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ADVANCES

Harvard Hoist on Its Own Petard?

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Over fifty years ago Daniel Patrick Moynihan, four term U.S. Senator, Ambassador, advisor to presidents, and, perhaps most importantly, distinguished Harvard professor, had some presciently dire warnings about the future. "That which was specifically forbidden by the Civil Rights Act is now explicitly (albeit covertly) required," he wrote.

Moynihan refers, of course, to the efforts over the decades to establish in most American institutions, but universities in particular, a racial preference regime (sometimes called quotas) in which selected racial and ethnic groups are chosen in numbers reflecting their share of the general population. While quota advocacy has been ardently supported by those who consider themselves most advanced in their social thinking, Professor Moynihan observed that just the opposite was more likely true. "Let me be blunt," said Moynihan. "If ethnic quotas are to be imposed on American universities and similarly quasi-public institutions, it is Jews who will be almost driven out . . . And much the same exodus would be required of Japanese and Chinese Americans . . . One assumes that America has known enough of anti-Semitism and anti-Oriental feeling to be wary of opening that box again."

Alas, Moynihan assumed wrongly. That box of discreditable racial rejection has been opened wider than he could have imagined, and he was wrong too about the Jews. As Ron Unz has dramatically shown, Jewish admissions and hiring in the Ivies has remained surprisingly—almost inexplicably—high. (Though Unz suggests, provocatively, that Jews, who flooded the Ivies in the strictly meritocratic postwar decades, may now themselves be the beneficiaries of another unseemly form of group favoritism: legacy admissions.)

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Moynihan was dead right, however, about the Asians. Although they haven't been driven out of higher education, a "holistic" ceiling has been placed on their presence, secured by the preferences granted to other groups. In what may turn out to be one of the great ironies of modern American progressivism—or perhaps merely world class poetic justice—the diversity faith, created and sanctified by Harvard, may meet its demise there as well. The impetus for this impending ruination is a lawsuit, *Students For Fair Admissions v. Harvard College*, claiming that Harvard's implementation of racial preferences—and by extension, similar implementation at other selective institutions—discriminates against Asians.

Bakke: The Beginning

In his solitary but controlling opinion in *Regents of University of California v. Bakke* (1978), Justice Lewis Powell for the first time let the nose of the diversity camel under the anti-discrimination tent, holding that race could be used as "a factor in some admission decisions," as a "plus factor" that could "tip the balance" in favor of some applicants without discriminating against those whose race precluded them from receiving such a balance-tipping preference. Powell justified this conclusion by citing the exemplary authority of "the Harvard College Admissions Program," which he quoted from heavily and even attached to his opinion as a model for others to follow. Having initially sanctified racial preference to promote diversity in *Bakke*, the Harvard seal of approval continued to protect race preference policies in subsequent Supreme Court cases, even after it became abundantly clear that such preferences were far weightier than tipping points in close cases.

Twenty-five years later, in *Grutter v. Bollinger* (2003), Justice O'Connor, writing for the majority, continued to shroud racial preference in Harvard's esteemed authority, repeatedly referencing the revered institution's practices:

- [T]he Law School's use of race was narrowly tailored . . . because [it] was 'virtually identical' to the Harvard admissions program described approvingly by Justice Powell and appended to his *Bakke* opinion.
- We are satisfied that the [University of Michigan] Law School's admissions program, like the Harvard plan described by Justice Powell, does not operate as a quota.

- Justice Powell's distinction between the medical school's rigid 16-seat quota and Harvard's flexible use of race as a 'plus' factor is instructive. Harvard certainly had minimum goals . . .
- Justice Powell flatly rejected the argument that Harvard's program was 'the functional equivalent of a quota'. . .
- As the Harvard plan described by Justice Powell recognized . . .
- See ante, at 23 (distinguishing a race-conscious admissions program that automatically awards 20 points based on race from the Harvard plan . . .)
- Like the Harvard plan, the Law School's admissions policy . . .
- We also find that, like the Harvard plan Justice Powell referenced in *Bakke*, the Law School's race-conscious admissions program adequately ensures . . .
- Justice Kennedy speculates that "race is the likely outcome determinative for many members of minority groups" . . . But the same could be said of the Harvard plan discussed approvingly by Justice Powell in *Bakke*, and indeed of any plan that uses race as one of many factors.

Nine years later, in *Fisher v. University of Texas* (2013), Justice Ruth Bader Ginsburg's dissent begins by noting that "The University of Texas at Austin (University) is candid about what it is endeavoring to do: it seeks to achieve student body diversity through an admissions policy patterned after the Harvard plan referenced as exemplary in Justice Powell's opinion" in *Bakke*.

Not everyone sees the "Harvard plan" as benevolent social policy. Those taking a dimmer view see "the Harvard plan" as the reincarnation of Harvard's anti-Semitic holistic admissions developed in the 1920s. As unrefined, coarse first and second generation east European Jews surged into elite colleges, admissions officials adopted the holistic approach to applicant assessment, mostly as a way to maintain their culturally Protestant social environments, instituting sometimes crass subjective standards for admission. These criteria often included "character" assessments and alumni evaluations in which the adjudicators were instructed to determine if applicants were "attractive and well-bred in appearance and deportment" or "the kind of a man whom you yourself would welcome as a classmate in college." Thus, in his *Grutter* dissent Justice Clarence Thomas observed that "Columbia, Harvard, and others infamously determined that they had 'too many' Jews, just as today the [University of Michigan] Law School argues it would have 'too many' whites if it could not discriminate in its admissions process."

Harvard Under Siege

As recently as 2012 the editors of the *Harvard Crimson* could write, in response to a U.S. Department of Education investigation of alleged discrimination against Asian Americans, that the complaints were "ludicrous" and represent "an almost surreal turn of events." The editors claimed there was "no evidence of undue discrimination" because any discrimination "can at the most be considered a necessary consequence of race-based affirmative action" [presumably immunizing it from criticism], and because "It is furthermore unclear that affirmative action is unduly harming those of Asian descent at Harvard." Due harm, in this instance, is apparently unobjectionable.

Only a Harvard administrator or defense lawyer could make such claims today, and those lawyers have been honing their skills at making such indefensible claims. In order to "foster inclusive environments," in 2016 Harvard attacked its famous single-sex final clubs, fraternities, and sororities. prohibiting students who join them from serving as captains of sports teams or leaders of officially recognized student clubs. Nor could they receive letters of endorsement from college deans for postgraduate fellowships. The clubs, of course, sued in 2018, arguing that Harvard was discriminating on the basis of sex against students who joined such clubs and that the university has no authority to regulate off campus private organizations. For its part, Harvard insists that "these organizations are very much of Harvard," and that such organizations subordinate women, according to court filings. (As of this writing, the case is pending.)

Harvard officials, however, took an entirely different tack in responding to another recent lawsuit, this one against the Harvard Law Review, Harvard Law School, and Harvard College claiming that the Law Review is violating civil rights laws "by using race and sex preferences to select members." Unlike their approach toward the Greek organizations, here Harvard officials deployed high powered lawyers—former Solicitor General Seth Waxman and Donald Verrilli—to argue that the Law Review as a private organization is beyond the reach of Title VI and Title IX and, moreover, is an independent organization for which Harvard cannot be held responsible.

The well-known public interest lawyer John Banzhaf ("the Ralph Nader of the Tobacco Industry") commented incisively, "Under such a legal premise, the Harvard Law Review could presumably exclude African Americans and females and Jews from its membership, or, at the other extreme, insist that all of its members, as well as the authors it chooses to publish, be African American lesbians who are also atheists."

Students For Fair Admissions v. Harvard College

By far the most serious threat to Harvard, and by extension to diversity justified racial preference programs everywhere, is *Students for Fair Admissions v. Harvard College*, recently tried in federal district court in Boston and, as of this writing, awaiting the judge's decision. When it comes, however, that decision will likely be of fleeting importance. If Harvard wins, the decision will no doubt be appealed, all the way to the Supreme Court if necessary. If Harvard loses it may choose not to immediately appeal to the Supreme Court, preventing the conservative majority from ruling authoritatively and hoping that a future Democratic president can appoint more liberal justices before another similar appeal could reach it.

Nevertheless, the stakes could not be higher. If the "exemplary" Harvard plan is invalidated, or even partly invalidated by finding that it discriminates (one is tempted to say "unduly") against Asians, the fate of all similar race preference programs, whose defense has been that they are just like Harvard's, can be challenged. That is why fervent defenders of diversity like *Inside Higher Ed* nervously asked "Could Diversity Survive a Harvard Loss?" and a writer in *The Atlantic* concluded that, no matter who wins here, "the entire, time-honored way of doing admissions at Harvard and its peer institutions is unsustainable."

"The Harvard Plan" Revealed

> The plaintiff's memorandum in support of its motion for summary judgment summarizes the evidence:
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> Asian American applicants are significantly stronger than all other racial groups in academic performance. They also perform very well in non-academic categories and have higher extracurricular scores than any other racial group. Asian American applicants (unsurprisingly, therefore) receive higher overall scores from alumni interviewers than all other racial groups. And they receive strong scores from teachers and guidance counselors—scores that are nearly identical to white applicants (and higher than African American and Hispanic applicants).

Nevertheless, Asians were consistently admitted at a lower rate than applicants from any other group.

One of the most explosive bombshells in the data was the revelation that the low Asian admission rate resulted from the fact that Harvard's admissions officials

assign Asian Americans the lowest score of any racial group on the "personal rating"—a "subjective" assessment of such traits as whether the student has a "positive personality" and "others like to be around him or her," has "character traits" such as "likability . . . helpfulness, courage, [and] kindness," is an "attractive person to be with," is "widely respected," is a "good person," and has good "human qualities."

The personal rating seems hauntingly similar to the admissions criteria implemented by Ivy League schools to select out "uncouth" Jews in the 1920s. But what makes this practice perhaps even more damning is that the low personal ratings are assigned only by Harvard admissions officials. "Alumni interviewers give Asian Americans personal ratings comparable to those of whites," *The New York Times* reported in a long article. "But the admissions office gives them the worst scores of any racial group, *often without even meeting them.*" [Emphasis added]

Equally dramatic was the revelation that a series of internal studies conducted in 2012-13 by Harvard's prestigious Office of Institutional Research confirmed the high barriers to Asian admission. Among OIR's findings from the ten year period it reviewed:

- If only academic credentials were considered, Asian Americans would have made up 43% of the admits, compared to their actual 18.7%, and only two-thirds of 1 percent would have been black, compared to their actual 10.46%.
- Admissions officials assigned significantly lower "personal" scores to Asian Americans than to whites even though teachers, guidance counselors, and alumni interviewers did not, and admitted white applicants at a higher rate at every academic index level.

The plaintiff's expert was Peter Arcidiacono, a professor of economics at Duke. His expert reports for the plaintiffs confirmed and expanded OIR's findings. His powerful analysis of 160,000 student records found, for example, that "an Asian American applicant with a 25% chance of admission . . . would have a 35% chance if he were white, a 75% chance if he were Hispanic, and a 95% chance if he were African American."

Asians v. Whites

The very fact that the plaintiffs are Asian led many on the left to accuse them of being witting or unwitting agents of white racism. At a rally on the eve of the

trial, the *New York Times* reported, Asian American students held signs proclaiming "Asians Will Not Be Tools for Your White Supremacy," and an article in *Slate* argued that the lawsuit is "exploiting" Asians "for the benefit of white applicants."

On the contrary, the data revealed at trial—such as plaintiff expert Arcidiacono's finding that the admission probability of an Asian American with a 25 percent chance of admission would improve by 40 percent if he were treated the same as a similarly qualified white—as well as reams of other data demonstrate that "the Harvard Plan" systematically treats Asians not only worse than blacks and Hispanics, but also significantly worse than whites. As the plaintiffs noted in their complaint, "it is obvious that if Harvard evaluated Asian Americans and non-Hispanic whites equally, non-Hispanic white admissions would drop significantly, possibly to the point where Asian American enrollment and non-Hispanic white enrollment would be roughly comparable."

In its amicus brief for *Students for Fair Admissions*, the National Association of Scholars cites work by Princeton sociologist Thomas Espenshade showing that, controlling for academic and other credentials, Asian American applicants to selective colleges face odds of admission sixteen times higher than similarly qualified blacks, six times higher than Hispanics, but also three times higher than whites. Another Espenshade study cited in the NAS brief "reached the staggering conclusion that racial preferences for blacks and Latinos at elite colleges come almost entirely at the expense of Asian Americans rather than whites. He and a colleague found that if affirmative action were eliminated '[n]early four out of every five places . . . not taken by African American and Hispanic students would be filled by Asians.'"

It is interesting to note that Asians, not whites, benefitted most after Proposition 209 prohibited race preferences in the state of California. The proportion of entering whites in the University of California system fell from 40 percent in 1997 to 34 percent in 2005, and the proportion of Asians rose from 37 to 41 percent.

Asians v. Asians

Perhaps the most intriguing aspect of this case is the split within the Asian community, if in fact there even is a single Asian community. Indeed, one of the oddest things about diversity is how it lumps all Asians into one category (as it does with Hispanics). I have seen no evidence, for example, that Harvard disaggregates its "Asian" applicants to ensure that it doesn't admit too many

or too few Chinese, Koreans, etc., or has any Hmong at all. A recent *Wall Street Journal* opinion piece about a heated and bitter conflict between Chinese and Japanese parents in Palo Alto over the naming of an elementary school suggests that references to an Asian community are often facile and misleading.

By now, given our experience with black civil rights organizations representing only progressive blacks, with feminist organizations supporting liberal men over conservative women, it should be no surprise (although it still is) that established Asian American legal organizations support the severe limitations on the number of Asian admits under the diversity regime. Because they are primarily progressive rather than ethnic organizations, they have no problem with Asian applicants having "to swim upstream to be admitted"—as Harvard law professor Jeannie Suk Gersen euphemistically put it in the *New Yorker*—so long as the racial balancing, which she regards as "unavoidable," is in the service of admitting more blacks or Hispanics. Her only objection to "race-conscious holistic review" is the "sub-rosa deployment of racial balancing in a manner that keeps the number of Asians so artificially low relative to whites" In short, treating Asians worse than blacks or Hispanics is fine; treating them worse than whites is not.

More interesting are the Asian students at Harvard, most of whom seem to support Harvard's policy. So far as I know there were no Jews at Harvard or elsewhere who supported Harvard's holistic restriction on Jewish admission in the 1920s, but Harvard's Asian diversiphiles, for the most part, are keeping the progressive faith.

Regarding the low personal scores of Asian applicants, *National Review* writer Jonah Goldberg writes that "It's not that these kids don't have good personalities, it's that they don't have fully 'woke' personalities. They don't speak the language of cosmopolitan, secular noblesse oblige that so often takes the form of political correctness—at least not with sufficient fluency." The Asians Harvard admits thus appear to be disproportionately "woke."

Woke or not, Asians defending discrimination against Asians can create dissonance. See, for example, the revealing "This American Life" interview with Alex Zhang, an activist Harvard undergraduate who read his admission file and was shocked to discover the low personal ratings Harvard assigned, especially given the unusually high personal ratings given by his alumni interviewer and teachers. Mr. Zhang was obviously unfamiliar with Arcidiacono's expert reports.

In any event the Harvard Asians who support the restrictions on Asian admission in the name of diversity are in a necessarily awkward position. They are in effect saying that it is o.k.to limit, even severely, the number of Asians so that we Asians who have been admitted, and others, can receive the benefit of being exposed to more blacks and Hispanics than would otherwise be the case.

Bakke to the Future

The trial judge in the Students for Fair Admissions case lacks the authority to undo Harvard's "plus factor/tipping point" protocol that Justice Powell approved of in *Bakke*, or its progeny. But it is conceivable that she could, imprudently, find a way to curtail the current discrimination against Asians by leaving some preferences for blacks and Hispanics and shifting to whites some of the penalty currently imposed by those preferences on Asians.

This is an ill-considered solution, owing to significant ethnic differences among whites. Ron Unz has pointed out that while Jews at Harvard are overrepresented, "non-Jewish whites at Harvard are America's most underrepresented population group, enrolled at a much lower fraction of their national population than blacks or Hispanics, despite having far higher academic test scores." Perhaps, Unz seems to suggest, Harvard should once again restrict Jews, this time to admit more WASPS. Fortunately, there is little danger of a policy like this being implemented, as it would require the diversicrats to view white students as something other than uniformly privileged.

One solution to diversity-generated discrimination might be for courts to make selective institutions practice what they preach, which would involve dispersing preference much more widely by disaggregating Asians, Hispanics, Native Americans, as well as adding others such as Mormons, Muslims, and Missouri Synod Lutherans. That, happily, might cause "diversity" to implode.

A better and far more workable solution would be applying Chief Justice Roberts's insistence in *Parents Involved,* the Supreme Court case prohibiting the assignment of students by race, that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[1] If the Supreme Court were to so rule in the Harvard case, the left would howl about its lurching to the right, but in fact such a ruling would bring civil rights policy back to its original premises of 1964 and in line with predominant public opinion for the first time in over a generation.

The roadmap to that result begins, as did the whole diversity mess, with *Bakke*, where Justice Stevens argued that racial preference is prohibited by "the plain language" of Title VI of the Civil Rights Act "unless that language misstates the actual intent of the Congress that enacted" it. In support Stevens

[1] *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), also known as the "PICS" case.

quoted several statements by Senator Hubert Humphrey, floor manager of the 1964 civil rights bill:

- What ["discrimination"] really means in the bill is a distinction in treatment . . . given to different individuals because of their different race, religion or national origin.
- The answer to this question [what was meant by "discrimination"] is that if race is not a factor, we do not have to worry about discrimination because of race.
- [I]f we started to treat Americans as Americans, not as fat ones, thin ones, short ones, tall ones, brown ones, green ones, yellow ones, or white ones, but as Americans . . . we would not need to worry about discrimination.

Moreover, Stevens noted, "the only suggestion" that the bill would allow race to be used against any individual "came from opponents of the legislation," such as one he quoted arguing that the term "discrimination" would be construed "as mandating racial quotas and "racially balanced" colleges and universities . . . The concept of 'racial imbalance' would hover like a black cloud over every transaction." Senator Humphrey also said the act "would prohibit preferential treatment for any particular group."[2]

Dozens of surveys over the years have consistently shown that strong majorities of Americans oppose race preferences. A recent Gallup article, "The Harvard Affirmative Action Case and Public Opinion," reviewed them and noted that four times over thirteen years Americans were asked whether they believed "applicants should be admitted solely on the basis of merit, even if that results in few minority students being admitted" or "an applicant's racial and ethnic background should be considered to help promote diversity on college campuses, even if that means admitting some minority students who otherwise would not be admitted." Every time between 67 and 70 percent chose "solely on the basis of merit."

As Stuart Taylor has pointed out in a superb chapter on the *Gratz and Grutter v. Bollinger* (2003) cases, "On no other issue have elected officials and establishment leaders implemented so pervasively a policy rejected so overwhelmingly by the general public."

Is it too much to ask the courts, or at least the Supreme Court, to breathe some new life into the formerly core principle embedded in the Civil Rights Act that individuals should be treated "without regard to race, creed, or color?" Perhaps *SFFA v. Harvard* has given us the chance to find out.

[2]All Justice Stevens's quotes taken from the *Bakke* decision, which can be found at the following link: https://www.courtlistener.com/opinion/109930/university-of-california-regents-v-bakke/