So Much for Class-Based Affirmative Action

The Trump administration considers even race-blind admissions policies illegal if they're intended to achieve diversity.

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When the supreme court struck down race-based affirmative action, it included some words of comfort for Americans worried about declining diversity at the nation's most selective universities. Chief Justice John Roberts, writing for the majority in the 2023 case *Students for Fair Admissions v. Harvard*, described the goal of creating a diverse student body as "commendable" and "worthy." He wrote that universities could still consider applicants' stories of how race had affected their lives. Even Justice Clarence Thomas—one of the Court's most ardent opponents of racial preferences—suggested in his concurrence that universities still have numerous paths to maintaining racial diversity, citing the experience of states that had already banned affirmative action. "Race-neutral policies may thus achieve the same benefits of racial harmony and equality without any of the burdens and strife generated by affirmative action policies," he wrote.

Everyone seemed to be in agreement: Racial preferences were illegal, but promoting diversity by focusing on nonracial factors, such as income or geography, were fair game. The Trump administration, however, feels differently: It argues that even race-neutral admissions policies are illegal if they are intended to achieve racial diversity. And this interpretation is already starting to have an effect.

Earlier this month, the College Board—the nonprofit that administers the SAT—shut down its Landscape tool, which had offered universities detailed data about applicants' environment, including socioeconomic information and educational offerings at their high school. In a vague statement, the organization cited evolving "federal and state policy" as its rationale for the decision. (David Coleman, the CEO of the College Board, declined to answer further questions about the decision.) Edward Blum, the president of Students for Fair Admissions, the group that took down affirmative action, praised the removal of what he called a "disguised proxy for race in the admissions process." **The Trump administration doesn't appear to have the law on its side, but if universities start following the College Board's lead, what the law says might not matter. The era of race-neutral diversity efforts could be over before it begins.**

Basing admissions preferences on socioeconomic or geographic factors rather than race was supposed to be the compromise that appeased everyone. In polls, most Americans simultaneously say they support efforts to increase universities' racial diversity but oppose the use of race or ethnicity in admissions. Class-based preferences, in contrast, earn wide support and can further both racial and economic diversity while sidestepping the constitutional issues involved in explicitly considering race. (The Constitution doesn't include any prohibition on treating people differently based on family income or where they grew up.) After Texas banned affirmative action, in 1996, the state's public universities famously began admitting any in-state applicant who graduated in the top 10 percent of their high-school class. (At the flagship University of Texas at Austin, the number will drop to 5 percent next year.) Because Texas's high schools remain largely de facto segregated by race, the program has helped maintain a diverse student body.

In the first admissions cycle after the *SFFA* ruling, class-based preferences seem to have blunted the impact of the Court's decision. Several top universities managed to keep their demographics roughly the same. (Only the most selective schools had used affirmative action to begin with.) This result was surprising; in briefs submitted to the Court, the universities themselves had predicted catastrophic declines in minority-student enrollment. Richard Kahlenberg, an expert witness for SFFA and a longtime advocate for class-based affirmative action, believes that the universities got their results by placing a greater emphasis on socioeconomic status. Yale, for

example, started using data from the Opportunity Atlas, a database run by researchers at Harvard and the U.S. Census Bureau that measures the potential for upward mobility of children who grew up in a given neighborhood. Some schools, including Duke and Dartmouth, reported greater shares of low-income students than before the ruling and relatively stable racial-diversity results, Kahlenberg told me.

Some other observers aren't convinced. Peter Arcidiacono, a fellow expert witness for SFFA, told me that he suspected several universities had flouted the Court's ruling. Blum, the president of SFFA, has suggested that Yale, Princeton, and Duke might be continuing to consider race while pretending not to.

The Trump administration has taken the position that colleges might be breaking the law either way. In February, the Education Department issued a "Dear Colleague" letter outlining its interpretation of the *SFFA* decision. The letter argued that universities cannot use race-neutral proxies in an effort to boost diversity. For example, it claimed that schools' eliminating standardized testing in order to achieve greater racial diversity would be illegal. Organizations including the ACLU sued, arguing that the interpretation in the letter infringed on academic freedom. Courts have since blocked the department from enforcing its interpretation of *SFFA*.

But the Trump administration has pressed on. In July, Attorney General Pam Bondi released a memo warning universities against the use of race-neutral proxies. "These are not mandatory requirements but rather practical recommendations to minimize the risk of violations," Bondi wrote. Even so, the memo goes on to declare that the use of "facially neutral criteria" is "legally problematic" if those criteria "are selected because they correlate with, replicate, or are used as substitutes for protected characteristics." In other words, according to Bondi, a college that chooses to implement place- or income-based preferences in order to help preserve racial diversity would be running afoul of the law.

The Department of Education followed Bondi's memo with a demand for new admissions data on the racial makeup, standardized-test scores, and GPA of applicants and admitted students for all institutions that receive federal student aid. Justin Driver, a Yale Law professor and the author of *The Fall of Affirmative Action*, told me that he expects any elite college that doesn't start enrolling fewer Black students to be accused by the Trump administration of breaking the law.

The court system has so far been loath to accept the Trump administration's interpretation of *SFFA*. Last year, the Supreme Court declined to take up two cases that challenged race-neutral proxies in high-school admissions. And proving that race-neutral policies are *intended* to advantage students of color could be very difficult, Peter Lake, a Stetson University law professor, told me. Universities have shifted toward touting their socioeconomic diversity and test scores, rather than the racial makeup of their incoming classes, he said.

Rose Horowitch: The era of DEI for conservatives has begun

But whether universities would prevail in a hypothetical legal battle may be beside the point. The Trump administration has shown that it is willing to wield the government's formidable power against educational institutions based on a mere accusation of wrongdoing. It has frozen universities' funding for biomedical research and threatened Harvard's nonprofit status without any official investigation. Columbia and Brown have proved themselves willing to settle with the administration even when they probably could have won a court fight. To enact its vision, all the Trump administration needs is for universities to be unwilling to risk government retribution. "It is overpowering for most schools to even imagine taking on the federal government

on these issues," Lake told me. "So the long and the short of it is that their interpretation is the one that drives outcomes."

Or perhaps universities will find themselves all but forced to fight the executive branch. In May, the Trump administration informed Harvard that the university was under investigation to determine whether it was adhering to the *SFFA* decision. Last week, the Education Department gave Harvard 20 days to provide documents about its admissions process. Based on settlements with Columbia and Brown, in which those schools agreed to provide data on the race, grades, and test scores of all applicants, the Trump administration appears to be appointing itself the arbiter of what counts as the right and wrong racial makeup of a student body. Universities are always reluctant to go to battle with the federal government. But if the alternative is appointing President Donald Trump as their de facto dean of admissions, they might have no choice.