After **Fisher***: What the Supreme Court's Ruling*
Means for Students, Colleges, and the Country

Reaffirming the Compelling Interest in Diversity and
Scientific Research on the Benefits of Diversity

Angelo Ancheta, J.D., M.P.A.

FISHER II AND THE COMPELLING INTEREST IN DIVERSITY

The U.S. Supreme Court's 4-3 ruling on June 23, 2016 in *Fisher v. University of Texas at Austin* ("*Fisher II")* reaffirmed the compelling governmental interest in promoting student-body diversity in higher education and upheld the constitutionality of the University's race-conscious admissions policy under the narrow tailoring requirement of strict scrutiny. Consistent with earlier case law, the Court granted appropriate deference to the University's particularized interests and goals in creating a diverse student body, at the same time that it applied rigorous standards of narrow tailoring to show the necessity of the University's employing race as a factor in its holistic admissions policy. The Court's ruling is fully supported by the scientific literature on diversity, some of which is highlighted and summarized below.

Diversity Goals. The Court's ruling in *Fisher II* did not break new ground in proposing additional requirements for strict scrutiny, nor did the Court cite extensive scientific research on the benefits of diversity, as it had in its opinion in *Grutter v. Bollinger* (2003), where a majority of the Court first upheld the interest in student-body diversity as compelling. The Court did, however, make clear that an institution's diversity interest must be precise and that "asserting an interest in the educational benefits of diversity writ large is insufficient" (*Fisher II,* slip. op. at 12).

The Court carefully analyzed the University's diversity interest and how, through race-conscious admissions, the University advanced several "concrete and precise goals," consistent with the Court's conclusion that "[a] university's goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them" (*Fisher II,* slip. op. at 12). Among the University's specific goals cited by the Court were "the destruction of stereotypes, the 'promot[ion] of cross-racial understanding,' the preparation of a student body 'for an increasingly diverse workforce and society,' and the 'cultivat[ion of] a set of leaders with legitimacy in the eyes of the citizenry'" (*Fisher II,* slip. op. at 13). All of these sub-interests and goals were recognized as elements of diversity by the *Grutter* Court as well, and they have been well-documented in the scientific literature as products of more diverse student bodies.

It is important to note that the Court's review of various diversity goals focused specifically on the University of Texas at Austin. Institutions should be able to employ and advance some or all of these same goals through race-conscious admissions and other carefully crafted policies (including recruitment, financial aid, and curriculum development), but they can also adopt or prioritize other diversity sub-interests particular to an institution. Institutions should precisely

articulate these sub-interests and goals, and they should carefully document how race-conscious policies advance them.

Critical Mass. Additionally, the *Fisher II* Court rejected the plaintiff's argument that the University had to specify a precise level of minority enrollment in order to narrowly tailor its admissions policy. The Court made clear that the interest in advancing diversity through a "critical mass" of minority students is not the same as "an interest in enrolling a certain number of minority students" (*Fisher II,* slip. op. at 11). The Court stated: "Increasing minority enrollment may be instrumental to these educational benefits, but it is not . . . a goal that can or should be reduced to pure numbers. Indeed, since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority at which it believes the educational benefits of diversity will be obtained" (*Fisher II,* slip. op. at 11). The Court's ruling is fully consistent with recent literature showing that "critical mass" is not a fixed number or percentage, and must be viewed flexibly and contextually.

Harms of Racial Isolation. The Court in *Fisher II* does not go into depth in analyzing how preventing the harms of racial isolation help justify the diversity interest, but it does cite anecdotal and quantitative evidence from the University showing serious problems of racial isolation during the period when it did not employ race-conscious admissions. The University documented that minority students "experienced feeling of loneliness and isolation" and minority classroom enrollments were especially low; for example, in 2002, nearly 80% of undergraduate classes containing five or more students had either no African American students or only one African American student (*Fisher II,* slip. op. at 14–15). These findings are fully consistent with the extensive literature documenting the harms of racial isolation at campuses throughout the nation.

HIGHLIGHTS OF RECENT RESEARCH SUPPORTING DIVERSITY

The following summaries highlight of the most recent scientific literature supporting the compelling interest in student body diversity. The research is merely illustrative of a much larger literature, however, and more extensive bibliographies and citations are available at the AERA web site (www.aera.net).

1. **EDUCATIONAL BENEFITS OF DIVERSITY**

Research continues to show that student-body diversity leads to important educational benefits. Among these benefits are:

- **Improvements in Intergroup Contact and Increased Cross-Racial Interaction**
  - Racially diverse educational settings are effective in reducing prejudice by promoting greater intergroup contact—both informally and in classroom settings–as well as encouraging friendship across group lines (e.g., Chang et al. 2006; Denson & Chang, 2015; Pettigrew & Tropp, 2006).
  - Meta-analyses (studies compiling and summarizing findings from several

previous studies) show that positive intergroup contact reduces prejudice and that greater intergroup contact is associated with lower levels of prejudice (e.g., Pettigrew & Tropp, 2006; Pettigrew & Tropp, 2008).

- **Improvements in Cognitive Abilities, Critical Thinking Skills, and Self-Confidence**
    - Student-body diversity promotes improvements in students' cognitive skills, such as critical thinking and problem solving, because students' exposure to individuals different from themselves (as well as to novel ideas and situations arising from exposure) challenges their thinking and leads to cognitive growth (e.g., Antonio et al., 2004; Hurtado, 2005; Luo & Jamieson-Drake, 2009; Bowman, 2010).

- **Greater Civic Engagement**
    - Diverse learning experiences also promote improvements in civic engagement, including civic attitudes toward democratic participation, civic behaviors such as participating in community activities, and intentions to participate in civic activities (e.g., Bowman, 2011).

- **Gains in Pluralistic Orientation**
    - Diversity also leads to gains in "pluralistic orientation," a metric tied to capacities for thinking and social interaction that enable students to engage in cooperative behavior, to manage controversial issues, and to develop a high regard for others' beliefs and backgrounds (Engstrom & Hurtado, 2011).

- **Improved Classroom Environments**
    - Classroom learning is improved in diverse environments. For example, a survey of over 500 students from the University of Michigan revealed that most respondents were engaged in positive interactions with students from different racial backgrounds, and that (a) greater diversity in the student body leads to increased classroom diversity and improved learning; (b) classroom diversity results in open minds and engaging classroom conversations; and (c) more structural diversity leads to greater participation by minority students and less tokenism (Deo, 2011).

- **Improved Intergroup Dialogues**
    - Recent research has also documented the necessity of diverse environments in promoting intergroup dialogues in designated classes. One nationwide study of over 1,400 students found gains in students' insights into how members of other groups perceived the world and increases in thoughtfulness about the underpinnings of inequality (Gurin et al., 2013).

2. **HARMS OF RACIAL ISOLATION**

Research studies examining the harms associated with racial isolation and tokenism, including negative stereotyping, "stereotype threat," and overt discrimination, continue to reinforce an institution's interest in obtaining a diverse student body

- **Isolation and Negative Stereotyping**
  - Isolation, subordination, and negative stereotyping are commonplace in settings where minority numbers are especially low and the norms of majority groups dominate (e.g., Thompson & Sekaquaptewa, 2002). Moreover, stereotyping by white students can be exacerbated if they experience segregated pre-college and college environments; one study found that white students socialized in segregated environments are more likely to remain in white-dominated environments and less likely to engage in cross-racial interactions (Jayakumar, 2015).

- **Stereotype Threat**
  - Defined as the increased pressure on students arising from negative stereotypes that leads to poor performance on tests and other measures, stereotype threat contributes to diminished academic performance among racial and ethnic minority students, as well as women in mathematics and science fields (e.g., Steele, 2010; Logel et al., 2012; Walton & Spencer, 2009).

- **Overt Discrimination and Subordination**

  - *Hostile campus climates* remain a problem on campuses with low diversity. Recent national surveys have found that problems of exclusion and discrimination were considerably more extensive on low-diversity campuses compared to high-diversity campuses. For instance, minority students were more often excluded from campus events and activities, were more often the target of discriminatory verbal comments, and had more experiences with offensive visual images (Hurtado & Ruiz, 2012; Hurtado & Ruiz Alvarado, 2015).

  - *Racial animosity and violence* have occurred with greater frequency on campuses with low numbers of minority students. One study of FBI data and educational data found a significant relationship between minority underrepresentation and hate crime incidents (Stotzer & Hossellman, 2012).

3. "CRITICAL MASS"

The plaintiff in *Fisher* argued that trying to obtain a "critical mass" of minority students to achieve student-body diversity is inherently unconstitutional, even though critical mass was fully endorsed by the *Grutter* Court. According to the plaintiff, critical mass is undefined and ambiguous, or it amounts to an unlawful quota.

As the Court concluded in *Fisher II*, "critical mass" is not a fixed number or percentage, and the literature suggests that it must be examined dynamically and contextually. Relevant factors to assess how critical mass promotes diversity include a campus's racial climate, its historical legacies and institutional signals, impediments to productive interactions, and the nature of cross-racial interactions (Garces & Jayakumar, 2014). For example, historical legacies and institutional signaling are highly relevant to campus climate and to recruitment and admissions policies designed to constitute a diverse student body; in the case of the University of Texas, the state's unfortunate history of legal segregation and exclusion, as well as the disincentives to minority students to attend the University, are key factors in determining critical mass.

4. "INTRA-RACIAL DIVERSITY"

Promoting diversity along multiple dimensions, including the intersection of race and class (sometimes framed as "intra-racial diversity" or "diversity within diversity") is fully supported by legal precedent and the research literature (Carbado, 2013; Harpalani, 2012). Diversity among minority students is particularly important because it counters the stereotype that minority students are monolithic and that they think and behave in the same way.

Research shows that socioeconomic diversity in tandem with racial diversity can lead to improved cross-racial interactions and learning. For example, a nationwide study of nearly 15,000 students at 88 institutions found that individual students who reported higher levels of cross-class interaction had significantly higher levels of cross-racial interactions and co-curricular diversity activities (Park et al., 2013).

5. REFUTING CLAIMS THAT RACE-CONSCIOUS ADMISSIONS POLICIES HARM MINORITY STUDENTS

- **Stigma**
  - The claim that stigma increases under affirmative action programs is contradicted by a number of recent studies. Recent research indicates that stigma among minority studies is *lower* in states with race-conscious admissions (e.g., Bowen, 2010; Onwuachi-Willig et al., 2008).

- **Mismatch Hypothesis**
  - The claim that minority students suffer academic harms when their admissions credentials do not "match" their institutions finds limited support in the scientific literature.
  - Research on undergraduates as well as on students at professional schools shows that minority students have higher graduation rates from attending more selective institutions (e.g., Kidder & Lempert, 2015; Kidder & Onwuachi-Willig, 2014; Bowen et al., 2009; Fischer & Massey, 2007; Cortes, 2010).
    - For example, a recent analysis of law school admissions nationwide compared race-conscious policies with class-conscious

policies and found that race-conscious plans would be more effective in increasing minority representation in the upper tier of law schools, and that there would be no statistically significant changes in the graduation and bar passage rates of any demographic group (Xiang & Rubin, 2015).

- Numerous studies show that minority students gain significant educational and economic benefits through their attendance at selective institutions – including higher graduation rates and increased earnings and labor force participation following graduation (e.g., Long, 2010; Dale & Krueger, 2014; Wolfe & Fletcher, 2015).

References

Anthony Lising Antonio, Mitchell J. Chang, Kenji Hakuta, David A. Kenny, Shana Levin & Jeffrey F. Milem, *Effects of Racial Diversity on Complex Thinking in College Students,* 15 Psychol. Sci. 507 (2004)

Deirdre M. Bowen, *Brilliant Disguise: An Empirical Analysis of a Social Experiment Banning Affirmative Action*, 85 Ind. L.J. 1197 (2010)

William G. Bowen, Matthew W. Chingos & Michael S. McPherson, *Crossing the Finish Line: Completing College at America's Public Universities* (2009)

Nicholas A. Bowman, *College Diversity Experiences and Cognitive Development: A Meta-Analysis,* 80 Rev. Educ. Res. 4 (2010)

Nicholas A. Bowman, *Promoting Participation in a Diverse Democracy: A Meta-Analysis of College Diversity Experiences and Civic Engagement,* 81 Rev. Educ. Res. 29 (2011)

Devon W. Carbado, *Intraracial Diversity,* 60 UCLA L. Rev. 1130 (2013)

Mitchell J. Chang et al., *The Educational Benefits of Sustaining Cross-Racial Interaction Among Undergraduates*, 77 J. Higher Educ. 430 (2006)

Kalena E. Cortes, *Do Bans on Affirmative Action Hurt Minority Students? Evidence from the Texas Top 10% Plan,* 29 Econ. Educ. Rev. 1110 (2010)

Stacy Dale & Alan Krueger, *Estimating the Effects of College Characteristics over the Career Using Administrative Earnings Data,* J. Hum. Resources 323 (2014)

Nida Denson & Mitchell J. Chang, *Dynamic Relationships: Identifying Moderators that Maximize Benefits Associated with Diversity,* 86 J. Higher Educ. 1 (Jan./Feb. 2015)

Meera E. Deo, *The Promise of Grutter: Diverse Interactions at the University of Michigan Law School,* 17(1) Mich. J. Race & L. 63 (2011)

Mark E. Engberg & Sylvia Hurtado, *Developing Pluralistic Skills and Dispositions in College: Examining Racial Ethnic Group Differences,* 82 J. Higher Educ. 416 (2011)

Mary J. Fischer & Douglas S. Massey, *The Effects of Affirmative Action in Higher Education,* 36 Soc. Sci. Res. 531 (2007)

Liliana M. Garces & Uma M. Jayakumar, *Dynamic Diversity: Toward a Contextual Understanding of Critical Mass*, 43 Educ. Researcher 115 (2014)

Patricia Gurin et al., *Dialogue Across Difference: Practice, Theory, and Research on Intergroup Dialogue* (2013)

Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 J. Const. L. 463 (2012)

Sylvia Hurtado, *The Next Generation of Diversity and Intergroup Relations Research*, 61 J. Soc. Issues 595 (2005)

Sylvia Hurtado & Adriana Ruiz, UCLA Higher Educ. Res. Inst., *The Climate for Underrepresented Groups and Diversity on Campus* (2012)

Sylvia Hurtado & Adriana Ruiz Alvarado, UCLA Higher Educ. Res. Inst., *Discrimination and Bias, Underrepresentation, and Sense of Belonging on Campus* (2015)

Uma M. Jayakumar, *The Shaping of Postcollege Colorblind Orientation Among Whites: Residential Segregation and Campus Diversity Experiences*, Harv. Educ. Rev. (forthcoming Winter 2015)

William C. Kidder & Richard O. Lempert, *The Mismatch Myth in U.S. Higher Education: A Synthesis of the Empirical Evidence at the Law School and Undergraduate Levels*, *in* Affirmative Action and Racial Equity (Uma M. Jayakumar & Liliana M. Garces eds. 2015)

William C. Kidder & Angela Onwuachi-Willig, *Still Hazy After All These Years: The Data and Theory Behind "Mismatch,"* 92 Tex. L. Rev. 895 (2014)

Christine R. Logel et al., *Unleashing Latent Ability: Implications of Stereotype Threat for College Admissions*, 47 Educ. Psychol. 42 (2012)

Mark C. Long, *Changes in the Returns to Education and College Quality*, 29 Econ. Educ. Rev. 338 (2010)

Jiali Luo & David Jamieson-Drake, *A Retrospective Assessment of the Educational Benefits of Interaction Across Racial Boundaries*, 50 J.C. Student Dev. 67 (2009)

Angela Onwuachi-Willig, Emily Houh & Mary Campbell, *Cracking the Egg: Which Came First—Stigma or Affirmative Action?,* 96 Calif. L. Rev. 1299 (2008)

Julie J. Park, Nida Denson & Nicholas A. Bowman, *Does Socioeconomic Diversity Make a Difference? Examining the Effects of Racial and Socioeconomic Diversity on the Campus Climate for Diversity*, 50 Am. Educ. Research J. 466 (2013)

Thomas F. Pettigrew & Linda R. Tropp, *A Meta-Analytic Test of Intergroup Contact Theory*, 90 J. Personality & Soc. Psychol. 751 (2006)

Thomas F. Pettigrew & Linda R. Tropp, *How Does Intergroup Contact Reduce Prejudice? Meta-analytic Test of Three Mediators*, 38 Eur. J. Soc. Psychol. 922 (2008)

Claude M. Steele, *Whistling Vivaldi: And Other Clues to How Stereotypes Affect Us* (2010)

Rebecca L. Stotzer & Emily Hosellman, *Hate Crimes on Campus: Racial/Ethnic Diversity and Campus Safety*, 27 J. Interpersonal Violence 644 (2012)

Mischa Thompson & Denise Sekaquaptewa, *When Being Different is Detrimental: Solo Status and the Performance of Women and Racial Minorities*, 2 Analyses Soc. Issues & Pub. Pol'y 183 (2002)

Gregory M. Walton & Steven J. Spencer, *Latent Ability: Grades and Test Scores Systematically Underestimate the Intellectual Ability of Negatively Stereotyped Students*, 20 Psychol. Sci. 1132 (2009)

Barbara L. Wolfe & Jason Fletcher, *Estimating Benefits from University-Level Diversity* (Feb. 2013)

Alice Xiang & Donald B. Rubin *Assessing the Potential Impact of a Nationwide Class-Based Affirmative Action System*, 30 Stat. Sci. 297 (2015)