STUDENTS FOR FAIR ADMISSIONS V. PRESIDENT AND FELLOWS OF HARVARD COLLEGE: A CASE BRIEF

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ABSTRACT: *Since Duncan v. Louisiana in 1968, the courts have interpreted the text of the Fourteenth Amendment to assert a single form of due process that all lower courts and state courts must follow. Prior to that case, the amendment was interpreted to mean that states could determine the rights of their citizens as well as by what process those rights could be stripped. The federal government only had authority to intervene when a state violated its own due process procedures for one of their own citizens. This paper will examine how, when reinterpreting the amendment, the Supreme Court assumed the authority to not only prescribe a single form of due process to which all states must abide, but also to determine which rights must be protected by that form. Further, this paper will assert that such assumption of judicial power following the reinterpretation of the text grants the judicial branch more legislative abilities than originally intended by the founders.*

In 2014, the nonprofit organization Students for Fair Admissions (SFFA) sued Harvard University based on the university violating Title VI of the Civil Rights Act of 1964 and the Fourteenth Amendment. SFFA claimed Harvard violated Title VI by discriminating against Asian-American students in their admissions department in favor of less accomplished students who fit categories of other racial minorities. The alleged discrimination is linked to elements of affirmative action, which has waxed and waned in public colleges since the 1970s.

Although the University of Harvard is a private institution, it still collects federal funding, meaning the university is subject to federal regulations and laws. The Civil Rights Act of 1964 outlaws racial discrimination and affects everything within the public sector, such as voting and education. Title VI of the act declares, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[1] The title also states, "Any department or agency action taken pursuant to section 602 shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds."[2] Under these parameters, the federal judiciary system must uphold standards compliant with the 1964 act.

The plaintiffs for SFFA claimed Harvard engaged in a "soft racial quota," which keeps an equal but limited representation for minorities without formally enacting the quota.[3] According to the plaintiffs, these quotas violate both

1 601. *Civil Rights Act of 1964*, U.S.C 8 (1964), § 2000e.

2 603. *Civil Rights Act of 1964*.

3 Hua Hsu, "The Rise and Fall of Affirmative Action," *The New Yorker*, October 15, 2018.

Title VI and the Fourteenth Amendment's Equal Protection Clause. The number of Asian-Americans admitted to Harvard consistently remains low despite an increase in applicants.[4] The 1978 Supreme Court case *Regents of the University of California v. Bakke,* deemed racial quotas illegal. In this case, the court generally left most policies of affirmative action ambiguous but struck down racial quotas as they violated the Equal Protection Clause of the Fourteenth Amendment. Powell noted that although encouraging diversity amongst collegiate institutions is noble, he ruled that "petitioner's special admissions program, which forecloses consideration to persons like respondent, is unnecessary to the achievement of this compelling goal, and therefore invalid under the Equal Protection Clause."[5]

In the case, Powell employs "strict scrutiny," which first arose during the New Deal court in the case *United States v. Carolene Products*. A greater level of scrutiny must be employed if a federal law or action under federal jurisdiction, such as public university affairs, violates one of three essential tenets: violations against the US Constitution, restrictions on the political process for citizens, or discriminations against vulnerable minorities who cannot redress the violation on their own.[6] The implementation of strict scrutiny alongside the "rational basis test" became essential standards for interpreting the law throughout the twentieth-century. In *Bakke*, Powell writes that in order for an institution's affirmative action programs to pass strict scrutiny, the pursued diversity that "furthers a compelling state interest encompasses a far broader array of qualifications and characteristics, of which racial or ethnic origin is but a

4 *Id.*

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

6 *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

single, though important, element."[7] Although the Supreme Court later altered the standard of passing strict scrutiny regarding affirmative action, Powell's initial use laid the foundation. Many future cases regarding affirmative action employed these standards including the SFFA's lawsuit against Harvard.

While later cases, such as *Grutter v. Bollinger* (2003) and *Fisher v. University of Texas* (2016), mostly reaffirmed the decision in *Bakke*, they still left the solution to affirmative action ambiguous. In *Grutter*, Justice O'Connor's majority opinion permitted the use of race a factor in the college admissions process, but it maintains that it must be narrowly tailored.[8] The decision in *Fisher v. University of Texas* (2013), also known as *Fisher I*, even held that the only solution for promoting diversity is to maintain race-based policies in the college's admission process.[9] SFFA's lawsuit against Harvard, eventually becoming *Students for Fair Admissions v. President and Fellows of Harvard College*, reached the United States District Court for the District of Massachusetts in late 2018. The district court paused on ruling on the case until the Supreme Court ruled on *Fisher II*, which, in many ways, the Supreme Court provided the guidelines for how the Massachusetts District Court later ruled.

Judge Allison D. Burroughs ruled in October 2019 that Harvard had acted accordingly with the standard of affirmative action as laid down by the Supreme Court. According to the judicial decision in *Fisher II*, which Burroughs used heavily when deciding, in order to be legal, Harvard's affirmative action policies could not possess race quotas, adhere to the Fourteenth Amendment, pass the strict scrutiny test, and be narrowly tailored in a way to garner the

7 *Regents of University of California v. Bakke*.
8 *Grutter v. Bollinger*, 539 U.S. 306 (2003).
9 *Fisher v. University of Texas*, 570 U.S. 297 (2013).

benefits from a diverse student body without discriminating against other minority students.[10] After considering all these parameters, Judge Burroughs ruled that Harvard did not violate the Supreme Court's precedents or any federal statutes. She stated that although Harvard's admissions office shows many glaring problem, it passed the test of strict scrutiny and every other parameter tied to it.

To pass strict scrutiny, Burroughs tested Harvard's admissions to examine if they are narrowly tailored and possess a compelling interest regarding the consideration of an applicant's race. She claimed the admissions process is indeed narrowly tailored for a few reasons. The most essential element of being narrowly tailored is the required absence of a quota system. According to Burroughs, "the Court sees no evidence of discrimination in the personal ratings save for the slight numerical disparity itself."[11] Other than a few odds and ends, the court found no clear existence of a quota system. To justify Harvard's purpose for its consideration of race in admissions, Burroughs also discovered the compelling interest tied to the greater United States. To ignore students based on race, she argued, would strip minority students of their identity, and ultimately withhold diversity from the institution altogether. She wrote, "the rich diversity at Harvard and other colleges and universities and the benefits that flow from that diversity will foster the tolerance, acceptance and understanding that will ultimately make race conscious admissions obsolete."[12] The diversity itself serves to encourage more diversity and cultural understanding

10 *Fisher v. University of Texas at Austin*, 579 U.S. 631 (2016).

11 *Students for Fair Admissions v. President and Fellows of Harvard College*, U.S. District Court of Massachusetts, Civil Action No. 14-cv-14176-ADB (2019).

12 *Students for Fair Admission v. President and Fellows of Harvard College*.

amongst the young students of Harvard, thus leading them to better know those different from themselves. The promotion of diversity eventually leads to better behavior towards one another and eliminate racism and prejudice altogether. This end justifies the compelling interest of the United States, and rather than violate the Fourteenth Amendment and Title VI, it supports both of the statutes. With all these thoughts considered, Burroughs found no illegitimacy or infringement of the law from Harvard's admissions office.

Although ending racism in the United States is a noble good, it should not come at the expense of others. Greater understanding of other racial groups is essential to fulfilling this goal, but the rejection of Asian applicants based on keeping an equally diverse campus rejects the aims of both the Fourteenth Amendment and Title VI, despite Burroughs best attempts to argue the opposite. Many Constitution aspirationalists only wish to attain a better future that provides equal liberty for all citizens without considering those who become marginalized in the present; this school of thought, however, prioritizes ruling in line with what they think society wants, not necessarily what is correct.

This sense of legal pragmatism first emerged under Justice Oliver Wendell Holmes who laid the framework for what became strict scrutiny.[13] Burroughs ruling, however, largely violates strict scrutiny as it goes against one of its essential tenets, that of protecting minorities from injustices. A similar injustice against Asian-Americans occurred during the New Deal Court. The Supreme Court upheld internment camps for citizens of Japanese ancestry in *Korematsu v. United States*.[14] With such a high volume of contradiction and indecisiveness, the American judicial system needs

13 Oliver Wendell Holmes, *The Path of the Law*, HARVARD LAW REVIEW 110, no. 5 (1897): 992.

14 *Korematsu v. United States*, 323 U.S. 214 (1944).

to reevaluate the questions asked in *Students for Fair Admissions v. President and Fellows of Harvard College* in order to be sure they are properly answered.

SFFA filed an appeal to the First Circuit Court of Appeals, and while it upheld Burroughs's ruling, the final decision is not set in stone. In December of 2021, the SFFA was in the process of bringing the case to the Supreme Court. President Biden urged the Supreme Court to reject the case and to not bring up the racial question in the college admissions.[15] Despite President Biden's best wishes, the court did the exact opposite. On January 24th, 2022, the Supreme Court agreed to hear both *Students for Fair Admissions v. President and Fellows of Harvard College* and the similar case *Students for Fair Admissions v. University of North Carolina* during the next term.[16] With the Supreme Court holding a much more conservative alignment than in previous years, the dual case may potentially overturn or redesign affirmative action in the college admissions process.

15 Nate Raymond, *Biden Administration Asks U.S. Supreme Court to Reject Harvard Affirmative Action Case*, ed. Lincoln Feast, Reuters (Thomson Reuters, December 9, 2021)

16 Adam Liptak, *Supreme Court Will Hear Challenge to Affirmative Action at Harvard and U.N.C.*, THE NY TIMES January 24, 2022.