AFFIRMING THE COURT'S DECISION IN REGENTS OF THE UNIVERSITY OF CALIFORNIA V. BAKKE

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ABSTRACT: *In light of the recent affirmative action case surrounding Harvard University, there is no better time to review the precedent of Supreme Court rulings regarding affirmative action in higher education. Justice Lewis F. Powell Jr.'s plurality opinion in the landmark Supreme Court case Regents of the University of California v. Bakke provides a compelling argument that delegitimizes racial quotas, yet promotes the idea of applying a racial "plus" system in order to enhance diversity in a university setting. In several similar cases following this decision, Justices have largely relied on Powell's argumentation in their own attempts to avoid discrimination, while also allowing universities the freedom to foster a diverse student body. This paper will argue that Regents of the University of California v. Bakke was decided correctly and should be used as a framework as the Supreme Court rules on future affirmative action cases.*

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While speaking to an audience in Chicago, Illinois, in 1858, Abraham Lincoln stated his desire for all citizens of the United States to come to a point where not one person would doubt that "all men are created free and equal."[1] For many citizens living during Lincoln's presidency, Lincoln's sentiments regarding equality for all citizens were admirable. Others, however, took issue with Lincoln's beliefs. In addition to the backlash toward Lincoln's pursuit of equality in the United States during his presidency, there have been countless challenges to the idea of equality throughout history, resulting in cases such as *Plessy v. Ferguson* and *Brown v. Board of Education* which eventually led to the creation of the Civil Rights Act of 1964. Fortunately, a wide variety of higher education institutions and places of employment across the nation have responded to race-related challenges by seeking to admit or hire an increasing number of minority appellants, particularly African-American citizens. However, many of these organizations have experienced the tension between seeking to expand diversity and preventing special

1 President Abraham Lincoln, Speech at Chicago, Illinois (Jul. 10, 1858), https://teachingamericanhistory.org/library/document/speech-at-chicago-illinois/.

preference for certain people based solely on race.

One pertinent example of this tension is found in a lawsuit currently facing Harvard University. On October 15, 2018, a case filed against Harvard in 2014 was finally presented in court.[2] The plaintiff, Students for Fair Admissions (SFFA), has argued that Harvard holds Asian-American applicants to a far higher standard than applicants of other races. SFFA claimed that Harvard's admissions staff is guilty of consistently rating Asian-American applicants lower than their non-Asian counterparts when evaluating applicants' courage, likeability, and other positive personality traits – strongly enforcing the negative stereotype that Asian Americans are solely gifted in academic pursuits but lacking in personality. [2] As a result, SFFA accused Harvard of violating Title VI of the Civil Rights Act of 1964, which forbids the use of racial discrimination in all programs that receive federal funds.[3] Additionally, SFFA is petitioning for a race-blind admissions protocol at Harvard and beyond in order to ensure that race-based discrimination in higher

2 Students for Fair Admissions, Inc., v. President and Fellows of Harvard College et al., No. 1:14-cv-14176-ADB (D. Mass. Feb. 13, 2019).

3 IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, et seq.

education will swiftly come to an end.

SFFA's case is largely focused on research presented by Dr. Peter Arcidiacono, an economics professor at Duke University.[4] Dr. Arcidiacono was hired by SFFA to analyze six years of Harvard's admissions data and search for signs of discriminatory practices while evaluating applicants. Arcidiacono testified that his research shows patterns of African-American applicants benefitting the most from Harvard's admissions policies, followed by Hispanics, Caucasians, and lastly, Asian Americans. Furthermore, Arcidiacono expressed his personal belief that his findings demonstrated "evidence of discrimination against Asian-Americans in the admissions process, both in how they rate applicants and in the decisions themselves."[5]

Admissions officers from Harvard insist that they have never rejected an applicant based on race. Harvard has claimed for years that they have admissions-related documents

4 Expert Report of Peter S. Arcidiacono at Students for Fair Admissions, Inc., v. President and Fellows of Harvard College et al., No. 1:14-cv-14176-ADB (D. Mass, filed Jun. 15, 2018).

5 Janelle Lawrence and Patricia Hurtado, *Harvard's Own Admissions Chart Comes Back to Haunt It in Trial*, BLOOMBERG (Oct. 25, 2018), https://www.bloomberg.com/news/articles/2018-10-25/harvard-s-own-admissions-chart-comes-back-to-haunt-it-in-trial.

proving that they do not engage in racial discrimination, but Harvard's administration has expressed concerns over disclosing details of their highly selective admissions process to the public.[6] As a result, there is a dearth of information regarding whether or not the university is taking race into consideration in the admissions procedure. Furthermore, Harvard has argued that a completely race-blind admissions process would cause the number of African American and Hispanic students on campus to rapidly decline, resulting in a significantly less diverse student body.[7]

While the case concerning Harvard University is far from being the first of its kind, it will likely be a landmark case with vast implications for Harvard University and higher education institutions in general if it reaches the Supreme Court. In order to properly understand the significance of the Harvard case, it is important to acknowledge that race has been a factor of the college admissions process for decades. It is equally important to note that the practice of giving

6 *Lawsuit Accusing Harvard of Asian-American Discrimination Goes to Trial*, MSNBC. (Oct. 15, 2018), https://www.msnbc.com/velshi-ruhle/watch/lawsuit-accusing-harvard-of-asian-american-discrimination-goes-to-trial-1344643139784?v=railb&.

7 Lawrence and Hurtado, *supra* note 5.

special preference to minority applicants began with noble intentions and a sincere desire to atone for the United States' history of callous discrimination against African American citizens.

In a memorable speech at Howard University in 1965, President Lyndon Johnson declared that equal opportunity alone could not undo the impact of discrimination against African Americans throughout United States history.[8] While President Johnson believed that ending segregation and inequality were necessary steps to ensure equal opportunity, true equality could not be fully reached until minority groups were given preferential consideration in higher education and the workforce. The sentiments behind President Johnson's desired vision, commonly referred to as affirmative action, inspired many higher education institutions to establish special admissions programs geared toward minority students.

Such was the case at the University of California at Davis Medical School. In order to attain a racially diverse

8 President Lyndon Johnson, Howard University Commencement Address (Jun. 4, 1965).

student body, the University created a special admissions program with sixteen out of one hundred spaces reserved for minority applicants.[9] These minority applicants were also eligible to fill one of the other eighty-four spaces in the general admissions program if they were not accepted into the special program. Caucasian applicants, on the other hand, could not compete for a spot in the sixteen-space special program, even if their academic qualifications were significantly higher than those of the minority applicants. As a result of this system, Allan Bakke, a Caucasian, was denied admission to the Davis Medical School twice.[9] He sued the school on the grounds that the school's use of this racial quota system barred him from competing against minority applicants with lower GPAs and test scores.

When Bakke's case eventually reached the Supreme Court, the Court ruled that the quota system at Davis Medical School unconstitutionally violated the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. However, the Court still supported the goals of affirmative action, claiming that racial preferences could be permitted

9 Regents of the University of California v. Bakke, 438 U.S. 265.

as long as race was being considered as just one factor out of many in the admissions process. Thus, the Court supported affirmative action generally, but ruled that Bakke was denied equal protection in this specific case.[9] This paper will argue that *Regents of the University of California v. Bakke* (1978) was decided rightly for two reasons: first, the Court correctly established that racial quotas are both discriminatory and in violation of the Equal Protection Clause in the Fourteenth Amendment. Second, the Court wisely affirmed that in certain circumstances, diversity is a compelling government interest that justifies the use of racial preferences.

The primary argument in support of the Court is that discriminatory racial quotas violate the Equal Protection Clause. In Justice Powell's plurality opinion, he claimed that the "fatal flaw" in the University's quota system is its failure to acknowledge the individual rights guaranteed by the Fourteenth Amendment.[5] The Equal Protection Clause of the Fourteenth Amendment declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[10] This important clause was crafted with the intent of

10 U.S. CONST. amend. XIV, §1.

ending discrimination, defined as "the unjust or prejudicial treatment of different categories of people, especially on the grounds of race, age, or sex."[11] In an attempt to remedy past discrimination, the University promoted an idea often referred to as reverse discrimination. Those who practice reverse discrimination intend to show favoritism to previously disadvantaged minorities, but at the same time, they experience the adverse effects of discriminating against those considered to be in the majority.

Though the Court recognized the University's noble goal of undoing past discrimination towards African American citizens, they determined that reverse discrimination was still discrimination and, therefore, violated the Fourteenth Amendment. Powell argued that "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[12] Even though reverse discrimination is used in order to correct a past wrong, it is in and of itself

11 *Discrimination,* OXFORD ENGLISH LIVING DICTIONARY (2019).
12 *See* Bakke, 438 U.S. 265.

discrimination: unjust treatment of one group while favoring the other. In this case, reverse discrimination benefitted minority applicants but harmed majority applicants such as Allan Bakke.

The court therefore ruled correctly that this racial quota system was unfairly infringing on Bakke's Fourteenth Amendment rights by giving special privileges to minority applicants. While minority applicants were eligible to apply to fill one of one hundred spaces in either the special admission program or the general program, Caucasian applicants were only permitted to apply for one of the eighty-four spaces in the general program. Because Caucasian applicants were excluded from the special program solely based on their race, this system falls under the "unjust treatment" aspect of discrimination.

The key problem with racial quotas is that they always result in one group being subject to exclusion due to race. The idea of using reverse discrimination in order to benefit disadvantaged applicants of one group only perpetuates discrimination by excluding members of a different group. Therefore, "reverse discrimination" is not

actually reversing discrimination at all but rather making the problem worse. In his "Radio Address to the Nation on Civil Rights," Ronald Reagan made a similar argument, claiming that quota systems are "discrimination, pure and simple, and [are] exactly what the civil rights laws were designed to stop."[13] Though the University of California's efforts to admit more minority students were commendable, they failed to realize that favoring one group of people inevitably leads to hindering another. This form of favoritism toward minority applicants violates the Equal Protection Clause.

Justice Powell reasoned that, in addition to the fact that racial quotas violate the Equal Protection Clause, quota systems lead to several negative impacts on minorities and majorities alike. One undesirable impact is that Caucasian students are forced to bear the heavy burden of a past injustice – discrimination against African Americans – that they were not responsible for causing. Powell addresses this negative consequence, arguing that "There is a measure of inequity in forcing innocent persons in respondent's position to bear

13 President Ronald Reagan, Radio Address to the Nation of Civil Rights (1985).

the burdens of redressing grievances not of their making."[14] More importantly, the presence of a racial quota system can easily lead one to believe that all admitted minority students were not capable of getting into the University based on their own merits. Rather, many people would reason that minority students were only admitted because of their race and might secretly deem them inferior or unworthy. Powell raised this concern in his plurality opinion, stating that these programs "may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth."[7] Based on Powell's argumentation, racial quotas would only perpetuate the issue of racial discrimination instead of serving as a solution. Racial quotas are therefore not only unconstitutional but harmful to society at large.

The second argument in support of the Court's decision is that the attainment of a diverse student body is a compelling government interest that justifies the use of affirmative action. Though the Court clearly rejected the

14 *See* Bakke, 438 U.S. 265.

University's use of a quota system, they did not want to completely discredit the goals of affirmative action. Rather, the Justices reasoned that under certain circumstances, there are compelling government interests that can justify the use of affirmative action. Powell applied the time-tested strict scrutiny standard to this case in order to determine the legality of the University's affirmative action program.[15] Strict scrutiny requires that any regulation that restricts a constitutional right must be narrowly tailored and must achieve a compelling government interest in the least restrictive way possible. While the University provided four "compelling interest" claims, the Court found that only one of these interests met strict scrutiny standards – the attainment of a diverse student body. [16]

The attainment of a diverse student body "clearly is a constitutionally permissible goal for an institution of higher education" due to the fact that academic freedom has long been considered to be connected to First Amendment rights.[17] Twenty years prior, Justice Frankfurter in *Sweezy v.*

15 *Id.*
16 *Id.*
17 *Id.*

New Hampshire (1957) similarly claimed that universities have freedom granted by the First Amendment to determine not only what they will teach, but whom they will teach.[18] The freedom of universities to admit whomever they please leads many universities to seek students who can add diversity to their campus. While referencing *Sweezy v. New Hampshire*, Powell notes that "The atmosphere of 'speculation, experiment and creation' – so essential to the quality of higher education – is widely believed to be promoted by a diverse student body."[8]

Powell's assertion is supported by a wide array of research pertaining to diversity in university settings. A study conducted by UCLA's Higher Education Research Institute, for example, found that students who interacted with racially and ethnically diverse peers both inside and outside of the classroom were more likely to be engaged in active thinking, be motivated to do well academically, and show the most growth in intellectual skills when compared to their peers.[19] Other studies demonstrate that there are

18 Sweezy v. New Hampshire, 354 U.S. 234 (1957) (Frankfurter, J., concurring).

19 Eve Fine and Jo Handelsman, *Benefits and Challenges of Diversity in*

countless advantages to having diversity in schools, including increased creative skills, enhanced cognitive development, and more engagement within the classroom.[20]

Importantly, research shows that completely race-neutral admissions policies often result in a huge lack of minority students. A separate study by UCLA School of Law found that enrollment rates of African Americans, Asians, and Native Americans fell by more than 70 percent after UCLA adopted a class-based admissions system that excluded race from consideration.[21] Without the presence of these students, UCLA forfeits the significant benefits that flow from having a racially diverse student body. It is reasonable to argue, therefore, that race should have a role in the admissions process for any university that wants to attain genuine diversity. This consideration led the Court to determine that racial preferences, rather than quotas, can be used in the form of giving minority applicants an extra

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Academic Settings, UNIV. OF WI-MDN (2010), https://wiseli.wisc.edu/wp-content/uploads/sites/662/2018/11/Benefits_Challenges.pdf.

20 Roy Y.J. Chua*, Sharpening Your Skills: Organizational Design*, HARVARD BUSINESS SCHOOL (Nov. 2011), https://hbswk.hbs.edu/item/sharpening-your-skills-organizational-design.

21 Richard H. Sander, *Experimenting with Class-Based Affirmative Action,* 47 Journal of Legal Education 4, 472-503 (1997).

"plus" due to their race.[22]

It is crucial to acknowledge that diversity is not strictly limited to racial and ethnic qualities. The Court agreed that race is a huge factor of diversity so that it can be considered as a "plus" in the admissions process but only on the condition that race is just one of many determining factors. Other examples of diversity that can be considered include personal talents, unique service or work experience, leadership potential, maturity, and any other qualification "deemed important" by the university. Applicants who possess any of these special factors are also eligible to receive a "plus." Notably, in his plurality opinion, Justice Powell referred to Harvard University as a perfect example of a university using the "plus" system in their admissions procedures.

It is best to explain the "plus" system with an example: Student A, an African American student, and Student B, a Caucasian student, are both applying to the same university. Both applicants are academically talented, both have exceptional leadership skills, and both are

22 *See* Bakke, 438 U.S. 265.

accomplished athletes in their high schools. Their college applications are essentially indistinguishable. While the university would be thrilled to admit both of these highly qualified students, they are only able to admit one. If the university is seeking to expand racial diversity on campus, they would likely choose to admit Student A rather than Student B. Student B was not being excluded due to his race. Rather, he simply lacked a desired trait that Student A held: the ability to contribute to racial diversity on campus. In this situation, race was one small factor considered alongside a plethora of others. Additionally, each student was given a fair chance considering that both were eligible to apply and neither was discriminated against. The "plus" system is a perfect example of how the criteria for admissions cannot be dependent upon race but can sometimes be associated with it.

There are many advantages that result from having a diverse student body, and it is crucial that universities seek to diversify their campuses in order to provide students with a well-rounded education. Affirmative action in the form of a "plus" system is an effective way to ensure that

universities can consider race in their admissions processes in addition to acknowledging the many other factors that make students unique. Unlike discriminatory racial quota systems, this model ensures that no student is being excluded on the sole basis of skin tone or other biological qualities. This system supports the goals of affirmative action by allowing universities to give minority students a "plus" on their applications, but it is still in accordance with the Equal Protection Clause in the Fourteenth Amendment, because all applicants are given a fair chance.

Therefore, rather than imposing unfair burdens on minority students, the Court's decision in this case prevents racial discrimination by ensuring that all students are treated as unique individuals with diverse qualities and skills. While diversity is a worthy goal of any higher education institution, the use of discriminatory racial quotas for the sake of attaining a more diverse student body is in clear violation of the Equal Protection Clause in the Fourteenth Amendment and often leads to negative outcomes. Thus, the Court correctly concluded that universities could continue to consider race and ethnicity in their admissions processes,

granted that they also consider the many other factors that contribute to diversity.

Conclusion

The Court's decision in *Regents of the University of California v. Bakke* set a judicial precedent for several affirmative action cases decided in following years. The two most notable Supreme Court cases that were greatly influenced by the *Bakke* case are *Grutter v. Bollinger*[23] in 2003 and *Fisher v. University of Texas*[24] in 2016. Similar to Justice Powell's approach when contemplating the *Bakke* case, the opinions delivered by Justice Sandra Day O'Connor in *Grutter v. Bollinger* and Justice Anthony Kennedy in *Fisher v. University of Texas* utilized the strict scrutiny standard while evaluating the merits of each case. In *Grutter v. Bollinger*, for example, the Court determined that the University of Michigan Law School could legally use race as a factor in admissions decisions because the University effectively demonstrated that they had a narrowly

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

24 Fisher v. University of Texas at Austin, 579 U.S. __ (2016).

tailored purpose of expanding diversity in the student body.[23] In *Fisher v. University of Texas*, the Court relied on the strict scrutiny test again when they held that the University of Texas' Top Ten Percent Plan was narrowly tailored to serve a compelling state interest of expanding racial diversity in higher education.[24] Conversely, the Court has utilized the strict scrutiny framework in order to demonstrate unconstitutional practices pertaining to affirmative action. In the desegregation case *Parents Involved in Community Schools v. Seattle School District No. 1*[25] in 2007, for example, Justice John Roberts argued that the school district's plan to prevent racial imbalances in their schools lacked a clear, narrowly tailored purpose; therefore, the school district's "racial balancing" plan was found to be in violation of the Equal Protection Clause of the Fourteenth Amendment. Overall, while there are a few exceptions, the Supreme Court justices have generally voiced support for using the strict scrutiny test when handling affirmative action cases.

Currently, many scholars and journalists speculate

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

that the Harvard case will eventually reach the Supreme Court, as both the plaintiff and the defendant have stated that they will appeal the Federal District Court decision if they lose. Given the fact that the Court has historically relied on *Bakke* as a precedent when critiquing other affirmative action cases, it is reasonable to expect that the Court will rely on *Bakke* while evaluating Harvard University's' admissions procedures. If provided the opportunity to hear the Harvard case, the Supreme Court justices should acknowledge the precedent set in the *Bakke* case. Justice Powell's use of the time-tested strict scrutiny framework provides an effective way for the Court to handle the delicate balancing act between allowing universities to expand racial diversity on campus and preventing abuses of the anti-discriminatory language of the Fourteenth Amendment. Additionally, this method has been utilized not only in *Bakke*, but also in several other affirmative action cases that have taken place within the past few decades. In order to achieve diversity in a fair manner, Harvard University and universities nationwide should continue to adhere to the Court's guidelines established in *Regents of the University of California v. Bakke*.