DOJ & Race-Conscious Admissions Practices

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- Award-winning faculty member at the Tulane University Schools of Law and Business where he teaches, among other things, Title IX and higher education law
- Designs and delivers training programs on a host of education issues, including Title IX compliance obligations; legal issues in faculty hiring, promotion, and tenure revocation; and managing risk in student affairs.
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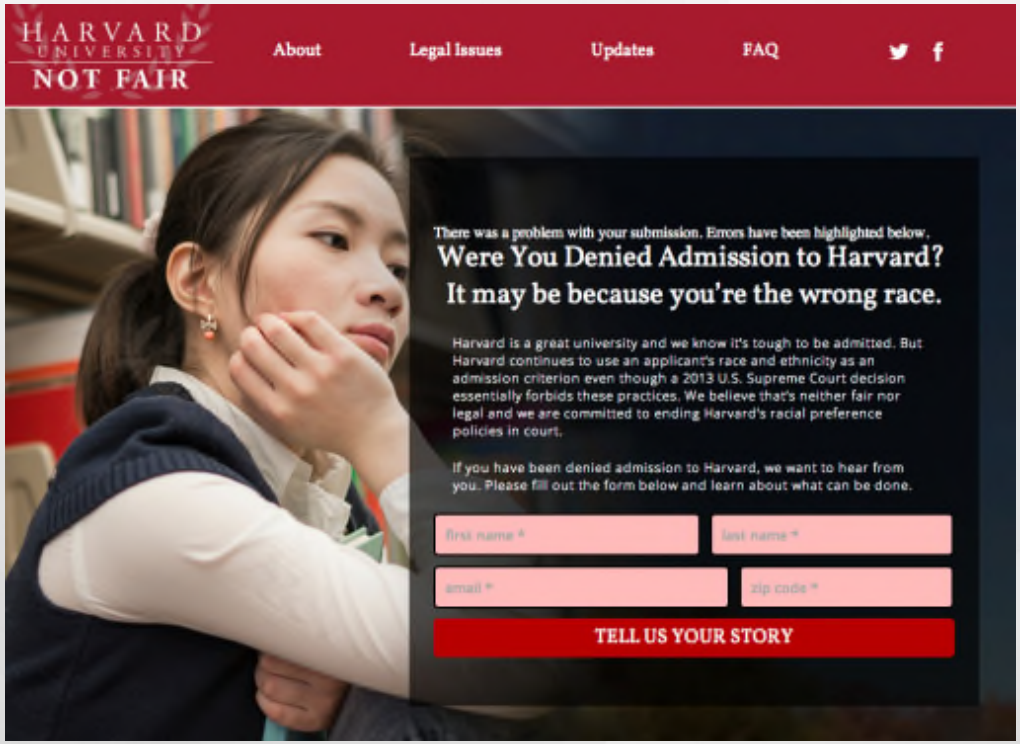
WHERE ARE WE
NOW?

The Fight Over Harvard Admissions

- May 2015: coalition of over 60 Asian American groups alleged that Harvard committed civil rights violations against Asian students in its admissions process.
- Coalition included: National Federation of Indian Americans, Asian Americans for Political Advancement, and the Long Island Chinese American Association.
- Percentage of Asians at Harvard has declined by 3 to 5% points since its peak attendance of 20% of the student population in 1993.
- Claim: Harvard used racial stereotypes and applied different standards to Asian students during admissions, as well as a racial quota, among others
- http://www.chronicle.com/items/biz/pdf/Final%20Aisan%20Complaint%20Harvard%20Document%2020150515.pdf

And There Is A Lawsuit Too . . .

- 120-page Complaint alleges violation of Title VI
- Brought by Students for Fair Admissions (which is run by Edward Blum)
- Filed in November 2014
- As of today, there are 357 docket entries
- Discovery ends in September
- http://studentsforfairadmissions.org/wp-content/uploads/2014/11/SFFA-v.-Harvard-Complaint.pdf



Discovery Ruling

- “Harvard shall produce **comprehensive data** from its admissions database for six full admissions cycles, beginning with the 2009-2010 admissions cycle, and ending with the 2014-2015 admissions cycle. Further, Harvard shall produce more limited admissions data for the 2007-2008 and 2008-2009 admissions cycle . . .”
- “Harvard shall not be required to produce data relating to the academic performance of matriculated students at this time, as Plaintiff has not shown that such data is likely to lead to the discovery of admissible evidence. The Court reserves the right to reconsider this ruling after further discovery.”
- “Harvard shall produce Electronically Stored Information (“ESI”) from the eleven (11) custodians identified in its July 27, 2016 letter to the Court. In addition, Harvard shall produce ESI from thirteen (13) additional custodians, to be selected by Plaintiff, for a total of twenty-four (24) Harvard custodians.”
- “Harvard shall . . . produce discovery relating to any prior investigations, reports, or official responses regarding alleged discrimination against Asian-American applicants. The relevant time period shall be from 1988 through the present.”
- “Plaintiff may take up to twenty (20) depositions in this matter without seeking leave of Court.”

THE UNIVERSITY of NORTH CAROLINA at CHAPEL HILL

June 2017

Thomas E. Wheeler, at the time serving as acting assistant attorney general at the Department of Justice said the agency was “acutely aware” of a lawsuit filed on behalf of Asian-American students questioning the admissions process at Harvard University.

Justice Dept. to Take On Affirmative Action in College Admissions

By CHARLIE SAVAGE AUG. 1, 2017

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FOX NEWS .com

NY Times story on affirmative action 'inaccurate,' DOJ says

By Barnini Chakraborty

Published August 02, 2017

FoxNews.com

The Justice Department is pushing back on a New York Times article that claimed officials were reshuffling resources in its civil rights division to go after colleges' affirmative action policies. The story ignited a firestorm after it was published, with civil rights groups and Obama-era education officials quickly condemning the DOJ for what they perceived as an "assault on affirmative action."

Late Wednesday, DOJ spokeswoman Sarah Isgur Flores issued a statement calling the press reports "inaccurate."

What Happened?

- Internal Justice Department posting sought lawyers for “investigations and possible litigation” relating to university affirmative action policies
- Purportedly was a call for volunteers to work on Harvard complaint
- Both NYT and WP said request/resume review being handled by political appointees & not career staff
- WP reported that staff from Education Opportunities Section of DOJ refused to work on the project, prompting the front office to take control of it themselves.
- John Eastman: “The DOJ, particularly the Civil Rights Division, has become intensely partisan . . . I see this as a very salutary development, one designed to yield enforcement priorities in line with the results of the last election—as it should be.”


WHERE HAVE WE BEEN?!?!


Reverse the
'BAKKE' Decision!
REVERSE THE "BAKKE" DECISION!
REVERSE THE "BAKKE" DECISION!
SPEAKOUT
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SUPREME COURT
BAKKE = RACIST ATTACKS ON AFFIRMATIVE ACTION
THE BAKKE DECISION
EXPAND AFFIRMATIVE ACTION!
DOWN WITH THE BAKKE DECISION!


PEOPLE'S TEMPLE
NATIONAL COMMITTEE TO OVERTURN THE BAKKE DECISION
REVERSE BAKKE!
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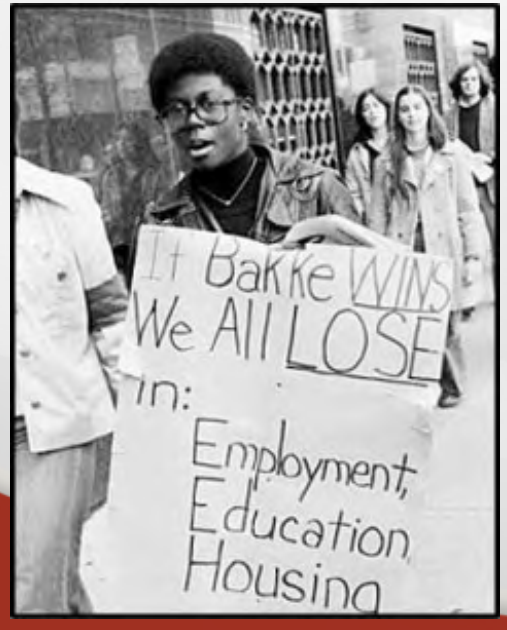
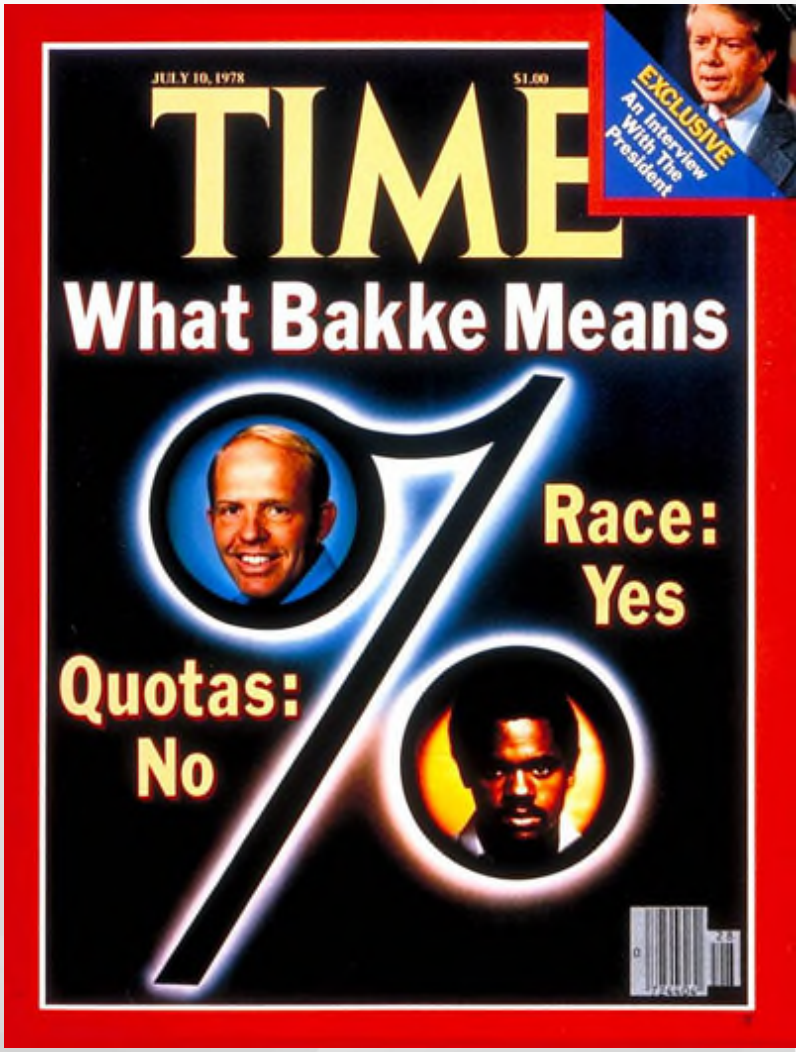

If Bakke WINS
We All LOSE
in:
Employment,
Education
Housing


ABOLISH
AFFIRMATIVE
ACTION
NOW!
Content of
Character,
NOT

Bakke (1978)

- Decision produced six separate opinions, none of which commanded a majority of the Court.
- Four Justices would have upheld the program against all attack on the ground that the government can use race to “remedy disadvantages cast on minorities by past racial prejudice.”
- Justice Powell provided a fifth vote not only for invalidating the set-aside program, but also for reversing the state court’s injunction against any use of race whatsoever.
- Holding: “State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin.” Thus, we reversed that part of the lower court’s judgment that enjoined the university “from any consideration of the race of any applicant.”
- Tribe: “the Court thus upheld the kind of affirmative action plan used by most American colleges and universities, and disallowed only the unusually mechanical—some would say unusually candid, others would say unusually impolitic—approach taken by the Medical School” of UC Davis



Grutter & Gratz (2003)

- Court endorses Justice Powell's view that **student body diversity** is a compelling state interest that can justify the use of race in university admissions
- Application of strict scrutiny: narrowly tailored to further compelling governmental interests.
- Strict scrutiny is not "strict in theory, but fatal in fact."

- Decision grounded “in keeping with our tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”
- “universities occupy a special niche in our constitutional tradition.”
- “In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy.”
- “critical mass” vs. quotas

- “We are mindful, however, that “[a] core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race . . . **Accordingly, race-conscious admissions policies must be limited in time**. This requirement reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle. We see no reason to exempt race-conscious admissions programs from the requirement that all governmental use of race must have a logical end point. The Law School, too, concedes that all race-conscious programs must have reasonable durational limits.”
- “It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”


AEI


DEFEND
Affirmative
Action &
Integration
FIGHT
for Equality


Judge
NOT
By Race
Diversity
is NO
Excuse for
Racism

Fisher II – Controlling Principles

1. Strict scrutiny applies
2. "the decision to pursue 'the educational benefits that flow from student body diversity' . . . is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper." No quotas.
3. "no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals . . . a university . . . bears the burden of proving a 'nonracial approach' would not promote its interest in the educational benefits of diversity 'about as well and at tolerable administrative expense.'" "Though '[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative' or 'require a university to choose between maintaining a reputation for excellence [and] fulfilling a commitment to provide educational opportunities to members of all racial groups,' Grutter, 539 U. S., at 339, it does impose 'on the university the ultimate burden of demonstrating' that 'race-neutral alternatives' that are both 'available' and 'workable' 'do not suffice.'

“I think that the generalized attack on race-conscious admissions as being unlawful is now essentially over for this generation,” he said. “I think we are going to see courts looking more at what’s happening inside the inner sanctum of the admissions process.”

Why UT Satisfied Strict Scrutiny (This Time)

1. “asserting an interest in the educational benefits of diversity writ large is insufficient. 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.”
    - “The record reveals that in first setting forth its current admissions policy, the University articulated concrete and precise goals . . . the University identifies the educational values it seeks to realize through its admissions process: 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.”
    - “The University's 39-page proposal was written following a year-long study, which concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful" in "provid[ing] an educational setting that fosters cross-racial understanding, provid[ing] enlightened discussion and learning, [or] prepar[ing] students to function in an increasingly diverse workforce and society."

Why UT Satisfied Strict Scrutiny (This Time)

2. “Petitioner argues that the University has no need to consider race because it had already ‘achieved critical mass’ by 2003 using the Top Ten % Plan and race-neutral holistic review. Petitioner is correct that a university bears a **heavy burden** in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan. The record reveals, however, that, at the time of petitioner's application, the University could not be faulted on this score.”
   - Before changing its policy the University conducted "months of study and deliberation, including retreats, interviews, [and] review of data," and concluded that "[t]he use of race-neutral policies and programs ha[d] not been successful in achieving" sufficient racial diversity at the University,
   - The record itself contains significant evidence, both statistical and anecdotal, in support of the University's position. To start, the demographic data the University has submitted show consistent stagnation in terms of the percentage of minority students enrolling at the University from 1996 to 2002.
   - The University put forward evidence that minority students admitted under the Hopwood regime experienced feelings of loneliness and isolation.
   - In 2002, 52% of undergraduate classes with at least five students had no African-American students enrolled in them, and 27% had only one African-American student. 12% of these classes had no Hispanic students, as compared to 10% in 1996.

Why UT Satisfied Strict Scrutiny (This Time)

3. Petitioner's final argument is that "there are numerous other available race-neutral means of achieving" the University's compelling interest. A review of the record reveals, however, that, at the time of petitioner's application, none of her proposed alternatives was a workable means for the University to attain the benefits of diversity it sought.
   - Petitioner suggests that the University could intensify its outreach efforts to African-American and Hispanic applicants. But the University submitted extensive evidence of the many ways in which it already had intensified its outreach efforts to those students. The University has created three new scholarship programs, opened new regional admissions centers, increased its recruitment budget by half-a-million dollars, and organized over 1,000 recruitment events

Fisher II: Words of Warning

- “The University of Texas at Austin has a special opportunity to learn and to teach. 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.”

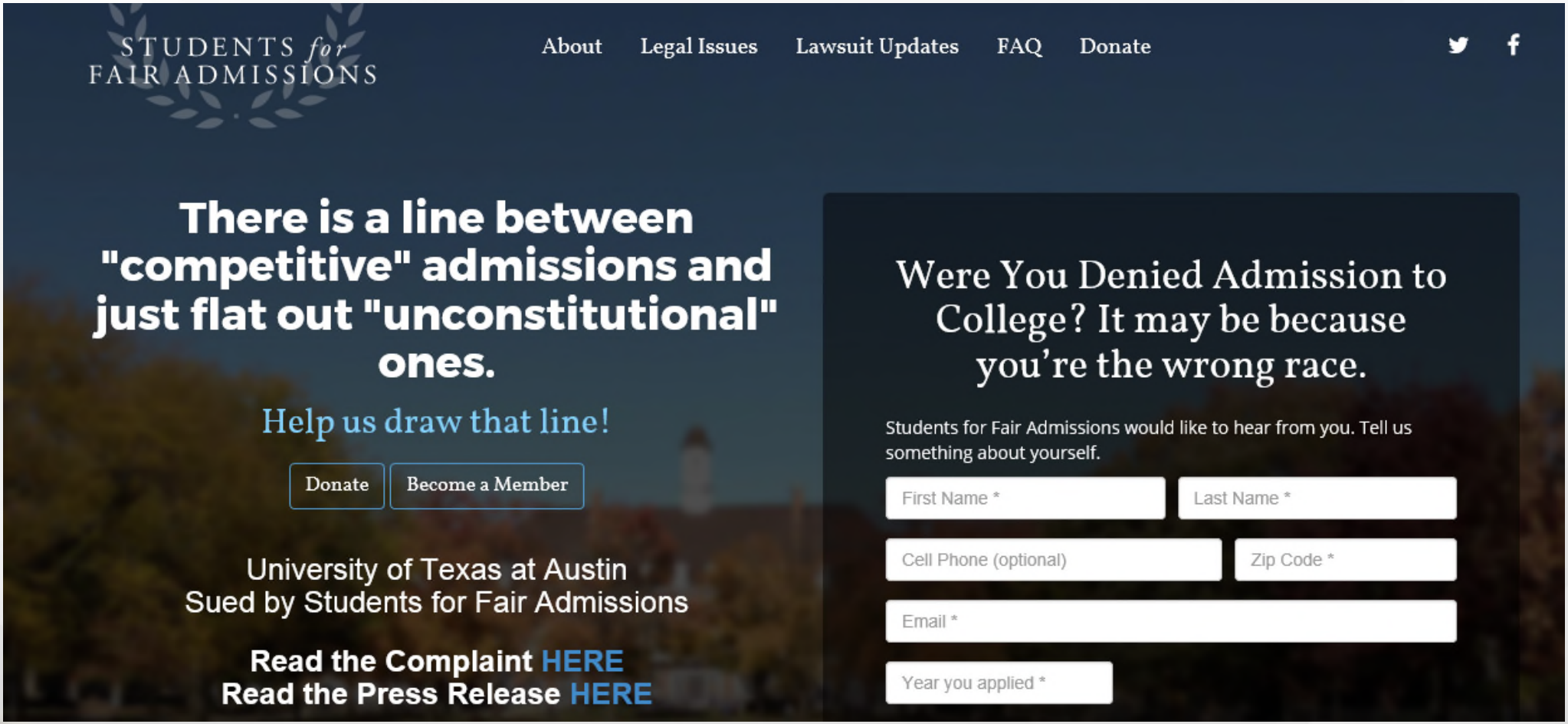
Title VI: University of North Carolina-Chapel Hill (NC) OCR Complaint No. 11-07-2016

On November 27, 2012, OCR closed a complaint against the University of North Carolina at Chapel Hill alleging that the University's undergraduate admissions process discriminates against White and Asian American applicants, in violation of Title VI. Under Title VI, strict scrutiny review is applied to the use of an individual's race in admissions in federally assisted programs. Under the strict scrutiny standard of review, the recipient must have a compelling interest for using race and its use of race must be narrowly tailored to that interest. OCR stated that the University has a compelling interest in achieving the educational benefits of diversity, as recognized by the U.S. Department of Education and the U.S. Department of Justice in the Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education. OCR also found that the admissions process met the second requirement of strict scrutiny: narrow tailoring. In light of the Complainant's specific concern regarding the differences among average SAT scores of applicants by race, OCR stated as part of its narrow tailoring analysis that SAT scores are not a decisive admissions factor in the University's holistic process, and the gaps in and of themselves do not establish that race is the predominant factor or even a predominant factor. Under Title VI, a recipient has academic discretion to decide on admissions criteria, including how test scores will be used.

Title VI: University of Virginia (VA) OCR Complaint No. 11-03-2072

On March 19, 2013 closed a complaint against the University of Virginia (the University). The complainant alleged that the University discriminated against White and male applicants by considering race and gender as factors in admissions as a means to achieve diversity in its undergraduate classes. Under Title VI, strict scrutiny review is applied to the use of an individual's race in admissions in federally assisted programs. Under the strict scrutiny standard of review, the recipient must have a compelling interest for using race and its use of race must be narrowly tailored to that interest. OCR stated that the University has a compelling interest in achieving the educational benefits of diversity, as recognized by the U.S. Department of Education and the U.S. Department of Justice in the Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education. OCR also found that the admissions process met the second requirement of strict scrutiny: narrow tailoring. OCR concluded the university uses a holistic admissions process, and seeks a meaningful mass of students across all characteristics, not just in terms of racial diversity. OCR found no evidence that the University's gender-neutral admissions process was in violation of Title IX.


WHERE
ARE WE
GOING?


STUDENTS for FAIR ADMISSIONS
About
Legal Issues
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Donate
There is a line between "competitive" admissions and just flat out "unconstitutional" ones.
Help us draw that line!
Donate
Become a Member
University of Texas at Austin
Sued by Students for Fair Admissions
Read the Complaint HERE
Read the Press Release HERE
Were You Denied Admission to College? It may be because you're the wrong race.
Students for Fair Admissions would like to hear from you. Tell us something about yourself.
First Name *
Last Name *
Cell Phone (optional)
Zip Code *
Email *
Year you applied *

Thoughts on Litigation

1. It has the potential to be expensive and time consuming
2. Significant discovery burdens
3. New potential class of plaintiffs every year
4. Litigation being led by advocacy groups that may be more immune to economic disincentives to significant litigation

Regulatory State

1. Is the table being set for an adverse Title VI finding?
2. If so, what are the practical implications for schools on a go-forward basis?

Justice Dept. to Take On Affirmative Action in College Admissions

By CHARLIE SAVAGE AUG. 1, 2017

Practical Suggestions & Thoughts

- We are seemingly done litigating over principles and instead perhaps moving to an era of litigation over **application**.
- Strict scrutiny is not fatal in fact, but it's still strict scrutiny
- If your institution is using race in its admissions policy, have you done the requisite homework?
  - Do you know how race is being used in your admissions process?
  - Have you articulated precise and concrete goals?
  - Have you studied why race-neutral policies could not get you there?
  - Are you regularly reevaluating?

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