Veritas on Race at Harvard

by Michael Curtis

On November 13, 2020, a panel in the Federal Appeals Court ruled 2-0 that Harvard University did not violate federal civil rights law by using race and ethnicity as factors in its admissions process. It upheld the decision by the District Court in October 2019 concerning the allegation by a non-profit group, Students for Fair Admission, that the University intentionally discriminated against Asian-American applicants. The argument was that these applicants were held to a higher standard in undergraduate admissions, and there was variance in admission rates for Asian-American, black and Hispanic applicants. The Court rejected the argument that Harvard had been affected by an implicit bias or unconscious racial stereotyping.

The Harvard case was first heard in October 6, 2019 in the Boston District Court which ruled that even if the Asian-Americans are penalized it is "justified by the compelling interest in diversity on campus and all the benefits that flow from a diverse college population." The ruling by Judge Allison Burroughs was that because of this diversity Harvard students would have "the opportunity to know

and understand one another beyond race, as whole individuals with unique histories and experiences." Paraphrasing Justice Sandra Day O'Connor, she explained Harvard had a necessary and narrow tailored policy to achieve diversity and the academic benefits flow from diversity.

The First Circuit Court of Appeals in September 2020 upheld the District Court. The issue was whether Harvard's use of race to achieve diversity was consistent with the requirement of Supreme Court precedent. The Court held Harvard did comply with precedent. The Court also held that Harvard was not biased against Asian-Americans just because some of its admissions criteria are subjective. Yet, the fact is that Asian-Americans had received lower grades on the Harvard personal rating which measures factors such as curiosity, the quality of essays and teacher recommendations. However, more challenging is the argument of the Court that the practices of Harvard which attempt to achieve diversity and considered race as one factor, though not a determining one, is consistent with the requirements of Supreme Court precedent. In view of different, divided decisions on race, the fundamental question now is what exactly is that precedent. Since the Harvard case may go to the Supreme Court it is useful to examine that precedent.

In doing so it is important to recognize two factors: one is that the composition of the Court has changed since its last decisions on the issue.; the other are consistent changing public views on affirmative action. One recent example is the decision of California voters, 56.8 % to 43.2 % on affirmative action, in November 2020 not to overturn the state ban on race and personal characteristics having weight in college admission or public hiring.

Opinion surveys have reached different conclusions. A survey in 2017 found that 52% of Republicans and 84% of Democrats thought that programs planned to increase the number of minority students were good. But another survey in 2019 found

that 85% of Republicans and 63% of Democrats thought that race or ethnicity should not be a factor in admission decisions.

On February 25, 2020 a Pew Research Center survey founded that 73% of Americans believe that race should not be considered in college admission decisions, 7% think it should be a major factor, and 19% a minor factor. Groups differ: 78% of white adults do not think race and ethnicity should be taken into account in admissions decisions, compared to 65% of Hispanics, 62% of African-Americans, and 59% of Asian-Americans.

The divisive problem stems from political actions in the 1960s starting in 1961 when President John F. Kennedy signed an executive order that government contractors take affirmative action in hiring, and the landmark 1964 Civil Rights Act that banned employment discrimination on the basis of race, color, religion, sex or national origin. Colleges could not discriminate against applicants on the basis of race or gender.

The Supreme Court has dealt with the problem at least since California v. Bakke, June 28, 1978, a case when a white man was rejected from admission to the University of California Medical School and claimed this was because of reverse discrimination. There was no clear decision by the SC, which rejected the School's quota policy, but held that affirmative action was constitutional. What was most important was the argument, stated by Justice Lewis Powell, in an opinion not joined by others, that the rationale for affirmative action was the need for diversity which promotes educational pluralism. To ensure this diversity, race should be one element, to be weighed fairly among other elements in the selection process for admission.

Since then, the argument for diversity has become in the Supreme Court, SC, the crucial factor for using racial preferences in the admission process. In 2003 the SC in Gratz

v. Bollinger dealt with the issue of two whites, denied admission, challenging the Michigan process that gave preference to "underrepresented minorities." The Court held the Michigan system was unconstitutional and violated the equal protection clause of the Constitution, Amendment XIV, ratified 1868, and Title VI of the Civil Rights Act of 1964. That clause states that no state shall "deny to any person within its jurisdiction the equal protection of the laws." At the time it was intended to prevent states from discriminating against African-Americans.

This matter was decided differently in a second case, Grutter v. Bollinger in 2003 concerning the Michigan Law School's use of race in admission decisions. The two cases illustrate the aphorism of Justice Scalia that it was necessary to explore this "jurisprudential twilight zone between two errant lines of precedent."

The SC in this case had upheld Bakke, allowing race to be one factor for consideration in admissions policy, and was not prohibited by the equal protection clause, and holding quotas to be unconstitutional. Justice Sandra Day O'Connor wrote that "student body diversity is a compelling state interest that can justify a narrowly tailored use of race in admission." Diversity, she wrote, has numerous educational benefits. Race or ethnicity can be considered a part, but only a part, of the applicant's file, yet the university could not establish quotas for members of certain social or ethnic groups or put them in separate admission tracts.

This opinion was challenged In dissent by Justice Thomas who wrote there was no basis for public universities to do what would otherwise violate the equal protection clause. The Constitution, he held, abhors classifications based on race. Those classifications not only can harm "favored races or are based on illegitimate motives, but by making race relevant to the provision of burdens or benefits demeans us all."

Another case involved the state of Michigan where on November 7, 2006 Proposal 2, the affirmative action initiative, banning programs in public hiring, education, and employment, that give preferential treatment on the basis of race gender, ethnicity, national origin, was approved. It was then overturned by the U.S. 6th Court of Appeals. Then, after complex legal procedures, that ruling was overturned on April 22, 2016, and the amendment was upheld by the SC. in Schuette v. Coalition to Defend Affirmative Action. The 6th Court did not have the authority to set it aside.

At the core of the case was the question of whether the decision of a state to prohibit race and preferential treatment in public university admission violated the equal protection clause. Even more generally, could the voters prohibit the use of race preferences in decisions of governmental bodies. The SC held, 6-2, that it was not for the courts to prevent voters from making such a choice. There is no authority for the judiciary to set aside Michigan laws on which voters have decided. Justice Scalia wrote that a state that provided equal protection by not allowing the use of racial preferences did not violate the Constitution. The case suggests self imposed limits by the SC. Justice Kennedy delivering the Court's opinion held there is no authority in the U.S. Constitution or in the SC for the judiciary to set aside laws that make policy decisions. Th task for the SC was about who can resolve the issue of racial programs, and the SC was not the best place to resolve policy. Rather surprisingly, Justice Breyer joined the majority. The Constitution permits, though it does not require, race conscious programs, but it is the ballot box not the courts,which is the normal instrument for deciding the merits of programs.

The most recent case on racial preferences is Fisher v. University of Texas. Abigail Fisher, a white student, who was denied admission to the University in 2008 argues that the University's use of race violated her right to equal

protection under the 14th Amendment. Her race, she held was a factor in her rejection in favor of less qualified black and Hispanic students. The University had removed race conscious admissions after a court case in 1996, and adopted a top ten percent law , that seniors in the top ten per cent of their high school class are guaranteed admission. Following the Grutter v, Bollinger case, Texas reinstated a consideration of race in admissions decisions for those who didn't fall in the top ten list. The SC, by 7-1, on June 24, 2013 upheld the decisions of the district court and the Court of Appeals that approved the Texas program. Noticeably, Justice Kennedy voted for affirmative action programs. In a related case on June 23, 2016, the Supreme Court, by 4-3, ruled that the Court of Appeals of the 5th Circuit had correctly found that the race-sensitive admissions policy of Texas was constitutional.

All this uncertainty about affirmative action makes it all the more imperative that the Harvard case go to the Supreme Court. The U.S. Court of Appeal for the First Circuit backed Harvard. The Supreme Court should now determine whether this was justified and examine two issues: whether Harvard's limited use of race in its admissions process in order to achieve diversity is really consistent with Supreme Court precedent; and what are the exact dimensions of diversity.