Law Commentary: Using Race in Higher Education Admissions Decisions

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The process of college admissions has become increasingly competitive as higher education access becomes universal. College admissions offices are tasked with compiling the most academically compelling, diverse student body out of the extremely large numbers of applications they receive annually. Admissions personnel use a variety of admissions processes from assigning academic scores to reviewing each, individual application holistically. However, in order to account for diversity, they must also be creative in their admissions practices. The use of race in decisions has been a legal issue for decades with the most recent case being decided last year. How can a university enroll a diverse student population while not discriminating against any students?

Can institutions use race as a factor in the admissions process? Based upon *Regents of the University of California v. Bakke* (1977), *Hopwood v. State of Texas* (1996), *Johnson v. Board of Regents of the University of Georgia* (2001), *Grutter V. Bollinger* (2003), *Gratz v. Bollinger* (2003), and *Fisher v. University of Texas at Austin* (2014), race can be used as a factor in admissions decisions. However, institutions must be very specific in the way the use race as part of the decision making process.

Overview of Legal Authority

Each of the six cases listed above argue discrimination based upon the equal protection clause of the fourteenth amendment to the U.S. Constitution. This clause states, “No state shall…deny to any person within its jurisdiction the equal protection of the laws” (U. S. Constitution, amend. XIV, § 1). This lays the groundwork that state institutions, which are branches of the state, must treat all applications equally. Many of the cases above also cite Title VI of the Civil Rights Act, which states “No person in the United States shall, on the ground of race, color, or national origin… be subjected to discrimination under any program or activity

receiving Federal financial assistance" (Civil Rights Act, 1964, §2000d). Based upon these two requirements, as well as previous case law, the Courts have determined a narrow allowance for using race in college admissions.

Regents of the University of California v. Bakke

In 1973, the University of California Davis created a new admissions policy for their medical school in order to create a more diverse student body. They created two different admissions processes, one for white students and another for disadvantaged students. Students were reviewed through the special admissions process if they met at least one of two requirements: the student considered himself or herself economically or educationally disadvantaged and the student was a racial or ethnic minority. The special admission students did not have to meet the same academic criteria as regular admission students, as they were each admitted separately. This also means that all students who listed themselves as a minority were competing for the 16 seats allotted for minority students. They were not considered for any of the regular admission seats.

The Supreme Court determined that the system of quotas used by Davis's Medical School was unconstitutional, going against Title VI (*Regents of the University of California v. Bakke*, 1977). They also declared the use of separate admissions processes for each race unconstitutional (*Regents of the University of California v. Bakke*, 1977). They stated that race can be used as a factor, but cannot be used to separate racial minorities from comparison with all other applicants (*Regents of the University of California v. Bakke*, 1977).

Hopwood v. State of Texas

In the early 1990's, the University of Texas Law School made admissions decisions using separate criteria, depending on the minority status of the applicant. Decisions were made based

on undergraduate GPA and LSAT score. They also considered backgrounds, experiences, and outlook. They scored each candidate, and created three zones: one for probable admits, one for probable denials, and another for candidates that were in between. However, the score ranges for each category were different dependent on race. For example, a certain score, if received by a white applicant, would probably be denied, while if a minority student received the same score, they would probably be admitted. Additionally, committees reviewed all white students in the middle zone. However, minority students were reviewed by a specific minority subcommittee, rather than comparting all students in the middle zone.

When reviewed, the judge originally looked at the two-point test established in *Bakke* regarding using race in college admissions. The first point is that the policy must serve a compelling government interest. The second is that the process must be narrowly tailored to accomplish said government interest (*Hopwood v. State of Texas*, 1996). The court originally upheld the point system that gave minority students additional points, but struck down the varying admissions committees for minority students. However, the Court of Appeals reversed the original decision regarding the point system (*Hopwood v. State of Texas*, 1996). The Court of Appeals claimed that the institution did not show a compelling state interest, nor did the program narrowly tailor to the previous court's perceived state interest. The court also established that employing different admissions decision procedures based upon race is unconstitutional (*Hopwood v. State of Texas*, 1996).

Johnson v. Board of Regents of the University of Georgia

The University of Georgia's admissions policy, in 1999, was to award "bonus points" to minority applicants, including males and non-whites. The admissions process comprised of three stages, where applicants could be admitted in each stage. The first stage, admissions decisions

were made based on SAT scores, GPA, and the institutions calculated academic index. Students were either automatically admitted, automatically rejected, or deferred based on these scores. At this stage, race was not considered. In the second stage, students were reviewed further and assigned a "Total Student Index." This was based on academic factors as well as other demographic factors. Students were given bonus points for being not Caucasian. Similar to the first stage, based on the scores, students were either automatically admitted, automatically rejected, or deferred to the third stage. In this stage, applicants were reviewed on an individual, case-by-case basis and given scores by the admissions officers. The team created a cut-off score, and all those above the score were admitted while all those below the score were not.

The admissions policy was struck down by the court. When considering the standard of compelling government interest, UGA claimed their interest was to diversity their student body (*Johnson v. Board of Regents of the University of Georgia*, 2011). The Court of Appeals held up the original decision that this was unconstitutional because, based on *Hopwood*, diversifying the student body alone is not a compelling government interest (*Johnson v. Board of Regents of the University of Georgia*, 2011). Because they did not establish that there was a compelling interest, they did not consider the question of narrow tailoring.

Grutter v. Bollinger

The University of Michigan's Law School used an admissions policy that took into account academic qualifications, applicant's talents and abilities, as well as their perceived ability to work collaboratively and learn from each other. In their policy, they noted that they were dedicated to racial and ethnic diversity, and intended to enroll a critical mass of minority students. The admissions policy was to review each candidate individually, and consider all factors, including race.

Originally decided unconstitutional, the Court of Appeals overturned the district court in saying that diversifying a student body was, in fact, a compelling state interest, as according to *Bakke* (*Grutter v. Bollinger*, 2003). The Court of Appeals also held that the admissions process was narrowly tailored to achieve the state interest, because race was but a factor, and not a prevalent issue in the admissions decision (*Grutter v. Bollinger*, 2003). The admissions policy, in this case, was sound because the students were reviewed on an individual basis, and race was only a small factor in the admissions process.

Gratz v. Bollinger

At the University of Michigan, the undergraduate admissions office made admissions decisions based upon academic abilities, including test scores, GPA, and past academic rigor. They also considered alumni relationships and in-state residency. The office also, in the name of diversity, admitted almost every qualified applicant that identified as a minority. The students were given scores based upon academic qualifications, residence and alumni ties. The initial review placed students into different categories based on their scores and their race. The score requirements for admission were also different based on race. The admissions policies were altered over the next few years, but in each policy, students were treated differently based on race. In the later policies, students were given bonus points if they identified with an underrepresented race. Lastly, they left seats open until later in the year. These seats were reserved for athletes, ROTC, international students, and minority students.

The Court decided that the interest of diversifying the student body was a compelling government interest (*Gratz v. Bollinger*, 2003). However, the court determined that the guidelines were not narrowly tailored to achieve this interest (*Gratz v. Bollinger*, 2003). They reviewed the different admissions policies that the university used over the course of the

litigation and the Court found that the admissions policies, including reserving seats and adding points to students applications based on race was not narrowly tailored to the interest of diversifying the student body (*Gratz v. Bollinger*, 2003). The admissions policies were declared unconstitutional.

Fisher v. University of Texas at Austin

The University System of Texas, after the decision in Hopwood, established a new admissions policy called the Top Ten Percent Rule. This gave all students who graduated in the top ten percent of their class from any public high school guaranteed admission into a State University. The students who were admitted using this rule were given 81% of the seats for incoming students in 2008. Applications for the remaining 19% of seats were reviewed on a holistic process that included a number of factors, including race.

The Court upheld the admissions policies used here in accordance with *Grutter*. The students were reviewed holistically, with all applicants in the same pool (*Fisher v. University of Texas at Austin*, 2014). Race was used as a small factor in the decision making process (*Fisher v. University of Texas at Austin*, 2014). However, in the decision, the court does make a note that this decision on using race in admissions policies should not stand for all time. Rather, it should be used similar to a court's approval of new voter districts, which are only approved until the next redistricting (*Fisher v. University of Texas at Austin*, 2014). This is because college enrollment patterns change overtime, and the court should not hold higher education institutions to antiquated policies.

Conclusion

Race can be used in admissions practices, but the use must be narrow and in context. As learned through *Grutter* and *Fisher*, race can be used as a factor of the larger decision. It also

must be used as a factor in a holistic admissions process, in which each applicant has their file reviewed based on all of their merits. The use of race must also follow the three requirements described in *Bakke*. The use of race must serve a compelling state interest. As stated in *Hopwood* and *Johnson*, the purpose of diversifying the student body alone is not always considered a compelling state interest. If the use of race does serve a compelling state interest, then the policy in question must also be narrowly tailored to satisfy the state interest, as displayed in *Gratz.* Lastly, the classification of race must pass the strict scrutiny test.

Race cannot be used in admissions decisions if race is used to fill ethnically or racially defined quotas, as was the case is *Bakke*. Race also cannot be used as a blind discriminate, to add points to a generic score as was the case in *Johnson* and *Gratz*. Race also cannot be used in admissions decisions if race creates a disconnect in the way students are reviewed, which was the case in *Bakke* and *Hopwood*. All students must be reviewed against all other applicants.

The use of race in admissions will continue to plague American Higher Education, because of the changing patterns in enrollment. However, the decisions in *Regents of the University of California v. Bakke* (1977), *Hopwood v. State of Texas* (1996), *Johnson v. Board of Regents of the University of Georgia* (2001), *Grutter V. Bollinger* (2003), *Gratz v. Bollinger* (2003), and *Fisher v. University of Texas at Austin* (2014) have built a strong precedent for acceptable and unacceptable uses for race in admissions.

References

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Hopwood v. State of Texas, 78 F.3d 932 (1996)

Johnson v. Board of Regents of the University of Georgia, 263 F.3d 1234 (2001)

Regents of the University of California v. Bakke, 438 U.S. 265 (1978)

U. S. Constitution, amend. XIV, § 1