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Case Review on Affirmative Action Admission Policies under Judicial Scrutiny: Whether Educational Interests Are Compelling

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Abstract: Lawsuits challenging affirmative action admission policies in higher education have been frequently filed in the United States. Cases such as *Regents of the University of California v. Bakke* aimed to determine the compelling interests for universities to continue using racial factors in their admissions processes. As a result, admission policies have faced increasingly strict judicial scrutiny. A recent case, *Students for Fair Admissions v. President and Fellows of Harvard College*, indicates that the Supreme Court has intervened and further investigated universities' discretion in admitting students. The majority opinion in this case concluded that Harvard employed race in a negative manner, perpetuating stereotypes through racial factors. By discriminating against Asian American applicants, Harvard's admissions program violated the Equal Protection Clause of the Fourteenth Amendment. While some criticisms may be unfounded, this case has prompted universities to reform their admission policies to ensure that their educational interests are strong enough to withstand strict scrutiny. Taking a wider perspective, individuals from minority groups often encounter different life circumstances influenced by cultural factors. Therefore, analyzing these cultural factors is equally important. In this specific case, the complex relationships within the plaintiff organization, Students for Fair Admissions (SSFA), revealed mixed motives. Affirmative action has successfully addressed the needs of minority groups and prevented further widening of the gap between the privileged and disadvantaged. Consequently, reforms of affirmative action admission policies in universities are expected.

Keywords: affirmative action admission policies, racial factors, strict scrutiny, educational interests, diversity of students

1. Introduction

It is the written judgement of *Students for Fair Admissions v. President and Fellows of Harvard College* [1] (*Harvard case*) that will definitely arouse extensive discussions in the coming future. US federal supreme court denied the decision of United States Court of Appeals for the First Circuit. The result turned to be that the Harvard admissions program violates the *Equal Protection Clause* of *the Fourteenth Amendment*. Affirmative action decisions and policies inevitably face a flood of lawsuits from the candidates, because these issues are exceptions of the constitutional right of equal protection.

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The disputes may be more heated in the field of higher education, because it is deeply rooted in the US tradition that universities enjoy much latitude to determining their academic affairs. Admission processes are included in such affairs.

This paper includes the following sections: In the first section, a systematic review of *Regents of Univ. of California v. Bakke* (*Bakke case*) and the development of strict scrutiny will be provided. In the second section, the results of *Harvard case* will be analyzed from two perspectives. This paper will focus on Harvard's admission policies and addressing the way different courts in the *Harvard case* had applied rules of strict scrutiny. In other words, this article will explain why the United States Court of Appeals held that admissions policies of Harvard did not violate the Constitution's *Equal Protection Clause*, while the Supreme Court overruled the result. In the third section, cultural factors will be taken into account. This paper will focus on the plaintiff, or the group named SFFA. It claimed to represent the educational interest of those who suffer from "reverse discrimination" and assert rights for them. As a result, reasons why some Asian Americans are now firmly opposed to affirmative action admission policies will be discussed. This paper will also elaborate on whether affirmative action on admission policies has achieved its purpose of caring for minority groups. If not yet, suggestions on a more reasonable classification will be provided for the reform of admission procedures.

2. Development and Doctrines of Strict Scrutiny

2.1. Disputes on Scrutiny in Bakke Case

According to the majority opinion in *Bakke case*, it depends on how compelling the state interest is in a specific case whether affirmative action programs can take racial factors into account without violating the federal constitution [2]. Meanwhile, the majority struck down the part of the program concerning racial quotas as well as the University of California's decision on *Bakke case*'s individual enrollment. However, *Bakke case*'s standards of scrutiny were deeply split, with none of them commanding a majority of the Court. Justice Stevens and three other justices held that *Title VI of the Civil Rights Act* states that no person may be excluded from participating in a program receiving federal financial assistance on the basis of race. As a result, such admissions policies were illegal. In other words, *the Civil Rights Act* is an interpretation that should comply with the "plain meaning" of *Equal Protection Clause* [3]. Such a plain meaning of *Title VI* is to ensure the elimination of any form of racial discrimination, and to implement the federal constitution in a color-blind way. Four other justices oppositely asserted an intermediate level of scrutiny.

The third opinion in *Bakke case*, namely Justice Powell's opinion, gained increasing support. He concluded that racial classifications of any sort were inherently suspect and called for the most exacting judicial scrutiny [2]. Among his statements, however, Powell did mention his support for universities selecting their student body without judicial intervention. Additionally, a university with student diversity could ideally be home to those best future leaders [4].

In a nutshell, *Bakke case* did not establish a doctrine to apply strict scrutiny in affirmative action cases. Apart from all of this, *Bakke case* revealed some inherent and irreconcilable contradictions about preferential treatment and reverse discrimination in jurisprudence. Analyses in this section focus on the perspective of the shift of compelling interests for strict scrutiny.

2.2. Strict Scrutiny Turning to Educational Interests

The development of scrutiny standards for affirmative action issues follows a principle. That principle can be generalized as follow: Discretion for institutes in their decisions on affirmative action admission policies has been shrinking. Samples of representative cases clarify this statement. In the first place, strict judicial scrutiny was limited to fields of public employment and contracts

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policies in cases such as *Wygant v. Jackson Board of Education* [5], *City of Richmond v. J.A. Croson Co.* [6] and Adarand Constructors, Inc. v. Pe ña [7].

In the field of higher education, the Supreme Court further standardized ways to implement specific strict scrutiny. One of the most important criteria was to identify the compelling interests. To explain further, the compelling interest of universities to continue their policies had changed from remedying historical discrimination into safeguarding the diversity of university student racial groups. The original goal of affirmative action was to remedy the historical discrimination against minority groups, especially to eliminate de facto racial segregation. Thus, the court recognized compelling interests with respect to such a goal.

A perspective of diversity, however, was a way of "looking ahead", which was devoted to helping future society achieve racial integration. According to E. Volokh, diversity demanded sound and unbiased judgment from a court, without a sense of guilt or the need for historical compensation [8]. There was an opinion that even in *Bakke case*, the historical discrimination against minority group members was no longer allowed to be compensated by recent admission preferences [9]. This evaluation might be radical, but it clearly pointed out the vulnerability *Bakke case* would brought to its following cases [10]. The reason was the court had created an edition of affirmative action, which would be inclusive enough for all members to claim to be victims of admission policies [9].

The diversity of student groups was established in *Gratz v. Bollinger* as a compelling interest of universities. However, the University of Michigan provided too much bonus for certain applicants in its "selection index" admissions procedure [11]. In *Grutter v. Bollinger*, the court explicitly upheld that kind of educational interest in the context of college admissions, and that the *Equal Protection Clause* in essential allows selective universities to take racial factors into account when admitting students. As a result, the controversial policies of the law faculty of the Michigan University survived strict scrutiny [12].

Meanwhile, another standard of strict scrutiny was demanding. It enforced the admission policies to be "narrowly tailored". In other words, that criterion emphasized affirmative action policy designs to be moderate. Exceptions notwithstanding, a noticeable case law trend was that the space had actually been sharply narrowed by the two standards.

Evidence supporting the "fatality" of strict scrutiny was increasing. There have been constant debates on the rationale of the educational interest behind student group diversity, as well as the legality of that kind of diversity. The contradiction burst in the admissions programs of prestigious private schools, such as Harvard. This paper will elaborate on these debates in the next section.

3. The Failure of Harvard

3.1. A Review of Harvard's Admission Policies and Educational Interests

As a private university, Harvard developed its own system of admission policies. Because Harvard accepted federal funds, it is subject to *Title VI of Civil Rights Act*. Additionally, Harvard's admission policy survived twice under strict scrutiny, but it was ruled unconstitutional.

According to the Supreme Court, every application towards Harvard would be assessed from six aspects or six dimensions. Harvard University's evaluation criteria for applicants not only consisted of objective evaluation criteria, such as GPA, test scores and after-school activities, but also included a relatively subjective personal rating. After several days of evaluation of the selected candidates, Harvard's subcommittees responsible for admission programs would recommend the most competitive applicants. They would be interviewed directly by the full committee with 40 members. Segments of Harvard's policies concerning racial factors were including but not limited to avoiding a "dramatic drop-off" in minority admissions, cutting some students by placing them on a "lop list", etc [1].

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According to the Supreme Court, Harvard pursued such educational benefits as cultivating potential leaders in different fields, orientating students to a pluralistic society and creating diversity-based new knowledge [1].

3.2. Judicial Opinions on Harvard's Policies

Different courts have used the strict scrutiny in different ways. The United States Court of Appeals for the First Circuit held that although Harvard's policies were imperfect, they were strong enough to survive strict scrutiny. According to the judgment, the Court of Appeals upheld that Harvard aimed not to realize racial balancing and that it did not use rigidly treat race as s preferential factor. Additionally, Harvard did not intentionally discriminate against Asian American applicants [13].

The logic behind the scrutiny, however, was reversed by the Supreme Court in Harvard. The court portended two dangers of state affirmative action in racial classifications. The first was the risk of pushing forward and the stereotype based on race, since minority students did not always advocate their group's characteristic viewpoint. This means that minority students didn't consistently articulate voices of their own groups. The second risk was that selective universities would actually force students that were not the beneficiaries of such preferences to undertake negative effects and to accept the results of being denied.

With such a generally conservative attitude, the court interpreted the constitution text and implemented strict scrutiny as below [1]:

(1) Universities should operate their race-based admissions programs in a manner that is sufficiently measurable to permit judicial review to survive strict scrutiny.

(2) *Equal Protection Clause* commands that race may never be used as a "negative" and that it may not operate as a stereotype.

(3) Harvard's admission program lacked an ending, at least in explicit forms.

3.3. Comments on the Attitudes of the Court Towards Educational Interests

On the one hand, the requirements of the Supreme Court in Harvard are not realistic with respect to the following aspects:

(1) No negative impact to all candidates can be accepted.

This was the second reason the court denied Harvard's policies. The court declared the negative impact Harvard had brought to Asian students. At the same time, however, it admitted that college admissions are zero-sum [1]. Actually, the court may have ignored the dangers of sacrificing minority groups' interests without such admission policies. Furthermore, enforcing absolute satisfaction is an unreasonable burden to universities, whether there is such a policy or not. As a result, the criticism may well be unfounded.

(2) Numerical evidence demonstrated the existence of "reverse discrimination".

In this case, the court quoted some statistics to prove the disparate impact of Harvard's policies to Asian students in their enrollment. That made sense to a great extent. However, the first difficulty is to clarify the cause-and-effect relationship between such policies and the low rate of Asian students. Harvard has another procedure in admissions known as ALDC. ALDC was born to protect interests of athletes, legacy applicants, deans interest list applicants, and children of faculty or stuff.

A demographic investigation was conducted by A. Nagai as a piece of evidence submitted by Harvard. The data about candidates was analyzed through a regression model, taking four admissions modes into account [14]. The first mode solely focused on academic scores, while the second added up ALDC factors [15]. And the third added up personal ratings [15].Only the fourth took racial groups into consideration [15].

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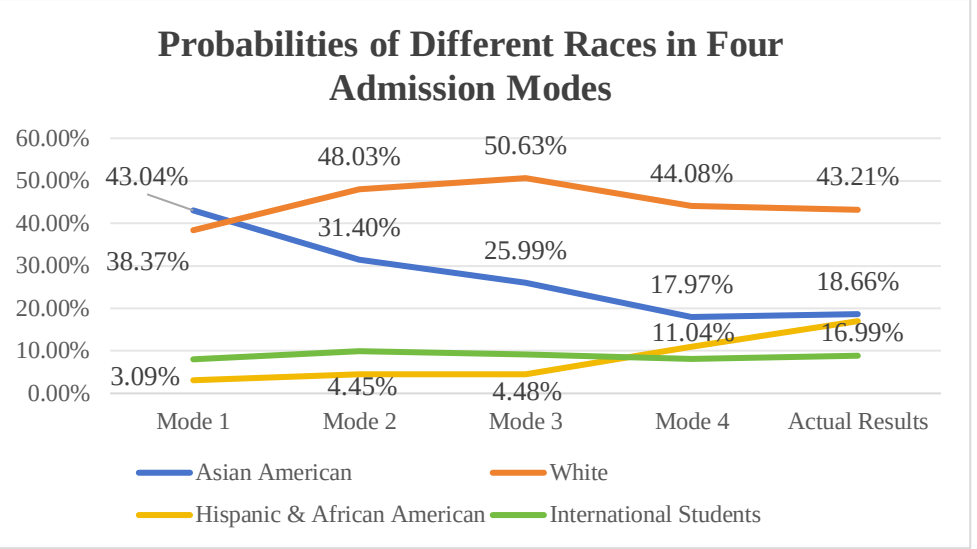

Figure 1: Probabilities of Different Racial Groups in Four Modes Differ from Those of Actual Admission Results.

What the line chart above indicated could support convincing arguments both for and against such policies. According to the figure, Asian Americans were less likely to be ultimately accepted, since the actual procedures were the most similar to Mode 4. Meanwhile, Hispanic and African American applicants enjoyed a higher admission rate in real situations than that of Mode 4. The statistics at least supported that Asian Americans were under disparate impact of those policies. As for the ALDC, Asians were not likely to be admitted through this procedure. This paper will not discuss whether such a procedure is unfair to Asian students, because it is highly to how private universities operate. Nonetheless, the existence of ALDC does weaken the cause-and-effect relationship between the procedure in question and the policies in question, leaving the court's decision exposed to attack by the dissents.

Despite these suspicious opinions, the court did objectively point out some weaknesses about Harvard's admission policies. These can be a lesson for all universities, namely all the potential respondents, to avoid frequent scrutiny from a court that disbelieves that universities will obey the *Equal Protection Clause* [1].

(1) Harvard failed to plan an ending time to such policies.

In essence, admission policies, along with the whole affirmative action movement, are a transition towards a higher level of equal opportunities. This paper suggests the form of such an end point be accurate goals in different periodical levels, rather than a rigid number, promising to stop such policies in one exact year. The latter form is not practical.

(2) Educational Interests needs renewing regularly.

This was implied between the lines of the judgment. As the supreme court has become more conservative in ideology, this paper postulates the need for ongoing maintenance of educational interests. In other words, it should be interpreted by courts in a more flexible way. Remedying historic systematic discrimination should fade away with time. With the passage of time, the history of explicit discrimination against the minority is no longer visible in retrospect. Powell, therefore, argued in *Bakke case* that the remedy for the fact that minorities were harmed should be based on a cause-and-effect relationship. And in accordance with the development within minority racial groups, that relationship has gradually become blurred. However, invisible discrimination, along with its disparate impacts, still exists. As a result, affirmative action in higher education is far from being eliminated. As for compelling interests, educational interests can take on more modernized

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interpretation to enrich its societal sensibility, namely to increase its content, especially in comparison with traditional ways of repairing harm done.

4. A Cultural Perspective to Reclaim Educational Interest

4.1. Whose Educational Interest the Plaintiff Were on Behalf of

Earlier in 2015, the Asian American Legal Defense and Education Fund alleged that Harvard deliberately admitted less qualified students instead of high-achieving Asians. The decision of U.S. Justice Department to investigate this issue further intensified the controversy. In a similar issue regarding Yale's admission policies, the justice department decided to file a lawsuit [16]. Although the lawsuit was eventually dropped, it, along with others, demonstrated a systematic, organized, and strategic use of judicial appeals to challenge the authority of the court.

In the case of Harvard, the plaintiff SFFA claimed to represent Asian Americans and argued that its members were entitled to equal educational opportunities. Since there were no individual Asians directly harmed by Harvard's admission program, the court needed to consider SFFA's standing in representing them. However, the motives of SFFA were questioned due to its founder Edward Blum belonging to the major white group and holding conservative views on racial issues. Critics argue that this kind of support for Asian Americans may be an attempt to reconstruct a broader system of racial discrimination. Highlighting the discriminatory history associated with traditional admission policies, Feingold suggests that affirmative action myths were created to conceal the original "white bonus" [17]. Katznelson criticizes lawsuits by white administration aimed at overturning affirmative action, arguing that they come at the expense of minority groups [18].

David Card, Ph.D, was hired by Harvard, while Peter Arcidiacono was hired by SFFA. According to simulations conducted in their respective reports, it was found that without preferential treatment, the proportion of white students in Harvard's class composition experienced the largest increase of six percentage points. On the other hand, Asian Americans only saw an increase of 3% or 4% [19].

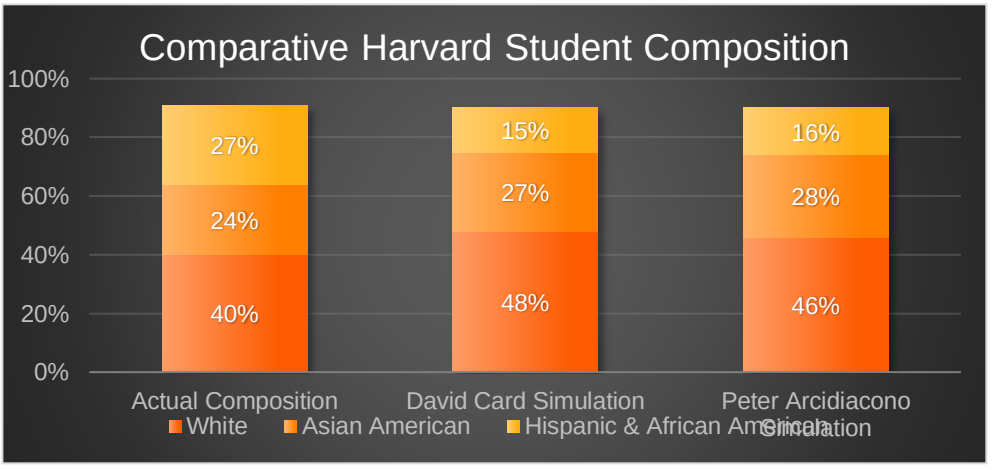

Figure 2: Harvard Student Composition Changed Visibly Without Consideration of Race.

Based on statistical results, selective universities may not deliberately impose an "Asian penalty", as the expansion of such policies is predicted to result in an increase in the proportion of white students, and the underrepresentation of Hispanic and African Americans students. However, whether Asian Americans will have easier access to universities under such circumstances remains uncertain.

Some argue that Asian Americans are no longer a minority group requiring protection, since they have achieved excellent results in standardized tests used in university admission procedures.

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However, this paper proposes that factors other than test results also play a role in admission procedures, such as personality. Stereotype about the personalities of Asian Americans, combined with potential discrimination against minority groups, may limit their opportunities to assert their educational interests.

This paper points out that the large amount of lawsuits filed by white candidates can be attributed to their numerical majority. Despite this, affirmative action admission policies may still be supported, since their actual beneficiaries may be white, especially when their educational interests from diversity are developed along with those of universities. Universities need to address the disproportionate enrollment rate of Asian American students caused by their current admission policies.

4.2. Goals of Affirmative Actions in Higher Education

The direct and short-term goal was to break the historical racial segregation and effectively implement *the Civil Rights Act*. The ultimate task is to achieve equal opportunities in higher education, with a key focus on preventing the widening income gap.

In theory, the beneficiaries of the affirmative action admissions policies should be all members of minority groups. However, some researchers suspect that these policies may not be able to fully address the issue of racial discrimination. African Americans have historically faced segregation and been deprived of educational rights. In the early stages, affirmative action policies successfully admitted members of minority groups, leading to diverse racial representation on campuses. On the one hand, some marginalized individuals were excluded due to the racial classification. Claims made by low-income earners, whether they are white, black, Asian or African, are often overlooked.

On the other hand, not all members of traditionally classified minority groups necessarily require affirmative action. An example of dissent against affirmative action can be seen in the views expressed by Justice Clarence Thomas. As a beneficiary of Yale's admission policy himself, he rejected the consideration of racial factors and criticized universities for perceiving minority group members as less capable. This represents a subtle yet enduring stereotype [20]. The policy previously provided reasonable support for successful individuals among racial minorities, but their descendants no longer face the same disadvantages and yet still receive preferential treatment in admissions. L.Benjamin has observed an increasingly strained relationship between the black elite and disadvantaged African Americans [21]. Higher education may exacerbate this divide, and affirmative action at least for African Americans may deviate from its ultimate goal.

4.3. Types of Educational Interests: Collective or Individual

This paper argues that admission policies must adhere to the court's discretion regarding the individual educational interests of candidates, as determined by strict scrutiny. However, when it comes to maintaining the collective educational interest of a private university, the approach may vary depending on specific admission issues.

On the one hand, for selective universities, the benefits of affirmative action admission policies outweigh the potential challenges from various perspectives. Expanding diversity can contribute to enhancing their overall competence. To further elaborate, the collective educational interest may only come into effect when the proportion of minority groups reaches a "critical mass". Addis A. argues that the critical mass represents the threshold at which public characteristics related to collective behavior and choices begin to emerge [22].

On the other hand, there must be a limit to the expansion of affirmative action admission policies due to the marginal utility. Otherwise, the policies may become rigid racial quotas or prioritize "racial balance" over numerical diversity among different nations and races. Complaints and criticisms from

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those rejected by universities may increase in such a scenario. In this regard, individual interests must take precedence over the collective educational interest.

Actually, the Supreme Court has tended to encourage discretion regarding individual cases particularly with respect to determining whether the plaintiff has been subject to unfair treatment. By filing a lawsuit, the plaintiff may have a greater chance of being ultimately admitted to the university they applied to. However, judicial intervention to protect individual rights has increased the scale of disputes, as there is no universal criterion for determining an individual's capacity when everyone has passed a standardized test. William F. Lee, Harvard's lead trial counsel, argued that there was no evidence indicating the university utilized racial-conscious preferential treatment over more qualified Asian Americans candidates, as all 15,000 candidates were fully qualified [23]. This paper contends that rather than only responding to claims made during judicial procedures, it would be more valuable for universities to design efficient policies beforehand. Suggestions for such policies will be offered in the next section.

5. Conclusion

Strict scrutiny has imposed limitations on universities' ability to justify their compelling interest in educational interests. Despite efforts to restrict affirmative action admission policies, the doctrines of strict scrutiny have remained intact. Student body diversity can continue to be a compelling interest in the context of college education procedures, which include admissions programs, as a whole. In order to make tenable judgement, courts are required to weigh between individual interests and collective educational interest in accordance with the *Equal Protection Clause*.

The *Harvard case* serves as a warning to universities, prompting them to make their admission policies more flexible. While there are controversies surrounding Harvard's admission policies, the institution has achieved significant accomplishments and innovations in its design. To comply with the court's judgement, Harvard may need to adjust its admission programs in certain cases while maintaining them in others. Cultural factors have also been taken into consideration, and an analysis of the leadership and complex relationships within the SFFA has been conducted. From a broader perspective, this paper concludes that affirmative action has fulfilled its purpose of addressing the needs of minority groups.

Brief suggestions will be provided for the reform of admission procedures, including the need for a more reasonable classification system. Reforms of affirmative action admission policies in universities are anticipated, as they will lead to more well-structured educational interests. Increasing information support, offering preferential treatment to members of minority groups during the admission process, and enhancing admission publicity are all crucial aspects of these reforms.

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