Supreme Court Rules On Using Race In University Admissions

Insights
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On June 24, 2013, the U.S. Supreme Court vacated a decision by the U.S. Court of Appeals for the 5th Circuit that upheld a race-conscious student admissions process used by the University of Texas. The decision clarifies earlier Supreme Court decisions holding that, although suspect, race may be considered in the admissions process if the process meets strict scrutiny requirements. *Fisher v. University of Texas.*

The Supreme Court has addressed the use of race in university admissions procedures in the past, and its decisions have ranged from a complete ban on the consideration of race in admissions to a more fluid approach of allowing it under certain conditions. Today's decision attempts to reconcile those past decisions.

Background
The case that most institutions of higher learning look to in devising admissions plans to promote diversity is *Grutter v. Bollinger*, decided by the Supreme Court in 2003. In that decision, the Court looked at the University of Michigan Law School's admissions policies and held that institutions of higher learning have a compelling interest in ensuring that their students obtain the educational benefits that come from having a diverse student body. Those benefits include widened perspectives and better preparation of students as professionals and future public leaders.

The Court held that consideration of race to meet those objectives was permissible *only* if the process was narrowly tailored to achieve the goal of diversity and did not amount to improper racial stereotyping. Plans that have been approved by the Court are those that look at the applicant as an individual and use race as part of a holistic review of the application. But the Court cautioned that a university's use of race to achieve diversity cannot go on indefinitely. Rather, the admission policy must be reviewed periodically to determine whether or not the goal of diversity has been met, and there must be an end at some point.

The Supreme Court also made clear in *Grutter* that establishing a *quota* of under-represented minorities based on demographics is not a permissible goal. In other words, it is unconstitutional to seek to achieve a pre-determined racial balance.

Facts Of The Case
The University of Texas (UT) has long sought diversity in its student body and, until 1996, directly

considered race in its admissions process. In response to a 1996 Supreme Court decision disallowing the use of race in the admissions process, the State of Texas enacted the Top Ten Percent Law, which is still in effect today. Under that law, Texas high school seniors in the top 10% of their class are automatically admitted to any Texas state university.

Although the Top Ten Percent Law increased racial diversity, the university felt the Top Ten Percent Law alone was not as effective in achieving diversity as its prior methods had been. The minorities admitted under the law remained clustered in certain programs, rather than having adequate representation in the various schools of study and classes offered.

In response to the Supreme Court's *Grutter* decision permitting universities to use race as part of a holistic review of prospective students' applications, UT immediately implemented a policy in which race was one factor to be considered in the early stages of the application process for those applicants who were not automatically admitted under the Texas Top Ten Percent Law.

Abigail Fisher, a white, non-diverse applicant, was denied admission to UT's 2008 undergraduate class. She sued UT claiming that her denial constituted race discrimination. In that regard, Fisher claimed that UT's admissions process failed to meet the standard established by the Supreme Court for evaluating admissions policies that seek to achieve a "critical mass" of under-represented minorities. In her view, the Top Ten Percent Law was a reasonable alternative that effectively achieved the university's interest in developing a diverse student body, without the consideration of race as a factor.

UT responded by asserting that the general diversity achieved by the Top Ten Percent Law did not meet UT's educational goal of "diversity within diversity," meaning that the Top Ten Percent Law did not allow for individualized consideration of applicants who were admitted under the law, since admission under that law was automatic. UT wanted to seek out applicants who would dispel racial stereotypes because they had different experiences or qualifications than the minorities admitted under the Top Ten Percent Law.

The goal of the UT plan was not necessarily to help students who come from underprivileged backgrounds, as typical affirmative action plans do; its goal was to seek out students with backgrounds different from those who were admitted under the Top Ten Percent Law. UT stressed that its consideration of race was only a modest consideration (a factor of a factor within a factor) and was never a *determining* factor in an admission decision.

The United States filed a friend of the court brief on behalf of UT arguing that it is of vital interest to the United States that colleges and universities nationwide continue to be able to shape their admissions policies in a way that ensures that they produce graduates who will be effective citizens and leaders in an increasingly diverse society and effective competitors in diverse global markets.

Although UT's policy called for its review every five years to determine if the policy was still warranted, Fisher argued that UT should not be allowed to continue to use a policy that has no

specific end in mind. UT argued that institutions of higher learning should be afforded a certain amount of deference in determining when and how long such a program should be used.

The Court's Ruling

Today, the Court left intact its precedent that the attainment of a diverse student body is a compelling state interest, and that some judicial deference is properly afforded to a university's judgment that such diversity is essential to its educational mission. However, the Court clarified that no judicial deference applies to a university's judgment about the means that are employed to achieve the educational benefits of diversity.

The Supreme Court held that the 5th Circuit improperly evaluated the "narrow tailoring" requirement with a degree of deference to UT, and misstated the burden of proof. In that regard, the 5th Circuit presumed that UT's decision to use race in its admissions process was in good faith and placed the burden on Fisher to rebut that presumption. As a result, the Supreme Court remanded the case, instructing the Court of Appeals to perform a "searching examination" and assess whether UT presented sufficient evidence that its admissions process is narrowly tailored to obtain the educational benefits of diversity. Thus, at the end of the day, whether UT's admissions process is constitutional has been left undecided pending further review and application of the correct standard, as previously articulated by the Court in *Grutter*.

The guidelines in determining whether a race-conscious admissions process is sufficiently narrowly tailored remain unchanged. Instead, the Court made clear that judicial deference is only proper with respect to a university's stated goal of achieving educational benefits through diversity, and not to the means by which the benefits are achieved. The Court stressed that the admissions process must ensure "that each applicant is evaluated as an individual and not in any way that makes an applicant's race or ethnicity the defining feature of his or her application." The reviewing court must ultimately be satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity.

Perhaps today's decision is a recognition, as articulated by various courts in earlier decisions, that allowing the use of race in university admissions at all "assures that race will always be relevant in American life."

Impact On Universities And Employers In General

As it stands now, institutions of higher learning are still able to consider race in the admissions process, although the process must meet the strict standards previously outlined by the Supreme Court. Under federal law, race can neither be a determining factor to help a college or university meet an established racial quota nor may it create an automatic preference.

Race can, however, be considered as *part* of an individualized review in the context of an applicant's entire application portfolio. In addition to the federal law, colleges and universities must also be mindful of the state laws under which they operate which may be more restrictive and completely prohibit the use of race in application procedures.

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Today's decision is really one of form rather than substance. The criteria for establishing a compelling state interest to justify the use of race in the admissions process remain the same. But the Supreme Court made clear that deference will not be given to a university's decision to consider race in an admissions program nor to the manner in which race is considered.

The impact of today's decision is not limited to colleges and universities. All employers should be mindful of the guidelines reaffirmed today as they seek to level the playing field for workers of all races, create affirmative action plans, or attempt to build diversity within their group. Businesses attempting to increase diversity may end up on the wrong side of a reverse discrimination claim if they do not ensure that their selection and promotion procedures meet the standards reiterated today.

For more information contact your regular Fisher Phillips attorney.

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