ABSTRACT

A New Light: Re-examining College Admissions After Fisher v. Texas

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The use of race-based affirmative action in college admissions has a well-established history in the Supreme Court. But with recent trends, has it finally gone too far? Asian interest groups argue that students of Asian descent are held to different standards than their peers and are currently suing Harvard University in federal court. With quantifiable metrics supporting their case, its outcome could be different than recent cases which lacked evidentiary justification. In this paper, I first examine the legal history of race-based affirmative action and then America's legacy of discrimination against Asian immigrants. Finally, I apply the Supreme Court's prior rulings to the facts of the Harvard case and discuss potential outcomes and their implications.

A NEW LIGHT: RE-EXAMINING COLLEGE ADMISSIONS AFTER FISHER V. TEXAS

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CHAPTER ONE

A History of Affirmative Action in America

Introduction

The history of affirmative action as we know it today is relatively recent news. Today it primarily refers to the process by which colleges consider a potential applicant's race. American courts have recently begun proceedings on several cases which argue that affirmative action hurts minority students. However, to understand the potential outcomes of affirmative action one must first have a clear understanding of the history behind the law as it stands right now.

The First Signs of Affirmative Action

The NLRA and the Origins of the Phrase

The phrase "affirmative action" had a history even long before it was ever associated with racial discrimination. The first known use of the term by the US federal government came in the National Labor Relations Act of 1935 (NLRA), a law which used the term affirmative action to refer to specific requirements which required that action be taken to compensate those victimized by unfair labor practices. This act also marked the creation of

America's first labor oversight board.[1] This definition differs from the modern understanding of affirmative action since the NLRA did not require a written plan of systematic action. Here the concept of "affirmative action" applied only after the National Labor Relations Board investigated a complaint and made official findings of fact.[2] The Board functioned as a quasi-judicial oversight board to investigate all labor disputes arising under the act. The "affirmative action" prescribed in the NLRA consisted of back pay, reinstatement, and specific provisions for fair union bargaining.[3] These provisions are similar to those used today by the Department of Justice to correct systematic workplace discrimination. But in the 1930s, the NLRA used affirmative action to correct *individual* acts of wrongdoing. It thereby punished employers for misbehavior as opposed to levelling the field to help people who had been mistreated.

Affirmative action from the NLRA was rudimentary by modern standards, but it included several principles that helped guide the creation of modern policies. The NLRA only provided protections for those who had previously been victimized in the workplace, which is the same standard the

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[1] *See e.g.* Judson MacLaury, "President Kennedy's E.O. 10925: Seedbed of Affirmative Action," *Federal History*. 2010 *and* Ira Katznelson, *When Affirmative Action Was White*, (New York: W.W. Norton & Company, 2005), 54-55.

[2] National Labor Relations Act, 29 U.S.C. §§151-169, at § 160. Sec. 10(c) (1933).

[3] Id.

Supreme Court would adopt when deciding civil rights. In order to pass constitutional muster, an affirmative action program must be purposely designed to correct a definable past injustice.[4] The NLRA also marked the beginning of federal oversight of fair employment practices. While the National Recovery Administration (NRA) had been established two years earlier in 1933, it only survived until 1935 and ultimately failed because it lacked retroactive enforcement.[5] The NLRA incorporated many of the same rules used by the NRA and institutionalized federal oversight of workplace fairness. This precedent was an essential prerequisite for the enforcement of civil rights rules in years to come.

Executive Order 8802: The First Executive Attempt

Federal protection for minorities first originated during World War II. In 1941, President Roosevelt issued Executive Order 8802 which prohibited discrimination by government agencies and federal contractors. In the relevant section, the order requires that "there shall be no discrimination in the employment of workers in defense industries and in Government, because

[4] *See e.g.* University of California Regents v. Bakke, 438 US 265 (1978); Grutter v. Bollinger, 539 US 306 (2003); Gratz v. Bollinger, 539 US 244 (2003); Fisher v. University of Texas at Austin, 133 S. Ct. 2411 (2013); Fisher v. University of Texas at Austin, 136 S. Ct. 2198 (2016).

[5] A.L.A. Schechter Poultry Corp. v. United States, 295 US 495 (1935).

of race, creed, color, or national origin."[6] The order was a response to rampant racial discrimination in the defense industry and marked the beginning of federal racial protections in the workplace. In fact, EO 8802 was the first Presidential order concerning race since Reconstruction and it signaled the dawn of a continuing trend towards protecting minorities.[7] The Order itself had only limited success; it was somewhat effective in the North, but in the South its efforts were stymied by legislative opposition which made it measurably less successful.[8]

Long before affirmative action became the law of the land, its foundations were already being laid in matters of federal policy. The policies of the 1930s and 1940s were mostly unrelated to discrimination, and any that approached the topic struggled to enforce rules effectively. However, the groundwork for worker protections had already been laid, giving the government a powerful tool to apply to civil rights in the coming decades.

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[6] Executive Order No. 8802, 6 Fed. Reg. 3109 (1941).

[7] "Executive Order 8802: Prohibition of Discrimination in the Defense Industry (1941)," U.S. National Archives and Records Administration, www.ourdocuments.gov

[8] William J. Collins, "Race Roosevelt, and Wartime Production: Fair Employment in World War II Labor Markets," *American Economic Review* 91, no. 1 (March 2001).

Executive Order 10925: The Beginning

It is not often that a truly new federal policy is launched, especially one which develops into a long-term pattern of thought and action that protects economically compromised minorities. Yet this is exactly what happened on March 6, 1961 when President John F. Kennedy issued Executive Order 10925. On that day, affirmative action became the official workplace policy of the United States Federal Government. President Kennedy famously explained that Executive Order 10925 would require federally funded employers to "take affirmative action to ensure that applicants are employed . . . without regard to their race, creed, color, or national origin."[9]

The Order marks the first time that the something akin to the contemporary meaning of affirmative action was used in American law. Since Executive Order 10925 was the first attempt at workplace non-discrimination regulations, it was weak by modern standards. The Order only regulated employers with a business connection to the federal government and left private companies free to engage in their own

[9] John F. Kennedy, "Statement by the President Upon Signing Order Establishing the President's Committee on Equal Employment Opportunity," 1961. Online by Peters and Woolley, *The American Presidency Project*. www.presidency.ucsb.edu/ws/?pid=8520

discriminatory hiring practices. Additionally, the Order itself did not actually define what it meant by affirmative action. Secretary of Labor Willard Wirtz has since explained that at the time the term itself had no specific meaning beyond "taking the initiative" to help the underprivileged rather than just prohibiting discrimination.[10] This distinction, though insignificant on paper, represented a sea change in the federal attitude towards discrimination.

In the past, as in Order 8802, the goal of regulation was to take punitive action against companies guilty of racial discrimination. Now, the idea was to "take initiative" to actively prevent discrimination in the workplace. Many of the provisions of the Order attempted to go beyond the bare minimum; for example, it created a committee which was required to suggest "affirmative steps" to other federal agencies to better promote nondiscrimination among their employees.[11] Many scholars correctly regard Executive Order 10925 as the birthplace of affirmative action. Yet while the order continued the trend towards protecting minorities, it was still structurally weak in several ways. The enforcement mechanism was strong, but only because of the extremely limited jurisdiction of the Order. The President's committee could only regulate federal employers, federal contract

[10] MacLaury, "President Kennedy's E.O. 10925: Seedbed of Affirmative Action," *Federal History*. 2010.

[11] Id.

employers, and the unions that represented their employees. The order lacked a justification for action that went beyond government self-supervision.

The Civil Rights Act of 1964 & Related Supreme Court Rulings

Even though the first executive order about affirmative action was made without a clear nondiscrimination law on the books, it was only a few years before the Civil Rights Act was passed. This landmark law made it illegal to discriminate on the basis of race in voter registration, employment decisions, public accommodations, and schools.[12] This was the first time the government had imposed restrictions on the employment practices of private employers. But declaring these practices illegal did not stop them overnight. The very same year, the Supreme Court heard oral arguments in *Heart of Atlanta Motel, Inc. v. United States.* The motel's owner argued that the CRA exceeded Congress' constitutional power under the Interstate Commerce Clause. When the Court considered this, they first turned to the legislative history of the act, which they found was "replete with evidence of the burdens that discrimination by race or color places upon interstate commerce."[13] The Court was concerned because Americans were increasingly mobile and

[12] Civil Rights Act of 1964, 42 U.S.C. §1981 (1964).

[13] Heart of Atlanta Motel, Inc. v. United States, 379 US 241, 252 (1964).

African American travelers faced unreliable and sparse accommodations.[14] Even the Administrator of the Federal Aviation Agency expressed his position that a lack of accommodation for black Americans was adversely affecting air commerce as well.[15] Ultimately, the Court found "overwhelming" evidence that discrimination impeded interstate travel, and after a thorough analysis of the interstate commerce power, found the act constitutional.[16]

The decision in *Heart of Atlanta Motel* hardly came as a surprise. The ruling was unanimous: 9-0 in favor of the United States. That same year another ruling, also decided by a 9-0 margin, applied the decision in *Heart of Atlanta* to smaller businesses which did not serve travelers but purchased supplies out of state.[17] This meant the requirements of the Civil Rights Act applied to most American businesses including small, local restaurants. The impact of these rulings on the trend of American jurisprudence should not be underestimated. For the first time, the Court approved the regulation of private industries and the decisions they made about whom to serve. These decisions put weight behind the enforcement of the Civil Rights Act and were a necessary prerequisite to many of the societal changes wrought by the Act.

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[14] Id. at 253.

[15] Hearings before Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess.; S. Rep. No. 872 at 12-13.

[16] *See* Heart of Atlanta Motel v. US at 253, 255, 262, etc.

[17] *See* Katzenbach v. McClung, 397 U.S. 294 (1964).

Executive Order 11246: The Maturation of Affirmative Action

Until this point, federal rules usually just called for nondiscrimination in hiring and accommodation, and any enforcement authority they held was reserved until after a violation had been proven. Executive Order 11246 changed the rules once more and created many of the programs we now refer to as affirmative action. This was not the first time the concept of affirmative action had been introduced, but for the first time it was clearly defined and enforceable. This Order gave the government tools to enforce nondiscrimination beyond hiring and accommodation and into all areas of the employment relationship. It also required proactive cooperation from federal contractors, and for the first time antidiscrimination efforts looked forward as well as backwards.

The Order instructed contractors to "ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin."[18] This language protected workers from disparate treatment during the duration of their employment, not just when they were hired or served by a business. The order also went beyond the requirements of the Civil Rights Act in that it required employers to maintain and furnish documentation of hiring and

[18] Executive Order No. 11246, 30 Fed. Reg. 12319, Sec. 202 (1965).

employment practices upon request.[19] The CRA did have a provision requiring documentation, but it only applied once there had been a finding of wrongdoing. This requirement would later prove to be an exceptional source of data for evaluating workplace and other nondiscrimination policies. This signaled a change in the purpose of affirmative action. No longer was it sufficient to check the discriminatory intent of a few individual employers. Now affirmative action was seen as a "means of relieving the national disgrace of minority exclusion from employment opportunities."[20]

Amendments to the order were made over the next few years and required, for the first time, that federal contractors with more than 50 employees and contracts worth at least $50,000 submit written affirmative action plans to be implemented in their companies. These plans did not just detail workplace policies and procedures, but were required to include a strategy for bringing the racial distribution back into balance. When deficiencies were found, companies had to put into writing "specific goals and time tables for the prompt achievement of…equal employment opportunity."[21] While the exact standards for writing and evaluating written

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[19] Faye J. Crosby and Cheryl VanDeVeer, *Sex, Race, & Merit: Debating Affirmative Action in Education and Employment* (University of Michigan, 2000), 220.

[20] Peter G. Nash, "Affirmative Action under Executive Order 11,246," 46 NYU Law Review 255, 229 (April 1971).

[21] 41 Code of Federal Regulations § 60-1.40 (1970).

plans were somewhat weak at first, the general principles have remained the same, and still require a thorough self-analysis of a firm's current workforce, identification of under-represented areas, and specific action-oriented policies to address problematic areas.[22] The Supreme Court would later use these same principles when colleges began to fashion affirmative action programs and federal oversight was required.

The significance of Executive Order 11246 is difficult to quantify, although its influence on the jurisprudential trend of America is clear. The Order gave specific rules that employers had to follow, and its framework has since been used to protect other classifications that face discrimination. In 1967, the Order was updated to include gender protection[23] – in 2014, it added sexual orientation and gender identity to the anti-discrimination provisions.[24] The framework of rules created by this Executive Order has guided affirmative action efforts in America ever since, and several of its

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[22] Office of Federal Contract Compliance Programs, "Guide for Small Businesses with Federal Contracts," *https://www.dol.gov/ofccp/TAguides/sbguide.htm*.

[23] Executive Order No. 11375, 32 Fed. Reg. 14303.

[24] Office of the Press Secretary, "Executive Order – Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity," *The White House,* July 21, 2014, https://obamawhitehouse.archives.gov/the-press-office/2014/07/21/executive-order-further-amendments-executive-order-11478-equal-employmen

principles are still relevant to the consideration of affirmative action in higher learning.

Affirmative Action Principles Applied to Higher Education

Regents of the University of California v. Bakke (1978)

When the Supreme Court heard arguments in the *Bakke* case, the entire nation paid at attention. That evening, it was the lead story on all three major television news programs, with anchors telling their audiences of "the most important civil rights case since segregation was outlawed."[25] These anchors were not wrong. The case brought to the forefront a major conflict between those who supported race neutrality and others who preferred racial balance and equal opportunity.

The case was brought by Mr. Alan Bakke, a white applicant to the UC Davis Medical School who was rejected in 1973 and again in 1974. Mr. Bakke was considered by university officials to be a desirable candidate. He had scored well on benchmark exams, yet was unable to secure admission.[26]

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[25] Howard Ball, The Bakke Case: Race, Education, & Affirmative Action, (University of Kansas Press, 2000).

[26] Mr. Bakke's 1973 interviewer, Dr. Theodore West, considered Bakke a "very desirable applicant to [the] medical school" and his benchmark score was 468 out of 500.

See University of California Regents v. Bakke, 438 US 265, 276-277, (1978)

However, for every entering class, the University reserved 16 seats for minority students who were evaluated and admitted using an entirely separate admissions process.[27] Bakke challenged the program under the Equal Protection Clause of the Fourteenth Amendment.

The Court was divided on this case. Ultimately the decision was made in favor of Bakke, yet it was announced as a plurality opinion. A plurality opinion is different from a simple majority in that a plurality decision is the position taken by Justices who concurred in the judgments "on the narrowest grounds."[28] Despite its status as a plurality opinion, six Justices agreed that the program at UC Davis unconstitutionally considered race. The University argued that its program was simply a means to the goal of minority representation. The Supreme Court vehemently disagreed:

> The special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status.[29]

The Court was clear that when race is considered explicitly as a qualifying factor, it does not matter how the policy is packaged or what the

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[27] University of California Regents v. Bakke, 438 US 265, 274, (1978)

[28] Marks v. United States, 430 U.S. 188, 193 (1977).

[29] University of California Regents v. Bakke *at* 289.

intentions behind it are – the specialized consideration alone invoked the 14th Amendment. The Supreme Court then evaluated the plan under strict scrutiny. Strict scrutiny is a legal burden the government bears to show that a program "serves [an] important governmental objective and must be substantially related to achievement of those objectives."[30] In more general terms, to pass strict scrutiny, the government must show three things: first, that the policy in question is the least restrictive means of achieving its end, second, the policy furthers a compelling government interest, and third, the policy must be narrowly tailored to achieve that compelling interest. When evaluated under strict scrutiny, the policy was found to further educational diversity which the Court agreed was a compelling interest.[31] The Court did not agree that the program was narrowly tailored, since the kind of diversity that makes a compelling interest involves far more than merely racial qualifications. This meant the program failed strict scrutiny since it considered race in such a way that was the "functional equivalent of a quota system."[32]

The *Bakke* case may seem like a departure from the trend towards greater protection of minorities. However, this ruling did not entirely discard

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[30] Califano v. Webster, 430 US 313 (1977); *as cited in* University of California Regents v. Bakke *at* 389.

[31] *Id* 315.

[32] *Id* 319.

the use of race in college admissions. It implicitly validated the use of race in certain situations, but only when such use was carefully considered as part of a larger program. Rather than a blow to the greater cause, *Bakke* shows the Court pushing back on an overly aggressive program while still carving out room for similar but more carefully constructed policies.

Richmond v. J.A. Croson Co. (1989)

This case considered a program by the city of Richmond, Virginia designed to increase the number of city contracts awarded to minority companies. Known as the Minority Business Utilization Plan, Richmond's policy essentially gave preference to companies which were at least 51% minority owned and controlled. It also required prime contractors to subcontract at least 30% of their work to minority owned businesses.[33] As is the custom in cases where the government uses race to decide between candidates, the Court considered the case under strict scrutiny.

The City was unable to show a compelling need for the remedial actions it proposed. Since the City already considered contracts on a case-by-case basis, the Court failed to see the need for additional numerical requirements.[34] The Court also noted that there had been little consideration by the City of whether a less restrictive plan would have achieved the same

[33] Richmond v. J.A. Croson Co., 488 US 469, 478 (1989).

[34] *Id.* at 543.

goals. The Court specifically thought the City had not explored the possibility of a race-neutral plan which could have still achieved the desired goal.

This finding is certainly less notable than the one in *Bakke*, but it still adds to our consideration of the jurisprudential trend. The Court was clear that numerical quotas, even those based on percentages, are unlawful. It also stated that the mere presence of past societal discrimination is not enough to make its correction a compelling government interest. Later cases would further clarify what level of discrimination is needed to invoke a true compelling interest.

Gratz & Grutter: The Twin Cases

In 2003, two cases arrived at the Supreme Court which would greatly help American universities understand exactly how the Court viewed race-conscious college admissions. These two cases are best evaluated as a pair, since they concerned similar policies in place at similar schools – the University of Michigan and the University of Michigan School of Law. Both cases involved well-qualified female applicants who were denied admission to the respective schools. Ultimately the Supreme Court approved the law school's program while overturning that of the undergraduate college.

Jennifer Gratz's application was almost strong enough to gain admission under the existing program. She had a 3.67 high school GPA, had

a strong record of extracurricular involvement, and had scored in the 83rd percentile of the ACT.[35] Her credentials were just low enough to exclude her from the group of admitted students. However, the University of Michigan used a different system for analyzing "underrepresented minority students" who were either African-Americans, Hispanics, or Native Americans. The University relied on a point system that rewarded applicants for possessing various achievements and qualifications. Out of a 150-point scale, minority students were automatically awarded an additional 20 points.[36] This ensured that the University was able to admit "virtually every qualified applicant" who was part of an underrepresented minority group – a fact they did not dispute.[37]

In *Gratz*, the Court agreed that educational diversity was a compelling interest, but took issue with the school's point system. First, the number of points awarded for "underrepresented minority" status was significant. The 20 points given were equivalent to one-fifth of the total points needed to guarantee admission.[38] Additionally, the basis for awarding these points was solely a racial one. Since the admission committee assigned extra points by

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[35] The Center for Individual Rights, "Gratz v. Bollinger; Grutter v. Bollinger," https://www.cir-usa.org/cases/gratz-v-bollinger-grutter-v-bollinger/ .

[36] Gratz v. Bollinger, 539 US 244, 255 (2003).

[37] Gratz v. Bollinger at 253-254.

[38] *Id.* at 270.

considering race alone and not as one factor among many, the Court found that this practice was not narrowly tailored to achieve the stated interest of educational diversity.[39] The Court also referenced the reasoning from *Bakke* which made provision for considering race so long as it was used as a "plus" on the applicant's file and not to fully determine admission.[40] Universities should design a policy flexible enough that all of an applicant's racial and other qualifications could be considered together to determine a student's contribution to the diversity mission.

The shortcomings of the undergraduate admissions process in *Gratz* were highlighted by the carefully constructed system used by the law school. The law school used a policy that favored underrepresented minority groups but also looked at many other factors to make individual assessments of each student. The school's policy considered first and foremost a student's GPA and LSAT score. However, it was also clear that exceptionally strong LSAT and GPA did not guarantee admission just as exceptionally low performance did not always mean rejection. Rather, the policy required officials to consider "soft" variables such as the applicant's undergraduate institution and major to determine what contributions he or she would make to the

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[39] *Id.*

[40] *See* University of California Regents v. Bakke *at* 315; *as cited in* Grutter v. Bollinger *at* 271.

"intellectual and social life" of the law school.[41] The system required the admissions committee to find students who would contribute to campus diversity but never defined diversity in simply racial terms. Yet it did call for the admission of a "critical mass" of minority students.

The Court was deeply divided in the *Grutter* case, and even the weak 5-4 majority ruling was supported by Justices who only partially agreed with the result. Ultimately it found that student body diversity was a compelling enough state interest to warrant the consideration of race in university admissions.[42] Yet the decision only partially endorsed race-based admissions. The Court was clear that "race-conscious admissions policies must be limited in time" and speculated that in 25 years' time the consideration of race would be wholly unnecessary to obtain diversity.[43]

Justice Scalia issued a fiery dissent in which he declared the "critical mass" component a "sham" designed to obscure what was really a racial quota.[44] Justice Thomas wrote a partial concurrence solely to agree with the

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[41] Grutter v. Bollinger, 539 US 306, 315-317 (2003).

[42] *Id.* at 326.

[43] *Id.* at 343.

[44] Grutter v. Bollinger, 539 US 306 (2003) (Scalia, J, Concurring in part and Dissenting in part).

Majority that the law school's policy would be illegal in 25 years just as (he argued) it was at present.[45]

Despite the deeply divided Court, the rulings in *Gratz* and *Grutter* continued the trend begun in *Bakke*. All three cases made it clear that race could be considered in college admissions, but that its use must be narrowly tailored to achieve a defined purpose. *Bakke* and *Gratz* showed that policies backed by good intentions are not enough. Schools that want to consider race in their admissions procedures must do so very carefully. In order to win in court, a school must be able to show that its policy furthers a compelling interest that requires the use of race. It must also use race in the least restrictive way possible. Once those two burdens are met, the program must also be sufficiently narrow to achieve only its stated purpose. These principles theoretically hold today, but as we will soon see, the Court has strayed from its narrow path and ceased to enforce these essential requirements.

[45] Grutter v. Bollinger, 539 US 306, 351 (2003) (Thomas, J, Concurring in part and Dissenting in part).

CHAPTER TWO

The Most Recent Cases from the Supreme Court

Introduction

In recent years, the University of Texas at Austin (UT) has been at the forefront of the legal battle over the use of race in college admissions. Two cases in particular have challenged UT's admissions process. Known colloquially as *Fisher I* and *II*, they actually represent two hearings of the same case before the Supreme Court which took place almost three years apart.

In 2008, Abigail N. Fisher, a Caucasian female, applied to the undergraduate college at UT. Because Fisher graduated high school outside the top 10% of her class, she competed with similar students for approximately 25% of the University's total first-year slots. Her application was denied.[1] Both iterations of her case challenged UT's admissions program under the Equal Protection Clause of the 14th Amendment, but in the first case the Court did not rule on that issue. Instead, *Fisher I* was remanded to the Fifth Circuit Court of Appeals to be decided again under the legal

[1] Richard Lempert, "Fisher v. University of Texas at Austin: History, issues, and Expectations," *The Brookings Institute*, 2015.

doctrine of strict scrutiny. Once the lower court had considered the case again, it was reheard in the Supreme Court as *Fisher II*.

Admissions Policies at The University of Texas

The University of Texas at Austin uses a complicated system of calculations to determine which students to admit. The exact formula has undergone significant revisions over the last twenty years in response to the changing federal legal landscape and actions of the Texas State Legislature. In adjusting its admissions process, the University has "generally employed in the most aggressive manner permitted under controlling precedent."[2] An understanding of the University's policies is necessary to understanding their legal justification and Constitutionality under the Supreme Court's Equal Protection Clause jurisprudence.

Texas' Pre-1997 Admission Policy

Before 1997, the University only considered two factors when reviewing a student's application. During this time, an applicant was first given a numerical score called the Academic Index which was reflective of his or her standardized test scores and academic performance in high school.

[2] Fisher v. University of Texas at Austin, 126 S. Ct. 2198, 2217 (2016) (Alito, J, Dissenting).

The other factor considered was an applicant's self-reported race.[3] However, in 1996, this system was challenged in the Fifth Circuit and found to be unconstitutional. In *Hopwood v. Texas*, The Circuit Court ruled that the policy violated the Equal Protection Clause because the school was unable to articulate a compelling state interest in considering race so explicitly.[4]

Writing for the majority, Judge Smith struck down four potential justifications for such a policy including "[T]o achieve a diverse student body, to combat…a hostile environment at the law school, to alleviate the law school's poor reputation in the minority community, or to eliminate any present effects of past discrimination by actors other than the law school."[5] Eventually this rule was overturned by the Supreme Court in *Grutter*, which approved as a compelling interest "the achievement of a diverse student body."[6] Nevertheless, the ruling in *Hopwood* is important context for the next policy UT put forward, as it was legally binding precedent at the time.

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[3] Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2415 (2013).

[4] Hopwood v. Texas, 78 F.3d 932, 955 (1996).

[5] *Id.* at 962.

[6] Grutter v. Bollinger, 539 US 306, 345 (2003).

Texas' "Personal Achievement Index" and the Top 10% Rule

After the *Hopwood* ruling, the University was forced to alter its admissions system to bring it into legal compliance. UT halted all consideration of race, and instead introduced a new holistic metric known as the Personal Achievement Index (PAI). The PAI was intended to be used together with the Academic Index and was designed to reflect a student's "leadership and work experience, awards, extra-curricular activities, community service, and other special circumstances" in a single, discrete number.[7] The "special circumstances" considered by the Index include various hardships a student may have faced in childhood. Some, such as having a primary language other than English, could be used to infer race; but there was nowhere an explicit consideration of a student's race or ethnicity.[8] Finally, in an effort to combat declining minority enrollment, the University also bolstered its outreach programs.[9] This iteration of the University of Texas' admissions process stood for several years without a successful legal challenge. However, the impact of this new policy UT's

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[7] Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2416 (2013).

[8] *Id.*, Despite the fact that 'race' and 'ethnicity' have different meanings, they are both used in this paper because the strict scrutiny analysis required by the Supreme Court and federal law treats the terms as interchangeable.

[9] *Id.*

enrollment diversity was not as great as it could have been, since at the same time the Texas Legislature passed a rule guaranteeing admission to the top high school students in Texas.

Passed in 1997, Texas House Bill 588 guarantees admission at a state-funded school to all high school students who graduate in the top 10% of their class.[10] Unsurprisingly, this law came to be known commonly as the "Top Ten Percent Rule." Because the University of Texas at Austin is the premier state school in Texas, it is uniquely impacted by the rule. In fact, UT only needs to fill up to 75% of its incoming freshman class with these students and is allowed to reserve the remaining seats for students as the University sees fit. So, while the law is still referred to as the "Top Ten Percent Rule," as a practical matter, a student actually needs to finish in the top seven or eight percent of the graduating class to be guaranteed admission to the top-ranked University of Texas.[11] Admission at other top colleges and universities is seldom guaranteed, but at UT, the vast majority of the freshman class applies with assurance of guaranteed admission. Those who fall outside this group are in fierce competition for a few spots.

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[10] Tex. Educ.Code Ann. § 51.803

[11] Fisher v. University of Texas at Austin, 126 S. Ct. 2198, 2206 (2016).

After Grutter – Bringing Race Back into the Equation

After the twin Supreme Court cases *Gratz* and *Grutter*, the University of Texas again altered their admissions formula to bring back an explicit consideration of race. In its decision, the Court upheld the use of race as "one of many 'plus factors' in an admissions program," and it is the University's attempt to implement this variety of racial consideration which was at issue in the first *Fisher* case.[12]

The University conducted an internal analysis which found the student body lacked a "critical mass" of minority students and recommended the admissions counsel explicitly consider student race as a remedy.[13] It implemented this recommendation by adding self-reported race as an additional component of the student's Personal Achievement Index score. The specifications of the new formula rather vaguely required race consideration to be contextual and said it could not operate as a "mechanical plus factor" for certain applicants.[14] Theoretically, this means that no student will be denied or accepted to the University on the condition of race alone. But practically, that seems to be a logistical impossibility.

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[12] Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2416 (2013).

[13] *See* Proposal to Consider Race and Ethnicity in Admissions *as cited in* Fisher v. University of Texas (2013) at 2416.

[14] Fisher v. University of Texas at Austin, 126 S. Ct. 2198, 2206 (2016).

While race is not ranked or assigned a numerical value, both parties to the case agreed that race was a "meaningful factor" under the new PAI.[15] UT further acknowledged that, of all the holistic factors considered in the PAI, race is the only one reflected on the cover of every application file. This means that, despite assurances that race was one of many factors considered contextually, race and name are the only factors reviewers are aware of throughout the process.[16] The Supreme Court was only partially reassured, and wrote that the consideration of race and its impact on a PAI score combine such that race "can make a difference to whether an application is rejected or accepted."[17] Understanding this nuanced use of race in the admissions process is essential to understanding the ruling of the Court and its future implications for affirmative action.

The Fisher Rulings

The first ruling in *Fisher v. University of Texas* came in 2013. A seven Justice majority found that the Fifth Circuit erred in its application of strict

[15] Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2416-2417 (2013).

[16] *See* Tr. of Oral Arg. 54 (Oct. 10, 2012) *as cited in* Fisher v. University of Texas at Austin 126 S. Ct. 2198, 2220 (2016) (Alito, J, Dissenting).

[17] Fisher v. University of Texas at Austin, 126 S. Ct. 2198, 2207 (2016).

scrutiny.[18] The second ruling in 2016 upheld the University's program despite a vociferous, lengthy dissent joined by the remaining Justices. In both cases, there were two components of strict scrutiny review at issue. The first relates to the rationale or goal which motivates an affirmative action plan. Since 1978, it has been clear that when race is used in college admissions it must be only in furtherance of a compelling governmental interest.[19] The second component of strict scrutiny review is best articulated in *Grutter* and states that any plan which considers race must be narrowly tailored to further a compelling interest.[20] In practice, this places the burden of proof on the University to show that race-neutral alternatives would be insufficient to meet the stated goal.[21] The distinction between these two elements was ultimately a deciding issue in *Fisher II.*

A Constitutionally Permissible Goal

In order to pass strict scrutiny review, a university must first establish a written plan to further a compelling government interest. This is the easier

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[18] Justice Elena Kagan recused herself because of prior involvement in the case during her tenure as Solicitor General.

[19] Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

[20] Grutter v. Bollinger, 539 U.S. 306, 326 (2003).

[21] 133 S.Ct. at 2420.

of the two parts of strict scrutiny for a university to pass. The University of Texas asserted an interest in attaining a critical mass of student diversity. This was not a new idea, even in *Bakke*, Justice Powell recognized that "the attainment of a diverse student body…is a constitutionally permissible goal for an institution of higher education."[22] However, simply asserting an interest in diversity itself is constitutionally necessary, but not sufficient.[23] When *Bakke* was originally decided, the majority opinion did not specify how much deference the universities would hold when making this determination.[24]

The University argued, and *Fisher I* upheld, the idea that the basis for an affirmative action program should remain the prevue of the university.[25] The Court explained that since a university has far more relevant "experience and expertise" than any court, it ought to be given more discretion to make these decisions independently. In order to properly justify an affirmative action plan, a college should show that its plan is "reasoned" and provide a

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[22] Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

[23] Fisher v. University of Texas at Austin, 126 S. Ct. 2198, 2223 (2016).

[24] Arthur L. Coleman & Teresa Taylor, "Emphasis Added: Fisher v. University of Texas and Its Practical Implications for Institutions of Higher Education," *The Future of Affirmative Action: New Paths to Higher Education Diversity after Fisher v. University of Texas,* edited by Richard D. Kahlenberg, The Century Foundation, 2013, 47-48.

[25] *See e.g.* Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2419 (2013) *and* Grutter v. Bollinger, 539 US 306, 326 (2003).

"principled explanation" for the decision.[26] This presents a challenge when justifying a plan. A plan cannot define diversity in terms of a hard, numerical cap or a percent-based breakdown of desired racial representation. But at the same time, it must articulate its goal with such certainty that its effectiveness can be tested and evaluated later. Furthermore, the school must assert a purpose beyond pure diversity such as the educational impact attained by increasing diversity. After all, that which would be considered unconstitutional racial balancing is not "transformed from 'patently unconstitutional' to a 'compelling state interest' simply by relabeling it [as] racial diversity."[27]

When the University explained the strict scrutiny justification for its plan in *Fisher II,* it expressed that its goal was to increase minority enrollment to reach a "critical mass." Because it was based on the recommendation of an internal study, the Court granted UT deference by accepting its stated goal. Fisher challenged by arguing that the policy was overly vague since the University never gave a specific definition of what it expected a "critical mass" would look like.[28] The Court disagreed with

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[26] Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2419 (2013).

[27] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 732 (2007).

[28] *See* Fisher v. University of Texas at Austin, 126 S. Ct. 2198, 2210 (2016) *and also* Fisher v. University of Texas at Austin, 126 S. Ct. 2198, 2216 (2016) (Alito, J, Dissenting).

Fisher's argument, however. Justice Kennedy wrote that the University had provided a "reasoned, principled explanation," and added that a more concrete definition of the diversity UT sought to attain would likely violate the prohibition on quotas.[29] While the plan lacked written specificity, since it was supported by an internal analysis and testimony in the trial record, the Court decided to approve UT's decision to pursue race-based diversity.

A Narrowly Tailored Plan

Once it has justified its goal of diversity as a compelling government interest, a university must next submit its plan for judicial review. On this point, the university is not granted deference because "there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation."[30] While the ultimate determination of validity is left to the courts, schools bear the burden of proof when it comes to showing that their plans are sufficiently narrowly tailored. Since a university must internally approve its plan before implementing it, a university approval is "of course necessary, but…is not sufficient to satisfy strict scrutiny."[31] In order to meet its burden, a university must carefully

[29] *Id.* at 2211.

[30] Fisher v. University of Texas at Austin, 133 S. Ct. 2411, 2419-2420 (2013).

[31] *Id.* at 2420

consider whether there are race-neutral means to achieve its stated purpose. The university does not need to consider every conceivable race-neutral alternative, but the ultimate decision is left to the courts rather than the university's good faith effort.[32] This issue of deference is at the heart of the first *Fisher* case. For almost thirty years, the Court has held that the petitioner's burden is met when no "nonracial approach…could promote the substantial interest about as well and at a tolerable administrative experience."[33] The Fifth Circuit failed this standard to the University of Texas, and ultimately this is the issue on which the case was remanded for further review. It had only considered whether "[the University's] decision to reintroduce race as a factor in admissions was made in good faith."[34] Justice Kennedy wrote that the Fifth Circuit erred in applying the good faith standard to the University, because in doing so, they had placed on Fisher the burden of rebutting that presumption.[35] Since the Circuit Court granted UT deference in error, the case was remanded to be heard anew under the correct standard. Universities trying to justify a race-conscious program must do more than merely recite "a benign or legitimate purpose for a racial

[32] *Id.* at 2420.

[33] Wygant v. Jackson Board of Education, 476 U.S. 267, 280 (1986).

[34] Fisher v. University of Texas at Austin, 631 F. 3d 213, 236 (2011).

[35] *Id.* at 231-232.

classification," but instead must affirmatively prove that race is essential to the furtherance of the university's mission.[36]

Implications of Fisher for Future Cases

The Fisher cases have lasting implications for future challenges to affirmative action. As the most recent, and thereby controlling, precedent on race in higher education, these cases will guide strict scrutiny analysis for years to come. Several implications of the Fisher case specifically alter the legal landscape for universities that wish to use race in their admissions.

A More Specific Rationale

The most significant change from *Fisher* is likely to be a more rigorous consideration of the rationale for a compelling interest. In his dissent, Justice Alito drew attention to the fact that UT did not present a clear version of its goal beyond a vague assertion of a "critical mass." He revisited the holding of *Fisher I* and sharply criticized the majority for failing to require the University's compliance.

> (1) to identify the interests justifying its plan with enough specificity to permit a reviewing court to determine whether the requirements of strict scrutiny were met, and (2) to show that those requirements were

[36] City of Richmond v. J. A. Croson Co., 488 U.S. 469, 500 (1989).

> in fact satisfied. On remand, UT failed to do what our prior decision demanded.[37]

Alito is correct that the majority did not enforce this requirement on the university. The majority pointed to the difficulty of specifying a goal without using quotas as the reason for relaxing this standard. However, the difficulty of doing this is an intentional aspect of its design. This is because the use of race is always highly suspect, indeed, "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people."[38] *Fisher II* recognized three "controlling principles" which it set for future cases, among which is a requirement that universities demonstrate with articulable clarity the objective of an affirmative action plan.[39] Because of this indirect emphasis in the majority and a heightened focus in the dissent, it is likely future cases will require a more quantifiable goal from schools.

Furthermore, *Fisher II* admonished the University for failing to keep records which would allow the Court to quantify the impact of its plan. The dissenting justices wrote that "UT's records should permit it to determine without much difficulty [the effectiveness of its plan]. UT either has not

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[37] Fisher v. University of Texas at Austin, 126 S. Ct. 2198, 2215 (2016) (Alito, J, Dissenting).

[38] Rice v. Cayetano, 528 U.S. 495, 517 (2000).

[39] Fisher v. University of Texas at Austin, 126 S. Ct. 2198, 2208 (2016).

crunched those numbers or has not revealed what they show."[40] This evidence will likely become essential in future cases, especially any case alleging unintended discrimination against minority applicants. Alito hinted that this could be a rising issue by not that "UT [has not] explained why the underrepresentation of Asian-American students in many classes justifies its plan, which discriminates against those students."[41] These allegations are serious, and as I will examine later, the ruling in Fisher, and particularly the verbiage of Alito's dissent, could shake the justifications of race-based affirmative action to their core.

A Changing Field for Universities

Affirmative action was never intended to be a permanent solution to racial disparity in America. *Grutter* explained that "25 years from now, the use of racial preferences will [likely] no longer be necessary to further the interest approved today."[42] The interest Justice O'Connor was referring to is the same that UT relied on in building its plan. An educational interest in the benefits of diversity is based on remedying past discrimination, which the Court found cannot be a permanent goal. We are just over halfway through

[40] *Id.* at 2216 (Alito, J, Dissenting).

[41] *Id.*

[42] Grutter v. Bollinger, 539 US 306, 343 (2003).

the period of 25 years (it began in 2003), and while racial disparities are by no means solved, the Court may be more sympathetic to that line of argumentation.

The changing nature of society is not the only factor for universities to contend with. Affirmative action was never conceived as an end in itself. Rather it serves as a means to attaining the true compelling interest. *Fisher II* made clear that schools must continually re-evaluate the efficacy and necessity of their plans in light of changing circumstances.[43] The majority even went beyond that, stating that in future cases "that assessment must be undertaken in light of the experience the school has accumulated and the data it has gathered since the adoption of its admissions plan."[44] This requirement goes hand in hand with the requirement for a more concrete statement of the compelling interest. As colleges' programs age, the student body should gradually approach the desired critical mass. In the reasoning of the Supreme Court, once the state's compelling interest has been met, there is no need for further consideration of race. Since racial distinction are inimical to the progress of a free society and subject to such rigorous constitutional scrutiny, once there is no longer a present compelling interest, the use of race becomes unconstitutional.

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[43] Fisher v. University of Texas at Austin, 126 S. Ct. 2198, 2210 (2016).

[44] *Id.*

CHAPTER THREE

The Asian-American Challenge to Race-based Affirmative Action

Introduction

Before we can consider how the Supreme Court would rule on an Asian-American challenge to affirmative action, it is important to consider the history of discrimination against Asian-Americans.[1]

A Historically Oppressed Minority

Asian Americans have faced discrimination in a way that is unique different from other American minorities. The first significant wave of Asian immigration came to America during the California Gold Rush of the 1850s. Immigrants fled hostile conditions in their home country such as the Opium Wars and the harsh economic conditions that accompanied the conflict. Once they arrived in America, immigrants often worked as miners, factory workers, railroad hands, and farm laborers.[2] As gold became scarcer, animosity towards immigrants began to grow. Americans came to view the

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[1] This paper uses the terms "Asian" and "Asian American" interchangeably. Furthermore, this paper discusses Asian Americans as a whole but recognizes that different subgroups may be affected differently by affirmative action policies.

[2] "Asian Americans Then and Now: Linking Past to Present," Center for Global Education at Asia Society. Online.

Asian workforce as a threat to their jobs and economic stability. States passed policies such as the Foreign Miner's Tax Act – a law which required all foreign-born miners to pay a $20/month tax.[3] Often, once Asian railroad employees had completed their work, they were exiled from the very towns they helped to create. Eventually, the societal exclusion of Asian immigrants from town centers gave birth to so-called "Chinatowns" – sanctuary neighborhoods on the outskirts of major American cities.[4] This problematic treatment continued, largely unchecked, for several decades more.

Discrimination against Asian immigrants was formally written into law in 1882 when Congress passed the aptly-named Chinese Exclusion Act. The Act prohibited all immigration by all Chinese laborers for a period of ten years, but it was renewed several times beyond its supposed expiration date.[5] The brunt of the force of discrimination was felt by the Chinese, but similar

[3] Jean Pfaelzer, *Driven Out: The Forgotten War Against Chinese Americans*, (Berkley, California: University of California Press, 2008), 50.

[4] Maurice Berger, "Why Chinatown Still Matters," The New York Times. May 16, 2016.

[5] "Transcript of Chinese Exclusion Act (1882)," U.S. National Archives and Records Administration, www.ourdocuments.gov

acts were later applied to immigrants from the Philippines[6], Japan[7], India[8], and others. These laws only served to increase sinophobic sentiment in America and drove a wedge in race relations for years to come. Under these laws, Asian immigrants were the only ethnic group to be specifically targeted by US law. This, in turn, had a significant impact on the Asians who were already in America, who had a much more difficult time integrating into American society than those of other backgrounds.[9]

The Chinese Exclusion Act remained on the books for decades, and it was not until America sought to form an alliance with the Chinese that it was removed. When he signed the Chinese Exclusion Repeal Act, President Franklin D. Roosevelt gave a candidly transparent statement of purpose. He explained that, "[a]n unfortunate barrier between allies has been removed. The war effort in the Far East can now be carried on with a greater vigor and

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[6] *See* "Today in History: Luce-Celler Act Signed in 1946," South Asian American Digital Archive. July 2, 2014.

[7] *See* "The Immigration Act of 1924 (The Johnson-Reed Act)," U.S. Department of State Office of the Historian.

[8] *See* "Today in History: Luce-Celler Act Signed in 1946," South Asian American Digital Archive. July 2, 2014.

[9] Kelly Tian, "The Chinese Exclusion Act of 1882 and Its Impact on North American Society," *Undergraduate Research Journal for the Human Sciences* Vol. 9 (2010).

a larger understanding of our common purpose."[10] America's early history with Asian immigrants can be summed up as utilitarian. When Americans feared the value of their work would be diluted by Asians, they were excluded from entering. Later, when America needed an ally in the second World War, it undid the same law, once again, for practical benefit.

A "Racial Mascot:" Are Asian-Americans Being Used as a Racial Prop?

When I first undertook this project, I did so because the plight of Asian Americans in college admissions seemed to be one which was largely ignored by media in America. In recent months, this has changed. I want to address an argument which seems to have been gaining momentum lately – namely the idea that the racial imbalance facing Asian Americans is being exploited by white opponents to affirmative action. Of particular relevance is a recent VOX News article by Alvin Chang which alleges that only a small percentage of Asian Americans are actually opposed to affirmative action. This article also argues that white Americans are using Asians as a racial prop to advance their arguments against affirmative action.[11] Chang proceeds by pointing out sources of potential bias in commonly-cited studies and refuting

[10] Franklin D. Roosevelt: "Statement on Signing the Bill to Repeal the Chinese Exclusion Laws.," December 17, 1943. Online by Gerhard Peters and John T. Woolley, The American Presidency Project.

[11] Alvin Chang, "Asians are being used to make the case against affirmative action. Again.," VOX News, March 28, 2018.

the argument that white Americans are hurt by affirmative action. While the author is correct that few white Americans will actually face the so-called "reverse discrimination" that so many fear, he fails to accurately represent the interests of many Asian American college applicants.

A common argument in favor of Chang's viewpoint is that most Asians simply do not care about affirmative action and do not believe its consequences affect them negatively. They correctly argue that many of the most often-cited studies are based on data over ten years old, yet data from the most recent election cycle points to a continuation of the same trend. Many Asian-Americans are skeptical of affirmative action, even when it is stated in terms of assisting black applicants. A 2016 study by APIAVote, a non-partisan group aimed to increase civil participation by Asians, found that only 52% of respondents thought that affirmative action policies on college campuses were a good thing.[12] Recent legal action also demonstrates widespread opposition to perceived unfair treatment of Asian Americans. In 2016, the Asian American Coalition for Education (AACE) filed a complaint against Yale, Brown, and Dartmouth universities alleging unfair treatment of Asians in the admissions process. Joining the AACE were "more than 130

[12] "Inclusion, not Exclusion – Spring 2016 Asian American Voter Survey," Asian and Pacific Islander American Vote & Asian Americans Advancing Justice, A25-A26 (2016).

concerned Asian-American organizations."[13] Admittedly, a number of surveys show some measure of support for affirmative action by Asian Americans, but since racial factors would most likely apply to students seeking admission at elite, highly selective universities, most applicants would not be affected in the same way.

Ultimately, the data for support of or opposition to affirmative action is irrelevant if discrimination is not actually taking place. The real test of the "racial prop" argument must come from a detailed analysis of college applicants and the racial makeup of actual student populations at top universities. If Asians are actually being used as tools by the opponents of affirmative action, the numbers should show that such claims of discrimination are, at best, overblown, or more likely, entirely false. However, the numerical evidence shows no such thing.

Numerical Evidence of the Incongruous Treatment of Asian College Applicants

In order to prevail in their case, the AACE must show evidence of discrimination against Asians, or at least a specific disparate impact against Asian students. Both anecdotal and empirical evidence makes a compelling argument that Asian Americans have long been disadvantaged by the

[13] Asian American Coalition for Education, "Complaint for Unlawful Discrimination Against Asian-American Applicants in the College Admissions Process" 1 (2016) [hereinafter AACE Complaint].

application of race-based affirmative action. In a 1986 report, the Committee on Undergraduate Admissions and Financial Aid at Stanford University detailed the findings of an internal investigation into reports of discriminatory behavior. The report stated that "No factor we considered can explain completely the discrepancy in admission rates between Asian Americans and whites."[14] The Committee went on to explain that subconscious bias by admissions personnel was the most likely culprit, but declined to investigate further because the analysis required would be "formidable."[15] In 2004, The Princeton Review's *Cracking College Admissions* handbook boldly warned readers that an "Asian-sounding surname" could be a disadvantage to an otherwise strong college application.[16] The colleges named in the AACE case have updated their admissions policies innumerable times since the Stanford report was released, but this has often had the result of obfuscating the process. Admissions statistics, however, paint a clearer picture.

Despite the lack of transparency in admissions criteria, the data still paints a troubling picture that hints at the unfair impact these policies have on Asian students. Proving racial discrimination is an inherently difficult

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[14] Dana Y. Takagi, *The Retreat from Race* (Rutgers University Press, 1992), 39–40.

[15] *Id.*

[16] John Katzman et al., *Cracking College Admissions 2d. ed.* (The Princeton Review, 2004), 174.

task, but the aggregate of statistical evidence indicates that Asian applicants are held to a higher standard. Studies have shown that "Asian applicants have 67% lower odds of admission" than similarly-situated white applicants possessing comparable test scores.[17] The disparity is made even more egregious when considering the fact that Asian applicants are often more qualified than their counterparts. Asians routinely make up more than half of top SAT scorers, National Merit Scholarship recipients, and other high-level indicators of academic merit.[18] The practical impact of all of this is that Asian applicants are held to a different standard than their peers. In other words, Asian students "must perform better than all other groups to have the same chance of admission."[19] In an attempt to quantify this gap, Princeton professors Thomas Espenshade and Chang Chung found that, without affirmative action's racial preferences, Asian acceptance rates at top colleges would rise by one third, from 18 to 23 percent.[20]

The evidence of unequal treatment of Asian students is also reflected when SAT scores are cross-referenced with admission outcomes. Another

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[17] AACE Complaint (2016), 12-13.

[18] Ron Unz, *The Myth of American Meritocracy: How Corrupt Are Ivy League Admissions?*, (The American Conservative, 2012)

[19] Harvard Law Review, "The Harvard Plan That Failed Asian Americans," 131 Harv. L. Rev. 604 (December 2017).

[20] Thomas Espenshade & Chang Chung, "The Opportunity Cost of Admission Preferences at Elite Universities," SOCIAL SCIENCE QUARTERLY, Volume 86, Number 2 (June 2005), 304.

study by Espenshade found that, in the act of applying to top universities, Asian American students had to score 140 points higher on the SAT than white students to obtain the same admission decision. The disparity only grew when Asian SAT scores were compared with those of black and Hispanic students.[21] The graph reproduced below highlights the findings about SAT scores, and shows the increasing disparity at the upper range of test results:[22]

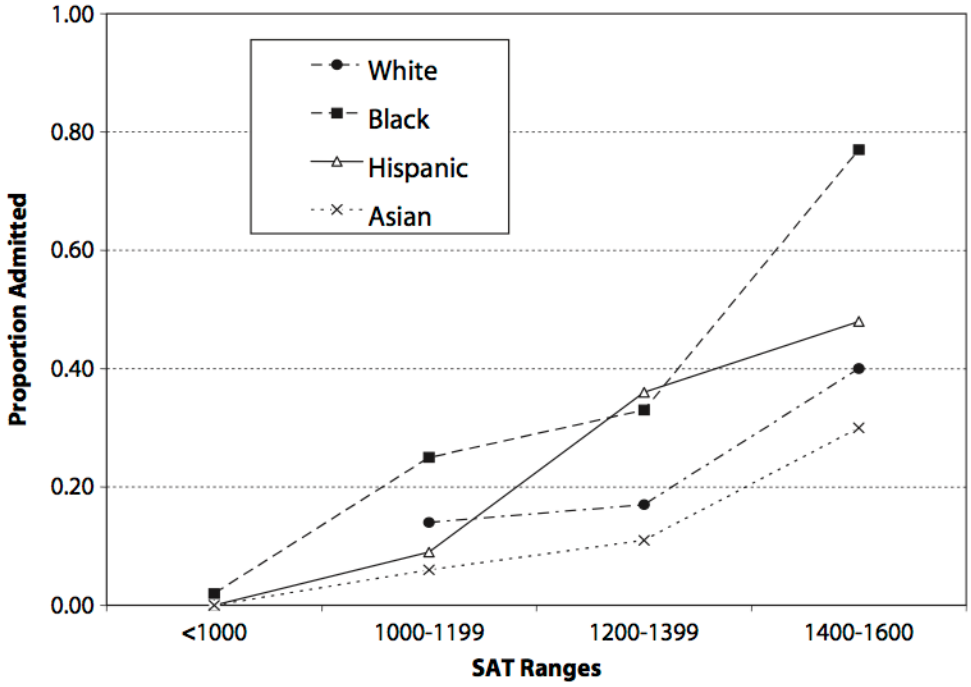

Figure 1. Proportion of students admitted, by SAT ranges and race. [23]

[21] Thomas Espenshade & Alexandra Radford, *No Longer Separate, Not Yet Equal*, (Princeton University Press, 2009), 93.

[22] *Id.* At 83.

[23] *Note:* As measured at private NSCE Institutions, 1997. Source: National Study of College Experience

The great difference between SAT results and college acceptance shows how Asian students are held to a different standard than their peers. Because it is nearly impossible to discover the actual means by which admission committees accept or reject certain students, it is hard to say definitively that this inconsistency is the result of affirmative action. However, the racial breakdown of colleges where race-based affirmative action is prohibited gives us additional insight into the process.

Over the last several decades, the number of Asians applying to top colleges and universities has increased, but the number of Asians admitted has become stagnant.[24] A 2012 study by Ron Unz showed this fact in stark relief. His study compared the population growth of college-aged Asian Americans against Asian American enrollment at Harvard, Yale, and other top universities. The results showed that Asian enrollment only rarely surpassed 20 percent and was typically three to five points lower.[25]

[24] AACE Complaint, supra note 13, at 15–16.

[25] Ron Unz, *The Myth of American Meritocracy: How Corrupt Are Ivy League Admissions?*, (The American Conservative, 2012).

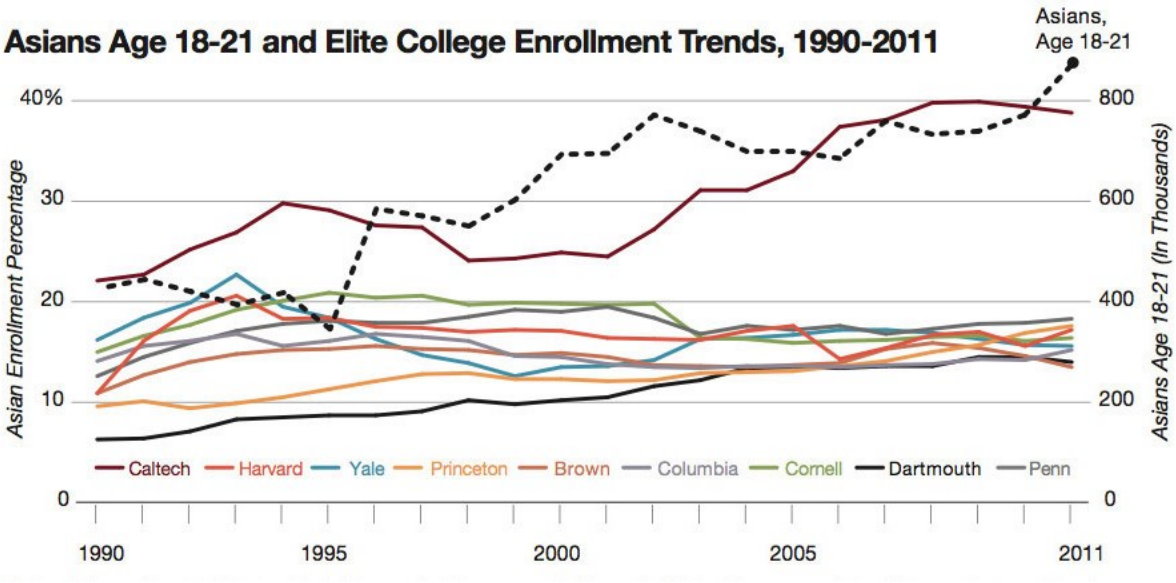

Figure 2. Trends of Asian enrollment at Caltech and the Ivy League universities, compared with growth of Asian college-age population.[26]

The study concluded that the relative enrollment of Asians at top American institutions was in decline and had "dropp[ed] by over half during the last twenty years."[27] The graph above shows one acceptance line that does seem to correlate to Asian population growth. The proportion of Asian-Americans enrolled at Caltech (The California Institute of Technology) has risen almost in sync with the Asian college-age population. Caltech's status as an outlier cannot be attributed to a lack of academic prestige, however. While it is not considered an Ivy League institution, Caltech is nevertheless at the apex of elite American colleges, joined only by Harvard, Yale, and

[26] *Note:* Asian age cohort figures are based on Census CPS.

[27] *Id.*

Princeton universities. Measurements using the SAT scores of incoming students and their status as National Merit Finalists shows that only the most prestigious Ivies are even on par with Caltech's numbers.[28] Instead, Caltech's student body is most likely explained by its admissions methodology.

In 1996 the people of California approved Proposition 209, a ballot initiative which outlawed the use of race or ethnicity in admissions decisions. This requirement shifted admissions practices in the direction of a race-blind meritocracy. Without race in the equation, Asian enrollment followed population trends at Caltech, and data from other California schools indicates and almost identical effect.[29] Admittedly, California is one of the most heavily Asian states by population, but this argument is of superfluous importance. Columbia University is situated in New York City, which houses one of America's largest urban Asian populations. New York state's Asian population has doubled in recent years, and more than two-thirds of the most selective local high schools' students are of Asian descent.[30] Despite this,

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[28] As per incoming student SAT scores and National Merit Designations. SAT Reading and Writing section scores are nearly identical among these four, but Math scores and the number of National Merit Scholar matriculants give Caltech a slight edge over the top Ivies. *See e.g. supra* note 36 *and* data from NCES website: www.nces.ed.gov/collegenavigator.

[29] Unz, *The Myth of Am. Meritocracy* note 39.

[30] Kyle Spencer, "For Asians, School Tests Are Vital Steppingstones," The New York Times, October 28, 2012.

Columbia is below many of its fellow Ivy League schools when it comes to Asian enrollment, above only Dartmouth and Brown.[31]

These statistics do not show, as some would no doubt claim, that Asian American students are being used solely as a "racial prop" for the advancement of a white, anti-affirmative-action agenda. While quantitative data cannot entirely rule out this possibility, it does show that the plight of Asian students is real and nascent. Likewise, correlation cannot convey intent, and so it is impossible to conclude that the race gap is due to discriminatory behavior from these numbers alone. However, these metrics point to a disturbing trend of Asian exclusion. It is a trend which is endemic to schools which consider race, and which seems to eschew schools where race is not considered. If nothing else, these numbers point to an unacceptable disparate impact on applicants of Asian descent.

Credible Anecdotal Evidence of the Treatment of Asian College Applicants

In addition to a pattern of different treatment, evidence of ongoing mistreatment of Asian students comes in the form of direct testimony from those familiar with the process. Sara Harberson, the former Dean of Admissions at the University of Pennsylvania, wrote a column in the Los

[31] *See* Figure 2.

Angeles Times about her experience in the office. There she explained the attitude of the admissions panel when faced with an Asian applicant.

> "[T]here's an expectation that Asian Americans will be the highest test scorers and at the top of their class; anything less can become an easy reason for a denial. And yet even when Asian American students meet this high threshold, they may be destined for the wait list or outright denial because they don't stand out among the other high-achieving students in their cohort. The most exceptional academic applicants may be seen as the least unique, and so admissions officers are rarely moved to fight for them"[32]

Of course, Harberson cannot speak on behalf of the entire admissions panel, but if what she says is true, this does amount to prima facie racial discrimination. The field of applicants has become so heavily saturated that the most objectively qualified students on paper are too boring to advocate for. Regardless of the motivation, this mindset shows how Asians are held to a different standard than their peers and must do something beyond the ordinary to gain admittance to college.

The attitude Harberson explains is not an isolated case. Among the thriving culture built to get students into top colleges, there is almost an unspoken acknowledgment of what has become known as "the Asian tax." Counselors at private companies which specialize in coaching students for admission report that they take a different approach with Asian students.

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[32] Sara Harberson, "The Truth About 'Holistic' College Admissions," Los Angeles Times, June 9, 2015.

Instead of highlighting a cultural background as they might do for other students, the director of one such organization explains "[w]hile it is controversial, this is what we do…[w]e will make them appear less Asian when they apply," the goal is to "overcome the Asian penalty."[33] Ann Lee, the director of a similar college-prep company puts in another way, "Everyone is in orchestra and plays piano…[and]…tennis. Everyone wants to … write about immigrating to America. You can't get in with these cliché applications."[34] Simply put, applications that would likely secure admission for other students are too boring and perfect for Asian applicants.

[33] Bella English. "To get into elite colleges, some advised to 'appear less Asian'," The Boston Globe (2015).

[34] Frank Shyong, "For Asian Americans, a changing landscape on college admissions," The Los Angeles Times (2015).

CHAPTER FOUR

The Future of Race-based Affirmative Action in America

Introduction

Asian-American advocacy groups have long sought to challenge the race-conscious admission practices of American colleges. In the 1980s Harvard was investigated by the Department of Education's Office of Civil Rights because of allegations that it used illegal race quotas to deny Asian applicants.[1] Harvard was ultimately cleared of the charges, but then-Dean of Admissions William Fitzsimmons conceded that, "Statistically, one could make the argument that it's easier for certain minorities [to be admitted]."[2] The situation has only grown murkier since.

Background of Current Cases

Currently, there are two substantial pending challenges to race-conscious academic admissions practices. They are brought by two similar interest groups but are in different places in the legal process. In November 2014, a group called Students For Fair Admissions (SFFA) filed a lawsuit

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[1] Derek Xiao, "Investigating Harvard Admissions: The 1990 Education Department Inquiry," The Harvard Crimson (May 2016).

[2] Melissa Lee, "Report Discloses SATs, Admit Rate: Shows Breakdowns by Race, Ethnicity," The Harvard Crimson (May 1993).

against Harvard University alleging racially discriminatory practice in admissions.[3] In 2015, the Asian-American Coalition for Education (AACE) began administrative complaints of a similar nature with the Departments of Education (DOE) and Justice (DOJ) against Yale University, Brown University, and Dartmouth College.[4]

The SFFA Complaint Status

The civil lawsuit filed by the Students For Fair Admissions received the typical publicity when it was announced, but proceeded without much fanfare for several years. This all changed in November 2017, when the US Department of Justice opened an investigation into the very complaints raised by SFFA.[5] In a letter to Harvard's counsel, the DOJ announced an investigation under Title VI of the Civil Rights Act. The letter also alleged that Harvard had failed to comply with a deadline to produce documentation

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[3] Complaint, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 308 F.R.D. 39 (D. Mass. 2015) (No. 14-cv-14176) [hereinafter SFFA Complaint].

[4] *See* e.g. Asian American Coalition for Education, "Complaint for Unlawful Discrimination Against Asian-American Applicants in the College Admissions Process" (2016) [hereinafter AACE Complaint] *and* Asian American Coalition for Education website: http://asianamericanforeducation.org/en/home/.

[5] Melissa Korn & Nicole Hong, "Harvard Faces DOJ Probe Over Affirmative-Action Policies," The Wall Street Journal (Nov. 21, 2017).

of the university's policies and practices.[6] The presence of an active DOJ investigation means that the DOJ could file its own lawsuit against the university, but as of the time of writing it has taken no such action. As of March 2018, both SFFA and Harvard indicated their readiness to proceed to trial, and the trial could begin as early as summer.[7]

The SFFA complaint was clearly devised as a case to reach the Supreme Court. Trial is the first step in that progress, during which all the facts of the case will be established. The case will inevitably be appealed after trial meaning the outcome could ultimately be overruled. Once the case has been appealed to the Supreme Court, the Court must decide to hear it, a notoriously difficult hurdle to overcome.[8]

The AACE Complaint Status

As of 2018, the AACE complaint is potentially viable, yet practically dead. Though it is often referred to as a lawsuit, the AACE action is technically an administrative complaint. Civil rights lawsuits seldom begin

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[6] *Id.*

[7] Joan Biskupic, "Suit accusing Harvard of capping Asian-American admissions could be tried this summer," CNN Politics (Mar. 10, 2018).

[8] Only 2.8% of cases appealed to the Supreme Court are granted a Writ of Certiorari, and all of these will not necessarily be heard in oral argument. *See* Supreme Court Press, "Success Rate of a Petition for Writ of Certiorari to the Supreme Court," http://www.supremecourtpress.com/chance_of_success.html.

in court, rather, would-be petitioners typically submit a complaint to the DOJ or DOE. Both departments have an Office of Civil Rights which investigates these claims. This removes much of the logistical and financial burden of fact-finding from petitioners themselves. Upon its completion, if an investigation yields fruit, the Departments will file lawsuits on behalf of the complainants.

Because it was submitted to both Departments concurrently, the AACE complaint is more accurately thought of as two separate but identical complaints. The Department of Education quickly dismissed the entire complaint, citing its substantial similarity to the SFFA case.[9] However, the Department of Justice was not so swift to act. At the time of writing, the Department of Justice complaint remains pending with the Civil Rights Division. Given the DOJ's apparent interest in the SFFA case against Harvard, it is likely the AACE complaint will not be acted upon. To this end, the AACE released an official statement supporting the Harvard investigation as soon as it was officially confirmed.[10]

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[9] *See* "Our Impact: June 25, 2015," Asian American Coalition for Education, http://asianamericanforeducation.org/en/impact/our-impact/.

[10] *See* "AACE Applauds DOJ's Investigation of Harvard and Urges All Colleges to Treat Asian American Applicants Fairly and Lawfully," Asian American Coalition for Education, http://asianamericanforeducation.org/pr_20171122/.

In order to justify its admissions practices, Harvard must show that the consideration of race meets a compelling state interest that warrants its preservation. But this burden is not Harvard's alone to bear. Since the case brought by SFFA is a civil action, the legal burden for trial is a preponderance of the evidence. In order to win, SFFA must show that it is more likely than not that Harvard uses race in an unconstitutional manner. In responding to this charge, Harvard must show that its use of race is essential to achieve a compelling state interest.

Throughout the litany of Supreme Court cases touching on affirmative action, no college has had to defend a policy against alleged minority discrimination. In considering the potential outcome of such a case, it is important to consider how a school would defend such a policy in the face of these accusations. It is generally accepted that the Supreme Court has laid out two acceptable justifications for the otherwise unacceptable practice of using race as a factor to decide college admission.

A Remedy for Past Discrimination

Since the use of racial classification is clearly proscribed by the Constitution, it can only be used in very limited circumstances. The Supreme Court has long held that one of those circumstances is the correction of past discrimination. Specifically, the Court wrote that "the government has a

compelling interest in remedying past discrimination for which it is responsible."[11] The Court was very clear that "past discrimination" did not refer to just any observed discrimination, but only discrimination for which the state was responsible. Showing responsibility, however, was not enough. To act on such a finding, schools would be required to show a "strong basis in evidence" that the remedial consideration of race was necessary to undo its past mistakes.[12] Furthermore, the Court has held that the act of remedying "social discrimination" in order to provide role models for minority students is not a constitutional justification for considering race.[13] The Court reject this argument because it had "no logical stopping point."[14]

In another case that dealt with affirmative action specifically, the Court once again rejected the idea that correcting generalized societal discrimination was a justification for the use of race. Justice Powell wrote that such a rationale was "an amorphous concept of injury that may be ageless in its reach into the past."[15] Because of the difficult burden required to show responsibility, and the requirement that proposed solutions be

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[11] Richmond v. J.A. Croson Co. 488 U.S. 469 (1989), 500.

[12] *Id.* at 504.

[13] Wygant v. Jackson Bd. Of Ed., 476 U.S. 267 (1986), 277.

[14] *Id.* at 276.

[15] University of California Board of Regents v. Bakke, 438 US 265 (1978), 307.

absolutely necessary to ending discrimination, this compelling interest has largely been abandoned. It is unlikely that Harvard would attempt to argue for such a justification, indeed it hardly makes sense given the facts of the case which is now brought against them. Harvard is probably not directly responsible for the long history of discrimination against Asian Americans, but even if it were, their current system does not alleviate the problem, it exacerbates it.

Potential Supreme Court Outcomes

Long before the case arrives at the Supreme Court, it must work its way through the courts. As early as this summer, the case could go to trial. Attorneys will gather all the relevant evidence and a court will make a preliminary ruling one way or the other. Regardless of which side wins, the case is likely to be appealed until it is appealed to the Supreme Court.

The First Hurdle: Attaining a Writ of Certiorari

Before the case can be heard, the justices will examine the appeal and carefully weigh the merits. The votes of only four justices are needed to grant a Writ of Certiorari and guarantee the case will be heard. Some have raised concerns that the Supreme Court is growing more conservative with the successful appointment of Neil Gorsuch to the Court. This argument may hold weight in the long term, but the ideological balance of the Court has

hardly shifted since the second *Fisher* ruling. Gorsuch does lean conservative, but his role is to replace the clearly conservative Scalia who, due to his untimely departure, did not rule in the second decision. It is worth noting that a future case will likely also be heard by the liberal Justice Elena Kagan, who recused herself from *Fisher* due to prior involvement. However; the presence of one additional conservative and one liberal on the court is unlikely to meaningfully shift the ideology of the court. Especially when it comes to granting a writ, the Court's balance is almost identical to the last case.

Concluding Thoughts

All things considered, the case against Harvard University could present the most meaningful challenge to race-based affirmative action in recent history. A unique confluence of history, the current political climate, and the facts of the case means that the Harvard case could shape college admissions for the coming decades.

From a historical perspective, the justifications for racial consideration have always been somewhat tenuous and ill-defined. The law is plagued with self-contradictory standards that schools will inevitably fail to meet. Schools must define their racial goals with ever-increasing specificity without making and impermissible quota scheme. The justification schools have relied on recently has been an increase in the diversity of the student body. This

argument is also doomed to expire in time. The Court in 2003 suggested race-conscious remedies for diversity would likely be unnecessary in 25 years. A deeper consideration of diversity trends may extend or decrease that number, but it is clear diversity is not a permanent rationale.

The current political climate is shift against affirmative action, at least among some groups. The SFFA Harvard case presents the clearest challenge to affirmative action by a minority group yet. Some authors argue that such a case is racist and based on faulty data. While data cannot show bias against Asian-Americans, it shows very clearly that the data doesn't match a race-neutral policy. The legitimacy of this argument ultimately comes down to whether you believe the treatment of Asians is fair in the current system, but no one can argue that different SAT cutoffs based on race is fair.

The facts of the case are also unique from any case brought already. *Bakke* and *Fisher* were both petitioned by white individuals. This case, however, is petitioned by a minority group which alleges discrimination under the very policy designed to protect minority groups. The case exposes a unique flaw whereby minority students, at least allegedly, face discrimination in the name of bolstering other minority numbers. Picking minority groups for empowerment is certainly not something the United States should be in the business of doing. The facts of this case are unique in the way the issue is framed, and if affirmative action appears to harm minority enrollment, this is a claim which should certainly be examined. It

seems affirmative action may have come full-circle, and it may be time to consider race-neutral ways to ensure the diversity of American colleges and universities.

WORKS CITED

41 Code of Federal Regulations § 60-1.40 (1970).

"AACE Applauds DOJ's Investigation of Harvard and Urges All Colleges to Treat Asian American Applicants Fairly and Lawfully," Asian American Coalition for Education, http://asianamericanforeducation.org/pr_20171122/.

A.L.A. Schechter Poultry Corp. v. United States, 295 US 495 (1935).

Alvin Chang, "Asians are being used to make the case against affirmative action. Again.," VOX News, March 28, 2018.

Arthur L. Coleman & Teresa Taylor, "Emphasis Added: Fisher v. University of Texas and Its Practical Implications for Institutions of Higher Education," *The Future of Affirmative Action: New Paths to Higher Education Diversity after Fisher v. University of Texas,* edited by Richard D. Kahlenberg, The Century Foundation, 2013.

Asian American Coalition for Education, "Complaint for Unlawful Discrimination Against Asian-American Applicants in the College Admissions Process" 1 (2016).

"Asian Americans Then and Now: Linking Past to Present," Center for Global Education at Asia Society. Online.

Bella English. "To get into elite colleges, some advised to 'appear less Asian'," The Boston Globe (2015).

Califano v. Webster, 430 US 313 (1977)

City of Richmond v. J. A. Croson Co., 488 U.S. 469, 500 (1989).

Civil Rights Act of 1964, 42 U.S.C. §1981 (1964).

Complaint, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 308 F.R.D. 39 (D. Mass. 2015) (No. 14-cv-14176).

Dana Y. Takagi, *The Retreat from Race* (Rutgers University Press, 1992).

Derek Xiao, "Investigating Harvard Admissions: The 1990 Education Department Inquiry," The Harvard Crimson (May 2016).

"Executive Order 8802: Prohibition of Discrimination in the Defense Industry (1941)," U.S. National Archives and Records Administration, www.ourdocuments.gov

Executive Order No. 8802, 6 Fed. Reg. 3109 (1941).

Executive Order No. 11246, 30 Fed. Reg. 12319, Sec. 202 (1965).

Executive Order No. 11375, 32 Fed. Reg. 14303.

Faye J. Crosby and Cheryl VanDeVeer, *Sex, Race, & Merit: Debating Affirmative Action in Education and Employment* (University of Michigan, 2000).

Fisher v. University of Texas at Austin, 126 S. Ct. 2198 (2016) (Alito, J, Dissenting).

Fisher v. University of Texas at Austin, 126 S. Ct. 2198 (2016).

Fisher v. University of Texas at Austin, 133 S. Ct. 2411 (2013).

Frank Shyong, "For Asian Americans, a changing landscape on college admissions," The Los Angeles Times (2015).

Franklin D. Roosevelt: "Statement on Signing the Bill to Repeal the Chinese Exclusion Laws.," December 17, 1943. Online by Gerhard Peters and John T. Woolley, The American Presidency Project.

Gratz v. Bollinger, 539 US 244 (2003).

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

Grutter v. Bollinger, 539 US 306 (2003) (Scalia, J, Concurring in part and Dissenting in part).

Grutter v. Bollinger, 539 US 306 (2003) (Thomas, J, Concurring in part and Dissenting in part).

Harvard Law Review, "The Harvard Plan That Failed Asian Americans," 131 Harv. L. Rev. 604 (December 2017).

Hearings before Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess.; S. Rep. No. 872 at 12-13.

Heart of Atlanta Motel, Inc. v. United States, 379 US 241 (1964).

Hopwood v. Texas, 78 F.3d 932 (1996).

Howard Ball, The Bakke Case: Race, Education, & Affirmative Action, (University of Kansas Press, 2000).

"Inclusion, not Exclusion – Spring 2016 Asian American Voter Survey," Asian and Pacific Islander American Vote & Asian Americans Advancing Justice, A25-A26 (2016).

Jean Pfaelzer, *Driven Out: The Forgotten War Against Chinese Americans*, (Berkley, California: University of California Press, 2008).

Joan Biskupic, "Suit accusing Harvard of capping Asian-American admissions could be tried this summer," CNN Politics (Mar. 10, 2018).

John F. Kennedy, "Statement by the President Upon Signing Order Establishing the President's Committee on Equal Employment Opportunity," 1961. Online by Peters and Woolley, *The American Presidency Project*. www.presidency.ucsb.edu/ws/?pid=8520.

John Katzman et al., *Cracking College Admissions 2d. ed.* (The Princeton Review, 2004).

Judson MacLaury, "President Kennedy's E.O. 10925: Seedbed of Affirmative Action," *Federal History*. 2010 *and* Ira Katznelson, *When Affirmative Action Was White*, (New York: W.W. Norton & Company, 2005).

Katzenbach v. McClung, 397 U.S. 294 (1964).

Kelly Tian, "The Chinese Exclusion Act of 1882 and Its Impact on North American Society," *Undergraduate Research Journal for the Human Sciences* Vol. 9 (2010).

Kyle Spencer, "For Asians, School Tests Are Vital Steppingstones," The New York Times, October 28, 2012.

MacLaury, "President Kennedy's E.O. 10925: Seedbed of Affirmative Action," *Federal History*. 2010.

Marks v. United States, 430 U.S. 188 (1977).

Maurice Berger, "Why Chinatown Still Matters," The New York Times. May 16, 2016.

Melissa Korn & Nicole Hong, "Harvard Faces DOJ Probe Over Affirmative-Action Policies," The Wall Street Journal (Nov. 21, 2017).

Melissa Lee, "Report Discloses SATs, Admit Rate: Shows Breakdowns by Race, Ethnicity," The Harvard Crimson (May 1993).

National Labor Relations Act, 29 U.S.C. §§151-169, at § 160. Sec. 10(c) (1933).

Office of Federal Contract Compliance Programs, "Guide for Small Businesses with Federal Contracts," *https://www.dol.gov/ofccp/TAguides/sbguide.htm*.

Office of the Press Secretary, "Executive Order – Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity," *The White House,* July 21, 2014, https://obamawhitehouse.archives.gov/the-press-office/2014/07/21/executive-order-further-amendments-executive-order-11478-equal-employmen

"Our Impact: June 25, 2015," Asian American Coalition for Education, http://asianamericanforeducation.org/en/impact/our-impact/.

Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 732 (2007).

Peter G. Nash, "Affirmative Action under Executive Order 11,246," 46 NYU Law Review 255 (April 1971).

"Proposal to Consider Race and Ethnicity in Admissions," *as cited in* Fisher v. University of Texas (2013) at 2416.

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

Rice v. Cayetano, 528 U.S. 495, (2000).

Richard Lempert, "Fisher v. University of Texas at Austin: History, issues, and Expectations," *The Brookings Institute*, 2015.

Richmond v. J.A. Croson Co. 488 U.S. 469 (1989).

Ron Unz, *The Myth of American Meritocracy: How Corrupt Are Ivy League Admissions?*, (The American Conservative, 2012).

Sara Harberson, "The Truth About 'Holistic' College Admissions," Los Angeles Times, June 9, 2015.

Tex. Educ.Code Ann. § 51.803.

The Center for Individual Rights, "Gratz v. Bollinger; Grutter v. Bollinger," https://www.cir-usa.org/cases/gratz-v-bollinger-grutter-v-bollinger/.

"The Immigration Act of 1924 (The Johnson-Reed Act)," U.S. Department of State Office of the Historian.

Thomas Espenshade & Alexandra Radford, *No Longer Separate, Not Yet Equal*, (Princeton University Press, 2009).

Thomas Espenshade & Chang Chung, "The Opportunity Cost of Admission Preferences at Elite Universities," SOCIAL SCIENCE QUARTERLY, Volume 86, Number 2 (June 2005).

"Today in History: Luce-Celler Act Signed in 1946," South Asian American Digital Archive. July 2, 2014.

Tr. of Oral Arg. 54 (Oct. 10, 2012) *as cited in* Fisher v. University of Texas at Austin 126 S. Ct. 2198, 2220 (2016) (Alito, J, Dissenting).

"Transcript of Chinese Exclusion Act (1882)," U.S. National Archives and Records Administration, www.ourdocuments.gov

William J. Collins, "Race Roosevelt, and Wartime Production: Fair Employment in World War II Labor Markets," *American Economic Review* 91, no. 1 (March 2001).

Wygant v. Jackson Bd. Of Ed., 476 U.S. 267 (1986).