



Situating University Affirmative Action Jurisprudence in the Contemporary Asian American Movement for Civil Rights

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Abstract. One of the most controversial issues facing the American socio-political apparatus is the question of affirmative action policies. In fact, the discourse around affirmative action has ventured beyond the scope of one social group, involving the unique perspectives of Asian Americans, with a constant focal point on one aspect of affirmative action policies: university admissions. This paper explores the distinct experiences of Asian Americans in American society and their contributions to the affirmative action debate by analyzing past and current United States Supreme Court cases and decisions, as well as evaluating the merits of affirmative action policies in their entirety. The work first looks at the origins of affirmative action and the first challenges to its legality. Then, the paper will discuss talking points from both sides of the affirmative action discourse while highlighting important implications these have on future policy making and the American political landscape.

Keywords: Asian Americans, Affirmative Action, University Admissions, Equality of Opportunity.

1 Introduction

Used by university admission offices across the United States, affirmative action policies aim to, as the Cornell Legal Information Institute states, “eliminate unlawful discrimination among applicants, remedy the results of such prior discrimination, and prevent such discrimination in the future.” These policies, at the very least, take a holistic view of university applicants’ characteristics including factors such as race, gender and creed. At the cross fire of public discourse is the race-based admissions process adopted by many of the United States most prestigious universities.

According to Cornell Legal Information Institute, affirmative action policies derive their legality from U.S president John F. Kennedy’s Executive order 10925 in 1961 which instructed government contractors to “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.” [1]. However, affirmative action in its contemporary form has its basis in the 1978 U.S Supreme Court case *Regents of the University of California v. Bakke*, where the court’s decision of striking down the use

of racial quotas in the admission process while acknowledging race could be a narrowly tailored factor if it serves a compelling interest for the state, which will only be determined by the judicial institutions using strict scrutiny, the most stringent standard of judicial review [2]. Since then, affirmative action has evolved from simply a measure for fixing the past discrimination of racial minorities to its effectiveness in promoting a diverse academic environment in universities, as arguing for corrective justice might venture too close to somewhat a system of racial quotas. This, along with the ambiguous stance of the supreme court, paved the way for controversies for decades to come.

As a recent U.S Supreme Court case *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* makes its way through court proceedings, it has once again sparked controversy regarding affirmative action [3]. What is different about this time is a new discord between opponents who argue that affirmative action policies are specifically racist towards the Asian American community, discrimination described as existing in the form of de facto quotas or “negative action”, where the race of the applicant is seen as a minus instead of a plus as in affirmative action, and proponents who cite this opposition as “a wolf in sheep’s clothing” with malign political intentions of ending diversity and affirmative action policies altogether on college campuses [4]. As shown in Figures 1 and 2 [12], this fault line between the two sides of the affirmative action debate has now translated into blatant confrontations, in the form of protests and counter-protests. Concepts like diversity and merit along with a rekindled discussion on race-conscious admissions policies have morphed into a new political as well as civil rights battleground. This paper seeks to reconcile the fundamental rift between equality of opportunity and equality of outcome demonstrated here as a result of Americans’ different perspective on the notion of equality. Such analyses make use of historical jurisprudence on affirmative action and concurrent legal cases.



Fig. 1. Asian Americans who views affirmative action programs in universities as “the wolf of racial bias” [12], protest against affirmative action in Boston, Massachusetts.



Fig. 2. Supporters of affirmative action stage counter-protest in defense of diversity.

2 Diverging Views on Affirmative Action Within the Asian American Community

The term Asian American is an overarching term for ethnicities such as Chinese, Japanese and other groups from Asia, incidentally, views on affirmative action or rather anti-negative action are different across the Asian American community. A 2016 poll suggested that 64% of Asian Americans supported affirmative action programs designed to help blacks, women and other minorities get better access to higher education while around 25% disagreed, with Chinese Americans being the least supportive, at 41% [5]. Arguably, previous research has not recognized the disequilibrium of six core systems of power and its implications both culturally and practically as outlined by Professor Suchang Chan at the University of Santa Barbara in 1989 [6]. The opposition to affirmative action may be necessary to understand this debate but how affirmative action disincentivizes Asian Americans' striving for academic success due to cultural factors is vital to dissecting the issues of Asians as a race "caught in the middle" in American higher education power dynamics. Furthermore, established scholarly literature has only focused on the divergence in policy opinion between racial groups in America as opposed to discussing variations of opinions within each group, specifically Asian Americans, who are consistently brought up by recent challenges to Affirmative Action policies.

The "perpetual foreigner" stereotype of Asian Americans seems to hinder their ability to assimilate into mainstream academia and society at large. Although many Asian

Americans possess substantial representational power, this is seen at least with regards to quantifiable academic qualifications where for example at the top range of SAT score-senders — from which selective institutions draw the majority of their students — around 50% are Asian and that Asian Americans often have to score proportionally higher than all other racial groups [7]. In fact, an internal investigation conducted by universities seem to see no fault in academic or extracurricular achievements by Asian Americans, a Stanford University's 1986 report conceded that “no factor we considered can explain the discrepancy in admission rates between Asian Americans and whites completely” and Brown University found that “Asian American applicants have been treated unfairly in the admissions process” [7]. This reveals a key part of the issue, where Asian Americans suffer negative action because they lack personal qualities and leadership character [6]. In *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, an ally organization of Students for Fair Admissions, the Silicon Valley Chinese Association Foundation argued exactly this. In their amicus curiae to the United States Supreme Court, the SVCAF points to Harvard University's use of “the ‘Student Diversity’ rationale” where the university “resorts to using a subjective ‘personal rating’ ... and subjects Asian-American applicants to prejudicial assumptions and stereotypes” (4). Harvard, in an attempt to justify the disparity in the personal ratings, used past admission data, which showed how Asian American students uniformly provided poor recommendation letters from their counselors and teachers, suggesting that the disparity springs from the institutions that students came from, not Harvard. The university has apparently taken these teachers and counselors of Asian Students at their word despite consistently arguing that it uses a robust and versatile admissions process calibrated to root out any systemic biases [8].

3 Class: An Often Overlooked Factor

A trait often overlooked in university admissions is the class background of the applicant, it is possible that a minority student is brought up in a household towards the top of the socioeconomic ladder while a majority student is from a lower class family. The minority student coupled with being of disadvantaged class background could then have had greater access to educational resources, school choice, and robust academic environments than the student who might be part of a majority race. However, affirmative action nonetheless overlooks this factor in some cases. This means the minority student with a privileged background reaps further benefits at the expense of other students in the application process. This presents a stark contrast to universities' commitment to situating the use of affirmative action in individual contexts when for example, only 4.5 percent of students at Harvard come from families below the 20th percentile for income in the United States [9].

4 Affirmative Action Due to Americans' Differed Value Systems

Below the surface of contemporary affirmative action jurisprudence and challenges to its legality and practicality is a difference in views on what equality means. Affirmative action policies inevitably present obstacles to one minority group in its attempts to benefit another, in the United States, many are chained to the belief that there is an incompatibility between being a minority and being high-achieving which may have allowed Asian Americans to be placed in the awkward middle of affirmative action discourse and made it challenging for universities regarding their policies towards this minority group. What's more, the debate around affirmative action will ultimately come down to a decision between guaranteeing opportunity and controlling outcome. The intentions of affirmative action to achieve diversity is obviously an attempt at making sure equality of opportunity, but the cultural values of Asian subgroups mean that some will see the deliberate attempt to provide more opportunities for other minorities as an effort for equal outcomes, logically speaking, there has to be a standard or proportion of minority students universities seek to admit as part of their affirmative action policies. In doing so, some say that affirmative action disincentivizes both the preferred and non-preferred groups to perform their best, as the former would not need to and the latter would feel that the obstacles facing them proves their efforts futile [10]. Here the difference in the conception of equality becomes fully apparent, while some may see affirmative action as a policy to combat systemic discrimination and provide equality for minorities, others see it as an attempt to provide equal outcomes masked in the idealism of equality of opportunity.

5 Conclusion

Ultimately, affirmative action would never cease to be a topic of discussion in the modern political apparatus. In fact, it is a challenge to reconcile the evolving perspectives under a constantly shifting societal context. Opponents of affirmative action have advocated reverting to a meritocratic system, but what exactly constitutes "merit"? Could the diverse background and unique perspectives brought by minority students and enabled by affirmative action be a type of merit that is often overlooked? This value of diversity is certainly being argued by proponents of affirmative action. On the other hand, perhaps a move away from race conscious admissions or rather a class based affirmative action will better allow universities to truly consider applicants on an individualized basis and champion the moral duties of equal opportunity in educational access. Of course, it is difficult to abolish or prevail a policy that is only a short term remedy to a problem that has long term implications for the United States. Thus, further research should consider factors outside of the affirmative action debate which addresses the policy's main issues, for example, greater school choice or increased funding by these universities to primary and secondary institutions in underdeveloped neighborhoods could allow a naturally diverse student population in future admission

processes [11] and finally shake off the shackles of the constant controversy surrounding affirmative action.

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