



Fisher v. University of Texas

The U.S. Supreme Court Again Takes on
Higher Education Admissions

NASAI
Missoula, MT
May 30, 2013

Bradley J. Quin
Executive Director, Higher Education Advocacy
Advocacy and Policy Center
The College Board

Session Overview

- I. Legal and Policy Landscape
- II. *Fisher*: The Case and Key Issues
- III. The Amicus Brief Effort
- IV. Strategies and Action Steps to Consider
- V. Takeaways & Conclusion

I. Legal and Policy Landscape

Legal and Policy Landscape: General Overview

Major Points of Legal Action: Looking Backwards vs. Looking Forward

Remedying Unlawful Discrimination

- ❑ Federal requirement for de jure higher education systems and institutions to eliminate vestiges of discrimination
 - Foundations in *Brown v. Board of Education* → *U.S. v. Fordice* (1992)
- ❑ Movement from traditional legal "remedial" focus to more open-ended goals ('70s forward...)
 - Elimination of societal discrimination
 - Elimination of discriminatory effects of past practices
- ❑ Federal agency and court action regarding race-conscious practices, including
 - *Podberesky v. Kirwan* (4th Cir. 1994)
 - *Hopwood v. Texas* (5th Cir. 1996)

Pursuit of Educational Benefits of Diversity

- ❑ *Bakke* (1978)
 - Powell: Obtaining educational benefits of diversity is a "permissible goal for an institution of higher education"
- ❑ Federal agency and court action, including
 - U.S. Department of Education Race-Based Financial Aid Policy (1994)
 - *Hopwood v. Texas* (5th Cir. 1996) vs. other federal circuits
- ❑ *Grutter/Gratz* (2003)
- ❑ *Parents Involved in Community Schools* (2007)
 - Louisville and Seattle School Districts
- ❑ *Fisher v. Univ. of Texas* (5th Cir. 2011), cert. granted; oral arguments: October 10, 2012

Legal and Policy Landscape: General Overview

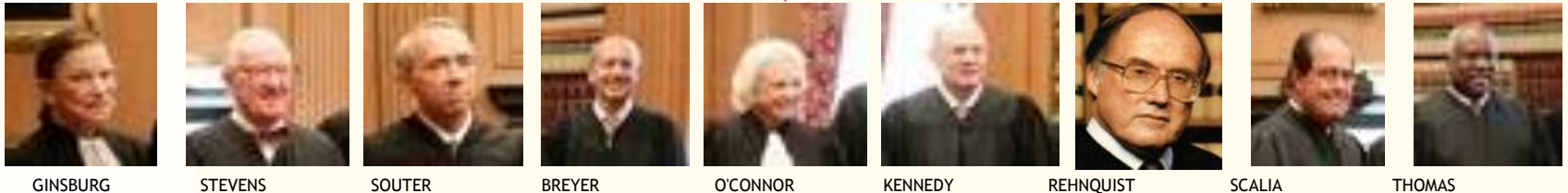
Strict Scrutiny = Compelling Interest + Narrow Tailoring

- ☑ Strict scrutiny is the legal test used by courts to evaluate action taken by all public institutions *and* all private institutions that receive federal funds when they treat persons differently because of their race, ethnicity, or national origin.
- ☑ The strict scrutiny standard establishes two key questions that must be addressed when pursuing race-/ethnicity-conscious practices:
 1. Is there a **compelling interest** that justifies the practice? (the ends/goals)
 2. Is the practice in question **narrowly tailored**? (the means to realize the goals)
 - a. Are race-conscious measures necessary to achieve goals?
 - b. Does the use of race-conscious measures have consequential impact, advancing goals?
 - c. Is the policy well calibrated so that it is neither over- not under-inclusive?
 - Is the use of the policy flexible?
 - What is the impact of the policy on equally-meritorious, non-qualifying candidates?
 - d. What is the process of review and refinement over time and is there an end in sight?

Legal and Policy Landscape: Cases and The Court

The Changing Composition of the U.S. Supreme Court...

2003 (University of Michigan cases)



GINSBURG

STEVENS

SOUTER

BREYER

O'CONNOR

KENNEDY

REHNQUIST

SCALIA

THOMAS

GRUTTER MAJORITY (2003)

GRATZ MAJORITY (2003)

2012 (*Fisher*)



GINSBURG

KAGAN
(Recused in *Fisher*)

SOTOMAYER

BREYER

ALITO

KENNEDY

ROBERTS

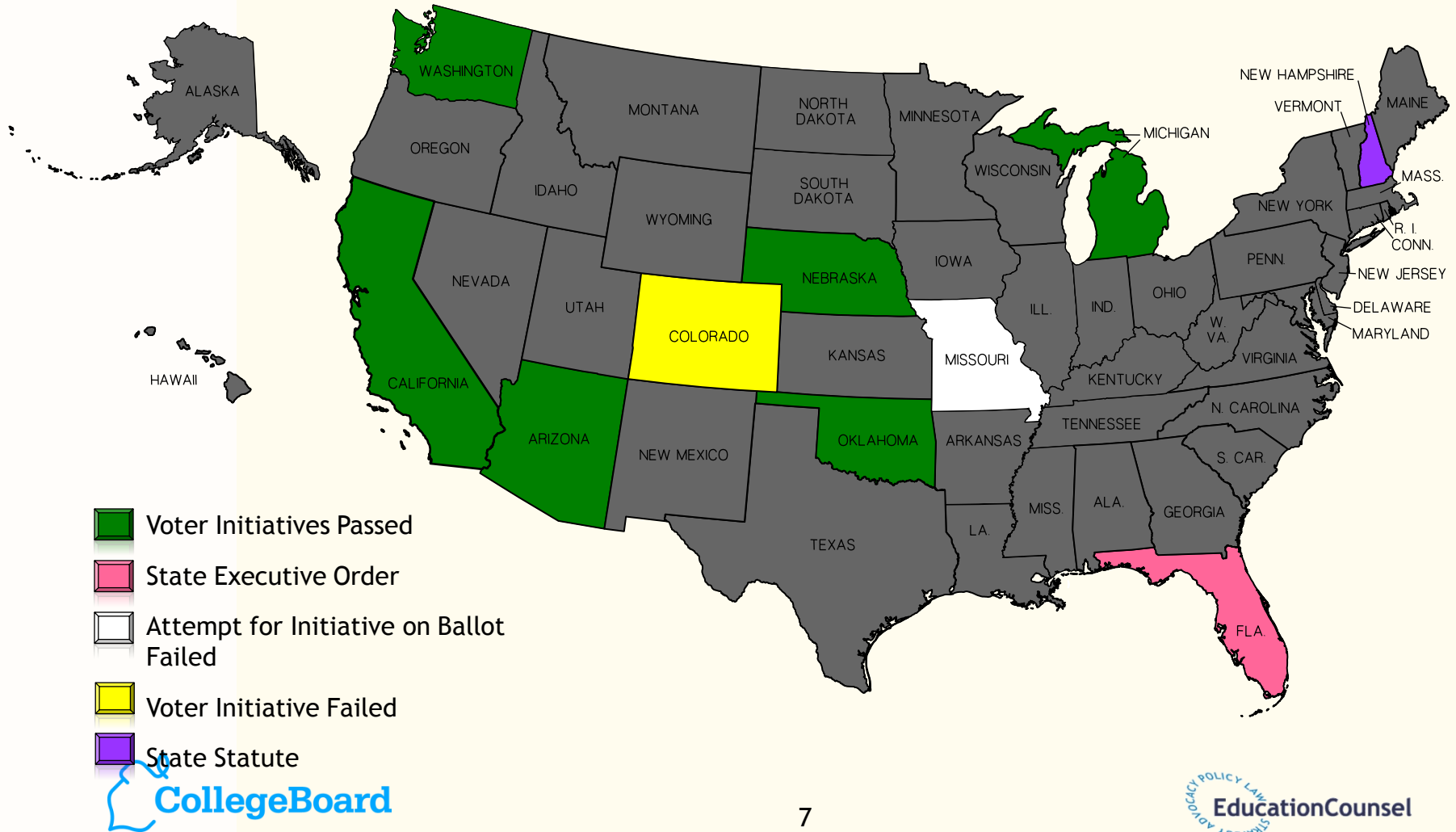
SCALIA

THOMAS

PICS V. SEATTLE S.D. MAJORITY (2007)

Legal and Policy Landscape: Federal-State Issues

Voter Initiatives to Eliminate Consideration of Race, Ethnicity, Gender



II. *Fisher*: The Case and Key Issues

A. Overview of the Case

B. Key Issues Before the Supreme Court

A. Overview of the Case

The Fifth Circuit Decision (2011)

- ❑ 5th Circuit panel (of 3) unanimously concludes that University of Texas race-conscious admissions policy comports with *Grutter* and is lawful.
- ❑ *Major issue addressed*: Whether UT's consideration of race was necessary—as required for narrow tailoring (under strict scrutiny principles)—in light of the effect of the State's "Top Ten Percent Law," which had resulted in increased minority enrollment.
 - Key issue is not one of "holistic review," per se, as in *Grutter* and *Gratz*.

B. Key Issues Before the Supreme Court

As Briefed by Fisher and the University of Texas

1. Necessity? Material Impact?
2. Critical Mass—What Is It?
3. Overrule *Grutter*???

1. Necessity? What's the Impact?

Is there material positive impact that results from the challenged preference?

University of Texas Position

- ❑ "The nuanced and modest constitutional impact of race...is...a constitutional virtue, not a vice."
 - **Consideration of race has impact: 20% of black admits and 15% of Hispanic admits were offered admission through a full-file review**
- ❑ Race-neutral alternative (Top 10% Law) is insufficient
 - Hurts academic selectivity, reducing admissions to just a single criteria, foreclosing consideration of other academic criteria (quality of high school, course load, performance on standardized tests)
 - **Undermines efforts to achieve diversity in broad sense and limits *within* group diversity**

Fisher Position

- ❑ UT fails to demonstrate that using race is necessary to further a compelling interest in student body diversity
- ❑ Use of race-conscious consideration led to only minimal additional minority enrollment - "impact is negligible"/"trivial gains"
 - **Increasing African American enrollment by 60 and Hispanic enrollment by 204, when compared to pre-policy numbers**
 - UT cannot identify any applicant where race was the deciding factor)
- ❑ Limited results of UT's consideration of race shows that race-neutral means would be effective



2. Critical Mass: What Is It?

Key Policy Parameters from *Grutter*

- ☑ **Premised on the need to attract sufficient numbers of underrepresented students that will advance educational goals—based on institution-specific research and data**
 - To ensure the “presence of ‘meaningful numbers’...of ‘students from groups which have been historically discriminated against....’ and who are “particularly likely to have experiences and perspectives of special importance to [its] mission.” An individual assessment that includes but is not limited to race of the individual.

- ☑ **Not defined with reference to rigid, numerical targets or goals (no quotas!)**
 - Not the equivalent of seeking a “specific number of students of particular races” or seeking “a hard and fast number” of students.

2. Critical Mass: Numbers? Classroom?

University of Texas Position

- ❑ UT policy lacks elements (that Kennedy) disliked in *Grutter*:
 - No race-based target established
 - No automatic value assigned for race
 - Racial/ethnic composition is not monitored during admissions cycle
- ❑ **Focus on critical mass at classroom level to determine whether students are realizing the educational benefits of diversity** (black and Hispanic students nearly nonexistent in thousands of classes)
- ❑ Determination requires trained educator judgment to ascertain and calibrate the environment in which students are educated

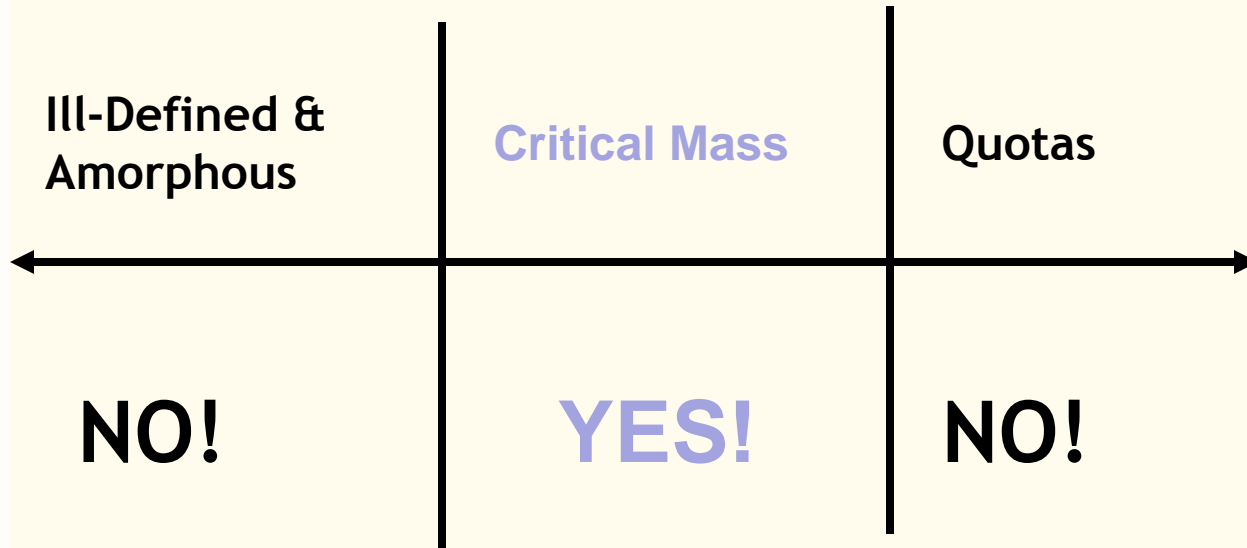
Fisher Position



- ❑ UT's claimed interest in classroom diversity cannot be implemented in a narrowly tailored way
 - Proper base to measure critical mass = student body
 - **Classroom diversity benchmark "would promote the use of race in perpetuity" and "justify racial engineering at every stage of the university experience"**
- ❑ Even if UT allowed to focus on classroom diversity, **UT has made no effort to define a percentage of underrepresented students that achieve critical mass (no educational target)**
- ❑ Critical mass should be URM's as a whole, not separate racial groups
- ❑ UT's use of race is not narrowly tailored because it is over-inclusive: Hispanics in Texas ≠ URM

2. Critical Mass

Something more than I know it when I see it?



3. *Grutter* to be Overruled?

Fisher to the Supreme Court

"To the extent [*Grutter*] can be read to permit the Fifth Circuit's effective abandonment of strict scrutiny...[t]he Court should expressly clarify or overrule *Grutter to the extent needed* to bring clarity to the law and restore the integrity of strict scrutiny review in the higher educational setting." (emphasis added)

- Interpretative difficulties
- Unworkable in practice and perpetuating hostilities
- *Grutter* has not created reliance because universities are not required to consider race in admissions
- *Grutter* established to be temporary

- Brief of Petitioner Abigail Noel Fisher (May 21, 2012)

3. *Grutter* to be Overruled?

UT's Response

"The Court should decline petitioner's far-reaching request to reopen and overrule *Bakke* and *Grutter*."

- Outside the scope of question presented, which asks Court to review UT's policy under existing precedent
- Legitimate expectations established just nine years ago, with reaffirmation in *Parents Involved* (2007)
- Profoundly important societal interests remain
- Institutional reliance vs. abrupt, destabilizing reversal
- Workable standard: Court's own reliance and three decades of implementation, including by U.S. Department of Education

- Brief of Respondent University of Texas (August 6, 2012)

III. The Amicus Brief Effort

The Amicus Brief Effort

- ❑ Seventeen briefs were filed in support of Fisher, including briefs by:
 - Libertarian public interest groups
 - Individual members of the U.S. Commission on Civil Rights
 - Asian American Legal Foundation
- ❑ Seventy-three briefs were filed in support of the University of Texas, including briefs filed by:
 - The United States and 17 states and territories
 - Members of the federal and Texas legislatures
 - Education organizations and at least 117 colleges and universities
 - Military and national security officials
 - 57 Fortune 100 and other American businesses and 21 small business owners and associations
 - Social science researchers and empirical scholars
 - Multiple Asian and Pacific Islander American organizations
- ❑ Two briefs were filed in support of neither Fisher nor the University

The College Board Amicus Brief

"Friend of the Court" Brief

Major Points:

1. 21st century education goals to advance economic success and promote our democracy's vitality are furthered by diversity.
2. Educational judgments in the admissions process that involve many student qualities and characteristics - reflecting determinations of merit aligned with mission, based on a wide range of factors, that may include the consideration of race/ethnicity as part of an individualized, holistic review - are essential foundations for attaining mission-driven educational excellence.
3. *Grutter* establishes a balanced and workable framework that should be preserved.

Joined by the National School Boards Association (NSBA), the American Association of College Registrars and Admissions Officers (AACRAO), the National Association for College Admission Counseling (NACAC), and nine other organizations.

The Amicus Brief of the United States

"Friend of the Court" Brief

Major Points:

1. Given both the global economy and the nation's security, the United States - including its armed services and federal agencies - has a critical interest in ensuring that institutions are able to provide the educational benefits of diversity.
2. UT's consideration of race in admissions is constitutional - supported by a compelling interest and but one factor in the holistic review of applicants.

IV. Strategies and Action Steps to Consider

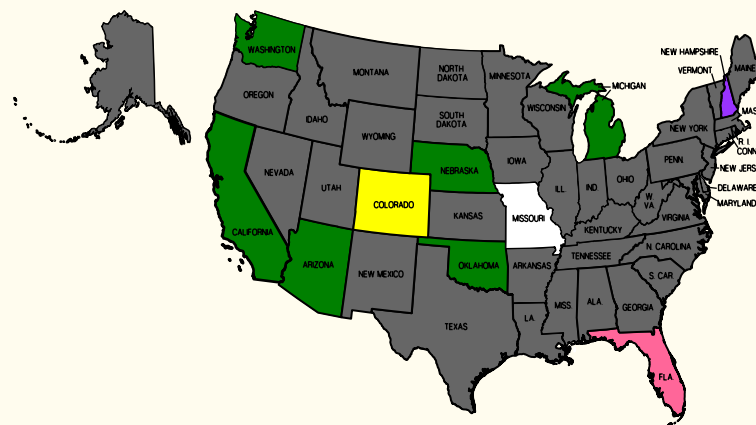
"What Do I Do Now??"

Key Strategies and Action Steps to Consider

- ✓ Develop/update management plan associated with the review/evaluation of all diversity-related policies and programs (potentially) implicated by the Court's decision. Ensure institutional leadership and counsel are included.
- ✓ Conduct preliminary assessment of policy/practice issues in light of legal issues in *Fisher*, identifying possible areas of focus in advance of Court decision. Prepare for action, post-decision.

Key Strategies and Action Steps to Consider

- ✓ In light of your management plan and preliminary assessment of policy/practice issues, consider notable race-neutral strategies that have been approved in states where race-conscious practices are prohibited.



Race-Neutral Strategy: Data Collection

- ❑ Data collection efforts that involve identification of students or faculty based on race, ethnicity, and sex (or disaggregating such data in analyses) are likely permissible.
 - 2001, California: finding that data collection concerning minority/female participation "can serve legitimate and important purposes."

Race-Neutral Strategy: Recruitment and Outreach Policies

- ❑ Recruitment and outreach policies that stem from efforts to enhance the race, ethnicity, and sex compositions of students or faculty on campus are often deemed inclusive and therefore not subject to prohibitions against discrimination.
 - Recruitment and outreach efforts must be authentically inclusive, documenting outreach to a broad range of potential applicants
 - See *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 2000: rejecting a recruitment requirement for a specific percentage of minority and women applicants

Race-Neutral Strategy: (Truly) Race-Neutral Preferences

- ❑ Policies that are race-, ethnicity-, and sex-neutral, even when they disproportionately benefit certain subgroups, may be permissible in certain contexts.
 - Policies that promote mission-driven policies that grant preference to race-neutral personal characteristics (ex. socioeconomic/family status, ties to geographic areas, favoring of bilingual/multilingual applicants) should not run afoul of state bans.
 - Such policies must be authentic and mission-driven, not operate merely as a pretext or proxy for race, ethnicity, or sex.

Race-Neutral Strategy: Federal Funding

- ❑ The utilization or continuation of a race-, ethnicity-, or sex-conscious policy on the assumption that a loss of federal funding would occur in its absence is likely not permissible.
 - California, 2004: finding that public entities must show not only that they considered race-neutral alternatives, but also that those alternatives were inadequate and would result in loss of federal funds.
 - Education institutions must likely do more than simply cite to the federal funding provision in their state bans to justify the continuation of policies.

Race-Neutral Strategy: Private Actors

- ❑ State law prohibitions do not cover action by private actors, including those who may - with sufficient distance - support public institutional efforts.
 - Private groups working to advance diversity-related goals in public institutions likely are excepted from state law bans (given sufficient distance between their efforts and the efforts of public institution).
 - Strong arguments subjecting private actors to prohibitions exist where:
 1. Public institution assists private actor with administering race-, ethnicity- or sex-conscious program,
 2. Private actor acts as agent to public institution or performs a function considered the responsibility of the public institution

V. Takeaways & Conclusion

Takeaways...

1. Never lose sight of goals

- You win with clear, educationally-grounded goals
- You lose with amorphous and unclear goals

2. Never take your eyes off the ball, even when you think the final buzzer has sounded.

- Law changes over time
- Developments regarding key evidence (data, research, experience) should inform policy judgments—good yesterday is not necessarily good tomorrow

3. Proactive engagement is a must.

- Embrace a forward- and outward-looking posture
- Engage with stakeholders beyond the usual suspects

Available Resources

The College Board's Access & Diversity Collaborative:
<http://diversitycollaborative.collegeboard.org/>

1. The Access & Diversity Toolkit (2009)
2. Diversity Action Blueprint: Policy Parameters and Model Practices for Higher Education Institutions (2010)
3. Professional Development Video Series (2011...)
 - A. *Access and Diversity and the Law: Understanding the Legal and Policy Fundamentals*
 - B. *From Law to Policy Development: Setting the Stage for Action*

Contact Information

Bradley J. Quin is Executive Director, Higher Education Advocacy and Special Initiatives at the College Board. He provides key project management for the purpose of advancing the College Board's advocacy initiatives and College Completion Agenda on a national basis. He coordinates several important activities focused on issues such as access, recruitment, outreach, admissions, and retention.

bquin@collegeboard.org

571-485-3438

College Board Advocacy and Policy Center

Access & Diversity Collaborative