St. John's Law Review

Volume 89
Number 2 *Volume 89, Summer/Fall 2015, Numbers 2 & 3*

Article 6

The Future of Workplace Affirmative Action After Fisher

Rebecca K. Lee

THE FUTURE OF WORKPLACE AFFIRMATIVE ACTION AFTER *FISHER*

REBECCA K. LEE[†]

INTRODUCTION

The United States Supreme Court's 2013 decision in *Fisher v. University of Texas at Austin*[1] raises interesting questions about its relevance for employment discrimination law and what employers may be able to do to achieve employee diversity in the workplace. Although *Fisher* dealt with the constitutionality of an affirmative action program used in the university setting to promote student body diversity, *Fisher*'s analysis would further apply to race-conscious affirmative action efforts in the public sector workplace[2] and also offers considerations for private sector employers to keep in mind when engaging in similar efforts.[3] As a relatively recent case that falls under the Supreme Court's jurisprudence on higher education affirmative action, *Fisher* confirms that the Court's earlier holdings in *Regents of University of California v. Bakke*,[4] *Grutter v. Bollinger*,[5] and

[†] Associate Professor of Law, Thomas Jefferson School of Law; B.A., University of Chicago; M.P.P., Harvard University, John F. Kennedy School of Government; J.D., Georgetown University Law Center. The author would like to thank the organizers of the Title VII at 50 Symposium, held at St. John's University School of Law and New York University School of Law, and the participants, including those who took part in the roundtable discussion on affirmative action and *Fisher v. University of Texas at Austin*.

[1] Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013). This Article addresses the Supreme Court's first ruling in this case and was prepared for publication before oral argument and the Court's decision in *Fisher II*. *See* Fisher v. University of Texas at Austin, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/fisher-v-university-of-texas-at-austin-2/ (last visited Nov. 10, 2015, 10:31 AM) [hereinafter Fisher, SCOTUSBLOG] (showing that oral argument is scheduled for December 2015 and noting that the issue presented is "[w]hether the Fifth Circuit's re-endorsement of the University of Texas at Austin's use of racial preferences in undergraduate admissions decisions can be sustained under this Court's decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. University of Texas at Austin*").

[2] *See infra* Part I.

[3] *See infra* Part II.

[4] 438 U.S. 265 (1978).

Gratz v. Bollinger[6] serve as good precedent.[7] Thus, it remains unchanged that a state university has a compelling interest in attaining a diverse student body for educational purposes that could make it constitutionally permissible under the Fourteenth Amendment's Equal Protection Clause to use race as a factor in admissions decisions.[8] *Fisher* does not prohibit the use of race in affirmative action programs per se by public universities and would not prohibit the use of race in affirmative action programs by public employers either. In clarifying the judiciary's role in reviewing governmental decisionmaking involving race, *Fisher* closely examines the narrowly-tailored part of the strict scrutiny standard under the Equal Protection Clause and explains that it is for the courts to fully and independently assess whether the program at issue is narrowly tailored based on the factual record.[9] In providing this clarification, *Fisher* provides further guidance to public sector employers who engage in affirmative action initiatives—guidance that may also be applicable to private sector employers on this issue.

In addition, the Supreme Court in *Schuette v. Coalition To Defend Affirmative Action*,[10] which was decided after *Fisher* and also touched upon higher education affirmative action, did not change the constitutional permissibility of such initiatives.[11] *Schuette* instead addressed a different question concerning whether a state's electorate may decide to ban race-conscious decisionmaking by governmental actors, including state universities.[12] *Fisher*, then, remains intact in upholding the

---

[5] 539 U.S. 306 (2003).

[6] 539 U.S. 244 (2003).

[7] Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2417 (2013).

[8] *See id.* at 2419.

[9] *Id.* at 2419–21.

[10] 134 S. Ct 1623 (2014).

[11] *Id.* at 1630 ("Before the Court addresses the question presented, it is important to note what this case is not about. It is not about the constitutionality, or the merits, of race-conscious admissions policies in higher education. . . . In *Fisher*, the Court did not disturb the principle that the consideration of race in admissions is permissible, provided that certain conditions are met. In this case, as in *Fisher*, that principle is not challenged.").

[12] *Id.* ("The question here concerns not the permissibility of race-conscious admissions policies under the Constitution but whether, and in what manner, voters in the States may choose to prohibit the consideration of racial preferences in governmental decisions, in particular with respect to school admissions."). The state constitutional amendment in *Schuette* adopted by voters in Michigan also prohibits

constitutional validity of affirmative action admissions programs carried out by state universities so long as they meet certain requirements, and the relevance of its constitutional analysis would likely extend to affirmative action programs implemented by state employers to diversify their workforces. Although private sector workplaces are governed by Title VII,[13] and accordingly are subject to Title VII's requirements rather than those under the United States Constitution,[14] *Fisher* provides lessons to keep in mind for private employers as well when making hiring and promotion decisions involving race.

I. WORKPLACE AFFIRMATIVE ACTION UNDER THE CONSTITUTION

As *Fisher* recounts, the Supreme Court's constitutional jurisprudence on affirmative action began with *Bakke* and continued with *Grutter*.[15] This body of case law explains that the decisions of state entities, such as state universities and public sector employers, if based on racial or ethnic origin, must pass constitutional muster under the Fourteenth Amendment's Equal Protection Clause.[16] Specifically, a state program that takes into account race must satisfy strict scrutiny, requiring that the program advance a compelling governmental interest and is narrowly tailored to meet this goal.[17] Justice Powell, who wrote the controlling opinion in *Bakke*, stated that a state university has a compelling governmental interest in the educational benefits that flow from having a diverse student body.[18] *Grutter*, which followed *Bakke* more than two decades later, affirmed that attaining student body diversity is a compelling governmental interest, as articulated by Justice Powell in *Bakke*.[19] Both *Bakke* and *Grutter*, like *Fisher*, concerned a state university's use of

---

preferences in governmental decisions based on sex, color, ethnicity, or national origin, in addition to race. *Id.* at 1629.

[13] 42 U.S.C. § 2000e (2012) (as amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071). This Article focuses on Title VII of the Civil Rights Act of 1964.

[14] *See infra* Part II.

[15] Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2417–19 (2013).

[16] *Id.* at 2419–20.

[17] *Id.*

[18] *Id.* at 2419; Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 311–12 (1978) (Powell, J.) (plurality opinion).

[19] *Fisher*, 133 S. Ct. at 2422–23 (Scalia, J., concurring); Grutter v. Bollinger, 539 U.S. 306, 328–29 (2003).

race in making admissions decisions in order to diversify the student body.[20] *Fisher*, in referring to these cases, does not reopen them but takes them as good precedent.[21] Thus, it remains settled that a state university's interest in bringing about racial diversity in its student body by factoring in race in admissions would satisfy the compelling interest prong of the strict scrutiny standard under the Equal Protection Clause.[22] Although the *Fisher* Court, in keeping with the Court's decisions in *Bakke* and *Grutter*, found the asserted goal of the University of Texas at Austin ("UT" or "the University") of attaining student body diversity a compelling state interest, the Court nonetheless remanded the case, explaining that the reviewing court must separately and fully assess whether the University's plan was narrowly tailored to meet its diversity objective,[23] without deference to the school's assertions on this point.

A. Applying Fisher*,* Wygant*, and* Grutter *in Implementing Affirmative Action Programs in the Public Sector Workplace*

Fisher and the *Bakke* and *Grutter* decisions it cites provide support to also argue that the benefits of diversity may be further recognized as a compelling state interest in the public employment context. Although these cases arose in the higher education context, with a focus on the educational benefits of having diversity in the student body, the strict scrutiny standard applies in any context where race is involved in governmental decisionmaking.[24] Thus, strict scrutiny would have to be satisfied in the public sector workplace context as well if race was used.

In *Wygant v. Jackson Board of Education*,[25] the Supreme Court looked at the constitutionality of a public employer's layoff policy that protected certain minority employees over nonminorities from layoffs as part of a collective bargaining agreement with the teachers' union.[26] The *Wygant* Court confirmed that strict scrutiny would have to be met because of

---

[20] *Fisher*, 133 S. Ct. 2411; *Grutter*, 539 U.S. 306; *Bakke*, 438 U.S. 265.
[21] *Fisher*, 133 S. Ct. at 2417.
[22] *Id.* at 2419.
[23] *Id.* at 2421–22.
[24] *Id.* at 2421.
[25] 476 U.S. 267 (1986).
[26] *Id.* at 269–70.

the public employer's use of race in implementing this policy.[27] Under strict scrutiny, state actors must meet the following two-pronged test when using race to make decisions: (1) whether a compelling governmental interest supports the use of race and (2) whether the method used by the state actor to achieve its objective is narrowly tailored to meet the asserted goal.[28] This test applies whether the state actor is a state university or public sector employer.

The plurality decision in *Wygant* explained that societal discrimination and a role model approach to addressing societal discrimination are not enough to warrant the use of race as part of the layoff policy but that a need for remedial action could justify the consideration of race in an affirmative action program if the public employer has sufficient evidence to demonstrate that it had engaged in prior discrimination.[29] The petitioners in *Wygant* were nonminority employees who were laid off, and they sued under the Equal Protection Clause and Title VII, as well as under other federal and state statutes.[30] The Court stated:

> Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees. . . . In such a case, the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary.[31]

Further, the Court stated that it is the plaintiff-employee's burden to demonstrate that an affirmative action plan is unconstitutional.[32] In *Wygant*, the Court did not settle the question of whether the Jackson Board of Education ("the

---

[27] *Id.* at 273–74.

[28] *See id.* at 274.

[29] *Id.* at 274–76; *see also* Cynthia L. Estlund, *Putting* Grutter *To Work: Diversity, Integration, and Affirmative Action in the Workplace*, 26 BERKELEY J. EMP. & LAB. L. 1, 9 (2005) ("The *Wygant* plurality seemed to point toward a 'remedial only' theory of affirmative action in employment under the Constitution, under which public employers were entitled to remedy only the underrepresentation to which they—the particular agency, that is—had at least arguably contributed. The 'remedial only' theory of affirmative action under the Constitution, and the focus on particularized evidence of past discrimination, gained credence with the Court's decisions striking down minority business set-asides in public contracting in *Croson* and *Adarand*." (footnote omitted)).

[30] *Wygant*, 476 U.S. at 272.

[31] *Id.* at 277.

[32] *Id.* at 277–78.

Board") had the required strong basis in evidence to support its conclusion that remedial action was needed because it determined, in any event, that the layoff policy did not satisfy the narrowly tailored prong.[33] The Court is particularly concerned when an employer's affirmative action policy involves a race-conscious preferential system for layoffs—as opposed to hiring—because layoffs exact a particular kind of injury on innocent individuals that is more directly and deeply disruptive to an employee's seniority-based rights and expectations on the job.[34] Preferential hiring objectives, on the one hand, impose a burden broadly on innocent individuals, whereas preferential layoffs, on the other hand, impose a specific and concentrated burden on only a small number of individuals.[35] Thus, even if the Board's asserted goal could be justified as a permissible governmental purpose, the Board's layoff scheme was not narrowly tailored to satisfy the requirements under the Constitution.[36]

As *Wygant* illustrates, addressing societal discrimination would not constitute a compelling governmental interest that would justify a race-conscious affirmative action plan, and a layoff policy based on race also would not satisfy the Equal Protection Clause's narrow tailoring mandate.[37] But when it comes to race-conscious hiring and diversity-related goals, *Grutter* and *Fisher* help show that employers, including public employers, may pursue an interest in the business and organizational benefits that flow from having a diverse workforce.[38] Consider the amicus briefs relied on by the Court in

---

[33] *Id.* at 278.

[34] *Id.* at 282–83.

[35] *Id.* at 283.

[36] *Id.* at 283–84.

[37] *Id.* at 274, 276, 283.

[38] *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013); Grutter v. Bollinger, 539 U.S. 306, 347 (2003). *See generally* Rebecca K. Lee, *Implementing* Grutter*'s Diversity Rationale: Diversity and Empathy in Leadership*, 19 DUKE J. GENDER L. & POL'Y 133, 141 (2011) [hereinafter Lee, *Implementing* Grutter*'s Diversity Rationale*], *cited and quoted in* Brief for the State of California as Amicus Curiae in Support of Respondents, *Fisher*, 133 S. Ct. 2411 (No. 11-345), 2012 WL 3540401, at *9–10; Brief of Distinguished Alumni of the University of Texas at Austin as Amici Curiae in Support of Respondents, *Fisher*, 133 S. Ct. 2411 (No. 11-345), 2012 WL 3418594, at *10; Rebecca K. Lee, Fisher v. University of Texas at Austin*: Promoting Full Judicial Review and Process in Applying Strict Scrutiny*, 4 HOUS. L. REV. OFF REC. 33, 39–40 (2013) [hereinafter Lee, *Promoting Full Judicial Review and Process*]. *See, e.g.*, Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et

Grutter—arguments put forth by various employers and corporations in support of Justice Powell's diversity rationale emphasizing that our heterogeneous and international economy needs leaders in the workplace with "exposure to widely diverse people, cultures, ideas, and viewpoints."[39] The amici in *Grutter*, made up of public and private sector employers, recognized that the benefits from exposure to diverse individuals extend beyond school and into the workforce.[40] Diversity in the workplace is needed for organizations and businesses to operate competitively and effectively and to create a work setting that is "inclusive, comfortable, and reflective of the multicultural communities in which [businesses do] business."[41] Because many employers seek to hire graduates from top schools, employers have a strong interest in taking note of the population of students who get admitted into our nation's selective colleges and universities—students who then make up the pool of college graduates from which employers recruit their employees.[42] To draw upon the full range of talent available and to be competitive in our diverse society and economy, employers commonly look to recruit diverse, qualified college graduates with wide-ranging experiences and knowledge.[43]

As part of its judicial review, it is proper for a court to give some deference to a university's expertise and judgment that diversity is indispensable to its pedagogical mission.[44] The

---

al., as Amici Curiae in Support of Respondents, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 1787554, at *1, *5; Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 399056, at *2, *5–6.

[39] *Grutter*, 539 U.S. at 330; *see, e.g.,* Brief of Exxon Mobil Corp. as Amicus Curiae in Support of Neither Party, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 554411, at *4; Brief for 65 Leading American Businesses, *supra* note 38, at *2; Brief of General Motors Corp. as Amicus Curiae in Support of Respondents, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 399096, at *12; Brief of Amici Curiae Massachusetts Institute of Technology, et al. in Support of Respondents, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 367215, at *9.

[40] *See, e.g*., Brief of Exxon Mobil Corp., *supra* note 39, at *4; Brief of General Motors Corp., *supra* note 38, at *6; *see also* Estlund, *supra* note 29, at 19–20.

[41] Brief of Exxon Mobil Corp., *supra* note 39, at *1, *3–4.

[42] *See* Brief of the Leadership Conference on Civil Rights and the LCCR Education Fund as Amici Curiae in Support of Respondents, *Grutter*, 539 U.S. 306 (Nos. 02-241, 02-516), 2003 WL 536770, at *20; Lee, *Implementing* Grutter*'s Diversity Rationale*, *supra* note 38, at 141–42.

[43] *See, e.g.*, Brief of Exxon Mobil Corp., *supra* note 39, at *3–4.

[44] *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419 (2013); *Grutter*, 539 U.S. at 328–29.

Supreme Court recognizes that a university is engaged in the learning enterprise and thus seeks a diverse student body to foster a better learning environment.[45] In looking at the workplace context, however, there is admittedly a difference between the mission of a university and that of an employer;[46] accordingly, employers cannot claim to have the same kind of educational mission.[47] But employers have asserted that a diverse workforce is needed to better inform a given employer's service or product and to better take into account the realities of the diverse marketplace.[48] Moreover, both employers and universities seek to cultivate and produce leaders.[49] Consequently, employers as well as universities can have diversity-related missions, and thus public employers may be able to make an analogous argument that they have a compelling interest in the benefits that come with having a diverse workforce. Relying on *Fisher* and *Grutter* for support, public employers may be able to successfully meet the compelling interest prong of the strict scrutiny standard with respect to a race-conscious hiring or promotion process.[50] And based on their particular experiences and organizational judgment, employers are in the best position to know whether diversity is essential for their respective institutional missions. Just as a university's experience and expert judgment that diversity is crucial for its educational mission receives some judicial deference, an

---

[45] *See Fisher*, 133 S. Ct. at 2419; *Grutter*, 539 U.S. at 328–30.

[46] *See Fisher*, 133 S. Ct. at 2419; *Grutter*, 539 U.S. at 329.

[47] *See* Estlund, *supra* note 29, at 21.

[48] *See, e.g.*, Brief of General Motors Corp., *supra* note 39, at *6 ("Immersion in a multiracial academic environment enhances students' knowledge of different cultures and their understanding of perspectives that are influenced by race. That augmented understanding in turn prepares students, upon graduation, to work cooperatively in multiracial environments and to serve multiracial clienteles."); Brief of Exxon Mobil Corp., *supra* note 39, at *8–9 ("A diverse workforce not only generates varied perspectives, which improve decision-making, increase productivity, and help companies understand the different environments in which business is conducted today, but also contributes to a positive work environment and decreasing incidents of discrimination.").

[49] Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312–13 (1978); *see also Grutter*, 539 U.S. at 330–32.

[50] *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 n.11 (1986) (stating that the earlier " 'school admission' cases . . . involve the same basic concepts as cases involving hiring goals"). Although these cases predate *Grutter* and *Fisher*, they still involve decision-making that took into account race by a state university. *See id.*

employer's professional and organizational judgment that diversity is essential for its institutional mission should be given some judicial deference.[51]

If it can be established that the goal of attaining workforce diversity is a compelling state interest, then the reviewing court would need to independently determine whether the employer's selection process is narrowly tailored to meet this asserted goal, as explained in *Fisher* respecting the narrowly-tailored requirement under strict scrutiny.[52] That is, a court would need to examine whether an employer's hiring process is individualized and flexible so that it considers the applicant's race or ethnicity as one of many relevant factors and not as the determinative factor.[53] A court must also determine whether the employer could have feasibly implemented an alternative hiring process without the use of race;[54] this does not mean, however, that an employer would have had to fully explore every possible alternative that would have avoided the use of race, but instead that an employer should have fully considered all feasible race-neutral options.[55] It seems a court could also appropriately note an employer's experience and knowledge in deciding to use or not use particular hiring approaches, but the court in its examination must rely on the evidence presented by the employer on this question without simply deferring to an employer's good-faith assertion that it looked at all race-neutral options.[56]

If deference were given to a public sector employer as to whether it has a compelling interest in having workforce diversity, which is the first part of the strict scrutiny standard, then it arguably makes sense to require the employer to present sufficient evidence to meet the second part of the strict scrutiny standard in demonstrating its need for a hiring process that

---

[51] *See* Estlund, *supra* note 29, at 33 ("Courts that follow the logic of *Grutter* into the public sector workplace might accord deference toward employers' institutional justifications for preferences that in fact tend to diversify and integrate predominantly white workplaces. Such deference would be grounded not in any special constitutional privilege of employers to define their own mission or needs, but in the ordinary deference that government employers are accorded in determining what their institutional mission and needs require.").

[52] *See* Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419–20 (2013).

[53] *Id.* at 2420.

[54] *See id.*

[55] *See id.* (quoting Grutter v. Bollinger, 539 U.S. 306, 339 (2003)).

[56] *See id.* at 2420–21.

considers race. Judicial review would lose its specific purpose if the employer were to receive deference on both parts of the strict scrutiny test.[57] For the court to fully carry out its judicial review under strict scrutiny, the court should undertake a separate and independent review to ensure that any selection process by the employer involving the use of race is not too broad for the purpose of meeting the asserted goal. Solely or overly relying on the governmental actor's arguments in meeting the narrow tailoring requirement would give the governmental party the discretion to both implement its chosen selection process and confirm its proper use. If judicial deference is given in one part of the strict scrutiny analysis, then the court ought to play a more active role in reviewing the other part in order for there to be a proper review of the state actor's decisions.[58]

However, this does not, and should not, mean that a court should ignore the employer's experience and particular familiarity with the use of certain selection processes in its industry; a court can and should take note of this. But having the court carefully perform its evidence-based review recognizes the court's important role in terms of judicial process, particularly under strict scrutiny where race is concerned. As a matter of procedural consistency when assessing the constitutionality of governmental action, a court should conduct an independent judicial review even when the state program appears to have been thoroughly considered and pursued in good faith.[59] But judicial review should make it possible for a public employer to be able to meet its diversity-related workplace goals so long as it can present sufficient evidence to demonstrate to the court that its hiring or selection process is narrowly tailored to achieve the workplace and business benefits of diversity.

The evidentiary requirement should be a realistic and not impossible standard to meet, keeping in mind that state employers, in meeting this burden, may likely have to expend greater administrative costs and effort to collect and maintain the information. At the same time, public employers may, in any event, already keep track of this information and certainly

---

[57] *See* Lee, *Promoting Full Judicial Review and Process*, *supra* note 38, at 35, 37 (making a similar point regarding judicial review of a university's race-conscious admissions program under strict scrutiny).

[58] *See id.* at 35.

[59] *See id.* at 37.

should do so to make sure that their hiring or selection processes are specifically tailored to meet their asserted objectives. *Fisher* just requires that this evidence be presented for the reviewing court to examine.[60]

B. Fisher *on Remand*

Because *Fisher* was decided in the lower courts on summary judgment before reaching the Supreme Court, the record was developed as part of the summary judgment proceedings and not as part of any trial.[61] The Supreme Court did not rule on whether the current summary judgment record was sufficient to demonstrate the constitutionality of the admissions policy at issue; instead, it remanded the case after further explaining the court's role in conducting a proper judicial review under strict scrutiny and clarifying the evidentiary requirements needed for such a review.[62] On the evidentiary question back in the Fifth Circuit on remand, the University stated that the record from its summary judgment motion should be sufficient to meet the constitutional standard set forth by the Supreme Court. Nonetheless, the University requested that the United States Court of Appeals for the Fifth Circuit send the case back down so that the district court could rehear the case first and allow for further factual presentation.[63] After more briefing and oral argument, the Fifth Circuit denied the University's motion for remand on the procedural issue, explaining that although it had the discretion to remand the case to the district court, doing so was not necessary for the court to complete its review and would yield no concrete benefit.[64] Circuit Judge Patrick Higginbotham, writing the majority opinion, which was joined by Circuit Judge Carolyn King, stated that the existing record was sufficient since there were no new factual issues in need of resolution and

---

[60] *Fisher*, 133 S. Ct. at 2421.

[61] *Id.* at 2417, 2421.

[62] *See generally id.*

[63] Appellees' Statement Concerning Further Proceedings on Remand at 1–2, Fisher v. Univ. of Tex. at Austin (*Fisher* on remand), 758 F.3d 633 (5th Cir. 2014) (No. 09-50822), *available at* http://lgdata.s3-website-us-east-1.amazonaws.com/docs/971/812884/Appellees__Statement_Concerning_Further_Proceedings_on_Remand.pdf; Supplemental Brief for Appellees at 5–6, *Fisher* on remand, 758 F.3d 633 (No. 09-50822), *available at* https://www.utexas.edu/vp/irla/Documents/2013-10-25-UT-Fisher.Supp.Br.pdf.

[64] *Fisher* on remand, 758 F.3d at 640–42.

because the reviewing court's error that the Supreme Court noted was made by both the appellate court and the district court in the same way.[65]

Turning to the merits of the case, the majority stated that under the proper strict scrutiny standard, it had a duty to independently evaluate, based on the evidence, whether the school's method of attaining student body diversity was narrowly tailored to meet its asserted diversity goal.[66] To satisfy the narrow tailoring requirement, the reviewing court must find that it is necessary for a university to use race for it to achieve the pedagogical benefits that flow from student diversity and that no workable race-neutral alternatives would bring about these benefits.[67] In conducting its assessment, the court cannot defer to the school on whether the means selected to achieve the school's stated purpose is narrowly tailored to achieve that purpose, but the court can take note of the university's experience and expert knowledge in independently evaluating the school's admission process.[68]

The Fifth Circuit perused the record concerning UT's use of its Top Ten Percent Plan ("Percent Plan"), which gave Texas students who graduate in the top ten percent of their high school class automatic admission to any public university in Texas.[69] This race-neutral method was used to select over eighty percent of its Texas students.[70] The University also used, in conjunction with this admissions program, an individualized, race-conscious holistic review to select the small remaining percentage of the entering class.[71] The court noted that UT additionally engaged in a variety of race-neutral outreach and scholarship programs to facilitate interaction with underrepresented student populations.[72] In its independent assessment, the Fifth Circuit found that the school used a range of race-neutral

---

[65] *Id.* at 641–42.
[66] *Id.* at 643–44.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 645.
[70] *Id.* at 645–46.
[71] *Id.* at 645.
[72] *Id.* at 647–48.

methods to try to grow minority enrollment and admitted the vast majority of its students through the race-neutral Percent Plan.[73]

Moreover, the court found that the University's use of a holistic review process, which considered the race of the applicants as one factor among many, served to complement the pool of students admitted through the Percent Plan.[74] The race-neutral Percent Plan, by looking at only one measure of achievement, failed to bring in students with diverse accomplishments, experiences, and backgrounds that would enrich the class profile but who did not make the rigid ten percent cut-off.[75] The holistic review thus supplemented and complemented the Percent Plan by looking at a spectrum of characteristics and contributions that applicants had to offer.[76] Further, the holistic review was implemented as a highly individualized and highly competitive review process, given the small percentage of seats filled outside the Percent Plan, and did not operate as a quota system or as an unlimited program in terms of time.[77] In painstakingly examining all of these aspects of UT's admissions program, the court held that the school's means for achieving its goal of student body diversity was narrowly tailored and thus strict scrutiny was satisfied.[78] As a result, the Fifth Circuit affirmed the district court's grant of summary judgment in favor of the University.[79]

---

[73] *Id.* at 649.

[74] *Id.* at 653.

[75] *Id.*

[76] *Id.*

[77] *Id.* at 647, 654.

[78] *Id.* at 637, 659.

[79] *Id.* at 637, 660. In July 2014, Plaintiff Abigail Fisher submitted a petition for rehearing en banc in the Fifth Circuit, and the court of appeals denied the petition. Petition for Rehearing En Banc at 1, *Fisher* on remand, 758 F.3d 633 (No. 09-50822), *available at* http://www.utexas.edu/vp/irla/Documents/7.29.14.Fisher.Petition.for.Rehearing.En.Banc.pdf; Order Denying Rehearing En Banc, *Fisher* on remand, 758 F.3d (No. 09-50822), *available at* http://www.utexas.edu/vp/irla/Documents/11.12.2014.Rehearing.En.Banc.DENIED.pdf. In February 2015, the plaintiff filed a writ of certiorari in the U.S. Supreme Court, and on June 29, 2015, the Supreme Court agreed to hear the case during its 2015–16 term. Petition for Writ of Certiorari, Fisher v. Univ. of Tex. at Austin, No. 14-981 (U.S. argued Dec. 9, 2015), 2015 WL 603513; Fisher, SCOTUSBLOG, *supra* note 1.

Circuit Judge Emilio Garza wrote a dissenting opinion, in which he questioned what the University meant when it used the term "critical mass" of student diversity.[80] In his view, the school framed its diversity goal as achieving a critical mass but was unable to objectively define this term in order to enable the court to do its separate assessment.[81] Because Judge Garza found that the school was unable to satisfactorily define critical mass and what it requires, he did not think the court could make an independent determination as to whether the school's race-conscious means of achieving this critical mass were narrowly tailored.[82] The majority, however, did not find fault with the University's use of this term because it understood that critical mass could not be defined simply as a numerical goal.[83] The majority demonstrated a fuller and more contextualized understanding of critical mass in trying to achieve student body diversity, stating:

> Critical mass, the tipping point of diversity, has no fixed upper bound of universal application, nor is it the minimum threshold at which minority students do not feel isolated or like spokespersons for their race. *Grutter* defines critical mass by reference to a broader view of diversity rather than by the achievement of a certain quota of minority students. Here, UT Austin has demonstrated a permissible goal of achieving the educational benefits of diversity within that university's distinct mission, not seeking a percentage of minority students that reaches some arbitrary size.[84]

C. Electoral Review Under Schuette

In *Schuette*, the Supreme Court's most recent decision on affirmative action, the Court did not disturb the strict scrutiny analysis for race-conscious decisionmaking. Rather, the Court addressed a different issue concerning the electoral process and state affirmative action programs. *Schuette* allows for limitations on the ability of state actors to use affirmative action if the restrictions are made part of a state's constitution through

---

[80] *Fisher* on remand, 758 F.3d at 661–62 (Garza, J., dissenting).
[81] *Id.* at 661, 666.
[82] *Id.* at 666.
[83] *Id.* at 654 (majority opinion).
[84] *Id.* at 656.

voter enactment or amendment.[85] *Schuette* thus presented questions concerning the legislative process at the state level on whether state actors can consider race in making decisions.

But this case, in allowing a state's voters to weigh in on whether a state actor can consider race in making decisions, even for constitutionally valid programs such as the University of Michigan's revised college admissions process,[86] arguably permits another type of review—what can be called an "electoral review"—of a public actor's affirmative action program, in addition to the already required judicial review of such programs. This electoral review exists as another layer of review by making it possible for a state's electorate to review, and approve or reject, a governmental actor's race-conscious decisionmaking.[87] If voters are permitted to approve or reject an affirmative action plan after public debate via electoral review, as seen in *Schuette*,[88] then state actors should be further prepared to provide information to the public at large concerning their race-conscious affirmative action programs in the event that the use of race in state decisions is brought up for a public vote. Thus, sufficient evidence to show why and how race is being considered is relevant and central for independent judicial review and any potential electoral review.

II. AFFIRMATIVE ACTION UNDER TITLE VII

As for either a private-sector or public-sector employer's use of race as part of a voluntary affirmative action plan under Title VII, the statutory language of Title VII does not prohibit voluntary affirmative action efforts.[89] On the contrary, the Supreme Court has ruled that the statute allows voluntary affirmative action to address racial or gender imbalances.[90] In enacting Title VII, Congress sought to avoid unnecessary federal

---

[85] Schuette v. Coal. To Defend Affirmative Action, 134 S. Ct. 1623, 1635, 1638 (2014).

[86] *Id.* at 1638.

[87] *See id.* at 1629 ("After a statewide debate on the question of racial preferences in the context of governmental decisionmaking, the voters, in 2006, adopted an amendment to the State Constitution prohibiting state and other governmental entities in Michigan from granting certain preferences, including race-based preferences, in a wide range of actions and decisions.").

[88] *See id.*

[89] United Steelworkers of Am. v. Weber, 443 U.S. 193, 203–04 (1979).

[90] *See id.* at 204–06; Johnson v. Transp. Agency, 480 U.S. 616, 641–42 (1987).

regulation of private businesses.[91] Further, Title VII was enacted under Congress's commerce power to govern private-sector actors and was not meant to incorporate the requirements of the Fourteenth Amendment.[92] Title VII thus has been interpreted to allow for an employer's exercise of business judgment in meeting the statute's antidiscrimination goals. If an employer's business judgment is that diversity is essential to its institutional mission, then this should receive some judicial deference under Title VII. Although business necessity cannot be used as a defense to a charge of intentional discrimination,[93] using business necessity would be permissible in setting forth a valid affirmative action plan because asserting the existence of a lawful affirmative action plan is not an affirmative defense but simply does not amount to action that violates Title VII.[94]

A. *Applying* Weber *and* Johnson *in Implementing Workplace Affirmative Action*

The Supreme Court first addressed affirmative action under Title VII in *United Steelworkers of America v. Weber*[95] and *Johnson v. Santa Clara Transportation Agency*;[96] these cases remain the relevant precedent for private and public employers under Title VII. In *Weber*, the private employer implemented a voluntary affirmative action plan, which was negotiated with the

---

[91] *Weber*, 443 U.S. at 206–07.

[92] *Id.* at 206 n.6.

[93] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k)(2) (2012); Estlund, *supra* note 29, at 35.

[94] *See Johnson*, 480 U.S. at 626–27 ("As a preliminary matter, we note that petitioner bears the burden of establishing the invalidity of the Agency's Plan. Only last Term, in *Wygant v. Jackson Board of Education*, we held that '[t]he ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative-action program,' and we see no basis for a different rule regarding a plan's alleged violation of Title VII. This case also fits readily within the analytical framework set forth in *McDonnell Douglas Corp. v. Green*. Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision. The existence of an affirmative action plan provides such a rationale. If such a plan is articulated as the basis for the employer's decision, the burden shifts to the plaintiff to prove that the employer's justification is pretextual and the plan is invalid. . . . [R]eliance on an affirmative action plan is to be treated as an affirmative defense requiring the employer to carry the burden of proving the validity of the plan. The burden of proving its invalidity remains on the plaintiff." (citation omitted)).

[95] 443 U.S. 193.

[96] *Johnson*, 480 U.S. at 619.

union, that reserved for black employees fifty percent of open positions in newly-created training programs until the percentage of skilled black craftworkers approached the percentage of blacks in the local labor force.[97] Before this plan was implemented, craftworker jobs were filled with employees who had craft experience, commonly gained through an apprentice system that historically had excluded blacks.[98] Brian Weber, an unskilled white worker, sued under Title VII because black workers with less seniority than he had were accepted into the craft training program.[99] The Supreme Court upheld the employer's voluntary, race-conscious affirmative action plan under Title VII.[100]

As the Court explained, this affirmative action plan was permissible because "the plan [did] not unnecessarily trammel the interests of the white employees [and did] not require the discharge of white workers and their replacement with new black hirees. Nor [did] the plan create an absolute bar to the advancement of white employees."[101] "Moreover, the plan [was] a temporary measure."[102] An employer's use of a voluntary, race-conscious affirmative action plan, if it meets these requirements, is not discrimination under Title VII.[103]

Johnson built on *Weber*'s analysis regarding the validity of an employer's voluntary affirmative action plan under Title VII and involved a gender-conscious plan.[104] In *Johnson*, a county employer unilaterally implemented an Affirmative Action Plan ("Plan") that applied to employee promotions.[105] The employer was allowed to take gender into account as a factor when making promotion decisions within a traditionally segregated job category where women were greatly underrepresented.[106] In its Plan, the employer noted that women were underrepresented in the agency as a whole and in particular in five of seven job categories, and that the agency's female workers were clustered

---

[97] *Weber*, 443 U.S. at 197–99.
[98] *Id.* at 198.
[99] *Id*. at 199–200.
[100] *Id.* at 200.
[101] *Id.* at 208 (citation omitted).
[102] *Id.*
[103] *See id.* at 208–09.
[104] Johnson v. Transp. Agency, 480 U.S. 616, 616–17 (1987).
[105] *Id.* at 619.
[106] *Id.* at 620–21.

largely in clerical and office positions which were traditionally occupied by women.[107] The county employer's long-term objective was to attain a workforce whose composition mirrored the proportion of minorities and women in the surrounding area's labor force.[108] The Plan advised creating short-term goals that would be updated yearly and used as a practical guide in making employment decisions at the agency.[109]

The plaintiff, Paul Johnson, was a male employee who applied for a promotion to become a road dispatcher.[110] Diane Joyce, a female employee who also applied for this position, was promoted pursuant to the agency's Plan.[111] For this road dispatcher position, Johnson and Joyce, along with seven other applicants, were found to be qualified for the job, and they each were given an interview with a two-person board.[112] Seven of the applicants, again including Johnson and Joyce, "were certified as eligible for selection by the appointing authority."[113] Three agency supervisors completed a second interview round, and they recommended that Johnson be promoted.[114] Before this second interview, Joyce had contacted the county's Affirmative Action Office due to a concern that her application would not receive serious consideration.[115] Consequently, the Affirmative Action Office reached out to the agency's Affirmative Action Coordinator who recommended to the agency's director that Joyce be promoted.[116] There were no skilled female craftworkers in the agency at the time, and a woman had never been employed as a road dispatcher at the agency.[117] The director ultimately decided to promote Joyce to road dispatcher.[118]

The Court found the agency's Plan to be permissible under Title VII, relying on *Weber* as the guiding precedent.[119] The Court first considered whether there was a manifest imbalance

---

[107] *Id.* at 621.
[108] *Id.* at 621–22.
[109] *Id.* at 622.
[110] *Id.* at 619.
[111] *Id.*
[112] *Id.* at 623.
[113] *Id.* at 623–24.
[114] *Id.* at 624.
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.* at 624–25.
[119] *See id.* at 627–28, 630–39, 642.

in skilled craft positions, leading to the underrepresentation of women in a traditionally segregated job category that would justify using gender as a factor in assessing applicants for these jobs.[120] According to the Court, gender was properly taken into account in order to correct the underrepresentation of women in skilled craft jobs.[121] Next, the Court examined whether the Plan "unnecessarily trammeled the rights of male employees or created an absolute bar to their advancement."[122] Because the Plan did not set aside positions exclusively for women and instead authorized the consideration of gender as one of many factors when evaluating applicants, the Plan required that all qualified female applicants be evaluated against all other qualified applicants for these skilled craft jobs.[123] The Court further noted that Johnson, the male petitioner, was not entitled in an absolute sense to the promotion he sought since he was one of seven applicants who were deemed qualified and eligible for the position.[124] Also, Johnson continued to have his job with the county employer and was eligible to apply for other advancement opportunities.[125]

For an affirmative action plan to be permissible under Title VII, the plan also must be temporary—that is, the plan must be intended to eliminate manifest racial or gender imbalance, but not to maintain a racial or gender balance.[126] The Plan at issue satisfied this requirement by taking realistic, incremental steps to eliminate gender underrepresentation and stating a goal of attaining a balanced workforce.[127]

The Court in *Johnson* also clarified that under either Title VII or the Constitution, the petitioner bears the burden of establishing that the employer's affirmative action plan is invalid.[128] If the plaintiff can prove this, then the plan would amount to a formal policy of discrimination and, as such, would violate Title VII as well as the Equal Protection Clause.[129] But,

---

[120] *Id.* at 631–32.
[121] *Id.* at 634, 636–37.
[122] *Id.* at 637–38.
[123] *Id.* at 638.
[124] *Id.*
[125] *Id.*
[126] *Id.* at 639–40.
[127] *Id.*
[128] *Id.* at 626.
[129] *Id.*

as seen through the constitutional cases and Title VII cases on the validity of employer plans, Title VII takes a more flexible approach to affirmative action than does the Constitution.

B. Lessons from Ricci*,* Fisher*, and the 1991 Civil Rights Act*

In *Ricci v. DeStefano*,[130] a 2009 Supreme Court case, the Court took a notable turn in importing a constitutional test into its analysis under Title VII, although the case did not deal with affirmative action but with disparate-treatment and disparate-impact discrimination.[131] Specifically, *Ricci* involved the discarding of test results normally used to make promotion decisions in the city's firefighting department by a city employer because of a statistical racial disparity in the results after the test was given.[132] *Ricci* held that the city's action in discarding the test results was race-based and that under Title VII such race-based action is prohibited unless the city could show a strong basis in evidence that had it not taken this action it would have been liable for disparate-impact discrimination.[133]

Although this strong-basis-in-evidence test had previously only been used in the constitutional context to assess claims of discrimination under the Equal Protection Clause, the Supreme Court explained that it should be further employed in the Title VII context because this standard would ensure that the statute's disparate-treatment and disparate-impact provisions are both enforced.[134] This standard would permit an infringement on one provision in order to uphold the other only in certain limited situations.[135] According to the Court:

> The standard leaves ample room for employers' voluntary compliance efforts, which are essential to the statutory scheme and to Congress's efforts to eradicate workplace discrimination. And the standard appropriately constrains employers' discretion in making race-based decisions: It limits that discretion to cases in which there is a strong basis in evidence of disparate-impact liability, but it is not so restrictive that it allows employers to act only when there is a provable, actual violation.[136]

---

[130] 557 U.S. 557 (2009).
[131] *Id.* at 562.
[132] *Id.*
[133] *Id.* at 583–85.
[134] *Id.* at 583.
[135] *Id.*
[136] *Id.*

By extending the applicability of this constitutional standard to Title VII, the *Ricci* Court moved toward some convergence between the constitutional and statutory approaches, at least when evaluating the statute's disparate-treatment and disparate-impact provisions and created a higher evidentiary burden under Title VII. But *Ricci* was not an affirmative action case, and *Johnson*, which dealt with affirmative action under Title VII, clearly held that Title VII should not be interpreted to incorporate the commands of the Constitution.[137] *Ricci* and *Fisher* indicate, however, that the Supreme Court is looking for strong evidentiary support when it reviews decisions involving race, whether under Title VII or the Constitution.

Further, Title VII was amended by the 1991 Civil Rights Act ("the 1991 Act"),[138] which added section 116[139] as an amendment to Title VII, and is the only part of the statute that expressly refers to affirmative action,[140] stating, "Nothing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law."[141] This statement can be interpreted to mean that the 1991 Act, in amending Title VII, does not affect affirmative action that is in accordance with Title VII or any other law. In enacting the 1991 amendments to Title VII, Congress expressly rejected the Supreme Court's decision in an earlier Title VII case but did not take any action to modify or reject the Supreme Court's rulings in *Weber* and *Johnson*.[142] In fact, section 116 appears to preserve

---

[137] *Id.* at 563; Johnson v. Transp. Agency, 480 U.S. 616, 627 n.6 (1987). *But see generally* Sachin S. Pandya, *Detecting the Stealth Erosion of Precedent: Affirmative Action After* Ricci, 31 BERKELEY J. EMP. & LAB. L. 285 (2010) (arguing that the Supreme Court in *Ricci* wrote the decision in a way designed to intentionally erode *Weber* and *Johnson* in order to advance an interpretation of Title VII that would allow affirmative action plans only in situations where the employer sought to remedy its own actual or arguable prior discrimination).

[138] Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[139] *Id.* § 116, 105 Stat. at 1079; 42 U.S.C. § 2000e-2 (2012).

[140] Pub. L. No. 102-166, § 116, 105 Stat. at 1079.

[141] *Id.*

[142] *Id.* §§ 2–3, 105 Stat. at 1071. ("The Congress finds that . . . the decision of the Supreme Court in Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections [and] legislation is necessary to provide additional protections against unlawful discrimination in employment. . . . The purposes of this Act are . . . to codify the concepts of 'business necessity' and 'job related' enunciated by the Supreme Court in

the legal force of those cases by stating that nothing in the 1991 Act affects affirmative action plans that are in accordance with these cases, and section 116 makes no changes to the Court's holdings.[143] Thus, *Weber* and *Johnson* continue to serve as the applicable precedent for affirmative action cases under Title VII.

But to the extent that the Supreme Court's approach to affirmative action under Title VII becomes stricter after *Ricci* and *Fisher*, and potentially more aligned with the constitutional test, public and private employers who wish to implement race-conscious or gender-conscious affirmative action plans for hiring and promotion decisions would be well advised to model their selection processes based on those in not just *Weber* and *Johnson*, but also the processes used in *Grutter* and *Fisher*. Private sector employers who implement affirmative action policies should be prepared to satisfy the standards set out in *Weber* and *Johnson* as well as prepared to potentially have to satisfy something closer to the strict scrutiny standard under *Grutter* and *Fisher*. In other words, a reviewing court may need to independently assess the validity of the program in the event that the Supreme Court also moves toward a more rigorous evidentiary assessment of affirmative action programs by private sector employers.

CONCLUSION

The Supreme Court's decision on race-conscious affirmative action in *Fisher*, along with the Fifth Circuit's ruling in *Fisher* on remand, importantly preserves the validity of affirmative action programs in state decisionmaking if the programs meet certain criteria under strict scrutiny and satisfy full judicial review.

Griggs v. Duke Power Co., 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989).").

[143] In fact, in *Johnson* the Supreme Court noted the lack of congressional reaction to *Weber*:

> As Justice Blackmun said in his concurrence in *Weber*, "[I]f the Court has misperceived the political will, it has the assurance that because the question is statutory Congress may set a different course if it so chooses." Congress has not amended [Title VII] to reject our construction [in *Weber*], nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct.

Johnson v. Transp. Agency, 480 U.S. 616, 629 n.7 (1987) (first alteration in original) (citation omitted); *see also* Michael J. Zimmer, *Taxman: Affirmative Action Dodges Five Bullets*, 1 U. PA. J. LAB. & EMP. L. 229, 233–35 (1998).

Although *Fisher* arose in the higher education context,[144] its application extends to the public setting more generally and thus would also apply to the public sector workplace under the Constitution, making it permissible for public sector employers to use race-conscious affirmative action in hiring and promoting employees. The approach taken in *Fisher* also provides relevant considerations for private sector employers who pursue affirmative action under Title VII, even if indirectly. Private sector employers can still look to *Weber* and *Johnson* in proceeding with affirmative action programs that consider race or gender; moreover, to further bolster their use of race in the wake of the Supreme Court's decisions in *Fisher* and *Grutter*, they would be wise to also take note of the Court's recent views concerning the evidentiary requirements needed to uphold such programs in the public sector.

[144] Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2415 (2013).