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Affirmative Action in the USA: A Look at the University Education

Bachelor thesis

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Prohlášení

1. Prohlašuji, že jsem předkládanou práci zpracovala samostatně a použila jen uvedené prameny a literaturu.

V Olomouci dne 18. června 2024 Magdaléna Tomanová

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Abstrakt

Všechny federálně financované instituce byly povinny přijmout opatření v boji proti diskriminaci menšinových skupin, ať už na základě rasy, barvy pleti či národnosti. Americké univerzity proto při přijímacích řízeních často využívaly pozitivní diskriminace, jakožto prostředku pro dosažení svého cíle o vybudování diverzního prostředí a napomohli tak zlepšit kvalitu vzdělávání. Takové postupy však vyvolaly mnoho kontroverzí. Odpůrci této politiky tvrdí, že diskriminuje příslušníky většinové společnosti a porušuje tak Čtrnáctý dodatek Ústavy. Ve Spojených státech došlo na toto téma k moha soudním procesím, a několik z nich se dostalo až k Nejvyššímu soudu. Bakalářská práce „Pozitivní diskriminace v USA: Pohled na univerzitní vzdělávání" se zabývá tím, jak se za poslední půlstoletí vyvinul přístup Nejvyššího soudu k problematice pozitivní diskriminace na univerzitách. V hlavní části této práce bude pojednáno o pěti případech, které přinesly největší změny v systému vysokoškolského vzdělávání.

Abstract

All federally funded institutions were required to take measures in a fight against minority group discrimination, whether on basis of race, skin colour, or national origin. American universities have often used affirmative action in admissions procedures as a means to achieve their goal of building a diverse environment and therefore helped in improving the quality of education. These procedures, however, caused much controversy. Opponents of this policy claim that it discriminates against the majority society and thus violates the Fourteenth Amendment to the Constitution. There have been numerous lawsuits on this topic in the United States, and several have reached the Supreme Court. The bachelor's thesis "Affirmative Action in the USA: A Look at University Education" deals with how the Supreme

Court's approach to the issue of affirmative action at universities has evolved over the past half century. The main body of this thesis will discuss five cases that brought about the biggest changes to university education system.

Klíčová slova

Pozitivní diskriminace, USA, univerzity, Nejvyšší soud, Bakke, Gratz, Grutter, Harvard, Severokarolínská univerzita

Keywords

Affirmative action, United States, universities, Supreme Court, Bakke, Gratz, Grutter, Harvard College, University of North Carolina

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1. Introduction

Since the inception of affirmative action policies, their aim has been to provide minorities with opportunities for social advancement. Today, some affirmative action policies are being questioned on their merits and some are being withdrawn because of their unfairness to minorities and women. Over the years, a number of court cases have questioned the legality of affirmative action.[1]

The beneficiaries of affirmative action policies are mostly representatives of ethnic minorities, women and other disadvantaged groups. The aim was to improve the position of minorities and compensate for their previous disadvantages by offsetting their handicaps vis-à-vis the majority society, especially in education, employment and the distribution of state contracts.[2] Factors that once caused discrimination, in particular race and gender, are now recognized as factors in favour of those who discriminate against representatives of the majority community.

This study addresses active discriminatory policies that focus on minorities who are different from the majority society in the United States because of their race, ethnicity or skin color, such as African Americans and in some cases Hispanics. However, since affirmative action measures under the United States legislation also cover those who differ in religion or nationality, these can also be considered as elements of minority representation.

After briefly introducing the historical background of this policy in the United States and the main concepts related to this issue, this thesis will focus on race and ethnicity, taking into account the practices of American universities and the positions that the Supreme Court has taken since then. The central question of this work is how the Supreme Court's position on the issue of affirmative action in education has changed from 1978, when the first major federal trial was held, to 2023, when the case of Harvard College and the

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[1] GARRISON-WADE, Dorothy F. a LEWIS, Chance W. Affirmative Action: History and Analysis. Online. *Journal of College Admission*. 2004, n. 185, p. 23. ISSN 07346670. [cit. 2024-01-15].

[2] Rachel Kranz, *Affirmative Action* (New York: Facts on File, 2002), 4.

University of Carolina was held. The main focus of this work rests in policies of affirmative action in college admissions based on race, color, or national origin.

1.1. Definition of basic terms

In order to understand the topic, several key terms used in the thesis, must first be defined. First of all, we need to clarify the term "affirmative action". Kellough in his publication *Understanding Affirmative action*[3] describes affirmative action as follows:

> *"Affirmative action is a term (...) that signifies a variety of strategies designed to enhance employment, educational, or business opportunities for groups, such as racial or ethnic minorities and women, who have suffered discrimination."*[4]

Further, it is necessary to define two terms, which will be often referred to in this work, such as discrimination and minority.

> *[Discrimination is] an action or policy that is unfair to a particular group, preventing them from enjoying the same opportunities as other people.*[5]

> *[Minorities are] a term used to refer to people of color other than white; considered acceptable in the 1970s, it came under attack in the 1980s as people of color pointed out that whites were actually a minority globally and in some parts of the United States.*[6]

[3] J. Edward Kellough, *Understanding Affirmative Action: Politics, Discrimination, and the Search for Justice* (Georgetown University Press, Washington, D.C., 2006).
[4] Ibidem, 3.
[5] Rachel Kranz, *Affirmative Action* (New York: Facts on File, 2002), 149.
[6] Ibidem, 152.

When discussing the concept of “minority”, it is also important to also define and understand the term “majority”. While it may appear to be straightforward, there are certain complexities that arise when using this term. One key aspect to consider is that the group referred to as the “majority” can vary depending on the specific context. In the context of African Americans being the minority, the majority encompasses individuals who are not of African American descent, such as whites, Asians, and others. It is only when the term “minority” explicitly refers to individuals of non-white skin colour that the majority is constituted by the white population. This particular concept will also be utilized thorough this piece of writing. Conversely, affirmative action initiatives often do not prioritize individuals of Asian origin, as this demographic does not exhibit the same underrepresentation in significant roles as African Americans or Hispanics.[7]

According to the 2023 census, the population of the United States is 75.5% white, 13.6% African American, 19.1% Hispanic or Latino, 6.3% Asians. Some states (e.g. California or Texas) have been experiencing a long-term decline in the white population in favor of racial and ethnic minorities, and the position of whites as the "majority" is threatened, if not completely invalidated.[8]

[7] E. g. Peter Schmidt, *For Asians, Affirmative Action Cuts Both Ways*, Chronicle of Higher Education 49, n. 39 (June 2003): A24

[8] United States Census Bureau „Overview of Race and Hispanic Origin” [online] 2023, [cit. 2024-01-06]. Available from: https://www.census.gov/quickfacts/fact/table/US/VET605222#VET605222

2. History of Affirmative Action

2.1. White racial preference in education

Historically speaking, the racial preference for whites is deeply embedded in the American educational system, especially in the South, where slavery of African Americans was the firmly embedded and teaching black slaves was prohibited for generations. In fact, the first broad-based public education system for blacks was not founded until the twentieth century. Thomas Jefferson advocated three years of compulsory education, just enough to ensure that blacks are prepared to do more specific tasks during hard manual labour. The privilege of proper education was of course conserved for whites only and this was long believed to be fair.[9]

Thorough the years, the American educational system provided black population separate institutions, which lasted that way until the middle of the twentieth century, when the case of Brown v. Board of Education, which will be later talked about in a little more detail.

To ensure the minorities would be given the same treatment as the majority white population, a law was created to provide the discriminated party (minorities) with a smaller percentage of vacancies for admission. This move sparked a series of lawsuits against the schools' decisions, mainly issued by white applicants for admission.

2.2. Legislation

The struggle against discrimination on the basis of race or color in the United States has its roots in the Reconstruction period after the Civil War, dating back to the 1860s. At that time, many states enacted laws and regulations that disadvantaged newly freed black population compared to whites and often excluded them from participation in public life. As a result, the United States Congress enacted measures to prevent racial discrimination against blacks. These measures include a number of anti-discrimination laws, particularly the Fourteenth Amendment of 1868, which stated that all persons born or naturalized in the United States are to be guaranteed equal protection before the law[10], and Fifteenth Amendment of 1870 to the United States Constitution that

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[9] Tim J. Wise. Series: Positions: Education, Politics, and Culture. (New York : Routledge, 2005), 39-40.

[10] Rachel Kranz, *Affirmative Action* (New York: Facts on File, 2002), 28.

guaranteed the right to vote to the citizens on the United States regardless of race, colour, or former slave status.[11] The principle of equality before the law later became the legal basis of all affirmative action measures. However, discrimination based on race continued to exist and was enshrined in law.

Furthermore, in 1896 in the case of Plessy v. Ferguson[12], the Supreme Court supported the idea of segregation of the white and coloured population with the principle "separate but equal"[13]. This principle was declared unconstitutional in 1954 in the case of Brown v. Board of Education[14]. It was decided that the existence of separate facilities for blacks and whites by its very nature means the inequality of these two groups of the population.[15]

President John F. Kennedy was the first to try to fight discrimination with affirmative action. In his Executive Order No. 10925 of 1961, establishing the Equal Employment Opportunity Commission[16], he issued a general directive to government contractors to take affirmative action to employ persons regardless of their race, creed, skin color or nationality.[17] This made him the first American president to use the phrase "affirmative action".[18]

President Lyndon B. Johnson also continued Kennedy's course. In 1964, he pushed through the passage of the Civil Rights Act, which was and still is the most comprehensive anti-discrimination measure in the United States. This act prohibited discrimination based on race, color, religion, or national origin in all public facilities connected with interstate commerce or funded by the federal government.[19] In addition, that same year, President Johnson issued Executive Order 11246, which made the Department of Labor responsible for enforcing affirmative action. All contractors of government contracts were to adopt such strategies that would make it possible to overcome discrimination against disadvantaged groups. This regulation was directed especially at the

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[11] Ibidem, 29.

[12] Homer A. Plessy v. Fergusson, 163 U. S. 537 (1896).

[13] Rachel Kranz, *Affirmative Action* (New York: Facts on File, 2002), 9-10.

[14] Oliver Brown et al. v. Board of Education of Topeka et al., 347 U.S.483 (1954).

[15] William M. Leiter, *Affirmative Action in Antidiscrimination Law and Policy: An Overview andSynthesis* (Albany: State University of New York Press, 2011), 94-113.

[16] The Equal Employment Opportunity Commission is the federal agency responsible for ensuring equal employment opportunities for people of color.

[17] Euel Elliott a Andrew I. E. Ewoh, „The Evolution of an Issue: The Rise and Decline of Affirmative Action“, *Policy Studies Review* 17, n. 2/3 (summer/autumn 2000): 214.

[18] Pamela Barta Moreno, „The History of Affirmative Action Law and Its Relation to College Admission“, *The Journal of College Admission*, n. 179 (spring 2003): 16.

[19] Euel Elliott a Andrew I. E. Ewoh, „The Evolution of an Issue: The Rise and Decline of Affirmative Action“, *Policy Studies Review* 17, n. 2/3 (summer/autumn 2000): 214-215.

construction industry, which was traditionally held almost exclusively in the hands of the white population.

Since the inauguration of President Richard M. Nixon in 1969, due to his conservative views, the strengthening of the struggle for civil rights was not much expected. Yet it was his administration that developed the so-called Philadelphia Plan, an experiment that committed construction industry players responsible for building highways in the Philadelphia area to employ more people from minority groups of population.[20]

In 1972, the Equal Employment Opportunity Act was also passed, which extended affirmative action to businesses with more than 15 employees, unions with more than 15 members, and employment by federal institutions at all levels.[21] Contrary to expectations, the 1970s ended up being a heyday for affirmative action. In addition to the aforementioned steps approved during the Nixon administration, President Carter was also in favor of it.

One of the cases that caused major changes was the case of Griggs v. Duke Power Co. [22] of 1971. A group of black workers sued the company for requiring applicants to have a high school diploma and intelligence and aptitude tests for admission to higher-paying departments, thereby indirectly discriminating against the black population due to their generally lower education at the time. Although lower courts ruled otherwise, the Supreme Court ruled in favor of the plaintiff because neither a high school education nor above-average intelligence and skill were necessary to perform the job. This established an important precedent, namely that an employer is responsible for discrimination in his company, even if it is unintentional. Employers were still required to prove in every extraordinary requirement for job applicants (such as intelligence tests) that this requirement is absolutely necessary for the performance of the job, and also to take positive measures to prevent discrimination in the workplace.[23]

[20] James P. Sterba, *Affirmative Action for the Future* (Ithaca, N. Y.: Cornell UniversityPress, c2009), 16.

[21] Ibidem, 17.

[22] Griggs et al. v. Duke Power Company, 401 U.S. 424 (1971).

[23] Rachel Kranz, *Affirmative Action* (New York: Facts on File, 2002), 34-37.

By the mid-1980s, several other federal laws were passed that instituted affirmative-action practices. These included, for example, the Civil Service Reform Act of 1978, which promoted the idea of diversity in the American civil service, or the Public Works Employment Act, which, among other things, required that at least ten percent of the funds from each government contract spent on business with minority-owned businesses. A similar setting aside of a certain part of funds was also supported by the Highway Improvement Act of 1982 or the Foreign Assistance Act of 1985.[24]

On the other hand, during his election campaign, President Reagan spoke fundamentally against affirmative action and took several steps during his administration that were intended to limit affirmative action programs as a result.[25] Among them were cuts in the budget of federal agencies in charge of anti-discrimination measures. In addition, he also installed personalities in these institutions who were also not inclined to affirmative action. [26]

The first significant modification of federal legislation regarding discrimination since the 1960s and 1970s[27] was the adoption of the Civil Rights Act of 1991. Although President George H.W. Bush was generally not very supportive of anti-discrimination measures, he eventually signed this legislative act, apparently out of concern , that if he were to openly oppose the fight against discrimination, he and the Republican Party would lose public support.[28] This law overturned several recent decisions of the Supreme Court, which burdened the employees themselves with the burden of proving whether specific employment practices are discriminatory or not.

The Civil Rights Act of 1991 shifted this burden of proof back to the employer, i.e. the party committing the discrimination.[29]

In the 1990s, there were several important court decisions that gave impetus to the creation of citizen initiatives fighting affirmative action measures

[24] Ibidem, 31.

[25] Euel Elliott a Andrew I. E. Ewoh, „The Evolution of an Issue: The Rise and Decline of Affirmative Action“, *Policy Studies Review* 17, n. 2/3 (summer/autumn 2000): 217.

[26] Ibidem, 217-218.

[27] James P. Sterba, *Affirmative Action for the Future* (Ithaca, N. Y.: Cornell UniversityPress, c2009), 20.

[28] Euel Elliott a Andrew I. E. Ewoh, „The Evolution of an Issue: The Rise and Decline of Affirmative Action“, *Policy Studies Review* 17, n. 2/3 (summer/autumn 2000): 219.

[29] James P. Sterba, *Affirmative Action for the Future* (Ithaca, N. Y.: Cornell UniversityPress, c2009), 20.

at the level of individual states. California was a pioneer in this issue.

Conservative businessman Ward Connerly campaigned here for a referendum to ban any preferential treatment of persons distinguished by race, ethnicity, gender or nationality in the public sphere. This measure, called Proposition 209, won the support of a majority of voters in a statewide plebiscite, and affirmative action was thus banned in California. Similar initiatives were then created and experienced success in several other states (Washington, Florida, Michigan, etc.). [30]

Since the 1970s, the issue of affirmative action in the United States has been reflected in lawsuits rather than legislative measures. Cases of discrimination or positive discrimination that reached the Supreme Court became important precedents, which they still are today. Over the years, the Supreme Court's opinion on affirmative action has continually changed, depending on which position the majority of judges took.

From the decision in the Griggs case, it is clear that the majority of Supreme Court justices at the time were in favor of affirmative action. In the 1970s, there were several other decisions (such as Albemarle Paper Co. v. Moody[31] and Franks v. Bowman Transportation Co.[32]) in which the Supreme Court also ruled in favor of affirmative action. Employers who were threatened with prosecution and financial penalties for discriminating against representatives of minorities preferred to voluntarily take measures to prevent possible lawsuits – that is, programs of affirmative action against the groups in question.[33]

Perhaps the most important court decision for university affirmative action programs was the Supreme Court's ruling in Regents of the University of California v. Bakke from 1978. The court then ruled that affirmative action programs in the form of quotas are not in accordance with the Fourteenth Amendment to the Constitution, but taking race into account in the admission process is generally permissible - if its use is sufficiently justified. The impact of this decision was therefore twofold: on the one hand, affirmative action

[30] Rachel Kranz, *Affirmative Action* (New York: Facts on File, 2002), 106-107.

[31] Albemarle Paper Company v. Moody, 422 U.S. 405 (1975).

[32] Franks v. Bowman Transportation Company, Inc., 424 U.S. 747 (1976).

[33] Rachel Kranz, *Affirmative Action* (New York: Facts on File, 2002), 36.

programs at universities were approved by the Supreme Court, but on the other hand, a specific direction was determined, in which they must not be followed.[34] The case of Bakke will be later discussed in more detail.

In 1980, there was an important attempt to challenge the so-called set-aside programs for minority-owned businesses introduced by the Public Works Employment Act of 1977.[35] This was the case of Fullilove vs. Klutznik[36]. A group of white business owners sued the Secretary of Commerce, alleging that the programs were discriminatory against whites and therefore discriminatory on the basis of race. However, the Supreme Court supported the set-aside programs, although with the onset of the eighties, the deviation of some judges from affirmative action measures already began to manifest itself. This inconsistency was manifested in several subsequent cases, but the change did not occur until 1989, when the Supreme Court in the case of Richmond v. Croson[37] decided to overturn the City of Richmond's set-aside program, although the case was otherwise very similar to the Fullilove case, where the court ruled to the contrary.[38]

Also in 1989 was the case of Ward's Cove Packing Co., Inc. vs. Antonio[39], which effectively overturned the precedent set by the Griggs case and shifted the burden of proof to the person facing discrimination. It has been decided that the fact that white people are employed in better jobs than ethnic minorities is not in itself sufficient to prove discrimination, and whether discrimination in the workplace is intentional or not must henceforth be proved by the employees themselves. This was a clear step against affirmative action because it suddenly became much more difficult for employees to win a lawsuit against a discriminatory employer, and this discouraged them from filing lawsuits.[40] As mentioned above, just two years later, the Civil Rights Act of 1991 burden of proof shifted back to employer.

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[34] Pamela Barta Moreno, „The History of Affirmative Action Law and Its Relation to College Admission“, *The Journal of College Admission*, n. 179 (spring 2003): 17.

[35] Rachel Kranz, *Affirmative Action* (New York: Facts on File, 2002), 51.

[36] H. Earl Fullilove, et al. v. Philip M. Klutznick, Secretary of Commerce,et al., 448 U.S. 448 (1980).

[37] City of Richmond v J.A.Croson Company, 488 U.S. 469 (1989).

[38] Euel Elliott a Andrew I. E. Ewoh, „The Evolution of an Issue: The Rise and Decline of Affirmative Action“, *Policy Studies Review* 17, n. 2/3 (summer/autumn 2000): 217-219.

[39] Ward's Cove Packing Company, Inc. v. Antonio et al., 490 U.S. 642 (1989).

[40] Euel Elliott a Andrew I. E. Ewoh, „The Evolution of an Issue: The Rise and Decline of Affirmative Action“, *Policy Studies Review* 17, n. 2/3 (summer/autumn 2000): 219.

The case of Adarand Constructors, Inc. v. Peña[41] from 1995 again dealt with set-aside programs. The unclear conclusions arising from the Court's decisions in the Croson and Fullilove cases have been unified here. The judgment in the Adarand case suggests that, where positive discrimination is concerned, the court's standard approach should be a particularly strict regime of review of whether the program in question is actually justified.[42]

In 2003, the Supreme Court handed down two major decisions regarding affirmative action in universities. These were the cases of Gratz vs. Bolinger and Grutter vs. Bollinger, both of which related to taking race into account in the admissions process at Michigan university. Its two-degree programs (bachelor's and master's) had different admissions standards—and both considered applicants' race, albeit in different ways. The Supreme Court supported the plaintiff in the Gratz case (bachelor's study program) because the admissions system favored minority applicants by automatically adding a certain number of points, which was characterized as too rigid, non-individualized procedure.[43]

Conversely, in the Grutter case (master's study program) the Supreme Court positively did not prohibit discriminatory practices in the admissions process, because race was only one and not the most significant of the factors by which an applicant could be favored in the admissions process. The overall tone of this case thus supported affirmative action at American universities, but with limitations.[44]

The issue of affirmative action then came to the fore again in the United States in 2006, when the Supreme Court heard a case regarding the consideration of race in efforts to integrate students in schools in the state of Washington, Parents Involved in Community Schools v. Seattle School District[45]. At that time, the

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[41] Adarand Constructors, Inc. v. Federico Peña, Secretary ofTransportation, 515 U.S. 200 (1995).

[42] Rachel Kranz, *Affirmative Action* (New York: Facts on File, 2002), 86.

[43] Mark Tushnet, „United States: Supreme Court Rules on Affirmative Action“, *International Journal of Constitutional Law* 2, n. 1 (January 2004): 161-162.

[44] Ashlee Richman, „The End of Affirmative Action in Higher Education: Twenty-Five Years in the Making?“, *DePaul Journal for Social Justice* 4, n. 1 (autumn 2010): 68-73.

[45] Parents Involved in Community Schools v. Seattle School District No.1 et al., 551 U.S. 701 (2007).

court decided to limit schools' ability to use race as a factor in efforts to increase integration.[46] The next major case related to affirmative action in the United States, Ricci vs. DeStefano[47], took place in 2009. It was a case of several firefighters from the city of New Haven, Connecticut, who were discriminated against by their employer in their career progression. This group of firefighters passed the exams required for promotion, but the city of New Haven voided the test results because no African Americans passed them. The Supreme Court declared such a practice illegal.[48]

After the election of the first African American president Barack Obama in the 2008, many citizens and supporters of affirmative action began to hope for a better future, however it was in 2010, when Obama pushed for previous president George W. Bushes' plan called *„No Child Left Behind Act"* with the policy of financial reward to any schools embracing oppressed students and minorities.[49]

In 2013, Supreme Court held another trial, a case of Fisher v. University of Texas at Austin, where Fisher argued that the University's consideration of race disadvantaged her and other white applicants and thus violated the Equal Protection Clause. The Supreme Court ruled in the University's favor for justifying their race-conscious admissions as "a means for obtaining educational benefits that flow from student body diversity"[50]

At the turn of 2022 and 2023, two big cases related to admission practises were to be heard by the Supreme Court: Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina. These schools are known to have very strict selective practices and race could and has always been considered in their admissions.[51] These cases will be discussed later in detail.

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[46] James P. Sterba, *Affirmative Action for the Future* (Ithaca, N. Y.: Cornell UniversityPress, c2009), 27-28.
[47] Frank Ricci et al. v. Johny DeStefano et al., 129 S. Ct. 2658 (2009).
[48] Adam Liptak, „Supreme Court Finds Bias Against White Firefighters", *The New York Times*, [online] 29.6.2009, [cit. 2024-03-08]. Available from: http://www.nytimes.com/2009/06/30/us/30scotus.html?pagewanted=all&_r=0
[49] Alyson Klein „*No Child Left Behind: An Overview*", Education Week [online] 10.4.2015, [cit. 2024-03-08]. Available from: https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04
[50] Fisher I, 570 U. S., at 9; see also Grutter, 539 U. S., at 328.
[51] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College et al., 600 U.S. ___ (2023)

3. University of California Board v. Bakke

The case of Regents of University of California v. Bakke was not the first Supreme Court case on affirmative action in universities, however it was the first case where decision was so groundbreaking that it served as a precedent.[52]

3.1. Circumstances of the case

The roots of the Bakke case can be found in 1973, when Alan Bakke, a white man, applied to the master's program at the University of California, Davis School of Medicine.[53] This university admitted one hundred students each year in two ways: regular admission and special admission. Each applicant had to indicate on the application form whether he or she considered himself or herself to be "disadvantaged" in terms of financial situation or educational background, or whether he or she was a member of a disadvantaged group, i.e. an ethnic minority. Sixteen of the total hundred places would remain vacant in a special admission program that was implemented for students that were judged to meet the disadvantaged criteria. These applications were assessed by a separate committee according to different criteria.[54]

In both the regular and special admission procedures, the committee evaluated the applicants according to the following criteria: CV data, including interview impressions, previous academic and scientific course averages, admission test results, letters of recommendation and extracurricular activities. From this data, the committee compiled a total score, according to which the applicants were ranked and accepted in order. In the standard procedure, however, an additional condition was that the candidate's academic average must not be lower than 2.5. Anyone who did not meet this condition was automatically excluded from the admissions process. In contrast, no such condition existed in the special admissions procedure, in which only the above-mentioned disadvantaged applicants could be assessed. In addition, candidates evaluated in a special regime were evaluated only among themselves, not against regular applicants.[55]

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[52] Mark Tushnet, „United States: Supreme Court Rules on Affirmative Action“, *International Journal of Constitutional Law* 2, n. 1 (January 2004): 44-46.

[53] Medical School of the University of California, Davis.

[54] Bankston III, Carl L. Series: Social Issues, Justice and Status. (Hauppauge : Nova Science Publishers, Inc. 2017), 55.

[55] Regents of the University of California v. Allan Bakke. 438 U.S. 265 (1978), 274-275.

Allen Bakke applied for admission in 1973 and was not accepted. His total score was almost as high as the score of the last applicant accepted in the standard program, and significantly higher than the score of the applicants accepted in the special program.[56] After this experience he complained to the chairman of the admission committee that reserved seats for the disadvantaged were not taken into account and that no whites received the reserved seats. Bakke applied again in 1974 and, in spite of getting much better score this time, he was denied admission again.[57]

3.2. Trial

Allen Bakke sued the university's board of trustees for violating the principle of equality before the law in the Fourteenth Amendment to the United States Constitution, the California Constitution, and Section 601 of Title VI of the Civil Rights Act of 1964 through its special admissions procedure.[58] The trial court ruled that the special admissions procedure operated as a racial quota, which he considered inadmissible. It was decided that the university may no longer consider the race of applicants in the admissions process, as this would be in violation of both the Constitution and Title VI. However, Alan Bakke should not have been additionally admitted because he did not present sufficient evidence that he would have been admitted without the existence of a special admission regime.[59] Concurrently, the Supreme Court of the State of California, to which both parties further appealed, also decided that the special admission regime applied by the university violates Fourteenth Amendment to the Constitution, and Bakke is additionally to be admitted to study, because the university did not present a sufficient amount of evidence that he would not have been accepted without the existence of a special program. [60]

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[56] Ibidem, 276-277.

[57] Bankston III, Carl L. Series: Social Issues, Justice and Status. (Hauppauge : Nova Science Publishers, Inc. 2017), 55.

[58] Ibidem, 56.

[59] Regents of the University of California v. Allan Bakke. 438 U.S. 265 (1978), 278.

[60] Ibidem, 279-281.

3.3. Verdict

The Bakke case at the Supreme Court was complicated by the fact that more than half of the judges could not agree on a common reasoning for the judgment, making it impossible to form a majority opinion. Therefore, two plurality opinions and four other opinions were created, which partially overlapped and partially differed. Each judge expressed his opinion on all matters that were part of the case or joined the opinion of one of his colleagues. The final opinion of the Supreme Court was created by "summing up" the opinions of individual judges on individual issues contained in the case.

The opinion that had the greatest significance for the future of decision-making by the Supreme Court and all other courts in the United States was that of Justice Lewis Powell. To this day, this opinion is, in most respects, the judicial precedent for evaluating the consideration of race in American education. Judge Powell's opinion is the longest and most detailed of the entire *Bakke* case, explicitly addressing all the issues. The other justices added in their opinions what they felt was missing from Powell's document or where they disagreed with it.

The Bakke case brought up several questions that all the judges delt with in their opinions. First question was whether Bakke was entitled to sue the university, as it was the right of the university to make its own judgements. Most judges voted in Bakkes favor. Next issue raised the question of whether classifying persons based on their race or ethnicity is per se unconstitutional.

For the future of affirmative action at American universities, or rather the decisions of the courts on the permissibility or constitutionality of the affirmative action policies of specific universities, four issues were of fundamental importance: 1.) whether the classification of persons on the basis of their race or ethnicity is in itself unconstitutional, 2.) what justifications for considering race or ethnicity in education are justifiable, 3.) what level of scrutiny should be applied to these cases, and 4.) whether this particular race-sensitive program at UC Davis is constitutionally valid.

Justice Powell agreed with the more liberal Justices Thurgood Marshall, Byron White, Harry Blackmun, and William J. Brennan that although the Fourteenth Amendment prohibits discriminating against persons based on their race or ethnicity, consideration of race as such is not prohibited by the Constitution. However, according to Powell, "discriminating persons on the basis of race or ethnicity (...) is inherently suspect and therefore requires the strictest possible judicial investigation."[61] If the race of an applicant is to be taken into account in the admissions process in education, this system should be subjected to strict scrutiny to make it clear that the use of the category of race or ethnicity for purposes of classification is justified. The condition is that the measures taken by the school must serve the public interest (compelling governmental interest) and to be adequate (narrowly tailored) to fulfill this interest. [62]

Contrary to his liberal colleagues, however, Powell believed that the UC Davis admissions system violated the Constitution because it did not pass the test of strict scrutiny. To achieve redress for the effects of past discrimination and the diversity of the student body, which according to Powell was a justifiable rationale for taking race into account in the admissions process, this program was not necessary. It was neither the only nor the best way in which these public interests could be achieved.[63] A more suitable solution to the situation would have been considered by Judge Powell to be such an admissions process in which the race of the applicant would be a mere "plus", a mere bonus, but would not be a decisive factor. Just such a procedure was applied, for example, at Harvard University, whose admission procedure Powell cited as an illustrative example of the application of the policy of positive discrimination.[64]

In the University of California program, an applicant's race or ethnicity determined their eligibility for special admissions. The quota for candidates subject to this regime was not insurmountable and harmed study applicants who did not meet the conditions of the special regime. Since candidate Alan Bakke was harmed by this system, he was entitled to compensation, i.e. additional admission to study. In this conclusion, Justice Powell agreed with colleagues

[61] Regents of the University of California v. Allan Bakke. 438 U.S. 265 (1978), 291.

[62] Ibidem, 287-320.

[63] Ibidem, 305-320.

[64] Ibidem, 315-318

Warren E. Burger, William H. Rehnquist, John P. Stevens, and Potter Stewart, and that was the final verdict in the Bakke case. Because the university was unable to prove that it did not discriminate against Bakke, it was forced to grant his application for admission. Justice Stevens further opined in his dissenting opinion that the question of the constitutionality of using race as a factor in university admissions in this case is not an issue and therefore it is unnecessary to decide about it.[65]

It is also necessary to present the arguments of the judges of the more liberal wing, who reserved themselves against Powell's conclusions. They believed that, from a constitutional point of view, the use of race to create a quota and the use of race as a bonus are quite identical, and therefore it should not be possible to label one approach permissible and the other not. After applying the rule of strict review, they did not consider it possible to achieve the university's goals (greater representativeness and diversity of students) in a more appropriate way than that chosen by the school. Bakke's additional admission was not considered necessary by these judges because, according to them, the university's action was in accordance with the Constitution and Title VI of the Civil Rights Act, and thus there was no discrimination.[66]

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[65] Ibidem, 408-421.

[66] Ibidem, 362-379.

4. Gratz v. Bollinger

Since the Bakke case, the issue of affirmative action at American universities has not been discussed by the Supreme Court until 2003. In that year, two cases reached the United States' Supreme Court, both of which dealt with affirmative action measures at the University of Michigan. The court decided to rule on both cases at the same time, fulfilling the need to create a clear and comprehensive position on the policy of affirmative action at universities in general.

4.1. Circumstances of the case

Each year, the University of Michigan's Faculty of Letters, Science, and Arts[67] created written guidelines for its undergraduate degree program that determined how admissions committees should proceed and what criteria they should apply. Partly academic, partly non-academic acceptance factors were taken into account in the admission process. Among the academic criteria were the academic average from high school, the results of entrance tests and the quality and level of the curriculum of the high school from which the applicant came. Up to 110 out of a possible 150 points could be obtained for these categories, with 100 being sufficient for admission. However, the applicant could have improved in other aspects as well. Three points could be earned for outstanding written work, four points for having a family member also a student at the University of Michigan, five points for personal achievements, and ten points for permanent residence in the state of Michigan. The rule that determined that representatives of under-represented ethnic minorities (as well as athletes) automatically received twenty points became problematic.[68] In 1999, this system was enriched with an element of "flagging" - a special committee was set up to review the applications again after the final allocation of points unsuccessful applicants and flagged the ones they found interesting. These applicants were then reassessed and could be given a second chance.[69]

[67] University of Michigan's College of Literature, Science and Arts.
[68] Jennifer Gratz and Patrick Hamacher v. Lee Bollinger et al., 539 U.S. 244 (2003), 276-278.
[69] Ibidem, 256-257.

4.2 Trial

Plaintiffs Jennifer Gratz and Patrick Hamacher, unsuccessful undergraduate applicants, alleged that they were denied admission to the University of Michigan because of its racial and ethnic bias and discrimination against whites in its admissions process. They therefore filed a class action against the university[70] for, among other things, a violation of the principle of equality before the law from the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. They demanded not only compensation for themselves, but also redress on the part of the university, i.e. a change in the conditions of its admission process.[71]

In order for a collective action to be filed, which allows the plaintiffs to request redress from the defendant, it must be proven that it concerns not only third parties, but that the plaintiffs themselves must have a legal interest in the case, i.e. they must be personally interested in the outcome.[72] Gratz Hamacher was also studying at another university at the time of filing the lawsuit, but Hamacher claimed that if the University of Michigan ended its discriminatory policy, he would apply to transfer.[73] Thanks to his intention, the circuit court granted Hamacher the status of a class representative and confirmed i.e. that the Gratz case is a class action.[74]

The circuit court further ruled that the guidelines determining the conditions of admission to the university's bachelor's program are adequate to achieve its goal, i.e. the diversity of the student body, and are therefore in accordance with the Constitution. The Sixth Circuit Court of Appeals, which was supposed to consider the case further, was unable to issue its opinion because the Supreme Court decided to speed up the process and rule on the Gratz case at the same time as the Grutter case, which was about to be heard.[75]

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[70] Lee Bollinger was chancellor of the University of Michigan at the time.
[71] Jennifer Gratz and Patrick Hamacher v. Lee Bollinger et al., 539 U.S. 244 (2003), 251-253.
[72] Ibidem, 282-290.
[73] Ibidem, 252-253.
[74] Ibidem, 260-268.
[75] Ibidem, 244-245.

4.3 Verdict

The majority opinion in that case was authored by Justice William Rehnquist and joined by Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Sandra Day O'Connor. The Court essentially followed the 1978 Bakke precedent set by Justice Powell's opinion. Therefore, the diversity of the student body was not questioned as a sufficiently serious public interest, the only question was whether the admission process of the Faculty of Literature, Science and Art is adequate to this interest. The judges were also based on Powell's ideas about the concrete implementation of university admission procedures taking into account the race of students, i.e. the rejection of quotas and the support of sufficiently flexible and individualized projects. The principle that race or ethnicity may be used as a factor in admissions, but only to a limited extent and in such a way as not to disadvantage white applicants, remained in place.[76]

Judge Rehnquist came to the conclusion that the admission process of the Faculty of Letters, Science and Arts did not provide a sufficiently individualized approach to applicants.[77] Considering the number of points that applicants were automatically assigned for belonging to an underrepresented ethnicity or race, this factor was decisive in the final result. According to the decision in the Bakke case, the use of the category of race was considered inherently "suspect", and when, in addition, the other criteria had relatively significantly less weight, Rehnquist assessed the faculty's approach as unreasonable.[78] Even the system of "flagging" did not convince the Supreme Court, because they considered this procedure in within the entire admission process rather as an exception. In addition, academically able minority students were virtually excluded from this process of individual assessment, as a score of twenty points for race or ethnicity usually earned them automatic admission, regardless of their special talents.[79] Because the admissions process of the Faculty of Letters, Science, and Arts, was not sufficiently individualized, the Supreme Court ruled that it was not adequate to achieve diversity and was therefore not in accordance with the Constitution. The university therefore had to change the terms of this admissions process so that it does not discriminate on the basis of race or ethnicity.[80]

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[76] Ibidem, 268-276.
[77] Ibidem, 271.
[78] Ibidem, 270.
[79] Ibidem, 275-276.
[80] Ibidem, 277-280.

Several other justices created their own opinions, adding to Rehnquist's assessment or explaining where they disagreed with him. For example, Justice Sandra Day O'Connor analysed in detail the allocation of specific points in the admissions process and concluded that the main flaw of the program is that the final score is created too mechanically, automatically, and therefore without individual assessment.

The dissenting opinions were composed by Justices John P. Stevens, David Souter and Ruth Bader Ginsburg. Justice Stevens based his argument on the fact that the plaintiff Hamacher had no legal interest in the outcome of the process, therefore the lawsuit should not be classified as a class action and the university cannot be remedied.[81] Justices David Souter and Ruth Bader Ginsburg primarily believed that the faculty admissions process it is sufficiently individualized and conforms to Justice Powell's 1978 vision of an appropriate system of accounting for race in education. The University considers not only race but many other criteria, and the plaintiff has not made any convincing arguments that the ethnic minority advantage is not overriding. On the contrary, the records, according to the judges, suggested that an eligible non-minority applicant could receive a higher overall score than candidates favored by their ethnicity. According to them, the "flagship" system was undervalued by the court, all its positive aspects were not explored.[82]

Justice Ginsburg's key argument was this: Given the continuing underrepresentation of minorities in education, schools will try to remedy the problem through legal means anyway. If a court were to ban affirmative action in admissions, universities would begin to apply other methods that, while not at first sight taking into account race or ethnicity (and thus discriminating on the basis of them), would do their best to produce the same results as if race or ethnicity could be taken into account. As long as the low representation of ethnic minorities among students persists, these minorities will have to be favored in some way, and (perceived) discrimination against whites will continue to occur, albeit covertly. It therefore makes no sense to try to limit race-sensitive programs at all costs.[83]

[81] Ibidem, 290-291.
[82] Ibidem, 293-298.
[83] Ibidem, 304-305.

5. Grutter vs. Bollinger

At the same time as the Gratz case, the Supreme Court was hearing a second lawsuit involving the University of Michigan's admissions system, this time to the law school's master's program. Due to the fact that the circumstances of the Gratz and Grutter cases were different, the court was able to distinguish itself in one position against the other and decide the opposite. The Supreme Court's opinion on these two cases served as a new precedent for at least the next ten years.[84]

5.1 Circumstances of the case

The Law Faculty of the University of Michigan[85] considered it a fundamental public interest to provide its students with the so-called educational benefits arising from diversity.[86] Among these benefits, which the study of law at the University of Michigan was supposed to bring, included understanding between individual races and breaking down racial prejudices, which they were supposed to lead to better academic results and students' preparation for a profession in which they will meet a very diverse collective.[87] This goal was to be achieved by accepting a "critical mass" of representatives of ethnic and racial minorities to study in each academic year. The concept of a critical mass was not quantified, the number of minority students was to be significant enough so that they did not feel isolated in the classroom, actively participated in the teaching and thus brought benefits arising from the diversity of the student body.[88] It was precisely in these educational benefits that the students received that the essence was supposed to lie education at the University of Michigan Law School. The university claimed that by eliminating diversity, the school would lose its prestige.[89]

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[84] This trial retook place in 2013.
[85] University of Michigan Law School.
[86] Barbara Grutter v. Lee Bollinger et al., 539 U.S. 306 (2003), 328.
[87] Ibidem, 330.
[88] Ibidem, 329-336.
[89] Ibidem, 356.

According to the university, the admission process showed a high degree of individualization. Each applicant was assessed on the basis of all the information they provided in the application, i.e. according to the academic average from the bachelor's level of education, the results of entrance tests, letters of recommendation and a motivational essay that described how the candidate would contribute to the diversity of the student body. In addition to these factors, so-called "soft" variables were also favored - the enthusiasm of the applicant, the quality of his previous education, etc. Diversity was not defined only by race or ethnicity but also by other factors (personal experiences, etc.), however, the long-term tendency of the university to take particular account of belonging to a racial or ethnic minority (especially African Americans and Hispanics) was manifested. The individual criteria did not have a specific weight, so even the highest possible score in the entrance test did not guarantee admission to the study and vice versa.[90]

5.2 Trial

In 1997, Barbara Grutter, a white woman and an unsuccessful applicant to the faculty, filed a race discrimination suit against the university in violation of the Fourteenth Amendment to the Constitution, Title VI of the Civil Rights Act of 1964, and other regulations. It considered the university's race-based approach unjustifiable by any substantial public interest and insufficiently narrowly in line with its stated goals. She requested compensation for damages, redress on the part of the university and admission to the faculty for herself. Because she herself had a legal interest in the matter, her lawsuit acquired the status of a class action.[91]

The District Court upheld the lawsuit, declaring the University of Michigan Law School's admissions system illegal. Its goals were declared to be indefensible by any serious public interest (i.e. the diversity of the student body was not considered to be a serious public interest either). However, the Sixth Circuit Court of Appeal rejected and reversed the lower court's opinion, deeming the university's action adequate and permissible under the Constitution.

[90] Ibidem, 310-316.
[91] Ibidem, 316-317.

According to the higher court, race was only one of the applicant's advantages in the admissions process, which corresponded to the precedent set by the Bakke case.[92]

5.3 Verdict

This time, Justice Sandra Day O'Connor wrote the majority opinion, joined by Justices John P. Stevens, David Souter, Stephen Breyer, and Justice Ruth Bader Ginsburg. Since the circuit court challenged the Bakke precedent in recognizing diversity in education for serious public interest, the Supreme Court commented on this issue. The previously applied rules for affirmative action at universities, i.e. the use of race as an admissions factor subject to strict scrutiny, fulfilment of the public interest and measures sufficiently narrowly tailored to the defined goals, were confirmed and formulated in more detail.

In addition to remedying previous discrimination, the diversity of the student body was recognized as one of the sufficiently significant public interests to justify affirmative action.[93] The requirement of narrow tailoring, i.e. the adequacy of a certain measure to meet the given goal, was also formulated in more detail. In order for a university admission procedure that took into account the race of the applicants to be marked as narrowly tailored, it had to meet the following criteria: it could not be a quota (that is, a system that would isolate individual groups from mutual competition), the factor of race or ethnicity could only be used as a bonus , not as a decisive aspect, and the whole system had to show a high degree of individual approach to candidates, be flexible and not make decisions mechanically. Furthermore, labelling the program as narrowly tailored did not require the exhaustion of all alternatives that do not take race into account, only those that would be applicable in the given case while maintaining the same results as when race was taken into account.[94] It continued to apply that representatives of any racial or ethnic group could not be directly disadvantaged by the criterion of race. The most significant (and virtually the only) change from the Bakke precedent was the necessity of time limits on all race-based university admissions processes.[95]

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[92] Ibidem, 317-321.
[93] Ibidem, 325.
[94] Ibidem, 333-341.
[95] Ibidem, 343.

The majority of judges concurred with her definition, although Justice Ginsburg, with the support of Justice Breyer, stated in her concurring opinion that the 25-year time limit, from her point of view, expresses only hope that positive discrimination programs will no longer be needed during this time.[96]

According to the majority of the Supreme Court, the University of Michigan Law School's admissions process met all these criteria.[97] The concept of a critical mass was not a quota due to the absence of specific numbers, race or ethnicity served as only one of many criteria in a very individual evaluation of applicants, there was no mechanical quantification of individual factors. Thanks to the individual assessment of applicants, the use of race as a criterion did not harm the representatives of any of the racially disadvantaged groups, because they had a good chance of receiving bonuses for other aspects, many of which were not even precisely defined.[98] In the event that the university were to abandon this system, it would have to pursue an alternative that would limit the diversity or lower the academic level of students, leading to substantial changes in the form of this educational institution.[99] Since the university expressed its will to proceed to a different system of admitting students, as soon as such an alternative was found that would allow the preservation of the results, the time limitation requirement was also met.[100] On the basis of this consideration, Judge O'Connor concluded that the Michigan in this case, the university does not violate the Fourteenth Amendment to the Constitution, and thus also other legal measures.[101]

Justices Antonin Scalia, Clarence Thomas, William Rehnquist and Anthony Kennedy composed their own dissenting opinions. Relatively the most significant of them is probably the opinion of the President of the Supreme Court Rehnquist, who was joined by his colleagues Scalia, Kennedy and Thomas. The criticisms contained in this opinion were mainly directed to the concept of critical mass and its application, which, according to Rehnquist,

[96] Ibidem, 346.

[97] Ibidem, 334.

[98] Ibidem, 335-339.

[99] Ibidem, 340.

[100] Ibidem, 343.

[101] Ibidem.

significantly favored African Americans against other representatives of minorities.[102] In his opinion, Justice Kennedy criticized primarily the insufficient level of rigor of review applied by the court.[103] Justice Scalia, in contrast to his colleagues, criticized he aimed primarily at the supposed ambiguity given by the precedents of Gratz and Grutter and expressed concern about further disputes concerning this issue.[104]

Justice Thomas' dissenting opinion was the most elaborate and longest. In his statement, all the goals proclaimed by the university (especially the gain of educational benefits from diversity) were examined and subjected to strict scrutiny. From the conclusions of Judge Thomas, it was not only that none of the mentioned benefits met the requirement of significant public interest, but also the very concept of diversity in education. In doing so, Justice Thomas challenged the Bakke precedent. In his opinion, this judge, himself an African American, virtually declared all affirmative action practices based on race on campus illegal.[105]

[102] Ibidem, 378-387.
[103] Ibidem, 387.
[104] Ibidem, 346-349.
[105] Ibidem, 349-378.

6. Students for Fair Admissions, Inc. v. President and Fellows of Harvard College and Students for Fair Admissions, Inc. v. University of North Carolina

Students for Fair Admission (henceforth SFFA) is a nonprofit legal advocacy organization founded by Edward Blum, an anti-affirmative action activist, in 2014. His organisation filed several lawsuits against the schools' practices on considering race as a factor in their admissions, starting with the Fisher v. University of Texas cases and continuing with SFFA v. Harvard case in 2019. However, the courts always ruled against SFFA, as SFFA were unable to come up with new and not yet tested arguments, and therefore were rejected.[106]

SFFA petitioned the Supreme Court to review the Harvard case in 2021 and finally in 2023, the case was revisited, this time together with the case of the University of Carolina (henceforth UNC), since these two cases were very similar.

6.1. Circumstances of the cases

Harvard College and University of North Carolina had always been desired by tens of thousands of applicants every year and are known for using race as one of the main decision-making factors in their admissions, all for the sake of creating diverse campus communities. Both Harvard and UNC have very similar admissions, where: „every application is checked by a "first reader" who assigns a numerical score in these categories: academic, extracurricular, athletic, school support, personal, and overall" (in which is included the consideration of race). Afterward a discussion is held, and the officials committee review every reader's decision and either approves or rejects the recommendation.[107]

SFFA' lawsuit was first at odds because some claimed that SFFA should be denied the right to sue, since they are an organisation, that was not considered genuine at the time it filled lawsuit, and others claimed that the organisation should be considered genuine if it was controlled and funded by identifiable members. Ultimately, it was decided that SFFA genuinely fulfils the requirements for organizational plaintiffs.[108]

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[106] Students for Fair Admissions, Inc. v. President and Fellows of Harvard College et al., 600 U.S. ___ (2023), syllabus, p. 6 (14) [online] 2023 [2024-06-10] Available from: https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf
[107] Ibidem, 1-2.
[108] Ibidem, 2-3.

6.2 Trials

The SFFA's lawsuits against Harvard and UNC alleged that their racial integration programs violated Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. Harvard and UNC justified their policy through introducing their goals: to create future leaders, prepare students by adapting in diverse society, provide better education through diversity and to come into contact with different outlooks. These, however, failed to entail the purposes of strict scrutiny, and failed to explain the connection between their goals and the race selection.[109]

Harvard and UNC previously emphasized that "race of the applicant can never be a disadvantage in the admissions process" and was found out later by the First Circuit that in contrast of this declaration, results showed that "fewer Asian Americans and whites were being admitted" despite increased applications by these persons. It was especially Asian Americans who undoubtedly achieved the best results in all of admission test categories, and yet, received the lowest rating in "overall" or "personal" categories. The statistics showed that the admission of Asian Americans to Harvard drastically decreased by 11.1%.[110]

Harvard's view appeared to be increasingly contradictory, when it stated that while preferring more talented applicants does not mean that not being excellent has a negative impact. By saying that, Harvard clearly admitted to favouring one group at the expense of another. Harvard's approach of stereotyping a race as a type of like-minded persons completely ignores the strengths and qualities of individuals. This mindset of Harvard and UNC only convinced the Supreme Court that their admissions practices were inconsistent with the Fourteenth Amendment. [111]

6.3 Verdict

In June 2023, it was ruled 6-2 in Harvard case and 6-3 in UNC case in favour of SFFA. The Supreme Court decided that race-based admissions practised by Harvard and UNC violated the Equal Protection Clause of the Fourteenth Amendment.

[109] Ibidem, 6.
[110] Ibidem, 27 (35).
[111] Ibidem, 7-8.

The majority opinions sided with the Equal Protection Clause that demands elimination of any kind of discrimination, be it racial or nationality. Justice Roberts wrote that the affirmative action programs were abused because of the "lack of sufficiently focused and measurable objectives". Justices Gorsuch, Thomas, Alito, Barrett and Kavanaugh concurred.[112] Justice Thomas readdressed the "colourblind constitution", which states that all citizens are equal before the law and does not tolerate any kind of segregation among people.[113] Justice Gorsuch joined with the majority; however, he emphasized that Title VI of the Civil Rights Act forbids race discrimination, therefore rejects affirmative action.[114]

Justices Jackson, Sotomayor and Kagan formed a dissenting opinion. Jackson opines that permitting universities to assess the whole being of applicants should be viewed as a progress of the promise of the Fourteenth Amendment, not at all a regress.[115] She concludes that by embracing the "color-blindness" in the admissions will only narrow the opportunities provided to applicants of different race.[116] But the majority wins. Both Harvard College and the University of North Carolina promised to abide by the law, however their strong beliefs will remain rooted deeply within.

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[112] Ibidem, 8.
[113] Ibidem, 39 (47).
[114] Ibidem, 23 (71).
[115] Ibidem, 15 (223).
[116] Ibidem, 21 (229).

7. Summary

U.S. universities often give preferential treatment to racial and ethnic minoritiesin admission procedure. This policy caused a number of litigations, some of the cases were even brought before the Supreme Court of the United States. This paper analysesfive of the major Supreme Court cases and attempts to find out how the Court's viewon affirmative action programs at universities had changed over the years.

The *Regents of the University of California v. Bakke* case from 1978 was the first suit against the policy of affirmative action at American universities that the Supreme Court dealt with. The Court decided that racial and ethnic classifications were inherently suspect and demanded strict judicial scrutiny. However, the Court also ruled that universities could consider race in admissions if this approach was justified by a compelling governmental interest. Remedy of past discrimination or maintaining the student body diversity could be such interest. The affirmative action program that a university applies must be sufficiently narrowly tailored to serve the interest, that is to say, it must be necessary to achieve the compelling goal. In no case can the university consider the minority candidates' applications in a separate admission process. Race can be only one of the admissions factors.

The *Gratz v. Bollinger* and *Grutter v. Bollinger* cases (2003) followed the precedent given by the *Bakke* case completely. According to the majority of the Court, race-based admissions which were necessary to promote the compelling governmental interest of attaining a diverse student body did not violate the Constitution. Race thus could remain a factor in the admission procedure but could not be the decisive one. Besides, universities were forbidden to assign a certain number of "plus" points to an applicant on the basis of his or her race or to reserve a certain proportion of places for racial minority students. Furthermore, for an affirmative action program to be considered narrowly tailored, the condition of individualizing the admissions process must be met. Finally, the admissions affirmative action programs must be limited in time. The

Supreme Court determined the limit to 25 years from the decision.

The main change of the Court's view thus lies in setting clearer for affirmative action. Since 2003, race-considering admission procedures have been forced to becomemore individualized, less rigid and limited in time. However, the essentials of the affirmative action programs – i.e. that race-based admission procedures are acceptable if they meet certain conditions – remained valid. This policy purposefully served the Supreme Court nearly the next 20 years.

The last cases *Students for Fair Admission, Inc. v. Harvard College* and *Students for Fair Admission, Inc. v University of North Carolina*, were held at the same time by the Supreme Court in 2023. These educational institutions used race as a strong factor in the admissions and caused Asian Americans to become a discriminated party. The lawsuits against these practices concluded in Harvard College and University of North Carolina prohibition of using race as a factor in deciding which applicants will be accepted to study.

Bibliography

Sources

Jennifer Gratz and Patrick Hamacher v. Lee Bollinger et al., 539 U.S. 244 (2003).
Barbara Grutter v. Lee Bollinger et al., 539 U.S. 306 (2003).
Regents of the University of California v. Allan Bakke. 438 U.S. 265 (1978).
Students for Fair Admissions, Inc. v. President and Fellows of Harvard College et al., 600 U.S. ___ (2023)

Literature

Monographs

James P. Sterba, *Affirmative Action for the Future* (Ithaca, N. Y.: Cornell University Press, c2009).
Rachel Kranz, *Affirmative Action* (New York: Facts on File, 2002).

William M. Leiter, Affirmative Action in Antidiscrimination Law and Policy: An Overview and Synthesis (Albany: State University of New York Press, 2011).
J. Edward Kellough, *Understanding Affirmative Action: Politics, Discrimination, and the Search for Justice* (Georgetown University Press, Washington, D.C., 2006)

Tim J. Wise. Series: Positions: Education, Politics, and Culture. (New York : Routledge, 2005)

Bankston III, Carl L. Series: Social Issues, Justice and Status. (Hauppauge : Nova Science Publishers, Inc. 2017)

Articles

Abraham L. Wickelgren, „Affirmative Action: More Efficient than Color Blindness“, *Texas Journal on Civil Liberties and Civil Rights* 10, č. 2 (duben 2005): 165-188.
Ashlee Richman, „The End of Affirmative Action in Higher Education: Twenty-Five Years in the Making?“, *DePaul Journal for Social Justice* 4, č. 1 (podzim 2010): 61-96.
Euel Elliott a Andrew I. E. Ewoh, „The Evolution of an Issue: The Rise and Decline of Affirmative Action“, *Policy Studies Review* 17, č. 2/3 (léto/podzim 2000): 212-237.

GARRISON-WADE, Dorothy F. a LEWIS, Chance W. *Affirmative Action: History and Analysis.* Online. Journal of College Admission. 2004, č. 185, s. 23. ISSN 07346670.
Mark Tushnet, „United States: Supreme Court Rules on Affirmative Action“, *International Journal of Constitutional Law* 2, č. 1 (leden 2004): 158-173.

Pamela Barta Moreno, „The History of Affirmative Action Law and Its Relation to College Admission“, *The Journal of College Admission*, č. 179 (jaro 2003): 14-21.

Peter Schmidt, „For Asians, Affirmative Action Cuts Both Ways“, *Chronicle of Higher Education* 49, č. 39 (červen 2003): A24.

Internet sources

United States Census Bureau „Overview of Race and Hispanic Origin” [online] 2023, [cit. 2024-01-06]. Available from: https://www.census.gov/quickfacts/fact/table/US/VET605222#VET605222

Adam Liptak, „Supreme Court Finds Bias Against White Firefighters“, *The New York Times*, [online] 29.6.2009, [cit. 2024-03-08]. Available from: http://www.nytimes.com/2009/06/30/us/30scotus.html?pagewanted=all&_r=0

Alyson Klein „*No Child Left Behind: An Overview*”, Education Week [online] 10.4.2015, [cit. 2024-03-08]. Available from: https://www.edweek.org/policy-politics/no-child-left-behind-an-overview/2015/04

Students for Fair Admissions, Inc. v. President and Fellows of Harvard College et al., 600 U.S. ___ (2023), syllabus [online] 2023 [2024-06-10] Available from: https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf

Overview of cited jurisprudence

Adarand Constructors, Inc. v. Federico Peña, Secretary of Transportation, 515 U.S. 200 (1995).

Albemarle Paper Company v. Moody, 422 U.S. 405 (1975).

Barbara Grutter v. Lee Bollinger et al., 539 U.S. 306 (2003).

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

Fisher I, 570 U. S., at 9; see also Grutter, 539 U. S., at 328.

Frank Ricci et al. v. Johny DeStefano et al., 129 S. Ct. 2658 (2009).

Franks v. Bowman Transportation Company, Inc., 424 U.S. 747 (1976).

Griggs et al. v. Duke Power Company, 401 U.S. 424 (1971).

H. Earl Fullilove, et al. v. Philip M. Klutznick, Secretary of Commerce, et al., 448 U.S. 448 (1980).

Homer A. Plessy v. Fergusson, 163 U.S. 537 (1896).

Jennifer Gratz and Patrick Hamacher v. Lee Bollinger et al., 539 U.S. 244 (2003).

Oliver Brown et al. v. Board of Education of Topeka et al., 347 U.S. 483 (1954).

Parents Involved in Community Schools v. Seattle School District No. 1 et al., 551 U.S.

701 (2007).

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

Students for Fair Admissions, Inc. v. President and Fellows of Harvard College et al., 600 U.S. ___ (2023)