Princeton Legal Journal

Volume 2 Spring 2023

REVIEW

Affirmative Action's Strict Scrutiny Revisited: Creating Meaningful Compelling Interests

David Chau

Introduction

The current national fabric of the United States is a colorful one. However, to reach that level of inclusivity, it took mass grievances demanding change and slow government acquiescence, creating a more equal, equitable representation in government to "form a more perfect union."[1] Some of these calls for reform moved their way up the judicial branch. And, 45 years ago, in *Regents of the University of California v. Bakke*, the Supreme Court attempted to answer the legal questions regarding race-conscious admissions policies in higher education. But the Court has inadequately decided *Bakke*, resulting in the presumptive downfall of affirmative action that we see when the Roberts Court announces its decisions in two cases it heard this term: *SFFA v. Harvard* and *SFFA v. UNC*.

Ever since *Bakke,* proponents of affirmative action have had to fight for its legitimacy with "one hand tied behind" their backs,[2] clinging onto an unworkable justification for its existence. Although the Court upheld some forms of affirmative

[1] U.S. Constitution, preamble.
[2] Emily Bazelon, "Why Is Affirmative Action in Peril? One Man's Decision," The New York Times, last modified March 4, 2023, https://www.nytimes.com/2023/02/15/magazine/affirmative-action-supreme-court.html.

action in *Bakke*, its justification for doing so effectively sentenced affirmative action to death. It reaffirmed this death sentence again in 2003 and will declare affirmative action effectively dead in June of 2023. A small change to include considering "past societal discrimination" as a justification for affirmative action back in *Bakke* would likely provide a more robust and effective framework for admissions policies that are in line with the requirements of the Equal Protection Clause.

I. Historical Background

Race-conscious affirmative action belongs to the legacy of the Civil Rights Movement and the Civil Rights Act of 1964. In a speech at Howard University in 1965, President Lyndon B. Johnson said:[3]

> "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair…Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result."

These political remarks reflected the attempts of education and employment institutions across the country to implement their own affirmative action policies.[4] However, the initial implementation of these policies also kickstarted flurries of opposition with legal strategies, such as claiming reverse discrimination, or most recently in *SFFA,* the victimization of a racial minority—Asians. As these claims rose to the Supreme Court, posing equal protection questions, the Court began to dismantle the policy that has helped undo decades of inequality in the United States.[5] Moreover, revisiting the diverse national fabric of America, no two lives are the same. Hence, as we discuss the issue of affirmative action and the general doctrines of antidiscrimination law, it is of the utmost importance that the

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[3] Lyndon B. Johnson, "Commencement Address at Howard University: "To Fulfill These Rights."," The American Presidency Project, last modified June 4, 1965, https://www.presidency.ucsb.edu/documents/commencement-address-howard-university-fulfill-these-rights.

[4] Barbara A. Perry, *The Michigan Affirmative Action Cases* (Lawrence, Kansas: University Press of Kansas, 2007), 14-15.

[5] This paper believes in the benefit of race-conscious admissions/hiring policies. Although it will not go into proving how affirmative action is beneficial, it believes that with the right combination of policies alongside affirmative action, the government can effectively reduce the level of income disparity among racial lines across locales and states. Affirmative Action on its own will not be able to tackle the multilayered, structural inequality among racial and class lines.

conversation stays at the individual level, since it is easy to conflate an individual, who is part of a category—which may or may not be a defining part of their identity—to a generalization of a collective group. This form of conflation was and still is the misconception that frames the conversations in political discourse, where rhetorics of reverse discrimination and mass victimization are invoked.[6] Nonetheless, the true definition and constraints of policies surrounding the practice of race-conscious affirmative action dictate that any consideration of race—as with all factors of admissions—must be considered only on an individual level.[7]

First, through *Bakke* in 1978, a split Court (4–1–4) decided that all racial distinctions, even including the classification of the racial majority, are protected categories under the Constitution. Hence, it held race-conscious admissions policies to strict judicial scrutiny, where only Justice Powell took the deciding vote on outlining the Court's affirmative action that persevered until today. Since *Bakke*, there has been only one justification for affirmative action that rises to a compelling state interest: the attainment of a "diverse student body" and the academic benefits that flow from such a population.[8] *Bakke* set the foundation for an unworkable *narrow tailoring* of the policy, effectively banning all quantitative measures that can be employed by universities to reach their goals of diversity.[9] Later on, via *Grutter* in 2003, the Court continued to uphold *Bakke*'s restriction while adding a "sunset clause" of 25 years, declaring affirmative action's death in 2028. However, six years before society reaches that point in time, the Court once again decided to jeopardize its fate.

Court cases involving affirmative action have long established the jurisprudence of using strict scrutiny because it is an issue related to a protected category of race. In *Bakke,* UC Davis, the Petitioner, argued that because Bakke was a white man, he is part of the white racial majority, and the case did not merit strict scrutiny under the definition of "discrete and insular" minorities outlined in *Carolene Products* Footnote 4.[10] However, the Court went further to make a jurisprudential claim that as long as a policy involves race, it must be subject to the most "rigid

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[6] Garriy Shteynberg, Lisa M. Leslie, Andrew P. Knight, and David M. Mayer, "But Affirmative Action hurts Us! Race-related beliefs shape perceptions of White disadvantage and policy unfairness," *Organizational Behavior and Human Decision Processes* 115, no. 1 (May 2011), 1-12. doi:10.1016/j.obhdp.2010.11.011.

[7] *Grutter v. Bollinger,* 539 US 306 (2003).

[8] *Regents of the University of California v. Bakke*, 438 US 265 (1978).

[9] *Bakke* and later *Grutter* banned racial quotas and any forms of numerical bonus points based on someone's race. This created a system that is forced to use qualitative measures to prove their goal of diversity, which by all means demands a quantitative answer of numbers and percentages.

[10] *Bakke. United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

scrutiny."[11] Interestingly, to justify this point, Powell quoted *Hirabayashi* and *Korematsu,* which were two of the worst and most infamous precedents that subjected Japanese Americans to second class citizenship and ultimately interment.[12] Regardless, with strict scrutiny applied for affirmative action, Powell opened up the conversation to the larger, more diverse national fabric that is inclusive of all races and ethnicities, which was prevalent back in the 1970s and is forever more so in the present: "The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro."[13] With this conception of strict scrutiny over a suspect category of race, Powell removed the binary narrative of a world of white and Black. The use of strict scrutiny has been important to protect the interest of everyone. Nonetheless, this Court's definition of affirmative action that satisfied its view of strict scrutiny has left the policy without any sustainable means to survive.

II. Re-examining the Current *Compelling Interest*

Contrary to many beliefs about affirmative action being one of the tools to remedy the country's long history of inequality and injustice, the Court has never held remedying past societal discrimination as a constitutional justification.[14] The only acceptable reasoning for a compelling state interest that the Court upheld ever since *Bakke* is that it helps foster "the attainment of a diverse student body."[15] The justices have not changed their holding since. Justice Powell, the author of *Bakke*, reasoned that creating a diverse educational environment at the university level will allow students to gain exposure to a wide range of different views and ideas. Acting as platforms for scholarly discussions to thrive, universities require voices from all walks of life to be represented because these institutions are the leaders in fostering meaningful changes in society. For one, they are pipelines of the nation's decision-makers—even more so at the top universities, which employ more of these policies compared to community colleges. If these graduates were to be making decisions, then they would be better off being conscious of the diverse national fabric of modern America.[16] As long as the current government is unrepresentative

[11] *Bakke.*
[12] Ibid.
[13] Ibid.
[14] Cynthia Chiu, "Justice or Just Us?: *SFFA v. Harvard* and Asian Americans in Affirmative Action," *Southern California Law Review* 92 (2019): 447.
[15] *Bakke.*
[16] *Grutter.*

of the American population, affirmative action—in universities and the workplace alike—may be employed to create a strong foundation for more representation in leadership.[17] And, this question may as well apply to the Court's current composition.

Moreover, one must always note that the idea of using race as a factor to admit someone does not negate any other factors that bolster the consideration of diversity, such as "academic interest, belief systems, political views, geographic origins, family circumstances, and racial identities."[18] In 2021, two writers for the Princeton Legal Journal contended that race-conscious admissions mean that "you opt for a scheme that deliberately favors applicants from some minority groups by applying different standards of admissions to students on the basis of their racial identities."[19]

This form of characterization of race-conscious admissions policies is the manifestation of the misconceptions of the system that opponents to affirmative action have leveraged for decades (from *Grutter* and *Gratz* in 2003 to *Fisher* in 2016): there is a *separate track* of admissions for certain racial groups while other groups are subject to more stringent academic standards when considering them for admission, be it Asian Americans or white applicants. However, this is not the sort of system the Court approved of in *Bakke* in 1978. The Court has ordered multiple times that any consideration of race in admissions must be done on an *individual level* that is holistic. There is not only the consideration of race but also other factors such as geography, religious beliefs, academic performance, family circumstances, etc. Ever since this 1978 decision was handed down, all forms of separate admissions tracks—especially those with special, lower standards for minority groups—have been outlawed and found unconstitutional.[20] This means that each applicant is individually held to certain standards that are based on the context of the person's profile. Every individual is unique and different in their sense, thereby demanding an accordingly individualized consideration for admissions.

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[17] This is not to say that affirmative action is the ultimate answer to create a more representative government. It must work in tandem with other policy that would allow for an informed, transparent, and fair democracy to thrive. Issues, such as gerrymandering, misinformation, disinformation, etc., are also barriers to reaching the goal of a representative government.

[18] *Student for Fair Admissions v. President and Fellows of Harvard College,* Merit Brief from the Respondent, 3.

[19] Myles McKnight and Benjamin Edelson, "Affirmative Action Admissions Regimes Are Unconstitutional: Strict Scrutiny Should Mean Something," *Princeton Legal Journal*, last modified May 5, 2021, https://legaljournal.princeton.edu/affirmative-action-admissions-regimes-are-unconstitutional-strict-scrutiny-should-mean-something/.

[20] *Bakke* outlawed the quota system, where racial minorities compete for 16% of the slots and the racial majority compete for the other 84%. And, *Grutter* outlawed the points system, where racial minorities were awarded 20 points extra for their race.

Nonetheless, there is still merit to the authors' argument critiquing the Court's decision in 1978 about the sole *compelling state interest.* The authors, quoting Justice Clarence Thomas, argued that current race-conscious admissions policies are singling out race as a special category of admissions to supposedly attain the educational benefits that flow from certain "'classroom aesthetics.'"[21] While that is difficult to prove quantitatively, if we were to take it as true, we could see how Thomas's critique details how the sole compelling interest creates flaws within the admissions systems. The current idea that the sole purpose of implementing race-conscious admissions is to attain diversity among the student body only considers the interest of the university and the enrolled students. The legal position that the Court adopted in *Bakke* did not allow for the interest of the applicants to be considered. In fact, the current compelling interest allows universities to have expansive discretion to practice either "egalitarian" or "exploitative" affirmative action to attain diversity without any mechanism to prevent performative affirmative action.[22] Because of the Court's refusal to consider remedying past discrimination a compelling interest, the benefits of race-based affirmative action only impact students who are admitted rather than truly providing equitable opportunities to applicants with less access to high-quality education.[23] This is, though, a matter of policy. Simply put, the current constraint of only operating within the silo of "attaining diversity" lacks the ability to differentiate whether universities are carrying out race-conscious admissions as a way to offer true diversity of thought or as a way to create "classroom aesthetics." Had the Court included the consideration "past societal discrimination" as a compelling interest for affirmative action, there might be a mechanism to protect individuals from the possibilities of such exploitative admissions schemes, which will be proved in the next section. Throwing affirmative action out the window simply is not the answer.

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[21] Myles McKnight and Benjamin Edelson, "Affirmative Action Admissions Regimes Are Unconstitutional: Strict Scrutiny Should Mean Something."

[22] Cynthia Chiu, "Justice or Just Us?" In this article, an "egalitarian" system of affirmative action will help the school body attain a more representative population, where educational benefits are attained from the diverse pool of opinions and life experiences. On the other hand, an "exploitative" scheme of affirmative action is the scheme that the PLJ article and Justice Clarence Thomas claimed to be. That schools will just consider race for its end goal of creating "classroom aesthetics." An egalitarian system centers itself in the means of achieving diversity while an exploitative system focuses on the ends of achieving diversity regardless of whatever means the institution takes. Institutions, even elite ones, may be both exploitative and egalitarian at the same time. These two concepts are not mutually exclusive.

[23] Ibid, 450.

III. Past Societal Discrimination: A Necessary, Compelling State Interest

Understanding the systemic and structural inequalities of American history, especially U.S. legal history, a consideration of past societal discrimination as a new compelling interest might be necessary to carry out affirmative action equitably without allowing for negative action and exploitative practices of these policies to affect other applicants. This paper only argues for the *consideration* of past societal discrimination, not *remedying* these instances of discrimination like the original case in *Bakke* discussed. Universities are foundations for societal change, not direct means for change. "Remedying" past societal discrimination insinuates that these academic institutions are agents that actively work to mend the evils of society. But, they do not have that responsibility—namely to actively seek disadvantaged groups for them to qualify for race-conscious admissions programs.[24] Universities only need to take a passive stance in considering one's background of past societal discrimination. That aside, affirmative action is not a panacea to solve all of these inequalities; it has to work in conjunction with comprehensive legislation in other facets. Affirmative action alone does no direct good. Before continuing on to forming constructive arguments, let us examine Powell's reasoning for not allowing the consideration of past societal discrimination as a compelling state interest.

In *Bakke,* Powell claims that the idea of societal discrimination is too nebulous and unstable to have a concrete, distinct classification for groups of people. Even the white racial majority can be broken down into smaller affiliated groups that might have been victims of discrimination in the past:[25]

> "[T]he white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only 'majority' left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit 'heightened judicial solicitude' and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups."

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[24] While actively seeking candidates that can qualify for affirmative action policies are not discussed in this paper, it may be a potential for a problematic characterization of ethnic and racial groups in society.

[25] *Bakke.*

Powell imagined a world where, once we started considering past discrimination, everyone would start claiming that they were structurally discriminated against—no matter how far back that discrimination occurred. To Powell, this would open the floodgates to a slew of litigation seeking remedies from the Court, and he did not think it proper for courts to decide which groups have suffered discrimination worthy of remedying. However, if affirmative action policies can employ both interests simultaneously—considering past societal discrimination and attaining a diverse student body—universities would be able to set limitations to prevent random claims of past discrimination writ large. There is no empirical evidence to back up his fear, but let us use his example to test the consideration of past societal discrimination as it works in tandem with the school's interest to attain a diverse body of students.

He mentioned that if the "white majority" is divided into smaller groups, everyone would be able to claim to be victims of societal discrimination—except for white Aglo-Saxon Protestants. This is true, especially when we examine the political situation of national affiliation during the early days of white settlers in the "New World." There were strong divisions among Irish, French, Dutch, and English groups of immigrants in these new lands.

With that said, would the descendants of these groups be able to make a claim of past societal discrimination to qualify under affirmative action? Maybe. However, if the consideration of "past societal discrimination" works in tandem with the universities' interests in attaining diverse bodies of students, the answer would be: not so fast. The schools' interests in gaining diversity among the student body would be the filter to sift out who can bring a different point of view to the table. For instance, an applicant of Irish descendent—who is white—can still make a claim to qualify under race-conscious admissions policies if their circumstances inform the admissions officer that that their family is structurally disadvantaged by past societal discrimination and that they would be able to bring their own unique point of view to the civil discourse on campus *because of* this part of their identity. With this framework, affirmative action will not be just for racial minorities, but rather for students *who truly need to have representation on campus.* And, although these groups usually tend to be racial minorities, this method will not preclude groups of racial majorities that are marginalized. This issue is particularly important when we consider the influx of international students. According to one *New York Times* article, which examined whom affirmative action truly benefited among the Black racial minority, the majority of Black students at Harvard and Cornell Universities are international or first-generation immigrants, who

usually arrive in the States as highly skilled workers.[26] This may as well be evidence for "exploitative" affirmative action policies, since they benefited mostly Black students who are not structurally disadvantaged compared to the multi-generation African Americans who survived slavery, Jim Crow, and other forms of societal discrimination. If these universities are bound to consider if these applicants have been affected by past societal discrimination, the composition of students who benefit from these race-conscious policies might have been different. Once again, universities are not agents to *remedy* past societal discrimination. They are not agents for change. They do not need to go on a *hunt* for students who are part of a group that suffered from past societal discrimination. Their only duty is to consider this factor among other considerations for admissions.

Furthermore, Powell argued in *Bakke* that if the Court were to take into account remedying "past societal discrimination" as a compelling state interest, it would endorse a "constitutional principle" that varies "with the ebb and flow of political forces," which would "exacerbate racial and ethnic antagonisms rather than alleviate them."[27] Powell was imagining a world of political chaos that would increase racial animus and destabilize the constitutional principle. That assumption is quite true with the current politicization of racial issues and affirmative action. However, once again, if these two government interests can work in conjunction with each other, i.e., considerations of past societal discrimination and attaining a diverse body of students, these two justifications for affirmative action would maintain the stability of the policy. The universities' interest to attain diverse and robust civil discourse among the student population would remain constant. If one group claims the political majority over the other, universities would still want to have fair representation of both groups in the unchanging interest of diverse discourse on campus.

Once the factor of disadvantaged groups is considered, universities can now admit a more representative student population that speaks to the colorful and vibrant national fabric of America. No longer can affirmative action be carried out exploitatively to attain "classroom aesthetics" under these new constraints. Furthermore, Powell's concern that this government interest would lead to further racial antagonism should not lie with the existence of affirmative action. This race-conscious policy is not a panacea to all societal inequities. Addressing the issue of racism and racial animus must be done holistically through careful legislating. Hence,

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[26] Jay C. Kang, "Where Does Affirmative Action Leave Asian-Americans?," The New York Times, last modified July 29, 2021, https://www.nytimes.com/2019/08/28/magazine/where-does-affirmative-action-leave-asian-americans.html.

[27] *Bakke.*

instead of striking down a workable standard for this policy, Powell could have noted the need for Congress to consider these more nuanced questions to assess societal issues related to race.

Let us return to the current cases in front of the Supreme Court, *SFFA v. Harvard* and *SFFA v. UNC,* which claim Asian Americans are victims of affirmative action.[28] Unlike what SFFA contends, there propositions are sample cases of generalizing the diversity of different ethnic and racial groups under an umbrella term of "Asian Americans." There are groups within the Asian community that earn and are more educated than the white racial majority, while there are specific ethnicities that constantly live below the poverty line and struggle to have their youth graduate high school.[29] Using the new addition to the compelling state interest would allow universities to look into the larger picture and parse the massive generalization that America has done to the Asian American community. Even the idea of grouping everyone under the term Asian may be problematic: for one it does not usually represent all populations in Asia, and two, it is Eurocentric and is a product of imperialism.[30]

Therefore, unlike what Powell imagined, adding this new compelling state interest would not create a chaotic situation where everyone would grab onto a claim to qualify under affirmative action. But in fact, it would benefit those who need benefiting, especially giving the platform to uplift those who need the space to represent not only themselves but also their identities, so that the decisions and the thoughts that undergird these processes are representative of all walks of life.

Concluding Thoughts

Affirmative action was made complicated, convoluted, and politicized through decades of racial animus. *Bakke* never gave the policy the ability to defend its legitimacy. Now, with affirmative action's fate set to be decided in front of the Court, we might as well consider if it had lived a different life—the life that would open possibilities to a more equitable and representative future. With the *meaningful compelling interests,* the addition of the consideration of past societal discrimination fills in the gaps that the current system has. Nonetheless, the policy's defenders have

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[28] *Student for Fair Admissions v. President and Fellows of Harvard College. Student for Fair Admissions v. University of North Carolina.*

[29] Pew Research Center, "Key Facts About Asian Americans, a Diverse and Growing Population," Pew Research Center, last modified October 10, 2022, https://www.pewresearch.org/short-reads/2021/04/29/key-facts-about-asian-americans/.

[30] Erika Lee, *The Making of Asian America: A History* (New York: Simon & Schuster, 2015).

fought hard for its existence through the last 50 years. And, with its presumed death, new opportunities await for other means of change to form equity and equality.