

Asians Get to Attend Harvard!

What Happens Next - 07.01.2023

Larry Bernstein:

Welcome to What Happens Next. My name is Larry Bernstein. What Happens Next is a podcast which covers economics, education, and culture.

Today's Topic is Asians Get to Attend Harvard!

Our speaker is Rick Banks who is the Jackson Eli Reynolds Professor of Law at Stanford Law School, the co-founder and Faculty Director of the Stanford Center for Racial Justice and he is also on the faculty at Stanford's School of Education.

Rick was previously the co-host for this podcast What Happens Next with me during most of 2020.

I asked Rick to discuss the Supreme Court decision in the Students for Fair Admissions cases against Harvard and the University of North Carolina.

Rick, let's start with the big picture, what happened?

Rick Banks:

The Supreme Court's decision in Students for Fair Admissions is a monumentally important decision but it's not unsurprising. It will change college admissions at selective universities and extend the court's view of the Constitution as colorblind to other areas of life.

Larry Bernstein:

Why isn't the Supreme Court decision shocking?

Rick Banks:

This case is not shocking because the composition of the court has changed and the new justices are less inclined to support race conscious policies such as affirmative action in college admissions. It's also not surprising because the issues that Justice Roberts highlights in the majority opinion are the vulnerabilities, contradictions, infirmities of affirmative action practice and law that have existed for a long time. And the court is simply now taking a much closer look at issues that have long troubled some of its members and applying more stringent standards than it had in prior cases.

Larry Bernstein:

What were the highlights of Roberts' opinion?

Rick Banks:

Affirmative action has always been beset by some ambiguities. That it's very difficult to measure the benefits of diversity. It's hard to classify people based on race, especially in our society, which is becoming ever more diverse. And you have people of mixed-race backgrounds and you have a bigger mix of people than we've had in the past. Relatedly, it's difficult to determine which group is in, which group is out. Why do we consider Latinos a group that can benefit from affirmative action, but then people from Spain are not. Do you distinguish among Asian-Americans when they're East Asian versus South Asian?

Some relate to this question of the coherence of the racial categories that are used to this goal of diversity that universities say justifies their use of affirmative action. So you have all of those questions looming, and frankly, you can be content with the answers the court has given in the past if you don't think too hard about it or if you're inclined to support the policy. But if you're inclined to oppose the policy, or you really want to look at the policy really with a really demanding look, you might think that the answers that universities are giving don't make a lot of sense.

Universities have long said that they need to have a critical mass of students from different groups. But all the way back in 2003, Justice Rehnquist said why does the critical mass of American Indian students, why is that so much less than the critical mass of black students or Latino students? And if you're trying to get the educational benefits of diversity by having a certain mix, why do you need a lot of some group and just a few of other groups? It's hard to have a really persuasive answer to that question if you stay within this framework of diversity, which enriches the educational process. There are all these questions that have been looming, and the court in the past contented itself with accepting the university's good faith judgment that it was pursuing these policies for the right reasons to realize the benefits of diversity.

One of the big moves that Roberts made in this case was to not grant the universities deference that they had relied on previously. He said "we're not going to give the universities a pass. We're not going to trust them anymore. We're going to be very demanding and want evidence that what they're doing is necessary to realize the benefits of diversity. And we need to know what those benefits are.

When you look at the programs with that stringent kind of standard, it's going to be really hard for them to pass muster. Those were the two big moves: he highlighted long standing issues with affirmative action, and then he declined to indulge the university's judgment about why the programs are necessary. And given that high standard of proof, he found the practices wanting.

Larry Bernstein:

The Harvard and North Carolina cases when they were in front of the district judge, most of the time was spent on the facts, going over the affirmative action policies, but in the Supreme Court opinions, the facts were secondary, why was that?

Rick Banks:

In both the North Carolina and the Harvard case, the lower courts ruled for the universities, and usually the lower courts are given great deference because after all the judges held the trials, they had witnesses, they took testimony. There were lots of judgments about credibility, weighing of evidence, and all of that. That's the prerogative of the trial court. It would be extraordinary for an appeals court or the Supreme Court to then revisit the trial record and second guess what the judge concluded based on their direct confrontation with the evidence. So, these rulings rest not on a different interpretation of the facts but rest on a change in the law. This is a dramatic change in the law where the court is declining to grant the universities the sort of deference that they had in prior cases.

Larry Bernstein:

Next topic is Justice Kavanaugh's concurrence where he discussed at length the importance of the so-called 25 year-rule expiration of the college admissions affirmative action. Justice O'Connor mentioned in the University of Michigan cases Grutter and Gratz that affirmative action would likely need to disappear in a generation. Why was this point so important?

Rick Banks:

I don't think there has been a 25-year rule until now. This court has created the 25 year rule, which is really a 20 year rule, because only 20 years have passed since Justice O'Connor said that in the Grutter and Gratz cases. She made the comment almost in passing, almost as if you're having a conversation with someone, and then you just mention something as an aside. And her comment was to the effect of just as 25 years have passed since we first approved affirmative action in the Bakke case, we expect that in another 25 years, these policies will no longer be necessary.

It wasn't a rule, it was an observation. It was an aspiration; it was a hope; it was a way to communicate to people that we don't believe these policies should go on forever and that the ultimate goal should be a race blind apparatus of decision making. It wasn't essential to the holding in any way. It was just a comment that she made in her opinion. Would she be surprised that was hardened into a rule that now people are using as a basis for a decision?

Larry Bernstein:

I think she may have been surprised when her opinion was released to the public, but I doubt she would have been surprised soon thereafter, because it became the most quoted aspect of her argument.

Rick Banks:

This court is changing the law, right? There's a lot of precedent to rely on that would've permitted affirmative action to continue. So, to seize onto the 25-year statement as kind of the precedent that you need to respect and need to be obedient to, that seems one of the odder parts of this set of opinions.

Larry Bernstein:

America is much different from 50 years ago when Bakke was decided and even 20 years ago when the University of Michigan cases came down.

Rick Banks:

American society has changed a lot since the late 1970s when Bakke was decided. And one of the big changes is that the relation between race and inequality, or race and disadvantage is not nearly as tight now as it was then. When Bakke was decided, The University of California Davis School of Medicine, when students were applying to medical school, the Black students who were applying grew up under Jim Crow. At a time and in a place where Black schools were markedly and intentionally made inferior to the white schools in every way you could imagine, from facilities to textbooks. And even in Bakke it was ambiguous whether the program was actually for disadvantaged students or whether it was for racial minority students because there was almost a one-to-one association between disadvantage and race. All of the Black students, you would admit, would have been severely disadvantaged, discriminated against and oppressed, downtrodden, and would've been trying to make it to medical school, despite all of that.

But the world in 2023 is very different from that. I mean, my children, for example, have a very different life from my parents who grew up under Jim Crow. That's to say that this image of affirmative action as benefiting these disadvantaged students who were growing up in single parent families and isolated inner-city areas, that image is ever more distant from the reality of affirmative action in elite colleges today.

One measure of that distance is that the percentage of students who even have ancestors who've been in the United States for a long time that's been declining at elite schools and ever-growing portion of students at places like Harvard are immigrants or the children of immigrants. They're not people whose parents were living under Jim Crow. It's not an understatement to say that just as you now welcome in privileged, affluent students from white families, they welcome in a lot of privilege and affluent students from Black families and other Latino families. I'm supportive

of affirmative action, but the impulses that would've supported it, which is you're extending opportunity to races associated with disadvantage, the logic of that is not as airtight as it was in 1970.

Larry Bernstein:

Roberts highlights in his discussion that the court was very divided in the Bakke decision, and what was very unusual was that the majority opinion was written by Justice Powell but none of the other justices agreed with his analysis.

Rick Banks:

Bakke was an unusual case because of the nine justices, we had four justices that would've struck down the policy and would've implemented a form of colorblindness under the federal statute, Title Six of the 1964 Civil Rights Act. They wouldn't have even reached the constitutional question. We had another four justices who would've upheld the practice in Bakke and upheld affirmative action and said, "Hey, this policy easily passes muster because the Constitution does not prohibit actions that are meant to undo racial hierarchy." And then in the middle, we had Justice Powell sided with four in striking down the policy at issue in Bakke, which provided a quota for students from underrepresented backgrounds. But then he sided with the liberal four in holding out the possibility that universities could engage in affirmative action.

The irony, though, of course, is that he proposed the diversity framework, which no one else on the court agreed with. So neither the conservative four who would've struck down affirmative action, nor the liberal four, who would've upheld it, none of them agreed with this diversity framework that Powell put forth. Yet after Bakke, schools quickly rewrote their affirmative action policies to comply with Powell, because Powell seemed to show the way forward.

In 2003, when the University of Michigan cases were decided, the undergraduate case and the law school case, the big question there was, what is the court going to do with Bakke? Is the court going to affirm what Justice Powell said, or is the court going to do something different? And the court decided, in the opinions where Justice O'Connor was then the pivotal justice, to affirm and embrace Bakke and say, yes, diversity is a sufficient justification.

Larry Bernstein:

The Harvard and UNC cases were brought by Asian Americans, why was this important?

Rick Banks:

From the strategy point of view, the architect of these cases, Edward Blum, he chose Asian Americans as the plaintiffs. Most all of the other cases involved white plaintiffs. And that change in the plaintiff changes the underlying moral calculus of the case, and it enables certain inferences from the facts that would be less likely if you had a white plaintiff.

Historically, it's a white person, and white people are assumed to be privileged and advantaged. And then on the other side, you have the African Americans and the Latinos who are presumed to be disadvantaged. And they're the ones on whose behalf the school is undertaking the special program. So that's the framing.

With this case, Edward Blum decided to make Asian Americans, the plaintiff, and not just one person, but he created an organization which had standing because it represented many Asian-American applicants who were denied admission. And that changes the underlying calculus of the case, because now you have one minority against another minority. And it also might make us think differently about what the university is up to. In the past, we would say, well, the university is simply trying to increase the representation of underrepresented students. Going back to the eighties, when we were in college, universities have been accused of trying to limit the number of Asian Americans because they, "didn't want too many Asian Americans." You can see this sort of anti-immigrant, pro-white bias to keep Asians out. The whole history where Asians have been excluded from immigrating to the United States. Asians have been excluded from certain occupations. Asians have been excluded from owning property in certain areas. And then in the university context, it's also the case that the experience of Asians resonates with the experiences of Jews about a century ago, where you had universities who said we want to keep Jews out, because they would change the character of the institution.

Then the question is, are Asians experiencing something like what Jews experienced? That's a form of racism if the university is trying to limit the number of Asians, because Harvard where 40% of the students are Asian, sort of makes people uncomfortable. That's just racist. Just the specter of that possibility changes the calculus of the cases.

Larry Bernstein:

This reminds me of the Yick Wo case from 1886 where the Supreme Court applied the Equal Protection Clause of the 14th Amendment to protect Asians from state sponsored discrimination in San Francisco where the city tried to stop Chinese immigrants from competing with whites in the laundry business.

Rick Banks:

The city leaders didn't want them competing with white people, and so they excluded them from operating laundromats, but they didn't do it directly by saying, no Asians permitted. They did it by saying, if you operate a brick laundromat, you're okay. If you have a wooden laundromat, you're not okay. We're worried about fire. But then when you look at it in the aggregate, it turned out that they were somehow or other approving all these white people to operate laundromats but virtually none of the Asian people to operate laundromats.

Larry Bernstein:

And was this the same logic for the Students for Fair Admissions case?

Rick Banks:

The plaintiffs framed this case to promote the same sort of inquiry. What is the university really up to? It's not an unreasonable conclusion to think that there are universities that might want to limit Asian American representation based on the concerns of alums and different constituencies. They might feel that at some point we could have too many Asians.

Larry Bernstein:

Roberts' opinion says that you can no longer use race explicitly in the application process, but it is perfectly fine for an individual to discuss his race in the application's essay and then apply the role of race to the applicant's personal experience.

Rick Banks:

Roberts is very concerned about the issue of stereotyping. The concern is that if we say we are pursuing diversity, and we mean diversity of perspectives and backgrounds and experiences and so forth, once we start to check a box on the basis of race, and you start to keep tabs in terms of race, you're stereotyping people of all different races. And you're assuming that black students have one particular set of experiences and views, and white students have a different set of experiences and views. And he would say at odds with the primacy of the individual in the American constitutional and political scheme. Sotomayor responds that race does shape people's experiences and backgrounds. So, what he would see as a stereotype, she would see as a reality, a generality that in fact is grounded in the social economic patterns of American society.

Larry Bernstein:

In Justice Jackson's dissent, she refers to a controversial study that found that black doctors have better medical results for black women during childbirth. Why did she bring this up in her opinion?

Rick Banks:

Justice Jackson when she talks about black doctors and maternal mortality for black women, she is picking up on an older theme, which had fallen out of the cases. This goes all the way back to Bakke, where one of the rationales that the medical school at the University of California Davis wanted to have black doctors is because they thought that black doctors were more likely to provide care for people in black communities. And that was probably true. So, stereotypes can have different degrees of truth.

I can also see a reason why black doctors would, in the aggregate, have better outcomes with black patients than white doctors would. That's about both the attitudes and the priorities of the

doctors, and also the sense of trust that the patient would have about the relationship with the doctor. The big question is, what do we do with that reality? But I think Justice Jackson is on to something that is true in a more general sense as well, which is that race does continue to have salience in American society. The big question is how do we respond to that fact that we are a long way from the colorblind society?

Larry Bernstein:

If listeners want to hear more about race and the medical profession, check out my podcast with Stanley Goldfarb who is the former associate dean of Penn's Medical School who now runs the not for profit Do No Harm. Stanley does not want medical care where white doctors take care of white patients and black doctors take care of black patients and opposes the Archie Bunker philosophy that we should have the same with the same and the different with the different. Stanley wants a meritocracy in medical care, research, and teaching.

Next topic is Justice Thomas's concurrent opinion. He very much wants a colorblind interpretation of the 14th Amendment.

Rick Banks:

Justice Thomas spends a good deal of his concurrence rehashing the historical arguments about the equal protection clause, and his conclusion is the equal protection clause mandates the norm of colorblindness. I confess that I personally find that a perplexing conclusion that the history mandates Thomas's approach.

Larry Bernstein:

Thomas believes that affirmative action hurts black students because he thinks that the public suspects that minorities get into the best schools primarily because of their race.

Rick Banks:

Thomas's view on the policy is that affirmative action is actually disserving black students because it reinforces stigma. And it puts people in academic environments where they're not fairing as well as if they were in other environments that were less challenging. I think there is a bit of truth there. Defenders of affirmative action argue that affirmative action is this great equalizer. But the reality is that an infinitesimal number of Black students go to places like Harvard or Stanford, or Chicago or Northwestern. And the majority of Black students go to other schools that are much less well funded, that receive many fewer donations. And another way to put this is that we have a very stratified educational system of higher education and most Black students are in the less prestigious institutions. But in embracing affirmative action as the higher education equality measure, what we're doing is trying to simply integrate more Black students into the top of the hierarchical system. But we're not doing anything to make the system less hierarchical. And Justice Thomas has actually highlighted this in the Michigan cases. The

university insists that the only way it can have this elite law school and have it be diverse is to use affirmative action.

And then his response was, “Why is the university even justified in having an elite law school? Maybe the problem is the elite law school and that we would do better to have less or not have as many elite institutions in American society. And that would actually expand opportunity.”

Larry Bernstein:

Rick, you are in the midst of writing a new book about reducing meritocracy in education.

Rick Banks:

I am writing about this issue, yes. <laugh> and my view is that there actually is a tension between our aspirations for racial progress and learning.

There’s a tension between a lot of the goals we have for education and the hierarchy and stratification in our system. And even the liberals are content to accept the hierarchy of the system and just try to change the people who are in the seats in the classroom, rather than trying to change the system as a whole. My view is we need to think about changing the system and diminishing the hierarchy and the stratification and that would be a win for everyone in American society.

Larry Bernstein:

Certain members of the admissions committee and senior decision makers at the university support affirmative action and oppose the Supreme Court’s colorblind vision. They will likely do their best to continue the current admissions process by paying lip service to the ruling but continuing affirmative action policies by other means. Do you think that is true, and if so, how will they do it?

Rick Banks:

It is certainly the case that universities who are committed to enrolling racially diverse student body will continue to want to do so for lots of reasons involving the desires of their alums and employers and their prestige and status. It would be hard to maintain their status as the institutions that picked the elite for society if the elite that they're picking was predominantly Asian American and white. Then the question is how are they going to do it?

One is to rely on criteria that are related to race, but that are not the same as race. You are low income, you're first-generation college, you grew up in a low-income area, you grew up in a racially segregated area. You could focus on the racial composition of the area rather than the racial identity of the student. You could look at whether English is a first language spoken in

your home. There are a lot of factors you could rely on that are not identical to the race of the student per se, but they're certainly closely related to the race of the student.

Larry Bernstein:

Texas decided to use an admissions policy where its top UT Austin public university would admit kids from the top 10% of a student's graduating class and would not discriminate between the good and the bad high schools.

Rick Banks:

Texas implemented the Texas top 10% plan in the 1990s after the court there struck down affirmative action, but only in that part of the country. And they said, if we can't rely on the race of individual students, we'll get students from certain percentage from every school in the state and they'll become eligible. That had a dramatic racial effect because the State of Texas was so dramatically segregated that it diminished the number from the suburban high schools, but it increased representation from majority Black or majority Latino schools. It also increased representation from rural schools that were mostly white.

So the goal is still a race related goal, but the means does not itself rely on race. And that's certainly what universities will double down on. Another thing universities could do, which receives a lot less attention, is that they could continue to rely increasingly on what I think of as middlemen. There are a lot of organizations now nonprofit groups that go out and recruit students, and then they deliver them up to universities. I think of programs like QuestBridge or Matriculate or Posse. These are all programs whose goal is to expand opportunity. They give you a much more racially diverse group of students that you would not otherwise have.

Larry Bernstein:

I don't think that the majority would have a problem with that if it's implemented independent of race.

Rick Banks:

Some people would have a problem. Imagine that you have a university who says to a nonprofit, we'll guarantee 20 spots every year to your students. Maybe you'll give us 40 and we'll select 20. And so, every year we'll take 20 of your students and this nonprofit their goal is to go out and find Black and Latino students who these universities would not otherwise have in their student population. And they recruit them, and maybe they train and they have summer programs and they coach them and all of that, and they delivered them up to the universities.

We actually have lots of quotas in American society and people get upset only when those quotas are based on race. We have quotas for Rhodes Scholars, we have quotas for National Merit Scholars. All that depends on geography. It's not like a national competition where the top

students just become Rhodes Scholars. If you're in Mississippi, you have a completely different pool that you're competing against.

Larry Bernstein:

Do you think that this ruling will affect affirmative action policies outside of university settings?

Rick Banks:

The reverberations of this case could be far reaching, because it's not simply about admissions. It's also about the majority's embrace of an interpretation of the equal protection clause in which the Constitution mandates governmental colorblindness. Governmental colorblindness could really remake society even more than it already has, depending on how aggressively or expansively the court interprets colorblindness.

The court could have implemented colorblindness. It could have simply said, you can't limit the number of Asian Americans full stop. It could have said, you can't have an affirmative action policy that provides different standards for African-Americans and Latinos than for others. It could have said, you can't even know the race of the applicants. It could have said the applicants can't even talk about race.

One of the big questions that the case raises is how far is the court going to go? Just to be very clear, while the court imposes a very stringent form of colorblindness in the context of college admissions, if we talk about some areas of policing, in law enforcement, the court hasn't nearly imposed as stringent form of colorblindness in those settings as it imposes here.

Larry Bernstein:

Do you think colleges will remove the question of what is your race in the application?

Rick Banks:

I think if they want to stay on the right side of this decision, they probably should.

What I would expect institutions to do is to take the checkbox off of the application, but to have essays in which students can talk about their experiences and their backgrounds and their struggles and so forth.

Larry Bernstein:

What makes you feel optimistic about this case?

Rick Banks:

My hope is that the restriction of the use of race in granting access to elite universities would prompt us to realize that elite universities representing this hierarchical structure is part of the problem in American society. And to consider whether we would be better off without a system

that privileges elite institutions. And that more democratized opportunity so that students could have access to good jobs and a chance to do something in their lives, even if they don't go to those institutions that are at the top of some hierarchy.

Larry Bernstein:

Stanford Law School where you work hires the best and brightest law professors from other law schools, and we get greater and greater concentration of the best teachers at these elite institutions. Is that bad?

Rick Banks:

There's a great synergistic effect to concentrating top researchers at particular schools. That probably has something to do with the fact that America's leading universities are the most prominent research institutions in the world. The tension, though, is that it's not clear that same logic applies to teaching and learning. In other words, I don't know that if we concentrate the best researchers at particular schools, that that means they're the best teachers, or that those schools will have the best teaching. You can tell a story that's kind of completely the opposite, in fact, where there's kind of a tradeoff between research and teaching. And I also don't know that if we concentrate the highest achieving students at particular schools, that we are thereby increasing learning in the aggregate. You can also tell a persuasive story that we would increase learning in the aggregate if we actually had more diversity in terms of academic achievement at our institutions.

Larry Bernstein:

Doesn't it seem unfair to ask our best students to learn less so that weaker students perform better. My high school had tracking. In French for example, the honors courses used immersion that required students to speak in French while the mainstream French classes were taught in English. I would have thought we wanted the students to be the best that they can be.

Rick Banks:

It seems outrageous if you imagine it like a competition, and we give the prize to the highest achieving people. But if your vision of education is that it's a social process, and we want to do something that's societally optimal, then you have a different calculus.

Larry Bernstein:

Thanks Rick for joining us today. If you missed last week's show, check it out. The topic was Hey, hey, Ho-Ho, AP Tests have got to go!

Our first speaker was Patrick Allitt who is a Professor of History at Emory. Patrick is perfectly positioned to help us evaluate the AP US History exam as he has graded and written the AP

Tests. Patrick has also taught the US History survey class that is available from the Teaching Company's Great Courses.

Patrick discussed the benefits of taking a US History survey class and why the AP exam properly evaluates mastery of the subject. Patrick talked about his views of multiple-choice exams and using essays to evaluate students.

Our second speaker was Annie Abrams who is the author of the new book entitled *Shortchanged: How Advanced Placement Cheats Students*. Annie teaches AP English at the NYC magnet high school Bronx Science. Annie describes her concerns related to teaching for the AP tests, and how it affects high school English pedagogy.

I now want to make a plug for next week's show that will continue the discussion about recently decided court decisions.

We will chat with retired Federal Judge Gary Feinerman who will discuss the recent case in North Carolina related to gerrymandering and whether the Supreme Court of North Carolina can apply judicial review to the redistricting proposed by the North Carolina State Legislature.

We will then hear from Renee Flaherty who is the attorney who successfully argued the case of *Jackson v. Raffensperger*. This is about the limits of state authority to regulate professions. Jackson teaches breastfeeding but the state demands that she meet minimum education requirements that would prevent her from doing her chosen profession which is counseling lactation care.

Renee is an attorney with the Institute for Justice, a not-for-profit that challenges government overreach on licensing and regulation as well as infringement on individual property rights.

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Thank you for joining me, good-bye.