NEPC
NATIONAL EDUCATION POLICY CENTER

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Newsletter

Affirmative Action on Trial. Again.

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Harvard on Trial

In November of 2018, Harvard went on trial. More specifically, representatives of the university spent 15 days defending undergraduate admissions policies that plaintiffs argue discriminate against Asian American applicants. The case, *Students for Fair Admissions vs. President and Fellows of Harvard College*, was filed in the U.S. District Court in Boston. It alleges that the university violates the Civil Rights Act of 1964 by using its holistic admissions approach. The key allegation is that Harvard holds Asian American applicants to a higher standard in an effort to racially balance incoming classes. The judge is expected to rule any day. The case is one of a series of similar efforts widely viewed as aiming to entirely eliminate the use of race in the college admissions process.

The Core Story

When it comes to cases that make it to the U.S. Supreme Court, opponents of race-conscious admissions policies have taken no fewer than four bites of apple. The story starts in 1978. That's when the U.S. Supreme Court set forth guidelines for selective colleges and universities to constitutionally use race-conscious admissions as part of their affirmative action policies. In a nutshell, race can be considered as part of a holistic review of applicants, but cannot be used as a quota (*Regents of University of California v. Bakke*). The decisive opinion pointed to Harvard as having an exemplary approach.

Yet challenges to race-conscious admissions policies continued to wind their way to The Supreme Court:

- 2003: *Grutter v. Bollinger* and *Gratz v. Bollinger* (at the University of Michigan)
- 2013: *Fisher v. University of Texas*
- 2016: *Fisher v. University of Texas* (II)

Each time, the Court's decisions were closely divided. But each time, the Court also concluded that the colleges and universities had a compelling interest in enrolling a diverse student body and that they could, in pursuit of that interest, include race-conscious elements as part of their holistic review.

In the 2013 and 2016 cases, Justice Anthony Kennedy was the deciding vote and wrote the majority opinion. But Kennedy is gone. Justice Brett Kavanaugh has replaced him, and opponents of affirmative action can count to five. At least two of the cases are backed by Edward Blum, a conservative activist who was also involved in prior efforts to end race-conscious admissions policies. Blum has said that his intent is to push the Harvard case to the Supreme Court in the hopes of ending all considerations of race in college admissions. A broader objective is to end affirmative action altogether. Blum's prior efforts have been backed by deep-pocketed conservative funders including the Searle Freedom Trust and The Lynde and Harry Bradley Foundation.

Why No One's Even Bothering to Challenge the Benefits of Diverse Educational Settings

As part of the "Just Talk" feature of UCLA's Center X, John Rogers recently interviewed Mitchell Chang about the new fleet of legal challenges to affirmative action. Both Rogers and Chang are professors at the University of California Los Angeles, and both are NEPC Fellows.

"[O]ne notable difference is that they're no longer going after the educational benefits argument," said Chang, a professor of higher education and expert in diversity-related initiatives. He continues:

> Since the Michigan cases, the research community has amassed a large body of empirical studies that show quite consistently and conclusively that there are real benefits that accrue for students, institutions, and society. When a study shows otherwise, those studies typically fail to account for what institutions have to do to maximize those benefits.

Writing for *Inside Higher Ed*, NEPC Fellow Michele Moses explains: "Research on the educational benefits of diversity provides strong evidence that we generate ideas and knowledge, solve problems, and think critically much better when we learn in environments rich in diversity." Moses is vice provost and associate vice chancellor for faculty affairs at the University of Colorado Boulder, where she's also a professor of education.

The Critical Question of Critical Mass

Yet, despite the strong evidence in their favor, efforts to diversify college campuses remain vulnerable to legal attacks, notes Chang:

> One way they're attacking it is by raising the question of when do institutions know that the composition of their students has reached a point where they don't need to apply race- conscious admission practices anymore? This argument is couched around the notion of critical mass. When do you reach a point where you're maximizing the potential of the student body to realize the educational benefits of diversity? Is it five percent underrepresented students? Ten percent? This is a tricky play, because as soon as you give folks a particular number, it becomes a target, and the target then becomes a quota; that number and quota is unconstitutional, so you've already undermined yourself by answering that question in the legal sense. Yet, if you don't define what a critical mass is in some concrete way, then "diversity" becomes very amorphous and unclear.

The problem, says Chang, is that "critical mass" is not a numerical target with a magic number. Rather, for legal and practical reasons, it varies from institution to institution, from year to year.

A New Approach: Asian Americans as Plaintiffs

In addition to eschewing arguments related to the educational benefits of diversity, this latest round of affirmative action attacks also differs from earlier cases in that key plaintiffs are Asian American.

"It goes without saying that highly selective colleges should not discriminate against Asian American applicants," Moses writes:

> The bottom line is that critics ... are using racial politics to pit racial groups against each other. Their attention to possible negative action against Asian American applicants wrongly targets affirmative action, overshadowing the real issue of inequality of access and opportunity in higher education: historical preferences that selective colleges and universities have displayed for legacy applicants, affluent applicants and urban/suburban white applicants. Those are the groups whose advantages have compounded over the years in K-12 schools, college entrance examinations, leadership and community service opportunities, and special "talents." Institutions of higher education can then incorrectly point to those students' "merit" to justify racial and ethnic disparities in admission and retention – and to challenge the fairness of affirmative action policies.

Chang further questions whether eliminating race-conscious admissions policies at Harvard would actually benefit Asian American applicants, given that research suggests admissions

practices at highly selective universities favor Whites over Asians.

> We should be asking whether or not there are discriminatory practices by Harvard that privilege white applicants, and as a result, [discriminate] against Asian applicants. If this were the focus, it makes little sense to target an unrelated policy like race conscious admissions that addresses underrepresentation. If the Courts find that Harvard is discriminating against Asian American applicants in favor of their white counterparts, I don't see why Harvard can't redress practices that privilege white applicants and still practice race conscious admissions to enhance the diversity of their student body. The two are separate issues and framing it as such is a qualitatively different way of looking at this case. It's important to decouple the discrimination claim from the diversity interest so that we shine a spotlight on the privileges that continue to be afforded to white applicants.

The Continued Existence of Opportunity Gaps

As noted, affirmative action in today's college admissions process includes race as one of many different factors in the college's holistic review. In the most simplistic version, imagine comparing a student with a 4.0 GPA who has faced few disadvantages in life to a student with a 3.7 GPA who has repeatedly overcome opportunity gaps linked to school and community resources, race, poverty, and disability. The latter student may be more impressive than the first and would likely add greatly to the institution's diversity—which creates a richer learning environment.

Because our society remains highly unequal, children do face large opportunity gaps, and those gaps are powerfully linked to race and ethnicity. Today's high school students who are Native American, Latinx, or African American are more likely than their White and Asian American counterparts to have faced the sorts of challenges that, if overcome, make them extremely impressive and attractive candidates at competitive colleges and universities. Certainly, it is less than ideal to impose discriminatory obstacles against certain groups of students in K-12 and to then offer them a boost if these obstacles are overcome. However, this is the reality we face.

Affirmative Action and the Harvard Lawsuit: Read More

- Just Talk (UCLA Center X): Mitchell Chang and John Rogers
- Mitchell Chang: *Post-"Fisher": The unfinished research agenda on student diversity in higher education*
- Michele Moses: *Affirmative action and the creation of more favorable contexts of choice*
- Michele Moses: *Living with moral disagreement: The enduring controversy about affirmative action*

- Michele Moses (*Inside Higher Ed*): *Making race-conscious affirmative action a scapegoat*

NEPC Resources on Legal Issues

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