut efforts to broaden admissions criteria in a holistic way. Thus, higher education leaders committed to the educational value of diversity will need to continue to push college ranking systems to think more broadly about the admissions statistics to which they pay attention in their rankings and to acknowledge the importance of diversity.

The immediate message from the *Fisher* decision is that colleges and universities should carefully document their good-faith consideration of race-neutral alternatives any time they have programs or policies in place in which race is a factor (not only in admissions but also in areas such as financial aid, outreach, etc.). This documentation can also address the values served by the various criteria considered. In identifying and reviewing possible race-neutral alternatives, institutions should carefully survey the national landscape and review the possible efficacy of the types of alternatives in place elsewhere—keeping in mind that their contexts and missions may not be the same (U.S. Department of Education Office for Civil Rights, 2004). Having someone review such documentation with a skeptical, questioning eye would be good preparation for any potential court challenge.

As the Court had made clear earlier in *Grutter*, this process is not a one-time exercise—it should be done regularly and periodically if race-conscious programs continue to be in place (pp. 342–343). In reviewing programs over time, it also makes sense for institutions to look at the changing circumstances and demographics that shape their pools of potential applicants and students. Race-conscious programs and policies may have to be modified or discontinued when institutional needs and circumstances change, or when these programs and policies are no longer needed or effective. Institutions must not be afraid to amend or end such programs and policies when such a time arrives.

In both *Grutter* and *Fisher*, even though the Court did acknowledge the educational benefits of diversity, it also expressed a sense of impatience with race-conscious programs. In fact, Justice O’Connor famously asserted in *Grutter* in 2003 that “the Court expects that 25 years from now [that is, the year 2028], the use of racial preferences will no longer be necessary to further the interest approved today” (p. 343). The clock is clearly ticking, with over 10 years having already elapsed since O’Connor’s admonition, but there is also clearly much work that remains to be done in higher education to ensure the educational benefits of diversity on many campuses and in many programs across the country.

What, then, are institutions of higher education supposed to do in the face of constrained resources and a pipeline of students that remains far from fully open for students of all backgrounds? As *Grutter* set forth a decade ago (and as *Fisher* reinforced), institutions that care deeply about the educational benefits of diversity for all students can start by ensuring that their policies and practices utilize holistic, individualized review in which all applicants have the opportunity to demonstrate the unique attributes that they could bring to an entering class. This approach is time, information, and labor intensive for selective institutions and programs—a point which must be acknowledged in an era when calls for efficiency and cost reduction in higher education administration are rampant. Holistic review means taking account of the full array of characteristics and experiences candidates bring to the table in the admissions process. Race is certainly one component, but there are many more—and institutions with race-conscious programs should be prepared to show that they consider a wide variety of diversity-related characteristics and experiences.

More urgently than ever, the best long-term strategy is almost certainly a multifaceted approach. Institutions must continue to respond to the immediate needs and circumstances around them—that is, they must seek to achieve the
educational benefits of diversity for today’s students as best they can, even while developing or searching for new and creative race-neutral ways to get there. Colleges and universities cannot and should not shut out cohorts of potential students from historically underrepresented groups, for years at a time, while the institutions struggle to figure out the ideal method(s) to achieve diversity. We cannot afford to leave generations of students behind, or fail to provide them with opportunities to reach their full potential and thus to participate in—and contribute to—the American dream.

But we also know that slow and incremental change will not be enough to meet the challenge posed by Justice O’Connor’s 25-year admonition and by the Court’s general impatience with race-conscious programs of any kind. Indeed, that impatience is shared by the general public, which, in recent public opinion polls, has indicated opposition to the consideration of race in admissions (Jaschik, 2013). Although complex civil rights issues do not lend themselves easily to sound bites, the message is clear that mere continuation of the policies and approaches of recent decades will not be sufficient. Bolder actions and long-term strategies that address underlying inequalities are more essential than ever.

Those of us in higher education cannot sit around and wait for P-12 schools and systems to solve the challenges alone. We are part of an educational continuum and we must therefore find ways to work together across institutional lines to build and strengthen educational opportunities for students at every level. States should be thinking strategically about their educational systems from the perspective of a “P-16 and beyond” continuum, not as separate P-12 and higher education systems that are not related. Higher education institutions can work cooperatively with colleagues in elementary and secondary education to examine and overcome sources of inequality that plague our educational system. Successful models of such collaborations that break long-existing cycles and provide continuing access do now exist and have shown considerable promise (Rutgers Future Scholars, 2013). As Columbia University Law School Professor Susan Sturm (2013) pointed out in response to the Fisher decision, “To close the gap between rhetoric and reality about the American dream, we must build on the foundation established by forward-looking colleges and universities that have begun to redefine the role of admissions from gatekeeper to bridge-builder.”

As Sturm describes, a variety of colleges and universities are collaborating with P-12 schools to increase high school and college graduation rates through innovative partnerships involving mentoring, tutoring, academic and social support, and financial aid. Selective 4-year institutions can work with school districts, community colleges, foundations, and other partners to identify and overcome the barriers that get in the way of college access. This work is labor intensive and requires long-term commitment; there is no quick fix. Although some people might cling to the belief that the deep-seated challenges to access and opportunity can disappear quickly and easily so that we no longer have to talk about issues of race or even class, we must be loud and clear about the fact that our best efforts cannot change our educational system overnight but need sustained and substantial time and resources.

It is perhaps tempting to get discouraged when court decisions seem to make this work even more difficult and potentially litigious (Schmidt, 2013). Institutional leaders face a real danger of fatigue from the constant attacks at every turn on programs and policies designed to enhance diversity. Yet the history of civil rights in this country is replete with challenges at every turn to attempts to increase access to opportunities in society. In this age of global competition, in which our greatest strategic asset is our diverse human capital, now is not the time to be faint of heart in the fight for access.

The stark choice facing selective institutions of higher education today is whether they will be engines of opportunity that open doors of possibilities for students of all backgrounds, or whether they will instead reinforce and even exacerbate inequalities in society—whether based on race, socioeconomic status, or perhaps both. New research showing that African American and Latino youth are increasingly underrepresented at selective institutions and overrepresented at open-access institutions suggests that the challenges may actually be getting greater in this regard. Based on this research, Anthony P. Carnevale and Jeff Strohl conclude that “the postsecondary system mimics and magnifies the racial and ethnic inequality in
educational preparation it inherits from the K-12 system and then projects this inequality into the labor market” (Carnevale & Strohl, 2013, p. 7).

For those of us who see higher education as a gateway to the future, and who believe that the doors of institutions of all types should be opened wide to individuals from all backgrounds, these trends are a cause for real concern and should serve as a call for action. The Supreme Court in Fisher and prior cases has provided some basic rules of the road, but hardly a detailed map on how to get to the ultimate destination. There may be a variety of pathways to help get us there, and it is up to us in higher education to find those pathways and share lessons learned with one another. We will learn from and with each other throughout this long and difficult journey, and that shared educational process is a fitting reflection of our mission and of the very principle for which we have been striving all along.

References


Fisher v. University of Texas at Austin. 133 S. Ct. 2411 (2013).


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