Master Class: Beyond the Cases...Legal and Policy Implications Associated with Race in Admissions

Attributes That Matter: Beyond the Usual in College Admission and Success
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Arthur L. Coleman
EducationCounsel LLC
art.coleman@educationcounsel.com
Session Objectives

- To return to a central issue associated with admissions—merit—and consider the policy and legal implications when race or ethnicity enter the picture.

- To provide an refresher on the current status of federal law governing race-/ethnicity-conscious admissions practices, as a foundation for assessing current practices in light of contemplated Court action in Fisher v. University of Texas...and our panel discussion.
Session Overview

I. Effective Policy Development 101
II. The Educational Benefits of Diversity
III. Missing in Action: Merit
IV. Key Questions
V. Fisher Overview
I. Effective Policy Development 101
Effective Policy Development

Key Spheres of Influence on Policy Development and Implementation

- Stakeholder Support
- Policy
- Law and Related
- Research & Experience
Effective Policy Development 101

Do Not Lose Sight of the Forest for the Trees

- Multiple spheres of influence will affect the success of any policy

- Remain focused on all likely high-visibility/high-challenge policy elements...even when you think you've already won the war.

- Communications in understandable, intuitive terms among all groups of stakeholders is a must.
Headlines from 2003

THE SUPREME COURT: AFFIRMATIVE ACTION; JUSTICES BACK AFFIRMATIVE ACTION BY 5 TO 4, BUT WIDER VOTE BANS A RACIAL POINT SYSTEM

AFFIRMED... FOR NOW THE SUPREME COURT'S DECISION MADE AFFIRMATIVE ACTION RESOUNDINGLY LEGAL. NOW COMES THE HARD PART - MAKING IT UNNECESSARY.

Supreme Court upholds University of Michigan Law School affirmative action policy with 5-4 ruling

HOW MUCH LONGER?, RULING COULD EXTEND AFFIRMATIVE ACTION FOR DECADES SUPREME COURT RULES: 'WE EXPECT THAT 25 YEARS FROM NOW, THE USE OF RACIAL PREFERENCES WILL NO LONGER BE NECESSARY'

Split Ruling on Affirmative Action
High Court Rules on Race as Factor in University Admissions

THE SUPREME COURT: AFFIRMATIVE ACTION; Impact on Universities Will Range From None to a Lot
Voter Initiatives Passed
State Statute
Voter Initiatives to Eliminate Consideration of Race, Ethnicity, and Gender as of 2013

- Voter Initiatives Passed
- State Executive Order
- Attempt for Initiative on Ballot Failed
- Voter Initiative Failed
- State Statute
II. The Educational Benefits of Diversity

- The Theory of Action
EBD: An Overview

Benefits associated with diversity are essential for student success in the 21st century.

- Key skills associated with diverse learning environments include: Critical and complex thinking, problem solving, communication, collaboration, creativity, innovation, transmission of cultural norms, interpersonal and social skills, etc.

- **Workplace preparation** - fastest growing industries demand skills inculcated in diverse learning environments - College Board

- **Health care needs of increasingly diverse population demand empathy; emotional intelligence; cultural competence; ability to understand, value, and accept disparate viewpoints** - AAMC

- **Business requires unique and creative approaches to problem-solving by integrating different perspectives** - Fortune 100

- **Mission-critical national security interest depend on collaboration skills, foreign language capabilities, and regional experiences** - Retired generals

- **STEM fields depend on creative insights to solve problems and graduates who can work in highly globalized market** - Cal Tech et al.
The Educational Benefits of Diversity

The Theory of Action

- A diverse learning environment, with appropriate pedagogical focus,
  - Leads to enhanced teaching and learning, with improved outcomes;
  - Better prepares students for productive lives in the [21st Century] workforce and in society
    - "College, career, citizenship readiness"

- Admissions decisions that consciously promote diversity will yield classes that improve learning and other outcomes for all students
Educationally sound and legally defensible race-/ethnicity-conscious practices are the product of a well-designed, institutionally aligned, and integrated process that connects means to ends.

**Goal**

**Objectives**

**Strategies**

- Recruitment
- Financial Aid
- Academic Affairs
- Student Affairs

**Educational Benefits of Diversity**

- Compositional Diversity/Critical Mass
- Enhanced Learning Outcomes

*Supporting Evidence*
III. Missing in Action: Merit
To often, admissions policies do not explicitly tackle the question of the intersection of merit and diversity and are not positioned effectively to rebut claims of discrimination.
Bakke prevails

- UC defined merit to include a GPA cut off of 2.5: "We will interview no one with a GPA below 2.5."

- UC admitted a set-aside group of 16 (out of 100) minority students who had GPAs that went as low as 2.11.

The Law School Admissions Policy APPROVED in *Grutter* in 2003

Individual review/evaluation of all applications, with a focus on [1] academic criteria; [2] likely contribution to intellectual/social life of the institution; and [3] contribution to diversity, which can enrich the education of all.

- Grades, test scores
- Enthusiasm of recommenders
- Quality of undergraduate institution
- Quality of essay
- Areas/difficulty of undergraduate course selection
- Diversity factors, including racial/ethnic diversity with a focus on groups that have historically been discriminated against

The Undergraduate Policy REJECTED in Gratz in 2003

*Individual review/evaluation of all applications*

- **Point system**
  - Maximum points awarded: 150
  - Points that guarantee admission: 10095-99: Admit or postpone
  - 90-94: Postpone or admit
  - 75-89: Delay or postpone
  - <75: Delay or reject

- 20 pts automatically awarded for underrepresented minority, attendance at predominantly minority/disadvantaged HS, athlete 40 points can be assigned for non-academic factors: geography, alumni relationship, essay, leadership, public service

- Point system constrains meaningful individualized review; “diversity contributions cannot be individually assessed”

- Race effectively “decisive” for virtually every minimally qualified minority student (vs. Powell on Harvard)
Fisher v. Univ. of Texas (2013)

- UT-Austin Admissions Policy:
  - 90% of all freshman seats awarded to Texas residents; in 2008, 81% of entering UT class admitted under Top 10% law
  - Remaining Texas residents compete for admission based on Academic (AI) and Personal Achievement (PAI) indices:
    - AI: Standardized test scores and class rank
    - PAI: Leadership qualities, awards and honors, work experience, involvement in extracurricular and community service activities, and special circumstances (SES, family status, standardized test scores compared to high school average, and race)
Merit is based on a wide range of mission-aligned factors

- Mix of criteria include grades, test scores, Advanced Placement performance, class rank, strength of curriculum, accomplishments, evidence of drive and initiative, life experiences (overcoming hardship or adversity, military experience, community service, jobs), family background, and other diversity factors (race, ethnicity, geographic origin, SES status, and life experiences in different cultural settings or in diverse learning environments)

- College Board

Merit requires more than academic competence; it also requires integrity, altruism, self-management, interpersonal and teamwork skills - AAMC
Implications for Action

Authentic holistic review should be multi-faceted, involving many student qualities and characteristics (that may include race and ethnicity).

From the AAMC
Race is not merely a designation on an application, but is reflected in discussions of backgrounds, life experiences and the like. For instance, essays designed to elicit how the student sees himself or herself in light of contributions that can be expected from an applicant often trigger discussion of racial and ethnic background, among other factors that may not otherwise surface in the admissions process. - College Board

Considerations of race and ethnicity are intertwined with other important qualities/characteristics (e.g., resilience, overcoming challenges) such that it is impossible to insulate consideration of race and ethnicity from applicant's background...Unlike most undergraduate institutions, medical and other health professional schools have always considered and highly value personal interviews in order to learn what the applicant’s background would contribute to a culturally competent workforce. - AAMC

Race can contextualize other components of the individual - Cal Tech et al.

Extraordinary to conclude race is single characteristic colleges and universities cannot consider; how possible to be blind to race? - Brown et al.
IV. Key Questions

- Session Objectives
- Legal and Policy Context
IV. Key Questions

1. What is merit? What are the many facets that define it for my institution, and how effective am I in communicating that reality? Do I have the data and stories that will reinforce my definition of merit?

2. How does race really enter into the equation? Is it really an "add-on"...or is consideration of race fully integrated into a holistic review?

3. Over the course of time, can I document educational success associated with my admissions definition of "merit" and the ways in which I consider race?
V. Fisher: Overview

- Session Objectives
- Legal and Policy Context
Fisher: Overview of the Case

Key Facts: Admissions at the University of Texas-Austin

- **Hopwood** (1996) → Top 10% Law in 1998
  - Mandates that Texas high school seniors in the top 10% of their classes automatically be admitted to a Texas state university


- **UT-Austin Admissions Policy Today:**
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Fisher:  Overview of the Case

The Fifth Circuit Decision (2011)

- 5th Circuit panel (of 3) unanimously concludes that University of Texas race-conscious admissions policy comports with *Grutter* and is lawful.

- **Major issue addressed**: Whether UT's consideration of race was **necessary**—as required for narrow tailoring (under strict scrutiny principles)—in light of the effect of the State's "Top Ten Percent Law," which had resulted in increased minority enrollment.

  - Key issue is not one of "holistic review," per se, as in *Grutter* and *Gratz*. 
1. Necessity? What's the Impact?

- The issue of necessity—to justify race-, ethnicity-, or gender-conscious-action has historically focused on how significant the gap or deficit to be filled is, and how that may justify such conscious action.

- In 2007, for the first time, the U.S. Supreme Court squarely addressed a different dimension of that question—one that had been present in past opinions, but addressed only in passing, if at all:
  - In *PICS v. Seattle Schools*, the Court ruled that the consideration of race was not "necessary" given its "minimal effect" on student diversity.
    - Seattle: 52 students affected; Jefferson County: 3% of all school assignments affected. VS.
    - University of Michigan: law school more than tripled minority representation with race-conscious admissions program...from 4 to 14.5% of the entering class.
1. Necessity? What's the Impact?

Is there material positive impact that results from the challenged preference?

University of Texas Position

- "The nuanced and modest constitutional impact of race...is...a constitutional virtue, not a vice."
  - Consideration of race has impact: 20% of black admits and 15% of Hispanic admits were offered admission through a full-file review

- Race-neutral alternative (Top 10% Law) is insufficient
  - Hurts academic selectivity, reducing admissions to just a single criteria, foreclosing consideration of other academic criteria (quality of high school, course load, performance on standardized tests)
  - Undermines efforts to achieve diversity in broad sense and limits within group diversity

Fisher Position

- UT fails to demonstrate that using race is necessary to further a compelling interest in student body diversity

- Use of race-conscious consideration led to only minimal additional minority enrollment - "impact is negligible"/"trivial gains"
  - Increasing African American enrollment by 60 and Hispanic enrollment by 204, when compared to pre-policy numbers
  - UT cannot identify any applicant where race was the deciding factor

- Limited results of UT's consideration of race shows that race-neutral means would be effective
2. Critical Mass: What Is It?

Key Policy Parameters from *Grutter*

- ✅ Premised on the need to attract sufficient numbers of underrepresented students that will advance educational goals—based on institution-specific research and data
  - To ensure the “presence of ‘meaningful numbers’...of ‘students from groups which have been historically discriminated against....’” and who are “particularly likely to have experiences and perspectives of special importance to [its] mission.” An individual assessment that includes but is not limited to race of the individual.

- ✅ Not defined with reference to rigid, numerical targets or goals (no quotas!)
  - Not the equivalent of seeking a “specific number of students of particular races” or seeking “a hard and fast number” of students.
University of Texas Position

- UT policy lacks elements (that Kennedy) disliked in *Grutter*:
  - No race-based target established
  - No automatic value assigned for race
  - Racial/ethnic composition is not monitored during admissions cycle

- Focus on critical mass at classroom level to determine whether students are realizing the educational benefits of diversity (black and Hispanic students nearly nonexistent in thousands of classes)

- Determination requires trained educator judgment to ascertain and calibrate the environment in which students are educated

Fisher Position

- UT’s claimed interest in classroom diversity cannot be implemented in a narrowly tailored way
  - Proper base to measure critical mass = student body
  - Classroom diversity benchmark “would promote the use of race in perpetuity” and “justify racial engineering at every stage of the university experience”

- Even if UT allowed to focus on classroom diversity, UT has made no effort to define a percentage of underrepresented students that achieve critical mass (no educational target)

- Critical mass should be URMs as a whole, not separate racial groups

- UT’s use of race is not narrowly tailored because it is over-inclusive: Hispanics in Texas ≠ URM
What Does the Future Hold?
What Should the Future Hold?

- Grutter affirmed?
- Grutter affirmed but with limits and/or additional hurdles?
- Grutter overruled?
- Grutter affirmed in name but overruled in practical terms?
Art Coleman is founding and managing partner of EducationCounsel LLC; he is also Chairman of the Board of the Institute for Higher Education Policy. He previously served as Deputy Assistant Secretary for Civil Rights in the U.S. Department of Education. Mr. Coleman may be reached at 202-545-2912 or at art.coleman@educationcounsel.com.