2012 Constitutional Law Exam Outline

1. Recognize affirmative action based on race – calls for strict scrutiny

2. Does Texas have a compelling interest in affirmative action?

   Not like Croson in attempting to remedy past discrimination

   Grutter factors are present
      Need to achieve critical mass – numbers low in key classes

      Defer to University officials – educational benefits of diversity

      Produce leaders for society

   Parents Involved majority's problem is present
      Marginal difference produced by consideration of race does not constitute a compelling interest – add so few beyond top 10% (maybe need to increase the weight given to the race factor?)

   Justice Kennedy's compelling interest may be present
      Dismantling racial isolation

      Ensure equal opportunity

3. Is the Texas approach narrowly tailored to achieve possible compelling interest?

   Texas simply uses the Grutter approach – consider race as one of several factors to achieve a critical mass

   Justice Kennedy's problem is present
      Approach affects individual students directly like in Parents Involved

      Alternative race neutral approaches exist
         Possibly increase class sizes to get enough diversity in each class

         Draw more from low income high schools (top 15% for them)

         Measure all minority students as one group – thus, have a critical mass already (Justice Thomas approach)

EXAM NO. _____

CONSTITUTIONAL LAW Section B

Final Examination 6 Hours
April 26, 2012 9:00 a.m.-3:00 p.m.

Instructions

This is an open book exam, with materials limited to the casebook for the course, personally prepared class notes, and personally prepared course outlines. You may not use any additional materials.

This exam tests skills of reading, legal analysis in the context of the United States Constitution, and writing. Accordingly, you should take time to read closely the new material provided in this exam packet. You should also take time to organize and frame the logic of your analysis. In addition, you should take time to write a clear and concise answer.

You should be aware that there is no reward for length. Please keep your paper focused and concise. Your exam paper may not exceed 7 double-spaced pages.

This exam packet includes these instructions and the factual history in the case of Abigail Fisher and Rachel Michalewicz v. University of Texas at Austin.

For purposes of this exam, you should assume that you are a law clerk for United States Supreme Court Justice Anthony Kennedy. Justice Kennedy has been assigned to draft the majority opinion in the University of Texas case. Your co-clerk has drafted the factual history section of the opinion included in this exam packet. Justice Kennedy has asked you to draft the legal analysis section of the opinion.

In giving you this assignment, Justice Kennedy tells you that he, along with a majority of his colleagues on the Court, want to find that the University's consideration of race in making admission decisions violates the *Fourteenth Amendment*. He also tells you that he wants you to address the Court's decision in Grutter v. Bollinger, but he does not want to overrule that case. Even though he dissented in Grutter, he respects precedent and sees no need to overrule Grutter in this case. In addition, he asks you to use the Court's decisions in City of Richmond v. J.A. Croson Company and Parents Involved v. Seattle School District to reason to the proper result in this case. As to Parents Involved, he wants you to use both the majority opinion and his concurring opinion.

You have worked with Justice Kennedy for over a year. You know that he expects you to engage in detailed and rigorous cross-case reasoning. More specifically, he expects you to draw appropriate case analogies and distinctions within the applicable legal framework.

In writing the legal analysis section of the opinion, you should consider and cite where appropriate the relevant case decisions discussed in class.

Professor Herring

FACTUAL HISTORY

Abigail Fisher and Rachel Michalewicz v. University of Texas at Austin

Abigail Fisher and Rachel Michalewicz, both Texas residents, were denied undergraduate admission to the University of Texas at Austin for the class entering in Fall 2008. They filed this suit alleging that UT's admissions policies discriminated against them on the basis of race in violation of their right to equal protection under the *Fourteenth Amendment*. More specifically, this suit challenges the use of race as a factor in making undergraduate admissions decisions at the University of Texas at Austin. While the University has confined its explicit use of race to the elements of a program approved by the Supreme Court in *Grutter v. Bollinger*, UT's program acts upon a university applicant pool already shaped by a legislatively-mandated parallel diversity initiative that guarantees admission to Texas students in the top ten percent of their high school class (the Top Ten Percent Law).

Our focus will be upon the process employed by UT to admit freshmen when Fisher and Michalewicz applied for the class entering Fall 2008, looking to earlier and later years only as they illuminate the rejection of these two applicants. Following the mandate of *Grutter*, UT evaluates each application using a holistic, multi-factor approach, in which race is but one of many considerations. In granting summary judgment to UT, the lower courts found that "it would be difficult for UT to construct an admissions policy that more closely resembles the policy approved by the Supreme Court in *Grutter*," and "as long as *Grutter* remains good law, UT's current admissions program remains constitutional."

HISTORY OF THE UNIVERSITY'S ADMISSIONS POLICIES

Each year, UT receives applications from approximately four times more students than it can enroll. Over the past two decades, UT has repeatedly revised its admissions procedures to reflect its calculus of educational values while navigating judicial decisions and legislative mandates.

Until 1996, UT selected students using two metrics. The first measure, still employed today, is the Academic Index ("AI"), a computation based on the student's high school class rank, standardized test scores, and the extent to which the applicant exceeded UT's required high school curriculum. Perceiving that AI alone would produce a class with unacceptably low diversity levels, UT considered a second element for admissions—race. These measures combined resulted in UT admitting more than 90% of applicants who were ranked in the top ten percent of their high school class. (Unlike the current Top Ten Percent Law, UT's earlier policies did not *mandate* the admission of all top ten percent students. Thus, even though a top ranking at a predominantly minority high school would contribute to a higher AI score, the AI

alone could not effectively serve as a proxy for race because, on average, minorities received lower standardized test scores.)

There were then no clear legal limits on a university's use of race in admissions. The Supreme Court decided *Bakke* in 1978 but its guidance came in a fractured decision, leaving a quarter century of uncertainty. The record does not detail precisely how race factored in admissions decisions during this time, but it is undisputed that race was considered directly and was often a controlling factor in admission. Under this race-conscious admissions policy, the freshman class entering in Fall 1993 included 5,329 students, of whom 238 were African-American (4.5% of the overall class) and 832 were Hispanic (15.6%).

Race-conscious admissions ended in 1996 with *Hopwood v. Texas*, when the Fifth Circuit Court of Appeals struck down the use of race-based criteria in admissions decisions at UT's law school. The court held that diversity in education was not a compelling government interest, a conclusion the Texas Attorney General interpreted as prohibiting the use of race as a factor in admissions by any undergraduate or graduate program at Texas state universities.

Beginning with the 1997 admissions cycle, UT deployed a Personal Achievement Index ("PAI") to be used with the Academic Index. In contrast to the mechanical formulas used to calculate the AI, the PAI was meant "to identify and reward students whose merit as applicants was not adequately reflected by their class rank and test scores." Although facially race-neutral, the PAI was in part designed to increase minority enrollment; many of the PAI factors disproportionately affected minority applicants.

UT also implemented other facially "race-neutral" policies that, together with the AI and PAI, remain in use today. It created targeted scholarship programs to increase its yield among minority students, expanded the quality and quantity of its outreach efforts to high schools in underrepresented areas of the state, and focused additional attention and resources on recruitment in low-performing schools.

Despite these efforts, minority presence at UT decreased immediately. Although the 1996 admissions decisions were not affected by *Hopwood*, the publicity from the case impacted the number of admitted minorities who chose to enroll. In 1997, fewer minorities applied to UT than in years past. The number of African-American and Hispanic applicants dropped by nearly a quarter, while the total number of University applicants decreased by only 13%. This decrease in minority applicants had a corresponding effect on enrollment. Compared to 1995, African-American enrollment for 1997 dropped almost 40% (from 309 to 190 entering freshmen) while Hispanic enrollment decreased by 5% (from 935 to 892 entering freshmen). In contrast, Caucasian enrollment increased by 14%, and Asian-American enrollment increased by 20%.

In 1997, the Texas legislature responded to the *Hopwood* decision by enacting the Top Ten Percent Law, still in effect. The law altered UT's preexisting policy and mandated that Texas high school seniors in the top ten percent of their class be automatically admitted to any Texas state university.

In its first year, the Top Ten Percent Law succeeded in increasing minority percentages at UT. African-American enrollment rose from 2.7% to 3.0% and Hispanic enrollment rose from 12.6% to 13.2%. However, the absolute number of minorities remained stable as a result of a smaller freshman class. Over time, both the number and percentage of enrolled Hispanics and African-Americans increased. The entering freshman class of 2004, the last admitted without the *Grutter-like* plan, was 4.5% African-American (309 students), 16.9% Hispanic (1,149 students), and 17.9% Asian-American (1,218 students) in a class of 6,796 students.

The Top Ten Percent Law did not by its terms admit students on the basis of race, but

underrepresented minorities were its announced target and their admission a large, if not primary, purpose. In 2004, among freshmen who were Texas residents, 77% of the enrolled African-American students and 78% of the Hispanic students had been admitted under the Top Ten Percent Law, compared to 62% of Caucasian students. These numbers highlight the contribution of the Top Ten Percent Law to increasing minority enrollment, but they also reflect a trade-off implicit in the Law: the increase rested heavily on the pass from standardized testing offered by the Top Ten Percent Law. After implementation of the Law, the likelihood of acceptance for African-American and Hispanic students in the second decile of their high school class, who were without the benefits of the pass from standardized testing, declined. Meanwhile, the acceptance probability of similarly situated Caucasian students increased.

Hopwood's prohibitions ended after the 2004 admissions cycle with the Supreme Court's 2003 decision in *Grutter*. In August 2003, the University of Texas Board of Regents authorized the institutions within the University of Texas system to examine "whether to consider an applicant's race and ethnicity" in admissions "in accordance with the standards enunciated in" *Grutter*.

As part of its examination, UT commissioned two studies to explore whether the University was enrolling a critical mass of underrepresented minorities. The first study examined minority representation in undergraduate classes, focusing on classes of "participatory size," which it defined as between 5 and 24 students. UT analyzed these classes, which included most of the undergraduate courses, because they offered the best opportunity for robust classroom discussion, rich soil for diverse interactions. According to the study, 90% of these smaller classes in Fall 2002 had either one or zero African-American students, 46% had one or zero Asian-American students, and 43% had one or zero Hispanic students. A later retabulation, which excluded the very smallest of these classes and considered only classes with 10 to 24 students, found that 89% of those classes had either one or zero African-American students, 41% had one or zero Asian-American students, and 37% had either one or zero Hispanic students. In its second study, UT surveyed undergraduates on their impressions of diversity on campus and in the classroom. Minority students reported feeling isolated, and a majority of all students felt there was "insufficient minority representation" in classrooms for "the full benefits of diversity to occur."

The University incorporated the findings of these two studies in its June 2004 *Proposal to Consider Race and Ethnicity in Admissions*. The 2004 Proposal concluded that diverse student enrollment "break[s] down stereotypes," "promotes cross-racial understanding," and "prepares students for an increasingly diverse workplace and society." With respect to the undergraduate program in particular, the *2004 Proposal* explained that "[a] comprehensive college education requires a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders." With one eye on *Grutter*, it observed that these objectives are especially important at UT because its "mission and . . . flagship role" is to "prepare its students to be the leaders of the State of Texas"—a role which, given the state's increasingly diverse profile, will require them "to be able to lead a multicultural workforce and to communicate policy to a diverse electorate."

Citing the classroom diversity study, the *2004 Proposal* explained that UT had not yet achieved the critical mass of underrepresented minority students needed to obtain the full educational benefits of diversity. Accordingly, the *2004 Proposal* recommended adding the consideration of race as one additional factor within a larger admissions scoring index. This recommendation was presented as "an acknowledgment that the significant differences between

the racial and ethnic makeup of the University's undergraduate population and the state's population prevent the University from fully achieving its mission."

After more than a year of study following the *Grutter* decision, UT adopted a policy to include race as one of many factors considered in admissions. UT has no set date by which it will end the use of race in undergraduate admissions. Rather, it formally reviews the need for race-conscious measures every five years and considers whether adequate race-neutral alternatives exist. In addition, the district court found that the University informally reviews its admissions procedures each year.

The current policy appears to have produced some measurable results. In 2008, of the 363 African-American freshmen from Texas high schools that were admitted and enrolled (6% of the 6,322-member enrolling class from Texas high schools), 305 (4.8%) were a product of Top Ten Percent, while 58 (0.92%) African-American enrollees had been evaluated on the basis of their AI/PAI scores. For the 1,322 (21%) total enrolled in-state Hispanic students, 1,164 (18.4% of enrolled in-state students) were a product of Top Ten Percent, while 158 (2.5%) had been evaluated on the basis of their AI/PAI scores. However, because of the myriad considerations and programs instituted, it can be difficult to attribute increases in minority enrollment to any one initiative or factor (such as race).

THE CHALLENGED POLICY

UT's consideration of race is one part of the complex admissions process operating when the plaintiffs were rejected. Given plaintiffs' challenge, we must examine the whole of the process.

UT is a public institution of higher education, authorized by the Texas Constitution and supported by state and federal funding. Accordingly, it begins its admissions process by dividing applicants into three pools: (1) Texas residents, (2) domestic non-Texas residents, and (3) international students. Students compete for admission only against other students in their respective pool. Texas residents are allotted 90% of all available seats, with admission based on a two-tiered system, beginning with students automatically admitted under the Top Ten Percent Law and then filling the remaining seats on the basis of the Academic and Personal Achievement Indices. Because plaintiffs are Texas residents, their challenge focuses on the admissions procedures applied to in-state applicants.

Texas applicants are divided into two subgroups: (1) Texas residents who are in the top ten percent of their high school class and (2) those Texas residents who are not. Top ten percent applicants are guaranteed admission to the University, and the vast majority of freshmen are selected in this way, without consideration of race. In 2008, for example, 81% of the entering class was admitted under the Top Ten Percent Law, filling 88% of the seats allotted to Texas residents and leaving only 1,216 offers of admission university-wide for non-top ten percent residents. The impact of the Top Ten Percent Law on UT's admissions has increased dramatically since it was first introduced in 1998, when only 41% of the seats for Texas residents were claimed by students with guaranteed admission.

The remaining Texas applicants, who were not within the top ten percent of their high school graduating class, compete for admission based on their Academic and Personal Achievement Indices. The Academic Index is the mechanical formula that predicts freshman GPA using standardized test scores and high school class rank. Some applicants' AI scores are high enough that they receive admission based on that score alone. Others are low enough that

their applications are considered presumptively denied. If an application is presumptively denied, senior admission staff review the file and may, on rare occasions, designate the file for full review notwithstanding the AI score. In other words, no applicant is denied admission based purely on AI score without having her file reviewed by at least one admissions reader and her individual circumstances considered.

The Personal Achievement Index is based on three scores: one score for each of the two required essays and a third score, called the personal achievement score, which represents an evaluation of the applicant's entire file. The essays are each given a score between 1 and 6 through "a holistic evaluation of the essay as a piece of writing based on its complexity of thought, substantiality of development, and facility with language." The personal achievement score is also based on a scale of 1 to 6, although it is given slightly greater weight in the final PAI calculation than the mean of the two essay scores.

This personal achievement score is designed to recognize qualified students whose merit as applicants was not adequately reflected by their Academic Index. Admissions staff assign the score by assessing an applicant's demonstrated leadership qualities, awards and honors, work experience, and involvement in extracurricular activities and community service. In addition, the personal achievement score includes a "special circumstances" element that may reflect the socioeconomic status of the applicant and his or her high school, the applicant's family status and family responsibilities, the applicant's standardized test score compared to the average of her high school, and—beginning in 2004—the applicant's race. To assess these intangible factors, evaluators read the applicant's essays again, but this time with an eye to the information conveyed rather than the quality of the student's writing. Admissions officers undergo annual training by a nationally recognized expert in holistic scoring, and senior staff members perform quality control to verify that awarded scores are appropriate and consistent. The most recent study, in 2005, found that holistic file readers scored within one point of each other 88% of the time.

None of the elements of the personal achievement score—including race—are considered individually or given separate numerical values to be added together. Rather, the file is evaluated as a whole in order to provide the fullest possible understanding of the student as a person and to place his or her achievements in context. As UT's director of admissions explained, "race provides—like [the] language [spoken in the applicant's home], whether or not someone is the first in their family to attend college, and family responsibilities—important context in which to evaluate applicants, and is only one aspect of the diversity that the University seeks to attain." Race is considered as part of the applicant's context whether or not the applicant belongs to a minority group, and so—at least in theory—it "can positively impact applicants of all races, including Caucasian[s], or [it] may have no impact whatsoever." Moreover, given the mechanics of UT's admissions process, race has the potential to influence only a small part of the applicant's overall admissions score. The sole instance when race is considered is as one element of the personal achievement score, which itself is only a part of the total PAI. Without a sufficiently high AI and well-written essays, an applicant with even the highest personal achievement score will still be denied admission.

The Academic Index and Personal Achievement Index now employed by UT have been in continuous use since 1997. The lone substantive change came in 2005, following the *Grutter* decision, when the Board of Regents authorized the consideration of race as another "special circumstance" in assessing an applicant's personal achievement score.

Race—like all other elements of UT's holistic review—is not considered alone.

Admissions officers reviewing each application are aware of the applicant's race, but UT does not monitor the aggregate racial composition of the admitted applicant pool during the process. The admissions decision for any particular applicant is not affected—positively or negatively—by the number of other students in her racial group who have been admitted during that year. Thus, "it is difficult to evaluate which applicants have been positively or negatively affected by its consideration or which applicants were ultimately offered admission due to their race who would not have otherwise been offered admission." Nevertheless, race "is undisputedly a meaningful factor that can make a difference in the evaluation of a student's application."

The University's reasons for implementing race-conscious admissions—expressed in the *2004 Proposal*—mirror those approved by the Supreme Court in *Grutter*. Both the UT and *Grutter* policies "attempt to promote 'cross-racial understanding,' 'break down racial stereotypes,' enable students to better understand persons of other races, better prepare students to function in a multi-cultural workforce, cultivate the next set of national leaders, and prevent minority students from serving as 'spokespersons' for their race." Like the law school in *Grutter*, UT asserts that it "has determined, based on its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body." UT argues that it has made an "educational judgment that such diversity is essential to its educational mission," just as Michigan's Law School did in *Grutter*.

LEGAL ANALYSIS

To be completed.