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The Legal Limitations on College Admission Standards: When Does the Pursuit of Diversity become Illegal Discrimination?

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**THE LEGAL LIMITATIONS ON COLLEGE ADMISSION STANDARDS
WHEN DOES THE PURSUIT OF DIVERSITY BECOME ILLEGAL
DISCRIMINATION?**

Bruce L. Haller, Molloy College

ABSTRACT

The value of diversity in the workplace, classroom, and c-suite is universally proclaimed as a given by scholars, experts and even the courts. In the abstract this presumption may be true, but in application the concept of inclusively having a diverse workplace or a diverse elite college student body is problematic. Fraught with incongruent denotations and insurmountable applications, achieving a critical mass of historically underrepresented employees or students resulting in a diverse workplace or student body is elusive if not unattainable.

In *Students for Fair Admissions, Inc. (SFFA) v President and Fellows of Harvard College* (Harvard University), the United States District Court, and eventually the United States Supreme Court will weigh in on the value, definition, and legally permissible process to achieve diversity in creating a college class. The holistic admissions process employed by Harvard has been cited by previous courts as an example of the appropriate balance of being race conscious and color blind to achieve the optimal learning environment for colleges to prepare students to productively excel in a diverse society.

This paper will summarize the history of the federal court system's attempt to reconcile society's simultaneous desire to create diversity and avoid discrimination based on those same classifications necessary to consider in order to achieve said goal. From the *Bakke v University of California at Davis* decision to prohibit quotas, but allowed race to be considered as one of many factors to achieve diversity to the *Gratz and Grutter* cases against the University of Michigan and University of Michigan Law School which were decided based on the weight race was awarded as a deciding factor in admission. *Fisher v University of Texas* (I and II) affirmed the Equal Protection Clause standard to be applied to test the state's use of race conscious albeit holistic standards in their admission's selection process.

The current lawsuit against Harvard alleging discrimination based on race in their holistic admissions process will be examined from the viewpoint of how to define and achieve the appropriate level of diversity within the environment of a changing United States Supreme Court. If the Harvard case, as many believe, makes its way to the high court, what will be the consequences of eliminating race as a permissible variable in college admissions processes?

KEY WORDS

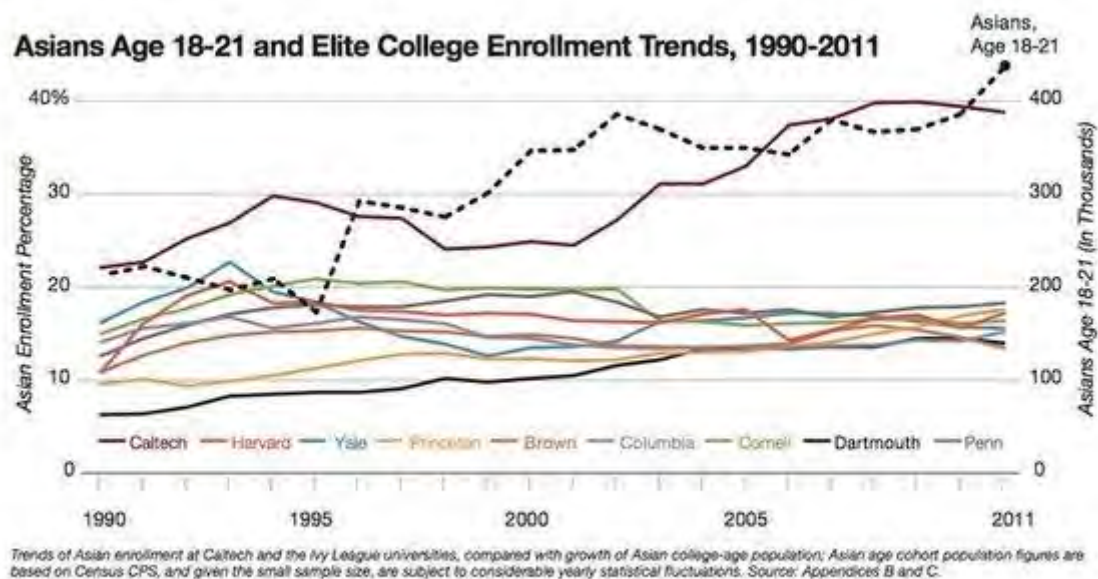
Affirmative Action, Strict Scrutiny, Racial Discrimination

DISCRIMINATION OR AFFIRMATIVE ACTION

The plaintiffs in *Students For Fair Admissions, Inc. v President and Fellows of Harvard College* (Harvard Corporation), hereafter *SFFA v Harvard*, allege the Harvard admissions process intentionally discriminates against Asian-American applicants. Harvard acknowledges their

holistic admissions process considers race as one of many factors. Harvard denies using any factor within the process to discriminate against Asian-Americans. They further contend, in compliance with applicable law, race is a considered, but not a dispositive factor in their admissions process.

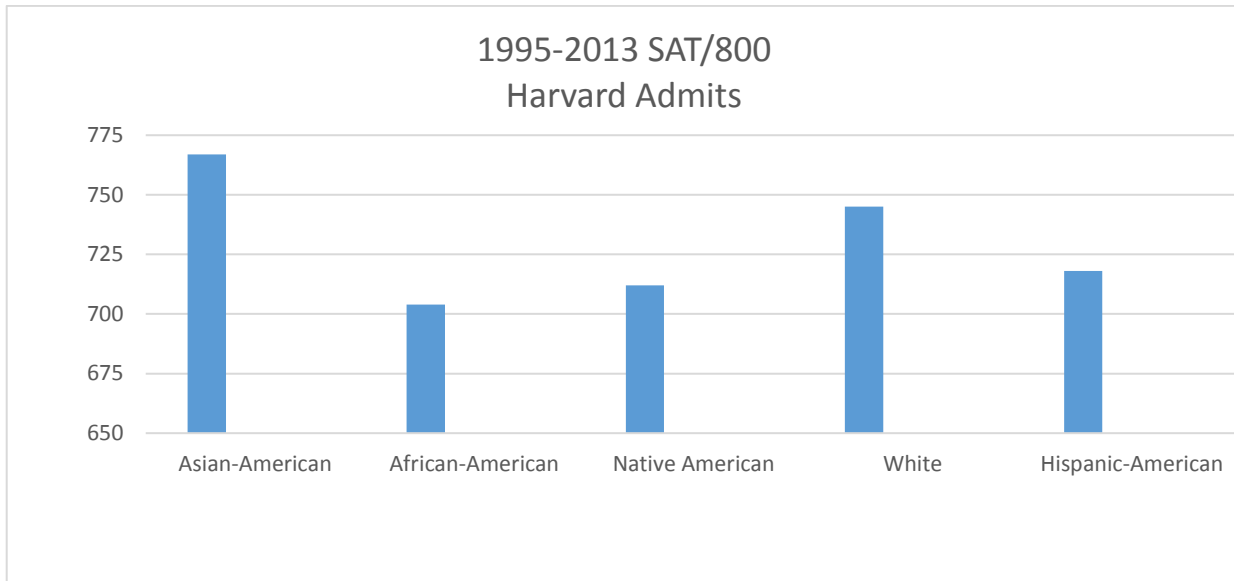
Edward Blum, President of the Students for Fair Admissions, (Halper, 2018) alleges Harvard intentionally discriminates against Asian-American applicants. He argues Harvard maintains a quota for Asian-American applicants' admission to Harvard. After the Justice Department closed an investigation in the early 1990s into charges that Harvard University discriminated against Asian-American applicants, Harvard's reported enrollment of Asian-Americans began gradually declining, falling from 20.6 percent in 1993 to about 16.5 percent over most of the last decade.



The Asian student population at Harvard can be viewed from multiple perspectives. Compare Asian Americans at Harvard as a percentage of the college age Asian American applicant pool. This pool having increased by almost 100%, while the Asian population as a percentage of Harvard's student body has actually declined slightly from 20.6 in 1993 to 18.6 in 2015. As the chart above illustrates, the Asian population at other Ivy League institutions has also not increased in proportion to the increase in the Asian college age applicant pool. Coincidentally, the percentage of Asian students at these elite institutions has converged, settling at approximately the same percentage.

In contrast, Asian Americans at California Institute of Technology have increased as a percentage of the student body to 43%. Approximately the same increase in percentage as the Asian American college age applicant pool. The same percentage as Model 1, indicating what percentage of Harvard's class would be Asian if only academics, not athletics, legacy, personal and extracurricular activities were factored in.

According to data released at trial, over an 18 year period from 1995-2013, Asian-American applicants admitted to Harvard earned an average SAT score of 767/800 across all sections. During the same period Hispanic American admits scored 718/800, African-American admits 704/800 and White admits 745/800.



Harvard’s holistic admissions process considers race as one of approximately 200 factors. Models presented at trial, demonstrated the weight given some of the variables considered and their impact on the class profile based on race.

Model 1 illustrates what the Harvard class would look like if only academics were considered. Asian-Americans under this construct would constitute approximately 43% of the Harvard class. Highly selective private university California Institute of Technology states academics is the most important admissions criterion. Under the Prop 209 amendment to the California State Constitution race may not be used as an admissions consideration. (Cal. Const. art.1 sec. 31(a)) In 2016, 43% of the undergraduate population at Cal. Tech. was Asian-American. (Jaschik, 2017)

Plaintiffs claim that despite receiving the highest average ratings in academic ratings, Asian-Americans received the lowest scores in “Personal” ratings. (Korn, 2018) It is the admissions notes on student files referring to Asian-American applicants in stereotypical terms such as “quiet, shy, science/math oriented and hard worker” that came from a previous Department of Education investigation and plaintiffs’ contend remains Harvard’s discriminatory behavior today. (Hartocollis, 2018) It is this behavior, the suit argues, Harvard uses to maintain an illegal quota on Asian-American students admitted.

Model 2 illustrates what the Harvard class would look like if only legacies were admitted. Model 3 illustrates the student body diversity if only recruited student athletes were admitted. Model 4 shows the resulting diversity if extracurricular activities and “personal scores” were considered for admission. The final Model “Actual” is Harvard’s student body currently, factoring in all variables in their holistic admissions process.

According to an analysis by one plaintiff's economist, 86% of recruited athletes were admitted. Almost 50% of applicants with a parent employed by Harvard was admitted. 33.6% of applicants who had at least one parent attend Harvard received admittance to Harvard. (Korn, 2018) This at an institution with an overall acceptance rate of below 5% (DeCosta-Klipa, 2018)

Harvard acknowledges a statistical disparity, but contends such does not prove intentional discrimination.



Unlike Bakke (Regents of the University of California v Bakke, 1978), Grutter (Grutter v Bollinger, 2003), Gratz (Gratz v Bollinger, 2003) and Fisher (Fisher v University of Texas at Austin, 2016), the United States Supreme Court cases establishing how much race may be considered in the college admissions process, Harvard is a private institution. As Judge Burroughs correctly pointed out in her pretrial motion ruling, this is not an Equal Protection Clause case. She does go on to inform the parties that as a federally funded private university the same test applied to public universities would be appropriate.

Race conscious admissions decisions, which includes Harvard's holistic process utilizing race as one of many variables, are permissible if the process is narrowly tailored to further a compelling

interest. The educational benefits of a diverse student body have been recognized by the court as a compelling interest. (*Grutter v Bollinger*, 2003) What admissions process is “narrowly tailored,” and what constitutes this valuable and compelling interest of a “diverse student body” remains unclear.

What is established law is that the Strict Scrutiny test of the Equal Protection Clause will apply to this Title VI claim. Furthermore, race may be a factor in a holistic admissions policy but it may not be a dispositive factor. (*Regents of the University of California v Bakke*, 1978) Receiving a specific number of additional points to enhance the possibility of admission is specifically a violation based on current applicable analysis. (*Gratz v Bollinger*, 2003)

The Harvard case went to trial after Judge Burroughs cleared up during motions that strict scrutiny standard would apply and the plaintiff’s four claims of intentional discrimination, racial balancing, race as a plus factor, and race-neutral alternatives were not moot and best decided at trial. (Huffman, 2019)

Many legal observers have opined that no matter what the outcome of this trial, the appeal is likely headed to the United States Supreme Court. Fisher and Grutter agree that the standard for review is strict scrutiny. However, Bakke and its progeny further have held that race may be considered as a factor in admissions policy if nondispositive, to achieve the compelling interest that is a diverse admissions class. This Court and this Justice Department have indicated a desire to prohibit any race based considerations in admissions.

Justice Thomas’s dissent in Fisher II may be the majority decision if and more likely when the U.S. Supreme Court grants cert for Harvard. “... use of race in higher education admissions decisions is categorically prohibited by the Equal Protection Clause. The Constitution abhors classifications based on race because every time the government places citizens on racial registers and makes race relevant to the provision of burdens or benefits, it demeans us all. That constitutional imperative does not change in the face of a “faddish theor[y]” that racial discrimination may produce “educational benefits.” (*Fisher v University of Texas at Austin*, 2016)

The Justice Department filed a Statement of Interest in Opposition with the U.S. District Court supporting the plaintiff’s lawsuit, arguing against granting defendant’s motion for summary judgment. In it the DOJ argues “Harvard has failed to demonstrate that its use of race is narrowly tailored to serve a compelling interest, that Harvard has failed to engage in good-faith consideration of race neutral alternatives,... (and) Harvard has not defined its diversity-related goals but nonetheless rejects race-neutral alternatives as inadequate to achieve them.” (Gore, 2018)

CONCLUSION

Harvard uses race as a factor in their admissions process. Harvard denies the use of race is a dispositive or plus factor. Harvard further denies any quota to admit students based on race is in effect. If true, Harvard’s holistic policy is legal under current law. The admissions data seems to indicate these statements are statistically unlikely and probably untrue.

It is also very unlikely the statistical evidence, admissions data, and testimony as to the use of race in Harvard's admissions process is legally sufficient to establish intentional discrimination against Asian applicants to Harvard.

Whether Harvard is in compliance with the parameters of using race as a factor in admissions in a narrowly tailored manner to achieve a compelling interest is unlikely, but very probably moot. The use of race based admissions policies in both public and private universities, whether inclusive affirmative action or illegal and inadvisable discrimination is also likely not what this case will ultimately be a vehicle for determining.

Open questions such as how to define "Asian-Americans," "what is a critical mass," and "how nondispositive must race be as a factor" will no longer need to be addressed.

SFFA v Harvard will be the United States Supreme Court case that creates the constitutional standard for any use of race in college admissions. Public or private, holistic or dispositive, with inclusive or discriminatory intentions, the U.S. Supreme Court will reconstruct the permissible process for college admissions of the next generation.

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