

# MINNESOTA LAWYER

## The Future of College Admissions: Experts Weigh the Harvard Case

Patricia Hurtado

November 15, 2018

Lawyers fighting to make Harvard drop race as an admissions factor and those battling to protect the college's diversity system have their marching orders. Tell me what you think the evidence shows and meet me back in court Feb. 13, U.S. District Judge Allison Burroughs told them.

Burroughs this month wrapped up a three-week trial in Boston over a lawsuit claiming that Harvard College limits the number of Asian-Americans it admits. Now, as the case makes its way toward a likely last stop at the Supreme Court, in a racially and politically charged environment, a question hangs in the air.

Will a college be able to consider an applicant's race in the future?

In the Harvard case, Students For Fair Admissions, led by affirmative action opponent Edward Blum, is suing to make the nation's oldest and wealthiest college replace its vaunted "holistic" admissions process with a race-blind system. To create a diverse student body of future leaders, Harvard responds, it needs to consider race as one of many factors, as the high court allows.

The fate of affirmative action? Here's what eight experts and partisans think.

### The Supreme Court could 'squeeze' affirmative action

In its 1978 Bakke decision the Supreme Court allowed race as one of many factors in college admissions, pointing to Harvard as an exemplar for avoiding a quota system.

Would the court, if it reviews the Harvard case, "not overturn 40 years of Supreme Court precedent, but squeeze the rules regulating how you admit your class so tightly that it makes it practically impossible to create the diverse learning environment?" Peter McDonough, vice president and general counsel of the American Council on Education, wondered in an interview. The Council filed a brief in support of Harvard.

"This case is about diversity and whether an institution like Harvard can define itself," said McDonough, a former general counsel of Princeton University. "Then the question arises, did the folks at Harvard actually go out of bounds? I don't think that higher education and our country are necessarily worse off if the outcome of this case is to help campuses understand better how to admit the class they'd like to admit."

### What happens if colleges can't consider race at all?

"The passage of Proposition 209 in 1996 had an immediate and negative impact on minority enrollment at the University of California, including at UCLA School of Law," Jennifer

Mnookin, the law school's dean, said of the California ballot measure that barred state institutions from considering race, ethnicity or gender in hiring and admissions.

By now, she said, "we have a fair bit of experience working to have a diverse student body while operating within these legal constraints."

Shortly after Prop 209 passed, UCLA started the Law Fellows program to encourage undergraduates from underrepresented backgrounds to consider law school. It has also created full-tuition scholarship programs for academically talented students who have overcome great hardships and has launched the First Gen In program to support the first in their families to earn a college degree.

"The good news is that even without traditional affirmative action, we have succeeded in attracting and retaining a diverse class by any measure, including racial diversity," Mnookin said. The bad news is that "it's a bit like running a race with your hands tied behind your back."

### **The Human Factor**

For each freshman class of roughly 1,700 seats, Harvard has more than 40,000 applicants, about 8,000 of them with perfect grades and 5,000 with pristine scores. So the college weighs academics, extracurriculars, athletics, personal essays, teacher and guidance counselor recommendations, and interviews with alumni and admissions staff. It considers 200 other variables including intended studies and the family's educational background.

### **Holistic admissions are even less transparent than quotas**

The high court's 2003 Grutter decision, reaffirming Bakke, held that a race-conscious admissions process that favors "underrepresented minority groups" but takes into account other factors serves a "compelling interest" and doesn't amount to an unconstitutional quota system.

The "irony" of the decision was that the court "struck down mechanical quotas, but it seems it was allowing a less transparent system that uses race even more than using a point system," said Ilya Shapiro, a senior fellow in constitutional studies at the Cato Institute who supports the suit against Harvard.

That's what the court could resolve with the Harvard case, Shapiro said, with a clearer standard or even by "throwing out racial preferences completely because the Supreme Court decides it's unworkable."

Harvard could win in Boston, he said, "but I think if the Supreme Court takes it up, it's more likely than not that Harvard will lose. It's anybody's guess how broad that decision will be."

### **Academics aren't the only measure of a student's merit**

"Mr. Blum clearly knows what he's doing and is a strategic thinker on how this case has been framed," said Prudence Carter, dean of the Graduate School of Education at the University of California at Berkeley. "But what I'm most distressed about is the idea Harvard's admissions are not based on merit."

Carter, a former admissions officer, said "when you're going through 30,000 applications, the overwhelming majority of those kids are incredibly skilled. So what it comes down to for the

1,500 or 1,600 spots, they're looking for students who are talented young people from across the country, across social classes."

"I feel we're trapped now in a very narrow understanding of what merit and achievement mean," said Carter, who rejects the plaintiff's argument "that Asian-Americans are the most merited, the most worthy, because they have the highest test scores and the highest grades." It doesn't mean other admitted students are less worthy or less accomplished, she said.

"That gets lost in the debate," Carter said, "because affirmative action has become a term in the popular imagination that is synonymous with 'not worthy' and 'not achieving.' The reality is that these test scores aren't fair."

### **Thumb on the Scale?**

Asian-Americans make up about 6 percent of the U.S. population and 23 percent of the current Harvard freshman class. If academics alone ruled the day, the group suing Harvard says, it would be over 40 percent.

### **Race-conscious admissions is un-American**

Americans don't like race-conscious admissions, said Roger Clegg, president and general counsel of the Center for Equal Opportunity, which supports Blum's suit. "It's not considered within the spirit and letter of the civil rights law," he said.

As for Harvard, he said, "it's clear that there's an enormously disproportionate number of Asian-American students with top credentials getting turned down, as opposed to other groups, especially African-Americans and Latinos."

Clegg said that while "there is a good chance the lower court will find Harvard liable for discriminating against Asian-Americans, it may be reluctant to give the plaintiff the relief they want. Either way, the case is likely to be headed to the Supreme Court."

### **Revelations**

As the Harvard trial proceeded, observers learned details of the school's special treatment of the children of donors and alumni and applicants from the Boston area. The judge also heard what Asian-American, African-American and Hispanic Harvard students and alumni think about diversity.

### **An urgent need to shatter 'enclaves of sameness'**

Ruth Simmons, an expert witness for the defense, became the first African-American president of an Ivy League school when she was hired to lead Brown University in 2001. Judge Burroughs asked her whether there might come a time when there was enough diversity at a school like Harvard.

"I've been doing this for decades, and I've never seen a moment when we're certain of that," said Simmons, now president of Prairie View A&M University. "We're constantly striving to ensure we have the appropriate mix of students. I don't think any university in the country thinks it's got the key to that."

She said diversity is the most important tool students have to “test themselves, to test their backgrounds, to test their assumptions,” and asked a question of her own.

“We are bedeviled in society by schisms. Religious differences, cultural differences,” Simmons said. “How are you going to mediate that if you don’t have people capable of doing that -- if we go back to our enclaves of sameness? How are you going to get a society that advances?”

### **Trump Steps In**

The Trump administration has joined the battle, filing a statement of interest in the Harvard College case alleging that the admissions process is “infected with racial bias” and also probing possible discrimination in admissions at Harvard and Yale universities.

### **Maybe Harvard is more transparent and Scotus holds off**

“I think this case is more broadly aimed at embarrassing Harvard and getting them to change the way they do things,” said Vinay Harpalani, an associate professor at Savannah Law School and an advocate of race-conscious admissions who studies race in American law. “Maybe what will happen is they change their admissions policies and become more transparent.”

Justice Sandra Day O’Connor, writing for the majority in the Supreme Court’s Grutter decision in 2003, suggested affirmative action would be unnecessary in 25 years. Harpalani, who teaches constitutional law, said “by 2028 the high court will have a doctrinal reason to revisit the case,” but doubted the court would hear the Harvard case after having just upheld Grutter in 2016.

Opponents of affirmative action may instead take their cause to the states, he said, as they did in California in 1996 with Prop 209. In the meantime, Harpalani said, the broader impact of the Harvard case will be “to divide Asian-Americans against other minorities.”

### **There is no GPA/SAT entitlement to Harvard admission**

“It’s hard not to believe that a lot of this campaign is about the growing Latino community,” Thomas Saenz, president and general counsel of the Mexican American Legal Defense and Education Fund, said of the latest efforts to eliminate affirmative action.

Saenz, a Mexican-American from Southern California who graduated from Yale University and got his law degree from Yale Law School, noted that some schools in past Supreme Court cases were dealing with a large population of Hispanic-American, as well as African-American, applicants. He said Blum turned to Asian-Americans only after failing with a white plaintiff in the 2016 case.

Saenz dismissed those who think “that if they follow the rules and outrank others academically, they’re automatically entitled to be admitted to Harvard.” He said, “I do think Asian-Americans face issues of bias at many schools, but if there is bias, it operates to the benefit of white students, not other minorities.”