# Fisher v. University of Texas at Austin, et al. (Oct. 2012)
# A Summary of Affirmative Action in Education

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**These Times They are a Changin' – Future Impacts of the 2013 US Supreme Court Session on Marriage Equality, Search and Seizure, Voting Rights, and Affirmative Action**
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Over the years, the University of Texas has attempted to implement admissions program goals to increase racial minority enrollment on campus. Prior to 1997, the university considered an applicant's test scores and high school academic performance, as well as an applicant's race. The 5th Circuit Court of Appeals found that admissions policy unconstitutional.[1]

Following *Hopwood,* the University of Texas implemented an admissions program that did not consider race. The Personal Achievement Index (PAI), however, still considered other circumstances about an applicant's background, such as socioeconomic status and speaking a language other than English at home.

In response to *Hopwood*, the Texas legislature passed the "Top Ten Percent Law,"which granted automatic admission to any Texas state college, to all students in the top 10% of their class at Texas high schools. The Top Ten Percent Rule resulted in a more racially diverse university environment.

Following the U.S. Supreme Court rulings in *Grutter v. Bollinger, supra,* and *Gratz v. Bollinger,*[2] where the court upheld the use of race as a consideration in the university admissions process, the University of Texas again revised its admissions policies to the current policy at issue here. Admissions policies now explicitly consider race as one of many "plus factors" in the admissions program. "While race is not assigned a numerical value, it is undisputed that race is a meaningful factor."[3] Once the applicant is scored, the applicant is placed on a grid based on individual scores, referred to as a PAI. The university admits those who fall above a certain line.

Abigail Fisher, a Caucasian woman, was denied admission to the University of Texas and filed a lawsuit alleging that the consideration of race in admissions violates the Fourteenth Amendment Equal Protection Clause. The U.S. District Court granted summary judgment to the university. Affirming, the 5th Circuit held that *Grutter* requires courts to give substantial deference to the university, both in the definition of the compelling interest in diversity's benefits and in deciding whether its specific plan is narrowly tailored to achieve its stated goal.[4] The Fifth Circuit held that the petitioner could only challenge whether the use of race as an admissions

[1] *Hopwood v. Texas*, 78 F. 3d 932, 955 (1996).
[2] *Gratz v. Bollinger,* 539 U.S. 244 (2003).
[3] *Fisher* Opinion, P.3-4.
[4] *Fisher* syllabus, Page 1.

factor "was made in good faith." The lower courts presumed that the university acted in good faith and shifted the burden to petitioner to rebut the presumption.

Applying *Bakke, Gratz and Grutter*, the U.S. Supreme Court reviewed whether the 5th Circuit properly applied strict scrutiny to both the university's asserted diversity goals, affording some deference to the stated justification, and whether the means that it chose to attain diversity were narrowly tailored to its goals. The U.S. Supreme Court in *Fisher* held that the Fifth Circuit did not hold the University to the demanding burden of strict scrutiny articulated in *Grutter* and *Bakke*.[5] The court clarified that strict scrutiny does not permit a court to accept a school's assertion that its admissions process used race in a permissible way without closely examining how the process works in practice.

## I. *Bakke, Gratz and Grutter* Factors

### 1. Strict Scrutiny:

University admissions programs that consider race in admissions are subject to strict scrutiny.[6] Race may not be considered unless the admissions process can withstand strict scrutiny.[7] The U.S. Supreme Court has recognized that a court may give some deference to a university's "judgment that diversity is essential to its educational mission provided that diversity is not defined as mere racial balancing and there is a reasoned, principled explanation for the academic decision."[8] The court in *Bakke* reasoned that "obtaining the educational benefits of student body diversity is a compelling state interest that can justify the use of race in university admissions."[9] Justice Powell further articulated that "this interest is complex, encompassing a broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.[10]

### 2. Narrowly Tailored:

Racial classifications will be found constitutional only if they are "narrowly tailored to further a compelling governmental interest."[11] A university does not receive deference as to whether the means it chose to attain diversity are narrowly tailored to its goal.[12] The Judiciary may review admissions programs to determine whether admissions processes "ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or

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[5] *Regents of University of Cal. v. Bakke*, 438 U.S. 265 (2003).
[6] *Fisher at* P. 9.
[7] *Fisher* at P. 7.
[8] *Grutter* at 230 ("based on its experience and expertise,")
[9] *Grutter* at 325.
[10] *Grutter* 539 U.S. at 315.
[11] *Grutter* at 326.
[12] *Grutter* at 328.

ethnicity the defining feature of his or her application."[13] Racial quotas are impermissible.[14]An automatic award of points to an applicant for race has been held unconstitutional, as well.[15]

## II. *Fisher's* Ruling

The U.S. Supreme Court in *Fisher* held that strict scrutiny analysis applies to both a university's asserted need for diversity, as well as the means by which it pursues implementing those goals. While a university receives deference from the courts as to its academic judgment for pursuing diversity goals, the court may review whether "there is a reasoned, principled explanation for the academic decision."[16]

If a university can demonstrate that its goal is consistent with strict scrutiny, "there must still be a judicial determination that the admissions process meets strict scrutiny in its implementation."[17] The university receives no deference towards whether the means chosen by the university are narrowly tailored to the goal.[18] It remains the university's obligation, subject to judicial review, to demonstrate that the admissions process evaluates each applicant as an individual, and does not make an applicant's race or ethnicity the defining feature of the application.[19]

Narrow tailoring also requires a reviewing court to verify that it is "necessary" for a university to use race to achieve the educational benefits of diversity and whether a university can achieve diversity without use of racial classifications.[20] The reviewing court must be "satisfied that no workable race-neutral alternatives would produce the educational benefits of diversity."[21]

The U.S. Supreme Court remanded *Fisher* back to the 5th Circuit Court of Appeals to assess whether the University of Texas offered sufficient evidence that its admissions program is narrowly tailored to obtain the educational benefits of diversity.[22]

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[13] *Grutter*, at 337.
[14] *Bakke v. Cal*, 438 U.S. 265. (setting aside 16 seats for minority applicants).
[15] *Gratz v. Bollinger, 539 U.S. 244* (2003).
[16] *Fisher* at 9.
[17] *Fisher* at 10. If the 5th Circuit Court of Appeals reviews the University of Texas admissions program, it could conclude that the university's stated diversity goal does not satisfy strict scrutiny because the campus has achieved critical mass. The Top Ten Percent Law has resulted in a more racially diverse environment even though race was not, per se, a factor in the law's application.
[18] *Fisher*, Id.
[19] Id. (citing *Grutter* at 337).
[20] *Bakke, supra* at 305.
[21] *Fisher* at 10-11.
[22] *Fisher* at 13.