PENN STATE
LAW REVIEW

REFLECTIONS ON *FISHER V. UNIVERSITY OF TEXAS II* AND CAMPUS PROTESTS OVER RACIAL INEQUALITY

Elizabeth B. Meers

VOL. 120 SPRING 2016 ISSUE 4

A Journal Publication of The Pennsylvania State University Dickinson School of Law
Published as The Forum *from 1897-1908, and as* Dickinson Law Review *from 1908-2003*

Article

Reflections on *Fisher v. University of Texas II* and Campus Protests over Racial Inequality

Elizabeth B. Meers*

Abstract

Colleges and universities frequently receive requests and demands from constituents to take race into account in selection of faculty, admission of students, and financial aid. Colleges and universities seek to promote racial and other diversity on campus and are open to ways to increase it. Donors, alumni, faculty, and students are often unaware of the legal framework that governs whether and how colleges and universities can consider race in making such decisions, and college and university administrators often seek guidance from counsel. This article aims to speak not only to legal scholars and campus lawyers, but to the wider campus community about the objectives that a college or university may

* Partner, Hogan Lovells US LLP; Georgetown University Law Center, J.D. 1980; Radcliffe College, B.A. 1975. Hogan Lovells served as counsel to the American Council on Education and other higher education associations as *amici curiae* in *Fisher v. University of Texas*. This article expresses the views of the author, not necessarily those of Hogan Lovells or its clients, and does not constitute legal advice. This article is an updated version of a presentation at *Penn State Law Review*'s Symposium on College and the Constitution on March 24, 2016. Many thanks to *Penn State Law Review* for the invitation to participate in the Symposium and to Hogan Lovells colleagues for their assistance in preparing the presentation and this article.

and may not seek through race-conscious means and the race-conscious methods that a college or university may and may not use to accomplish those goals. In light of the U.S. Supreme Court's second decision concerning race-conscious admissions in *Fisher v. University of Texas*, the time is ripe to survey this broader landscape, identify gaps, and consider whether and to what extent *Fisher II* fills them.

I. INTRODUCTION

The U.S. Supreme Court's consideration for the second time of the race-conscious admissions policy of the University of Texas at Austin (the "University" or "UT") has come at a moment of heightened awareness of persistent racial inequalities in our nation and calls for action by university and other leaders in our society. Sparked by protests at the University of Missouri, students, faculty members, and other constituents at colleges and universities around the country have demanded that institutions increase the racial diversity of their faculty and student bodies, including by implementing race-conscious measures.[1] The current crises magnify proposals that colleges and universities have received over the years for contributions from alumni and other donors to fund race-conscious scholarships, fellowships, professorships, and other programs.

Colleges and universities are committed to fostering diversity, including racial diversity, in their student bodies and faculty. Institutions welcome financial support from alumni and other donors, and ideas from all constituents, to increase diversity on campus and improve campus climate. But students, faculty, alumni, and donors often are unaware of the legal framework within which colleges and universities can consider race. As a result, constituents may make proposals or demands that would not or may not be permissible for the institution to accept.

Colleges and universities address diversity initiatives in a legally unsettled and litigious environment. Legislatures, regulatory agencies, and the courts have established some bright lines, but many questions about the lawful scope of race-conscious measures remain. In seeking to foster diversity, colleges and universities must remember the legal limitations on race-conscious measures and seek to avoid the cost and publicity of unnecessary legal challenges by private parties and/or enforcement actions by government agencies. College and university administrators typically discuss race-conscious proposals with counsel

1. *See generally* Leah Libresco, *Here Are The Demands From Students Protesting Racism At 51 Colleges*, FIVETHIRTYEIGHT (Dec. 3, 2015), http://fivethirtyeight.com/features/here-are-the-demands-from-students-protesting-racism-at-51-colleges/; *Our Demands*, BLACK LIBERATION COLLECTIVE (Mar. 18, 2016), http://www.blackliberationcollective.org/our-demands/ [hereinafter *Our Demands*].

and aim to arrive at an approach that fosters diversity in a legally permissible manner.

In addressing ways to reduce racial inequality on campus and in the broader society, it is important for both colleges and universities and their constituents to understand the nature of the constitutional right to Equal Protection, statutory rights to equal opportunity, the objectives that institutions may and may not seek to achieve through race-conscious means, and the race-conscious methods that institutions may and may not use to accomplish those goals. The Supreme Court's decision upholding the race-conscious component of UT's admissions policy in *Fisher II*[2] may bear on that dialogue in a variety of ways.

II. BASIC PRINCIPLES OF EQUAL PROTECTION AND NONDISCRIMINATION LAWS

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws."[3] From that basic principle the U.S. Supreme Court has derived a number of fundamental rules. Several are particularly relevant to the *Fisher* case and the current calls for greater racial equality on campus and in the wider society.

First, the Equal Protection Clause limits action by the state, not private parties.[4] The Court has also applied equal protection principles to the federal government via the Due Process Clause of the Fifth Amendment.[5] Congress and state and local governments, of course, have enacted laws that prohibit discrimination on the basis of race by private parties, as well.[6] As discussed below, the relationship between the Equal Protection Clause and these statutes varies from law to law.

2. 136 S. Ct. 2198 (2016). Reduced to seven Justices by the death of Justice Antonin Scalia and the recusal of Justice Elena Kagan, who had been involved in the *Fisher* case at the U.S. Department of Justice, the Court decided *Fisher II* with a 4-3 vote.

3. U.S. CONST. amend. XIV, § 2.

4. The Court's state action doctrine is beyond the scope of this article. *See generally* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001); Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999); DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189 (1989); Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988); Blum v. Yaretsky, 457 U.S. 991 (1982); Jackson v. Metro. Edison Co., 419 U.S. 345 (1974); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961).

5. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law"); *see, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

6. *See, e.g.*, 42 U.S.C. § 1981 (1991) ("Section 1981") (prohibiting racial discrimination in contracting); Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race by recipients of federal financial assistance); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) ("Title VII") (prohibiting racial discrimination in employment).

Second, the Equal Protection Clause "protects *persons*, not *groups*."[7] The legal analysis "is not dependent on the race of those burdened or benefited by a particular classification."[8] In *Regents of the University of California v. Bakke*,[9] a majority of the Court rejected the view that an admissions policy preferring minorities would be justified if "there has been some form of discrimination against the preferred minority groups by 'society at large'" and "'there is reason to believe' that the disparate impact sought to be rectified by the program is the 'product' of such discrimination."[10]

Therefore, "all 'governmental action based on race – a *group* classification long recognized as in most circumstances irrelevant and therefore prohibited – should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.'"[11] That "detailed judicial inquiry," which the Court has come to call "strict scrutiny," "means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests."[12] The Court "appl[ies] strict scrutiny to all racial classifications to smoke out illegitimate uses of race by assuring that government is pursuing a goal important enough to warrant use of a highly suspect tool."[13]

III. STRICT SCRUTINY REQUIRES LAWFUL OBJECTIVES ("COMPELLING INTEREST") AND NARROWLY TAILORED MEANS

Campus constituents have increasingly called for race-based countermeasures to racial injustice. The community needs to understand better the objectives and methods that the Supreme Court has approved for consideration of race by higher education institutions, as well as those it has not.

7. Grutter v. Bollinger, 539 U.S. 306, 326 (2003) (quoting *Adarand*, 515 U.S. at 227 (internal quotation marks and citations omitted)); *accord Bakke*, 438 U.S. at 289.
8. Gratz v. Bollinger, 539 U.S. 244, 270 (2003) (quoting *Adarand*, 515 U.S. at 224 (in turn quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 494 (1989) (plurality opinion) (internal quotation marks omitted)); *accord Bakke*, 438 U.S. at 290 (stating that if persons of different colors "are not accorded the same protection, . . . it is not equal").
9. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
10. *Bakke*, 438 U.S. at 296 n.36 (quoting *id.* at 369 (Brennan, J., concurring in part & dissenting in part)); *see also id.* at 297–98 n.37 (quoting DeFunis v. Odegaard, 416 U.S. 312, 337–40 (1974) (Douglas, J., dissenting)); *id.* at 408–21 (Stevens, J., concurring in part & dissenting in part).
11. *Grutter*, 539 U.S. at 326 (quoting *Adarand*, 515 U.S. at 227 (internal quotation marks and citation omitted)); *accord Bakke*, 438 U.S. at 290–91; 408–21 (Stevens, J., concurring in part & dissenting in part).
12. *Grutter*, 539 U.S. at 326.
13. *Id.* (quoting *Richmond*, 488 U.S. at 493 (plurality opinion) (internal quotations and punctuation omitted)).

A. *"Compelling Interest"*

Over the years litigants have argued that a number of interests rise to the level of "compelling." The Court has rejected most of them, but approved a few.

1. Objectives That Are Not Compelling

a. Seeking Racial Balance

To seek racial balance is not a compelling interest under current law. Racial balance includes trying to mirror racial demographics in a given community, such as the student body or faculty. "Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake"[14] and is "patently unconstitutional."[15]

b. Remedying Societal Discrimination

To remedy societal discrimination is not a compelling interest under current law. The "Court never has held that societal discrimination alone is sufficient to justify a racial classification. . . . Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy."[16]

c. Providing Role Models

To provide role models for particular races is not a compelling interest under current law. The Court rejected this interest in the context of a racial preference for minority teachers in layoff decisions, which was intended to provide role models for minority students.[17] The Court reasoned that the role model theory would allow the government to engage in "discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose."[18] The Court also worried that "[c]arried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education*."[19]

d. Preparing Professionals to Work in Underserved Minority

14. *Bakke*, 438 U.S. at 307.
15. *Grutter*, 539 U.S. at 330.
16. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274, 276 (1986) (plurality opinion).
17. *Id.* at 275.
18. *Id.*
19. *Id.* at 276; *see* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

Communities

To increase the number of professionals working in underserved, minority communities is not a compelling interest under current law without proof of correlation between race-conscious admissions and such post-graduate service.[20] In the context of medical school admissions preferences, the Court has explained that although it may be "assumed that in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling," there was no proof that setting aside seats for minority medical students would yield physicians practicing in underserved minority communities.[21] "[A]n applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage."[22]

2. Accepted Compelling Interests

In the higher education context, the Supreme Court has so far approved just two compelling interests: 1) overcoming the present effects of past discrimination by the institution and 2) achieving the educational benefits of a diverse student body.[23] These interests can justify higher education institutions' narrowly tailored use of race.

a. Remedying the Present Effects of Past Discrimination by the Institution

To remedy the present effects of the institution's past discrimination is a compelling interest under current law.[24] This compelling interest encompasses, at one end of the spectrum, remedies for identified victims of adjudicated racial discrimination, but not, at the other end, remedies for societal discrimination.[25]

Less clear is whether this interest is compelling absent judicial, legislative, or administrative findings necessary to justify remedial racial classifications.[26] The Court has "stressed" that a government that seeks to

20. *Bakke*, 438 U.S. at 310.
21. *Id.*
22. *Id.* at 311.
23. In the K-12 context, it appears that avoiding racial isolation also qualifies as a compelling interest. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 792 (2007) (Kennedy, J., concurring).
24. *See* Fisher v. Univ. of Tex. at Austin (*Fisher I*), 133 S. Ct. 2411, 2423 (2013).
25. *See supra* Section III.A.1.b.
26. *See, e.g.*, *Fisher I*, 133 S. Ct. at 2417.

use race to address "past discrimination for which it is responsible"[27] must provide a "strong basis in evidence for its conclusion that remedial action [is] necessary."[28] Colleges and universities typically do not rely on this justification because admission of past discrimination could give rise to other claims, and institutions have found this justification difficult to prove in court.[29]

b. Seeking the Educational Benefits of a Diverse Student Body

In *Fisher II* the Supreme Court reaffirmed that a university has a compelling interest in seeking the educational benefits of a diverse student body.[30] As the Court explained in *Fisher I*, the interest is rooted in an institution's educational judgment that a diverse student body is "conducive to speculation, experiment, and creation."[31] Because grounded in educational judgment and educational benefit, the compelling interest in diversity "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[32] An institution's "educational judgment that such diversity is essential to its educational mission" merits some deference.[33] Yet Courts will require an institution to have a "reasoned, principled explanation for the academic decision."[34]

B. "Narrow Tailoring"

Even when a compelling interest exists, narrow tailoring requires the institution to prove that it has adequately considered race-neutral alternatives and use of race is necessary to achieve the identified interest. As to narrow tailoring, an institution will "receive[] no deference."[35]

27. *Id.* at 2423.
28. Richmond v. J.A. Croson Co., 488 U.S. 469, 500–04 (1989) (plurality opinion) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (plurality opinion)).
29. *See, e.g.*, Podberesky v. Kirwan, 38 F.3d 147, 151 (4th Cir.) (restricting scholarships to minority students was unconstitutional because University of Maryland did not prove that race-exclusive scholarship was narrowly tailored to overcome present effects of past discrimination), *amended on denial of reh'g*, 46 F.3d 5 (4th Cir. 1994).
30. *See* Fisher II, 136 S. Ct. at 2210–11, 2214–15; Grutter v. Bollinger, 539 U.S. 306, 333 (2003).
31. *Fisher I*, 133 S. Ct. at 2418 (citation omitted); *see Fisher II*, 136 S. Ct. at 2210–2211, 2214–2215.
32. *Fisher I*, 133 S. Ct. at 2418 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978)).
33. *Grutter*, 539 U.S. at 328; *accord Fisher II*, 136 S. Ct. at 2207–08; *Fisher I*, 133 S. Ct. at 2418.
34. *Fisher I*, 133 S. Ct. at 2414; *accord Fisher II*, 136 S. Ct. at 2207–08.
35. *Fisher I*, 133 S. Ct. at 2414; *accord Fisher II*, 136 S. Ct. at 2207–08.

In *Fisher I* the Supreme Court explained that an institution must prove, and the court must independently "verify," that "sufficient diversity" cannot be achieved without using racial classifications.[36] Institutions need not exhaust "every conceivable race neutral alternative."[37] But they must give "serious, good faith consideration" to such alternatives.[38] The question is whether such alternatives would achieve the educational benefits of diversity "about as well" as race-conscious means at "tolerable administrative expense."[39]

If a race-conscious strategy is necessary, an institution may not use racial quotas or rigid numeric goals or assign to every minority applicant a set number of bonus points.[40] Rather, narrow tailoring requires that an institution (1) give individualized consideration to all potential recipients of the benefit (regardless of race); (2) not unduly burden members of the non-favored group; and (3) periodically review the need to consider race, and include a time limit on its use.[41]

IV. IMPLICATIONS OF FISHER II FOR PROPOSALS TO ADDRESS RACIAL INEQUALITY

Fisher II did not directly address a number of the issues that bear on race-conscious initiatives currently under discussion at campuses around the country. Nevertheless, the decision not only may affect college and university admissions, but could have ripple effects for other initiatives that are intended to reduce racial inequality on campus.

A. Admissions

Student groups have recently called for quantitative representation of minority groups in the student body as measured by the percentage of minorities in the U.S. or in specified percentages.[42] As noted above, the Supreme Court has long disapproved such numeric absolutes in admissions.

36. *Fisher I*, 133 S. Ct. at 2420.
37. *Id.* (quoting *Grutter* 539 U.S. at 339-40).
38. *Id.*
39. *Id.* (quoting *Wygant*, 476 U.S. at 280 n.6).
40. *See Fisher I*, 133 S. Ct. at 2421; Gratz v. Bollinger, 539 U.S. 244, 270–75 (2003).
41. *See Grutter*, 539 U.S. at 340–43; *see also Parents Involved in Cmty. Sch.*, 551 U.S. at 733–35 (striking down race-conscious student assignment plan for lack of consideration of race-neutral alternatives, among other reasons); *Gratz*, 539 U.S. at 275–76 (striking down race-conscious admissions policy at University of Michigan for lack of individualized consideration).
42. *See generally Our Demands*, *supra* note 1.

In *Fisher II* the Court first approved UT's articulation of its interest in student body diversity as sufficiently "concrete and precise."[43] UT described its goals as destroying stereotypes and providing "'an academic environment' that offers a 'robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders.'"[44] The Court emphasized that UT had engaged in a year-long study, culminating in a 39-page report, to determine whether UT's admissions policy allowed it to provide the educational benefits of a diverse student body to all its undergraduate students.[45]

Although *Fisher II* focused on race-neutral alternatives, the Court reaffirmed the longstanding principle that "[a] university cannot impose a fixed quota or otherwise 'define diversity as "some specified percentage of a particular group merely because of its race or ethnic origin."'"[46] In concluding that UT had met its "heavy burden" of showing that it had adequately considered race-neutral measures,[47] the Court again pointed to UT's "'months of study and deliberation'" and "good faith in conducting its studies."[48] The majority also noted demographic data showing "consistent stagnation" in minority student enrollment at UT during a six-year period when UT was forbidden by law to utilize race-conscious measures.[49] The Court observed that "[a]lthough demographics alone are by no means dispositive, they do have some value as a gauge of the University's ability to enroll students who can offer underrepresented perspectives."[50] The Court also noted that minority students "experienced feelings of loneliness and isolation," corroborated by the low number of minority students in many undergraduate classes.[51]

The Court also accepted the need for UT to consider race in admission because such consideration "had a meaningful, if still limited, effect on the diversity of the entering class."[52] The Court recited statistics showing that in a four-year period after UT's adoption of a race-conscious approach for the portion of the class admitted through "holistic review", the percentage of Hispanic and African-American students enrolled through that process increased 54 and 94 percent, respectively.[53]

43. *Fisher II*, 136 S. Ct. at 2210–11.
44. *Id.* at 2211.
45. *Id.* at 2205–06, 2211.
46. *Id.* at 2208 (citation omitted).
47. *Id.* at 2211.
48. *Id.* at 2211–12.
49. *Id.* at 2212.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*

The Court concluded that at the time of Fisher's application, none of her proposed race-neutral alternatives was "workable".[54] The Court emphasized that UT had "spent seven years attempting to achieve its compelling interest using race-neutral holistic review", but "[n]one of th[ose] efforts succeeded."[55] The majority was particularly critical of the "Top Ten Percent Plan", a Texas law that requires UT to admit up to 75 percent of its student body based on class rank in Texas public schools. The Court observed that "the Top Ten Percent Plan, though facially neutral, cannot be understood apart from its basic purpose, which is to boost minority enrollment" and that "if [college admissions] were a function of class rank alone[, t]hat approach would sacrifice all other aspects of diversity in pursuit of enrolling a higher number of minority students."[56] The Court reaffirmed the principle that "the Equal Protection Clause does not force universities to choose between a diverse student body and a reputation for academic excellence."[57]

Lastly, the Court stressed the need for ongoing review of race-conscious measures. "Through regular evaluation of data and consideration of student experience, the University must tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest."[58]

B. Financial aid

Some current calls to address racial inequality on campus propose increased financial aid for minority students, including scholarships restricted to minority students, and free tuition for minority students.[59] The Supreme Court cases relating to campus diversity have all involved race-conscious admissions decisions.[60] Although few cases involving race-conscious financial aid have reached the courts, those courts have invalidated race-exclusive scholarships as inconsistent with Title VI of the Civil Rights Act of 1964 ("Title VI"), which prohibits discrimination on the basis of race by recipients of federal financial assistance,[61] and the

54. *Id.* at 2212–13.
55. *Id.*
56. *Id.* at 2213.
57. *Id.*
58. *Id.* at 2210.
59. *See generally Our Demands*, *supra* note 1.
60. Fisher II, 136 S. Ct. at 2205–07; Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013); Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); De Funis v. Odegaard, 416 U.S. 316 (1974).
61. 42 U.S.C. § 2000d (2012) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); *see* Flanagan v. Georgetown Coll., 417 F. Supp. 377, 385 (D.D.C. 1976) (finding that set-aside of financial aid for minority law students violated Title VI).

Equal Protection Clause.[62] While the U.S. Department of Education ("Department") has noted differences between financial aid and admissions decisions,[63] it is likely that courts, the Department, and higher education institutions will continue to extrapolate the Court's decisions on race-conscious college admissions, including *Fisher II*, to race-conscious financial aid.[64]

C. Special programs

Student groups also have recently demanded that colleges and universities mount special programs for minority students, such as campus visits for potential minority applicants and bridge programs for students of color.[65] The Supreme Court has not directly addressed the lawfulness of such programs at colleges and universities.[66] As with financial aid, courts,

62. *See* Podberesky v. Kirwan, 38 F.3d 147, 161 (4th Cir. 1994) (en banc) (finding race-exclusive scholarship program was unconstitutional).
63. In 1994 the Department published guidance on race-conscious scholarships under Title VI, which generally followed the Supreme Court's then jurisprudence under Title VI and the Equal Protection Clause. 59 Fed. Reg. 8756 (1994). The Department observed that unlike the admissions quota disapproved in *Bakke*, race-exclusive financial aid does not exclude applicants from a university on the basis of race, and the amount of financial aid available to students is not necessarily fixed. *See id.* at 8759. While not ruling out race-exclusive scholarships, the Department emphasized that they should be a last resort. *See id.* at 8762. The guidance is dated, inasmuch as the law has evolved since 1994 and the importance of financial aid has increased as the price of higher education has risen.
64. Financial aid may also raise issues under Title VII if there are employment aspects to the financial support. *See* Section IV.D.
65. *See generally Our Demands*, *supra* note 1.
66. In other contexts, federal appeals courts have reached differing conclusions about minority-targeted outreach efforts. *Compare* MD/DC/DE Broad. Ass'n v. FCC, 236 F.3d 13, 22–23 (D.C. Cir. 2001) (applying strict scrutiny, court invalidated Federal Communications Commission's rule requiring outreach to minority applicants by broadcast employers as not narrowly tailored), *and* Safeco Ins. Co. of Am. v. City of White House, 191 F.3d 675, 692 (6th Cir. 1999) ("[W]here 'outreach' requirements operate as a *sub rosa* racial preference–that is, where their administration 'indisputably pressures' contractors to hire minority subcontractors–courts must apply strict scrutiny."), *and* Monterey Mech. Co. v. Wilson, 125 F.3d 702, 711 (9th Cir. 1997) (invalidating state statute requiring "good faith" efforts by general contractors to comply with participation goals for minority and women contractors through, among other steps, advertising and bid invitations where program mandated "distribution of information only to members of designated groups, without any requirement or condition that persons in other groups receive the same information"), *with* Dunnet Bay Constr. Co. v. Borggren, 799 F.3d 676, 697–98 (7th Cir. 2015) (applying strict scrutiny in upholding disadvantaged business enterprise participation goal of 20%), *and* N. Contracting, Inc. v. Illinois, 473 F.3d 715, 719–20 (7th Cir. 2007) (applying strict scrutiny in upholding goal of 22.77% participation by disadvantaged business enterprises because program was "narrowly tailored to the compelling interest identified by the federal government—remedying the effects of racial and gender discrimination in the highway construction market"), *and* Allen v. Ala. State Bd. of Educ., 164 F.3d 1347, 1352 (11th Cir. 1999) ("[W]here the government does not

the Department, and colleges and universities are likely to continue to apply principles from the Supreme Court's decisions in admissions cases to special programs intended to foster student body diversity.

D. Employment

A focal point of recent campus unrest has been the level of faculty diversity. Groups have called for a range of strategies to increase faculty diversity, including demands that minority faculty equal minority percentages in the national population or the student population or a specified percentage of faculty.[67]

For public institutions covered by the Equal Protection Clause, the Supreme Court to date has recognized only one compelling interest to justify consideration of race in employment – remedying the effects of prior discrimination by the public employer.[68] *Fisher II* addressed consideration of race only in connection with student body—not faculty—diversity under the Equal Protection Clause.

Public as well as private employers are subject to Title VII of the Civil Rights Act of 1964, which prohibits employment decisions "because of" race and certain other characteristics.[69] While the Court has distinguished Title VII analysis from its Equal Protection jurisprudence,[70] Title VII, like the Equal Protection Clause, allows an employer to consider race in employment decisions when necessary to remedy past discrimination in employment by the employer.[71] Title VII also permits

exclude persons from benefits based on race, but chooses to undertake outreach efforts to persons of one race, broadening the pool of applicants, but disadvantaging no one, strict scrutiny is generally inapplicable."), *vacated*, 216 F.3d 1263 (11th Cir. 2000).

67. *See generally Our Demands*, *supra* note 1.

68. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283–84 (1986) (invalidating under Equal Protection Clause provision of public school district's collective bargaining agreement that gave minority teachers preferential protection against layoffs).

69. 42 U.S.C. § 2000e-2(a) (2012). Courts apply the Title VII standard to cases brought under Section 1981 alleging racial discrimination in an employment contract. Coleman v. Blockbuster, Inc., 352 F. App'x 676, 680 (3d Cir. 2009); Takele v. Mayo Clinic, 576 F.3d 834, 838 (8th Cir. 2009); Schurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486, 498–99 (3d Cir. 1999). Title VI does not apply to the employment actions of federally funded universities unless the purpose of the federal financial assistance relates to employment. 42 U.S.C. § 2000d–3 (2012); *see* Johnson v. Cmty. Coll. of Allegheny Cty,. 566 F. Supp. 2d 405, 457 (W.D. Pa. 2008). *See generally* AM. ASS'N FOR THE ADVANCEMENT OF SCI. & ASS'N OF AM. UNIVS., HANDBOOK ON DIVERSITY AND THE LAW: NAVIGATING A COMPLEX LANDSCAPE TO FOSTER GREATER FACULTY AND STUDENT DIVERSITY IN HIGHER EDUCATION 77–126 (2010).

70. *See, e.g.,* Johnson v. Transp. Agency, 480 U.S. 616, 632 (1987) (noting that Court does "not regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans").

71. *See, e.g.*, Officers for Justice v. Civil Serv. Comm'n of San Francisco, 979 F.2d 721, 726–27 (9th Cir. 1992); *see also* Ricci v. DeStefano, 557 U.S. 557, 583–84 (2009) (reporting that City of New Haven, in effort to combat past discrimination, improperly

consideration of race in certain circumstances without evidence that the employer itself engaged in discrimination. In those instances, the employer's consideration of race as an affirmative action measure must be necessary to eliminate a demonstrated manifest imbalance in a traditionally segregated job group, must be temporary in nature, and must not unnecessarily trammel the rights of others or create an absolute bar to their advancement.[72] For the purpose of eliminating such manifest imbalance, the Supreme Court has upheld under Title VII a job apprenticeship program that temporarily allocated a portion of slots by race[73] and a hiring decision that used gender as a flexible plus factor when considered on a case-by-case basis along with qualifications.[74] In both of these cases, the employer examined the composition of the workforce in relation to the relevant labor pool, and there was a long-standing pattern of exclusion.[75]

discarded its firefighter examination to achieve more desirable racial distribution of promotion-eligible candidates; there was no strong basis in evidence that examination was deficient and that discarding it was necessary to avoid unlawful disparate impact related to race). For Section 1981 race discrimination cases in the employment context, a valid affirmative action plan serves as a defense, and the standard for evaluating the validity of a plan is identical to the standard developed under Title VII decisions. See Schurr v. Resorts Int'l Hotel, Inc., 196 F.3d 486, 498–99 (3d Cir. 1999).

72. *See Johnson*, 480 U.S. at 630; United Steelworkers v. Weber, 443 U.S. 193, 208–09 (1979).

73. *See United Steelworkers*, 443 U.S. at 208–09.

74. *See Johnson*, 480 U.S. at 640–42.

75. Lower court decisions in higher education cases have generally followed the Supreme Court's standards described above. *See, e.g.*, Rudin v. Lincoln Land Cmty. Coll., 420 F.3d 712, 721–22 (7th Cir. 2005) (denying college's motion for summary judgment in Title VII case because insertion of African American male into interview pool in manner bypassing first eliminations provided circumstantial evidence of race discrimination where college did not argue that it engaged in affirmative action in order to remedy any past discrimination or for some other remedial purpose and abandoned defense based on diversity rationale); Hill v. Ross, 183 F.3d 586, 590, 592 (7th Cir. 1999) (reversing summary judgment for university, stating that under Title VII and constitutional standards, public university had to articulate nondiscriminatory rationale for decision to take race or gender into account and, on remand, would need to demonstrate that it acted pursuant to permissible affirmative action plan); Taxman v. Piscataway Bd. of Educ., 91 F.3d 1547, 1557–58 (3d Cir. 1996) (stating faculty diversity is not permissible rationale for race-conscious employment decisions under Title VII; invalidating provision in collective bargaining agreement that gave minority teachers preference in case of tie in layoff decisions), *cert. dismissed*, 527 U.S. 1010 (1997); Honadle v. Univ. of Vt. & State Agric. Coll., 56 F. Supp. 2d 419, 423, 429 (D. Vt. 1999) (upholding, against Title VII challenge, voluntary affirmative action plan of public university that made incentive funds available to departments to encourage minority hiring in order to correct manifest imbalance in job group at issue because incentive funding "was not intended to influence hiring decisions" and no more than $10,000 could be made available to assist in any given hire); Univ. & Cmty. Coll. Sys. of Nevada v. Farmer, 930 P.2d 730, 737 (Nev. 1997) (upholding university decisions under race-conscious affirmative action program to hire and offer larger than normal salary to African American professor without conducting typical interviews because university had remedial purpose, but also referring to "compelling

Pursuant to Executive Order 11246 government contractors, including higher education institutions that hold government contracts, are required to develop affirmative action plans to address underutilization of minorities in various job categories.[76] Executive Order 11246 requires government contractors to set placement goals for hiring and promotion based on a statistical analysis of underrepresentation of minorities in the job group relative to the qualified labor pool.[77] While the contractor must use good faith efforts toward meeting goals, the Executive Order does not require or permit use of racial preferences in selection decisions to achieve those goals.[78]

E. Procurement

Recent calls for racial equality on campus have not highlighted procurement decisions. In a longstanding set of cases the Supreme Court has held that federal and state governments may award contracts to minority-owned businesses on a preferential basis in order to overcome the present effects of proven past discrimination only if the government has a "strong basis in evidence" to conclude that "remedial action is necessary."[79] *Fisher II* addresses race-conscious efforts to foster diversity, not to overcome past discrimination, and does not affect the law on minority contracting.

F. Public and Private Higher Education Institutions

While all of the Supreme Court cases to date challenging race-conscious initiatives at universities have involved public institutions subject to the Equal Protection Clause,[80] a number of those cases have also

interest in fostering culturally and ethnically diverse faculty"), *cert. denied*, 523 U.S. 1004 (1998).

76. 42 U.S.C. § 2000e note (referencing Exec. Order No. 11, 246, 30 Fed. Reg. 12, 319 (Sept. 24, 1965), *as amended by* Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 13, 1967)).

77. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965), as amended by 13,672, 41 C.F.R. § 60-2.16 (July 24, 2014).

78. Exec. Order 11,246, 30 Fed. Reg. 12,319 (Sep. 24, 1965); Exec. Order No. 13,672, 41 C.F.R. § 60-2.16(e)(2) (July 24, 2014) ("Placement goals do not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual's employment status, on the basis of that person's race, color, religion, sex, sexual orientation, gender identity, or national origin.").

79. Adarand Constructors v. Pena, 515 U.S. 200, 222 (1995) (quoting Richmond v. J. A. Croson Co., 488 U.S. 469, 500 (1989)).

80. Fisher v. Univ. of Tex. at Austin, 136 S. Ct. 2198 (2016); Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411 (2013) (same); Gratz v. Bollinger, 539 U.S. 244 (2003) (University of Michigan); Grutter v. Bollinger, 529 U.S. 306 (2003) (same); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (University of California at Davis); DeFunis v. Odegaard, 416 U.S. 312 (1974) (University of Washington).

involved claims under Title VI, which applies to both public and private recipients of federal financial assistance, and 42 U.S.C. § 1981 ("Section 1981"), which prohibits racial discrimination in contracting, including private school admissions decisions.[81] In *Bakke* a majority of the Court concluded that Title VI "proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment."[82] In a summary manner in *Grutter v. Bollinger* and *Gratz v. Bollinger*, the Court also equated Section 1981 with the Equal Protection Clause.[83] The Court has not squarely faced the question whether Title VI and Section 1981 might apply differently in the context of a private institution, thereby giving a private institution more flexibility to adopt race-conscious measures.[84] The Court's decision in *Fisher II* focused only on the Equal Protection Clause, but will be welcomed by colleges and universities as they address their obligations under Title VI and Section 1981 as well.

G. State law

Notwithstanding the permissibility of narrowly tailored race-conscious efforts to achieve student body (and possibly faculty) diversity under federal law, eight states—Arizona, California, Florida, Michigan, Nebraska, New Hampshire, Oklahoma, and Washington—have restricted use of racial preferences by public universities and other state agencies.[85]

In 2014 the Supreme Court upheld Michigan's constitutional amendment, thereby allowing states to prohibit use of race-based preferences in admissions by public higher education institutions.[86] The Court continued to allow higher education institutions to utilize race-

81. 42 U.S.C. § 1981(a) (2012) ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . ."); *see* Runyon v. McCrary, 427 U.S. 160, 172 (1976) (contract for educational services is "contract" for purposes of Section 1981).

82. *Bakke*, 438 U.S. at 287; *accord id.* at 328 (Brennan, J., concurring in part & dissenting in part); *see Grutter*, 539 U.S. at 343; *Gratz*, 539 U.S. at 275–76.

83. *See Gratz*, 539 U.S. at 275–76; *Grutter*, 539 U.S. at 343.

84. *See, e.g.*, Doe v. Kamehameha Schs./Bernice Pauahi Bishop Estate, 470 F.3d 827, 839 (9th Cir. 2006) (en banc) (distinguishing *Grutter* and *Gratz* and upholding, against challenge under Section 1981, admissions preference for Native Hawaiians by independent school that received no federal funds); Brief of Brown Univ., et al. as Amici Curiae Supporting Respondents at 3, Fisher v. Univ. of Tex. at Austin, No. 14-981 (U.S. filed Nov. 2, 2015).

85. *See* ARIZ. CONST. art. II, § 36; CAL. CONST. art. I, § 31(a); MICH. CONST. art. I, § 26(1); NEB. CONST. art. I, § 30; OKLA. CONST. art. II, § 36A; N.H. REV. STAT. ANN. § 188-F:3-a (2012); WASH. REV. CODE ANN. § 49.60.400 (West 2013); Fla. Exec. Order No. 99-281 (Nov, 9, 1999).

86. Schuette v. Coal. to Defend Affirmative Action, 134 S. Ct. 1623, 1637 (2014) (plurality opinion).

conscious admissions policies to the extent permitted by federal and relevant state law.[87]

As institutions in states with restrictions on use of race pursue diversity through race-neutral means, their experience may be helpful to institutions in other states considering whether various race-neutral alternatives are "workable" and entail "tolerable administrative expense."[88] The Court's decision in *Fisher II* does not affect the constitutionality of such state laws.

V. CONCLUSION

At oral argument in *Fisher II* UT's counsel concluded with an appeal that "now is not the time and this is not the case to roll back student body diversity in America."[89] The Court appears to have heeded that call. At the end of its opinion in *Fisher II*, the Court again recognized the compelling interest in student body diversity:

> A university is in large part defined by those intangible qualities which are incapable of objective measurement but which make for greatness. Considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission.[90]

But the Court also tied that compelling interest to the need for ongoing review of race-conscious measures:

> The University now has at its disposal valuable data about the manner in which different approaches to admissions may foster diversity or instead dilute it. The University must continue to use this data to scrutinize the fairness of its admissions program; to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary.
>
> The Court's affirmance of the University's admissions policy today does not necessarily mean the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in constant deliberation and continued reflection regarding its admissions policies.[91]

87. *Id.* at 1630.

88. Fisher v. Univ. of Tex. at Austin, 133 S. Ct. 2411, 2420 (2013); *see, e.g.*, Lorelle Espinoza et al., *Race, Class, & College Access: Achieving Diversity in a Shifting Legal Landscape*, AM. COUNCIL ON EDUC. (July 21, 2015), http://www.acenet.edu/news-room/Pages/Race-Class-and-College-Access-Achieving-Diversity-in-a-Shifting-Legal-Landscape.aspx; RICHARD D. KAHLENBERG, CENTURY FOUND., ACHIEVING BETTER DIVERSITY: REFORMING AFFIRMATIVE ACTION IN HIGHER EDUCATION (Dec. 3, 2015), http://www.tcf.org/assets/downloads/AchievingBetterDiversity.pdf.

89. Oral Arg. Tr. 68, Fisher v. Univ. of Tex. at Austin, No. 14-981 (Dec. 9, 2015), http://www.supremecourt.gov/oral_arguments/argument_transcripts/14-981_onjq.pdf.

90. *Fisher II*, 136 S. Ct. at 2214–15 (internal quotation marks and citations omitted).

91. *Id.*

The Court's decision in *Fisher II* confirms the lawfulness of the types of holistic, race-conscious admissions policies that many higher education institutions have utilized for many years, but repeatedly reminds institutions of the need for ongoing assessment of such policies. That principle is likely to apply not only in the context of race-conscious admissions, but in other types of race-conscious initiatives, existing and proposed. All campus constituencies should be mindful of that principle as colleges and universities address calls for measures to ameliorate racial inequality on campus and in the nation at large.