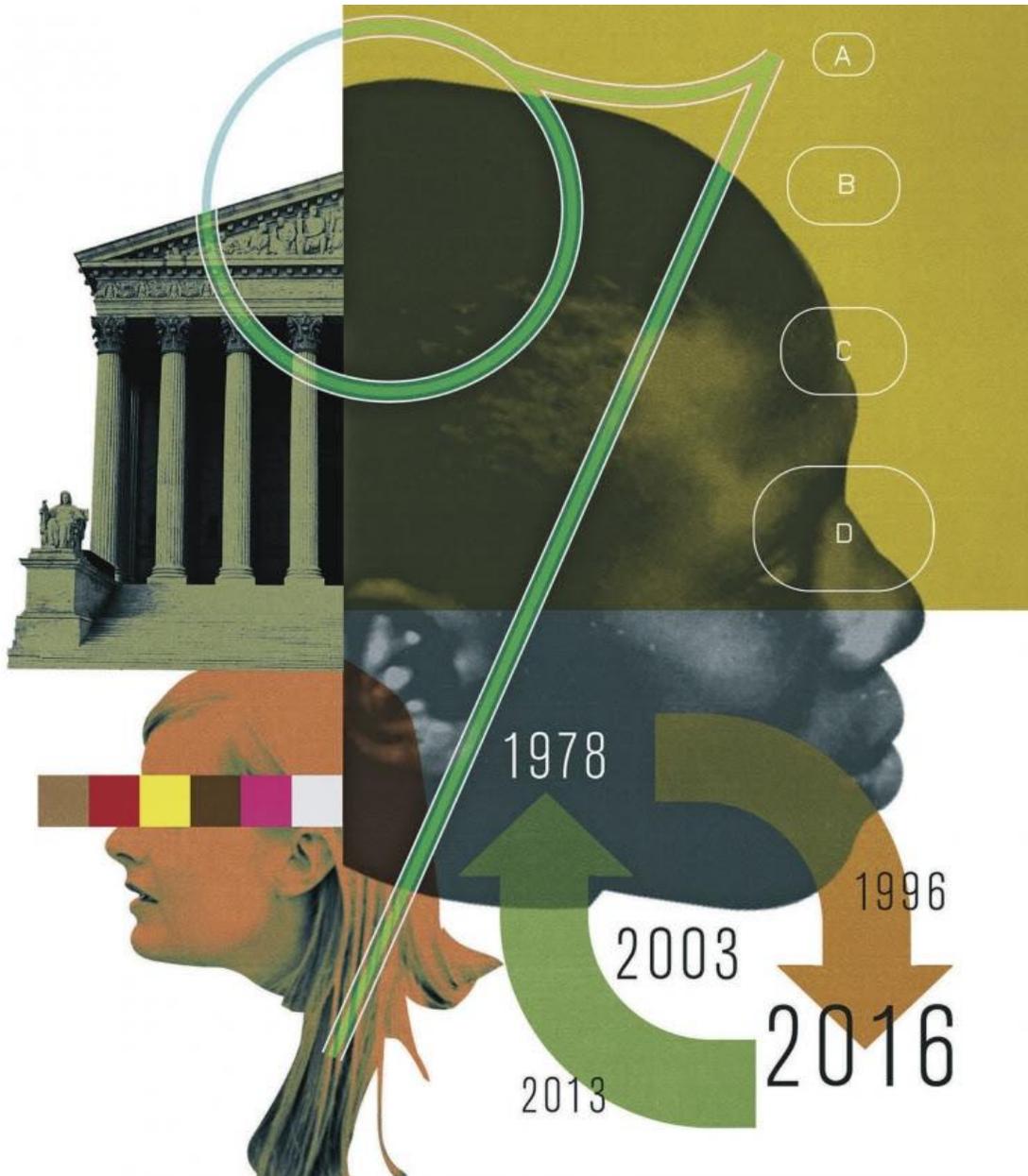


Now More Than Ever, We Need Diversity in Admissions

By Mark G. Yudof and Rachel F. Moran July 11, 2018 Premium



Stuart Bradford for The Chronicle

This month the Trump administration announced the [withdrawal of Obama-era guidelines](#) on the use of race in college admissions. The most recent version of those guidelines was drafted in response to the U.S. Supreme Court's 2016 decision in *Fisher v. University of Texas at Austin*. *Fisher* is just the latest case in which the justices have endorsed the use of affirmative action to achieve a diverse student body so long as programs are narrowly tailored to advance this goal.

The *Fisher* decision built on precedents handed down over the last 40 years, beginning with *Regents of the University of California v. Bakke* in 1978 and continuing with *Grutter v. Bollinger* in 2003. Admittedly, all of these cases involved split decisions with one justice casting the deciding vote. Even so, the reasoning and outcomes have been consistent, giving college administrators a sense that constitutional principles can be relatively stable even when the programs themselves spark controversy.

As a formal matter, the guidelines' withdrawal does not alter that longstanding constitutional landscape. *Fisher* is still the law of the land, and institutions of higher education remain free to use race as one factor in admissions; the University of Texas has said that [it will continue](#) to consider race when admitting applicants. Formalities aside, though, the administration's announced change has consequences. In issuing guidance, the Obama administration aligned itself with the Supreme Court and expressly endorsed the value of diversity. This sent a message of unity between the justices who pronounce the law and the federal agencies that enforce it.

The Future of Enrollment

That sense of common purpose is especially important when the court confronts divisive issues, as the justices learned when they pronounced that "separate educational facilities are inherently unequal" in *Brown v. Board of Education* in 1954 and later ordered that public schools be desegregated. Meaningful efforts to integrate did not begin until Congress and federal agencies put force behind the court's words.

Although the Trump administration has not offered guidelines that contravene the court's holdings, college administrators can justifiably infer that the withdrawal signals dissent from the diversity rationale. This change in policy does not, after all, come in a political vacuum. Last year the Justice Department's Civil Rights Division [circulated an internal memorandum](#) about plans to hire lawyers who would fight "intentional race-based discrimination" in college admissions. Later, officials clarified that they were focused on staffing an investigation into Harvard University's undergraduate admissions program.

There is a potent symbolism in targeting the very program of holistic review that Justice Lewis Powell held up as a model for enrolling a diverse student body when he cast the pivotal vote in *Bakke*. If Harvard's program is faulty, what will become of other affirmative-action programs that adopted its approach at the court's behest?

There is also some irony in the fact that the complainants in the current Harvard investigation are not white but Asian-American. In a related lawsuit, Harvard was [forced to produce](#) a 2013 internal study in which its Office of Institutional Research found that based solely on grades and test scores, Asian-Americans would make up approximately 43 percent of the entering class rather than just under 19 percent. By contrast, white students would account for 38 percent rather than 43 percent of the class; African-Americans for under 1 percent rather than just over 10 percent; and Latinos just over 2 percent rather than just under 10 percent.

From the standpoint of diversity, it is noteworthy that Harvard today is a majority nonwhite campus, whether the admissions process relies on academic credentials or holistic review. That situation would have been unimaginable when *Bakke* was decided. It is also striking that without affirmative action, African-Americans and Latinos would remain severely underrepresented in the student body.

Another significant feature of the study is the finding that attrition in Asian-American admissions is not solely a consequence of race-based affirmative action. In a complex and multilayered process, Asian-American applicants

are hurt by preferences for athletes and children of alumni as well as by subjective evaluations. In particular, Harvard admissions officers give Asian-American applicants lower personal ratings than they do for members of any other racial or ethnic group. Some critics [have argued](#) that Harvard's exclusion of applicants based on character traits is the modern-day version of Jewish quotas that held back the academically gifted due to perceived social deficiencies.

The complexities that have emerged in the Harvard case are not new. When *Bakke* was decided, the medical school at the University of California at Davis relied on interview scores to assess Allan Bakke's qualifications, and some well-connected applicants were admitted at the dean's discretion. The justices also worried about the appropriate treatment of Asian-Americans. They had been included in the special admissions program, but the U.S. solicitor general argued that there was no clear evidence that Asian-Americans were underrepresented in medical education or in the profession. He urged the court to remand the issue for further fact-finding.

At the same time, a number of public-interest organizations wrote amicus briefs in support of Bakke, expressing fears that affirmative-action programs could reinstate the discredited Jewish quotas of an earlier era. The justices did not remand the case, nor did they believe that quotas would inevitably re-emerge if affirmative-action programs continued. The constitutional antidote to these dangers resided in the individualized review inherent in the Harvard program: Every student must have the opportunity to compete for every spot in the class, and race had to count as only one factor among many in the admissions process. For the justices, deference to expertise, as protected under the mantle of academic freedom, became the way to experiment with diversity's meaning in a highly pluralistic and always changing world.

Bakke has survived to this day, as have the ambiguities and anxieties that surrounded the case 40 years ago. To prefer members of some groups based on their underrepresentation or past discrimination is, by definition, to lower the prospects for admission of individuals in other groups —

whether they are non-Hispanic whites, Asian-Americans, or others. College admissions involves multiple and sometimes conflicting values, from individual fairness to distributive justice. Continuing uncertainties about these competing considerations are reflected in speculation about the sensibilities of President Trump's second nominee to the United States Supreme Court, Judge Brett Kavanaugh. If Kavanaugh is confirmed, the court will face the same intractable dilemma that the justices grappled with in *Bakke*, *Grutter*, and *Fisher*.

Today, the Supreme Court must ask itself how America will chart its demographic and democratic future if African-Americans and Latinos account for just 3 percent of the student body at selective institutions like Harvard, while they make up 30 percent of the population. To ask "whither now, diversity" is in effect to ask whither now, a nation defined as much by its profound differences as by its shared fate.

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