THE FORUM BLOG
PENN STATE LAW REVIEW PENN STATIM

University Admissions Process or Protected Intellectual Property?

The composition of an incoming class at a college or university is just as interesting as the way one is created. How do admissions offices admit an incoming class? What factors play a role in the admission officer's decision making? The behind-the-doors process stirs questions from applicants, prospective students, family members, guidance counselors, and the workforce. Broadly speaking, institutions want to admit an incoming class that will academically succeed and contribute meaningfully to society and the institution. For many institutions, admitting a diverse student body is central to preparing students to live and work in an increasingly diverse and global world. Institutions also understand the societal, economics, and political benefits of obtaining an undergraduate degree. Not only does an undergraduate degree provide students with critical analysis skills, meaningful reflection, skills-based learning, and a community of peers, but it also provides students with social and economic mobility.

In creating a diverse class, institutions incorporate particular methods or policies meant to recruit and admit diverse students. These diverse students include students of color, first generation students, low income students, rural students, LGBT students, and religious minorities. In particular, affirmative action policies began in the 1960s following the *Brown v. Board of Education II* (1955)[1] case mandating integration and the Civil Rights Act of 1964 in an effort to increase the number of minoritized racial and ethnic groups on American college campuses[2]. Since its implementation, institutions have faced sharp criticism from opponents of affirmative action policies. Opponents challenge the consideration of race in the admissions process as unconstitutional and unnecessary. Namely, they argue race-conscious admissions policies are discriminatory against white applicants. Lawsuits against institutions of higher education have continued for more than three decades, starting with the first United States Supreme Court case *Regents of the University of California v. Bakke* in 1978[3].

Institutions that face legal action for considering race in the admissions process have decided to respond in unique ways. One way of protecting the consideration of race in the admissions process is to protect the admissions process itself. Institutions claim the *way* they admit a class is legally protected. During litigation, opponents of affirmative action policies file Freedom of Information Act (FOIA) requests for documents related to the admissions process. Institutions claim such documents are exempt from disclosure due to FOIA Exemption 4, "trade secrets and commercial or financial information obtained from a person that is privileged or confidential."[4] Here, institutions claim that their admissions process is akin to a trade secret, barring the government from disclosure. Institutions claim their admissions process is proprietary

[1] Brown v. Board of Education of Topeka, 349 U.S. 294 (1955).
[2] http://www.ncsl.org/research/education/affirmative-action-overview.aspx
[3] Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265 (1978).
[4] https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/foia-exemptions.pdf

as it provides them a substantial competitive advantage. This legal strategy was, too, used in the newest legal challenge to affirmative action policies in the case against Harvard University.

The trial against Harvard University concerning its race-conscious admissions policies ended on November 2, 2018[5]. The three-week trial was inundated with hours of testimony and evidence, leaving many to wonder when a decision may come. Several speculate that Judge Burroughs, the Boston federal district court judge, may come out with a decision in the coming months. The outcome of the case can have serious implications for colleges and universities seeking to advance racial and ethnic diversity at their institution.

The plaintiff, an organization called Students for Fair Admissions ("SFFA"), claims Harvard University discriminates against Asian-American applicants[6]. SFFA claims selective colleges like Harvard are effectively placing quotas for the number of Asian-American students they admit despite high academic performance. The case furthers a more than fifty-year battle of challenging affirmative action cases in higher education.[7] Since the implementation of affirmative action policies in the 1960s, litigants, mostly white applicants rejected from a particular institution, challenged the consideration of race in admissions. In this case, however, the plaintiff is an organization bringing the lawsuit on behalf of Asian-American students. Some legal scholars purport this angle of attacking race-conscious admissions policies is a novel way to secure the end goal of banning the consideration of race in university admissions. However, Harvard University maintains it does not discrimination against Asian-American applicants and

---

[5] P.R. Lockhart (October 18, 2018). "The lawsuit against Harvard that could change affirmative action in college admissions, explained." Available at https://www.vox.com/2018/10/18/17984108/harvard-asian-americans-affirmative-action-racial-discrimination

[6] Students For Fair Admissions: https://studentsforfairadmissions.org/sffa-files-motion-for-summary-judgment-against-harvard/

[7] *See, e.g.,* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); United States v. Virginia, 518 U.S. 515 (1996); Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); Fisher v. University of Texas (2016).

considers race during its admissions process consistent with the constitutional precedent set forth in *Grutter* (2003) and *Fisher* (2016).[8] That is, race is only but one factor in the admissions process that is viewed holistically with the rest of the student's application.

Sixteen private institutions, seven Ivy League institutions and nine highly selective institutions, filed a joint brief[9] in support of Harvard's use of race in admissions, arguing that a ruling against Harvard will significantly hurt diversity efforts in higher education.[10] In the brief, the institutions state they also have similar admissions policies in which they consider an applicant's background and experience, including their race or ethnicity. They argue for the profound importance of student body diversity for their educational mission. They urge the court to affirm the educational benefits that flow from a diverse student body, consistent with the Supreme Court's jurisprudence[11].

Before SFFA filed its lawsuit against Harvard University, the organization filed a similar lawsuit against Princeton University for allegedly discriminating against Asian-American applicants. Princeton was previously under a seven-year investigation by the U.S. Department of Education Office of Civil Rights (OCR) for discrimination against Asian-Americans, but, in 2015, OCR found no evidence of discrimination.[12] During the investigation, SFFA filed a Freedom of Information Act (FOIA) request to obtain Princeton's admissions files from the

---

[8] Grutter v. Bollinger, 539 U.S. 306 (2003); Fisher v. University of Austin, 579 U.S. _____ (2016); (The Court held the consideration of race in college admissions is constitutional because it furthers a compelling state interest and does so by means that are narrowly tailored to the policy. It said universities can consider race to obtain the educational benefits that flow from a diverse student body.)

[9] https://ogc.mit.edu/sites/default/files/images/Students%20for%20Fair%20Admission%20v.%20Harvard%20Amicus%20Brief%2007.30.18.pdf

[10] https://www.nytimes.com/2018/10/15/us/harvard-affirmative-action-asian-americans.html

[11] *See* Grutter v. Bollinger, 539 U.S. 306 (2003); Fisher v. University of Austin, 579 U.S. _____ (2016); (The Court held the consideration of race in college admissions is constitutional because it furthers a compelling state interest and does so by means that are narrowly tailored to the policy. It said universities can consider race to obtain the educational benefits that flow from a diverse student body.)

[12] https://www.princeton.edu/news/2015/09/23/ocr-review-finds-no-evidence-discrimination-admission-process?section=topstories

Department of Education. Princeton filed a "reverse FOIA" action in 2017 to "prevent the disclosure of certain confidential and commercially sensitive documents and information relating to the University's undergraduate admissions program submitted to the OCR in the course of an OCR compliance review."[13]

In its reverse FOIA claim, Princeton asserts it is protected from releasing materials under Exemption 4[14], which exempts from disclosure trade secrets and commercial or financial information.[15] The University argues the release of admissions information is proprietary and will violate the Trade Secrets Act due to the "commercial" nature of the confidential information.[16] If disclosed, the documents would reveal "core aspects of the University's applicant pool, admissions, and recruiting programs," putting the University at a "substantial competitive disadvantage to identify, evaluate, and enroll prospective students."[17] Princeton worries prospective applicants and college prep admissions services would use disclosed student files to craft applications to mimic previous applications.

Princeton's claim that its admissions process is proprietary, akin to a trade secret, raises significant legal and normative questions about the nature of admissions, especially in the continuation of the Harvard case. Can a university obtain a trade secret for its admissions process? Should it? Is there something proprietary or commercially advantageous about the way a university admits a first-year class? If a university's admissions process is revealed, would it affect the university's competitive advantage over peer institutions? Would it hinder or encourage the consideration of race in admissions? Would students simply tailor their application

[13] https://www.courthousenews.com/wp-content/uploads/2017/03/princeton.pdf, p. 1-2
[14] https://www.foia.gov/faq.html
[15] Id.
[16] Id.
[17] Id at 3.

to fit the interests and needs of a university? Does the transparency of a university's admissions process provide a better insight into the ways in which a first-year class is admitted? Or are there unspoken "rules" that are not documented; criteria that schools have which they know the public—or organizations such as SFFA—would view with disfavor?"?

Colleges and universities are constitutionally permitted to consider an applicant's race as part of its admissions process in order to achieve the educational benefits that flow from a diverse student body.[18] Following *Brown II* (1955)[19] and Executive Order 10925 (1961)[20], colleges and universities have introduced new affirmative action policies to adapt to the Court's decisions. However, since the introduction of affirmative action policies in higher education in the late 1960s,[21] opponents of affirmative action continuously challenge its constitutional merit. This includes quotas[22], point systems[23], Top 10% plans[24], tiebreaker systems[25], and holistic approaches[26]. While racial quotas, point systems, and tiebreakers were struck down as unconstitutional, the consideration of race as one factor among many has continually passed constitutional muster. Now, the mere consideration of race in the admissions process is being challenged in the Harvard case. Given the historical challenges colleges and universities face to admit a racially diverse class, should they be permitted to protect proprietary admissions processes in order to protect its compelling interest of admitting a racially diverse class?

---

[18] *See* Grutter v. Bollinger, 539 U.S. 306 (2003).
[19] Brown v. Board of Education of Topeka, 349 U.S. 294 (1955) (following the Court's previous, and more famous ruling in Brown I, the Court held integration must be implemented "with all due deliberate speed.")
[20] Exec. Order No. 10925 of March 6, 1961 (required government contractors to "take affirmative action to ensure applicants are employed and that employees are treated during employment without regard to their race, creed, color, or national origin.")
[21] http://www.ncsl.org/research/education/affirmative-action-overview.aspx
[22] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).
[23] *See* Gratz v. Bollinger, 539 U.S. 244 (2003).
[24] *See* Fisher v. University of Austin, 579 U.S. _____ (2016).
[25] *See* Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).
[26] *See* Grutter v. Bollinger, 539 U.S. 306 (2003).