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Legal Research Assignment:

Affirmative Action in University Admissions

I. Introduction

Affirmative action programs in university admissions have long been a topic of debate. Some say that programs which give race-based preferential treatment to applicants are unfair, whereas others argue that they are necessary to achieve diversity and equality. This paper explores the legal basis of affirmative action programs both federally and at the state level, in California. Moreover, this paper summarizes an article from the Harvard Law Review and describes how the topic has been characterized by *The New York Times* and *The New Yorker*.

II. Affirmative Action in Admissions from a Federal Perspective

The Civil Rights Act of 1964 is a key piece of legislation related to affirmative action. Title VII of this act makes the "discrimination because of race, color, religion, sex, or national origin[1]" unlawful. It "prohibited discrimination in public accommodations and federally funded programs.[2]" Universities must abide by this law when designing affirmative action programs. The constitutionality of using race as a factor in college admissions first appeared in the Supreme Court in Regents of the *University of California v. Bakke* (1978). The Court ruled that using racial quotas is not allowed under the Equal Protection Clause of the Fourteenth Amendment as well as the Civil Rights Act of 1964[3]. Justice Powell, author of the majority opinion, stated:

> The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder rather than further attainment of genuine diversity[4].

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[1]United States. *Civil Rights Act of 1964*. Sec 703.

[2]"Legal Highlight: The Civil Rights Act of 1964," *Office of the Assistant Secretary for Administration & Management*, U.S. Department of Labor, https://www.dol.gov/agencies/oasam/civil-rights-center/statutes/civil-rights-act-of-1964#:~:text=The%20Civil%20Rights%20Act%20of%201964%20prohibits%20discrimination%20on%20the,hiring%2C%20promoting%2C%20and%20firing.

[3]"Regents of the University of California v. Bakke (1978)," *Legal Information Institute*, Cornell Law School, last modified December, 2020, https://www.law.cornell.edu/wex/regents_of_the_university_of_california_v_bakke_(1978)#:~:text=Primary%20tabs-,Regents%20of%20the%20University%20of%20California%20v.,Civil%20Rights%20Act%20of%201964.

[4]*Regents of the University of California v. Bakke*, 438 U.S. 265 (1978): page 315.

Diversity means more than race. In *Grutter v. Bollinger* (2003), about the affirmative action program at the University of Michigan's law school, the Court upheld the admissions process, as it was aimed at promoting educational diversity. It did not violate the Equal Protection Clause in this case because race was not the sole factor of consideration[5].

In *Fisher v University of Texas at Austin* (2016), the Supreme Court upheld UT Austin's "race-conscious" admissions program also on the basis of the Equal Protection Clause[6]. As stated in the decision, "A university may institute a race-conscious admissions program as a means of obtaining 'the educational benefits that flow from student body diversity[7,8]'". The court finds it constitutional to consider race in admissions, as long as it is not the only thing considered.

III. Affirmative Action in Admissions in California

Affirmative action in university admissions has also been a topic of discussion at the state level. In California, Proposition 209 was approved in 1996, amending the California Constitution's Declaration of Rights to include Section 31[9]. Section 31 of Article I says:

> The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting[10].

Proposition 209 made it so that affirmative action policies, which involve race-based preferences,[11] are not allowed in public university admissions. Private educational institutions within California and other states also cannot discriminate against applicants because they receive federal funding, so doing so would violate the Civil Rights Act of 1964.

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[5]*Grutter v. Bollinger*, 539 U.S. 306 (2003).
[6]*Fisher v University of Texas at Austin* 579 U.S. 365 (2016): page 1.
[7]This idea was first expressed in the decision of *Grutter v Bollinger* 539 U.S. 306 (2003)
[8]*Fisher v University of Texas at Austin* 579 U.S. 365 (2016): page 11.
[9]"California Proposition 209, Affirmative Action Initiative (1996)," *Ballotpedia*, https://ballotpedia.org/California_Proposition_209,_Affirmative_Action_Initiative_(1996).
[10]C.A. Constitution art 1§ 31.
[11]"California Proposition 209, Affirmative Action Initiative (1996)," *Ballotpedia*, https://ballotpedia.org/California_Proposition_209,_Affirmative_Action_Initiative_(1996).

In 2020, Proposition 16 was on the California ballot to repeal the Affirmative Action Amendment created by Proposition 209. However, Proposition 16[12] was rejected, prohibiting institutions from discriminating against or granting preferential treatment to individuals "on the basis of race, sex, color, ethnicity, or national origin.[13]" Thus, affirmative action programs which grant preferential treatment to individuals based on their race are unlawful in California.

IV. Summary of a Law Journal Article

A *Harvard Law Review* article[14] discusses two guiding principles of Supreme Court decisions– the First Amendment right to free speech and the awareness of past racism. Diversity cannot be understood without recognition of the "relationship between today's concerns and historic events… for without that awareness it is difficult to understand the complexity of race in America"[15]. Following the *Brown v Board of Education* (1954) decision, the Court "supported voluntary government efforts affirmatively designed to integrate the nation"[16]. The decision of *Regents of the University of California v Bakke* (1978) reduced the value of desegregation. The goal has shifted from increasing diversity for the sake of progress and integration to furthering the perspectives a student gains through higher education.

As Justice Ginsburg expressed in her dissent in *Gratz v. Bollinger* (2003), the U.S. Constitution must "have the flexibility to be both colorblind and color-conscious"[17] in order to integrate society the way the decision in *Brown v Board* intended[18]. Affirmative action has

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[12]C.A. Proposition 16, *California State Legislature* (2020).

[13]C.A. Constitution art 1§ 31.

[14]Bollinger, Lee C. "What Once Was Lost Must Now Be Found: Rediscovering an Affirmative Action Jurisprudence Informed by the Reality of Race In America." *Harvard Law Review Forum*, no.129 (April 2016): 281. https://harvardlawreview.org/2016/04/what-once-was-lost-must-now-be-found-rediscovering-an-affirmative-action-jurisprudence-informed-by-the-reality-of-race-in-america/.

[15]*Ibid.*

[16]*Ibid*, 282.

[17]*Ibid*, 285.

[18]*Ibid*, 285.

allowed for the First Amendment supported exchange of ideas we benefit from today, but structural racism makes it necessary to extend it beyond what is allowed in *Bakke.* The Court should reevaluate the constitutionality of preferential treatment of university applicants on the basis of race[19].

V. Characterization of the Topic in Two Media Sources

A New Yorker article[20] discusses affirmative action in a positive light, as the reason for a more integrated society post de jure segregation. Lemann places it in a line of controversial changes that ultimately contributed to racial progress. He recognizes that different races are held to different academic standards for admission, but argues its necessity to protect the level of integration in higher education. Institutional racism affects test scores, grades, and more. If schools accepted students only considering academic merit, there is no way to maintain the diversity that has been attained by affirmative action policies.

A New York Times article[21] discusses affirmative action in terms of the upcoming Harvard Supreme Court case. It broadly characterizes discrimination as wrong, and brings up evidence about how different races were held to different standards. However, even with affirmative action in place, new classes of students do not represent true diversity. For example, applicants were given an advantage if they discussed their racial identity in personal statements, but a diverse group should also include the students who didn't. There are many factors which make up a student's identity, and this article argues that admissions committees ignore this. Meanwhile, students at elite universities continue to be disproportionately wealthy. Equal racial

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[19]*Ibid*, 289.
[20]Lemann, Nicholas, "The Supreme Court Appears Ready, Finally, To Defeat Affirmative Action." *The New Yorker*, January 27, 2022, https://www.newyorker.com/news/daily-comment/the-supreme-court-appears-ready-finally-to-defeat-affirmative-action.
[21]Kang, Jay Caspian, "It's Time for an Honest Conversation About Affirmative Action," The New York Times, January 27, 2022, https://www.nytimes.com/2022/01/27/opinion/affirmative-action-harvard.html.

representation does not necessarily equate to diversity, which was the mission of affirmative action to begin with.

VI. Conclusion

Overall, affirmative action programs are allowed in university admissions, as long as they do not admit students solely on the basis of race. It will be interesting to see how the Court decides in the upcoming case about affirmative action programs at Harvard and University of North Carolina.

Bibliography

Banks Christopher, O'Brien David, *The Judicial Process: Law, Courts, and Judicial Politics* Sage Publications, Inc, 2016, 314, https://dx.doi.org/10.4135/9781483395517.

Bollinger, Lee C. "What Once Was Lost Must Now Be Found: Rediscovering an Affirmative Action Jurisprudence Informed by the Reality of Race In America." *Harvard Law Review Forum*, no.129 (April 2016): 281-289. https://harvardlawreview.org/2016/04/what-once-was-lost-must-now-be-found-rediscovering-an-affirmative-action-jurisprudence-informed-by-the-reality-of-race-in-america/.

"California Proposition 209, Affirmative Action Initiative (1996)," *Ballotpedia*, https://ballotpedia.org/California_Proposition_209,_Affirmative_Action_Initiative_(1996).

C.A. Constitution art 1§ 31.

C.A. Proposition 16, *California State Legislature* (2020).

Fisher v University of Texas at Austin 570 U.S. 297 (2013).

Fisher v University of Texas at Austin 579 U.S. 365 (2016).

Grutter v. Bollinger, 539 U.S. 306 (2003).

Kang, Jay Caspian, "It's Time for an Honest Conversation About Affirmative Action," The New York Times, January 27, 2022, https://www.nytimes.com/2022/01/27/opinion/affirmative-action-harvard.html.

"Legal Highlight: The Civil Rights Act of 1964," *Office of the Assistant Secretary for Administration & Management*, U.S. Department of Labor, https://www.dol.gov/agencies/oasam/civil-rights-center/statutes/civil-rights-act-of-1964#:~:text=The%20Civil%20Rights%20Act%20of%201964%20prohibits%20discrimination%20on%20the,hiring%2C%20promoting%2C%20and%20firing.

Lemann, Nicholas, "The Supreme Court Appears Ready, Finally, To Defeat Affirmative Action." *The New Yorker*, January 27, 2022, https://www.newyorker.com/news/daily-comment/the-supreme-court-appears-ready-finally-to-defeat-affirmative-action.

Regents of the University of California v. Bakke, 438 U.S. 265 (1978): page 315.

"Regents of the University of California v. Bakke (1978)," *Legal Information Institute*, Cornell Law School, last modified December, 2020, https://www.law.cornell.edu/wex/regents_of_the_university_of_california_v_bakke_(1978)#:~:text=Primary%20tabs-,Regents%20of%20the%20University%20of%20California%20v.,Civil%20Rights%20Act%20of%201964.

United States. *Civil Rights Act of 1964*. Sec 703