THE WALL STREET JOURNAL.

Harvard Is Too Discriminating

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June 18, 2018

The U.S. Supreme Court may soon have an opportunity to clarify its muddled jurisprudence regarding racial preferences in college admissions. Unlike the high court's past cases on the question, *Students for Fair Admissions v. Harvard* involves a private university—but the same legal principles apply under federal civil-rights laws to any institution that accepts public funds.

In *Fisher v. University of Texas* (2013), the justices ruled 7-1 that the use of race in university admissions was permissible only if it was narrowly tailored to achieve "the educational benefits of diversity" and administrators had made a good-faith effort to consider race-neutral alternatives. In 2016, after Justice Antonin Scalia's death, the court ruled in favor of the university in another appeal from the same case. Seemingly exhausted by the topic, the justices held 4-3 that Texas' idiosyncratic admissions program satisfied the test. *Fisher II*was the first and only time Justice Anthony Kennedy has approved a use of racial preferences in college admissions. His opinion made clear that the key to surviving judicial scrutiny was "holistic" individualized review rather than quotas or other group-based screens.

Yet holistic review can facilitate discrimination by concealing a process that amounts to a quota. That's what Harvard did when it devised this method to cap the number of Jews it admitted in the 1920s and '30s. The university is now credibly accused of doing the same thing to Asian-Americans.

The lawsuit was filed in 2014, but paused as *Fisher* played out. It picked up steam in August 2017, when the Justice Department opened its own investigation into Harvard's use of race. This past April, after the department filed a "notice of interest" that cited the need to allow public access to the lawsuit's filings, a federal judge in Massachusetts ruled that most of the evidence the plaintiffs had obtained in discovery could be made public. It was last Friday, in legal papers

filed with a motion for summary judgment—a request that the judge rule against Harvard without a trial, based on facts not in dispute.

The plaintiffs argue that Harvard intentionally discriminates. "An Asian-American applicant with a 25% chance of admission," the plaintiffs' motion summarizes, "would have a 35% chance if he were white, 75% if he were Hispanic, and 95% chance if he were African-American."

That's not because Asians are weak in areas other than academics that might legitimately be considered in admissions decisions. Harvard's own documents show that Asians have higher extracurricular and alumni-interview scores than any other racial group, and scores from teachers and guidance counselors nearly identical to whites (and higher than African-Americans and Hispanics). Yet admissions officers assigned them the lowest "personal" rating—an assessment of "positive personality," character traits like "likability," "helpfulness," "courage," and "kindness," and whether the applicant has good "human qualities." It's reminiscent of the old stereotype that Jews weren't "clubbable."

The plaintiffs' motion asserts that Harvard officials' testimony "amounts to a confession" of racial balancing. Statistical analysis of public data by Duke economist Peter S. Arcidiacono, whom the plaintiffs hired as an expert witness, reinforces the suspicion that the school manipulates subjective criteria to maintain the same student-body composition regardless of shifts in the pool of qualified applicants. If the admissions office admits what it deems to be "too many" or "too few" students of any race it reshapes the next class as a remedy. The plaintiffs conclude that "Harvard has a desired racial balance and aims for that target"—an approach the Supreme Court has consistently said is improper since it first approved the limited use of race in admissions in 1978.

When shown evidence of this legerdemain at her deposition in this case, the director of college counseling at New York's elite Stuyvesant High School (where Mayor Bill de Blasio has been trying to reduce Asian enrollment) broke down in tears over Harvard's treatment of "my kids." She rejected the notion that "the Asian kids are less well rounded than the white kid" and agreed with the plaintiffs' lawyer that "it's hard to think of anything other than discrimination that could account for this."

Nor is Harvard's use of race narrowly tailored to achieve any particular measure of diversity. The idea of "critical mass" of minority enrollment played a central role in *Fisher*, and in a pair of landmark 2003 cases involving the University of Michigan. But Harvard officials' depositions show that, as the plaintiffs put it, "Harvard concedes that it has no interest in achieving critical mass and has never given the concept serious thought." Citing redacted testimony from the dean of admissions, the plaintiffs conclude that "Harvard is adamant that racial preferences are indispensable to its mission—and always will be." In other words, race isn't just a "plus factor," which would be acceptable under the Michigan precedents, but often the dominant consideration—which again the Supreme Court has held to violate the law.

Finally, and critically from a jurisprudential standpoint, Harvard has not considered race-neutral alternatives in good faith. In the face of litigation, it formed a committee, disbanded it, and then created a new committee controlled by the lawyers defending this lawsuit. There was no real

consideration of using socioeconomic or geographic preferences, increasing financial aid, eliminating preferences for legacies or athletes, increasing recruitment, ending early admissions, or a host of other options that experts suggest could promote diversity.

Perhaps the most damning evidence is an internal investigation Harvard conducted in 2013. The school's Office of Institutional Research produced three reports finding the admissions system was biased against Asian-Americans—including low-income students of the sort that one might think a college would want for diversity purposes. The dean of admissions buried the results.

If the judge denies the plaintiffs' summary-judgment motion, we can expect a trial in the fall. In any event, this case seems destined for the Supreme Court. Justice Kennedy may no longer be on the bench by the time it gets there, but his colleagues will have to decide whether elite education's system of racial spoils can be sustained.

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