

EDUCATION

What Constitutes “Discrimination” in College Admissions?

Universities regularly accept applicants for reasons besides academic merit, so why do diversity efforts draw special criticism?

◆ BY DENNIS L. WEISMAN

The issue of diversity on college campuses raises a number of difficult and provocative issues. For instance, the cost of admitting a less-qualified minority applicant may be rejecting a more-qualified applicant.

Harvard University is currently in full battle mode defending itself in court against the charge that its diversity admissions efforts discriminate against Asian Americans. Whereas the entering class at Harvard is comprised of approximately 23% Asians (approximately four times their representation in the U.S. population), the plaintiff, a group called Students for Fair Admissions, claims that Asian Americans would comprise 43% if admission decisions were based solely on academic metrics. In a ruling expected later this year, a federal district court will determine whether the selection criteria Harvard employs to boost admissions of some demographic groups pass legal muster. Some believe the case is ultimately destined for the U.S. Supreme Court.

The Court has previously ruled on the constitutionality of racial preferences in college admissions in several cases involving the University of Michigan (*Gratz v. Bollinger*, 2003; *Grutter v. Bollinger*, 2003) and the University of Texas (*Fisher v. University of Texas at Austin*, 2013, 2016). Those decisions have identified two compelling governmental interests: remedying the effects of past discrimination and enhancing diversity in higher education. With respect to the latter, the central question concerns whether racial

preferences should be eliminated and, if not, how they should be circumscribed. Universities are permitted to place some, but not too much, weight on race in admission decisions. The Court has provided direction but not clarity, and so the litigation continues.

THE ARGUMENTS PRO AND CON

Proponents of race-based preferences contend that colleges should have considerable discretion over admissions to enhance the educational experience of their students. Whereas some students who warrant admission on academic merit will be rejected, the very best of those students will still be accepted. As Brown University economist Glen Loury observes in his book *The Anatomy of Racial Inequality* (Harvard University Press, 2002), “Selective institutions will naturally try to reject the least qualified of the otherwise admissible nonblack applicants while admitting the most qualified of those black applicants who would otherwise have been rejected.”

The costs to the university in terms of objective qualifications forgone may be small, while the benefits of a more diverse student body may be large. Diversity has seemingly created its own virtuous dynamic; employers downgrade job candidates graduating from universities that are too homogeneous over concerns that the graduates will have difficulty integrating into a diverse work environment. Hence, there may well be positive externalities associated with a diverse student body.

Justice Sandra Day O’Connor reasoned in *Grutter* that a diverse student body “promotes learning outcomes and better prepares students for an increasingly diverse work force, for society and for the legal profession.” This is an endorsement of Justice Lewis

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F. Powell's observation in *Regents of the University of California v. Bakke* (1978) that "the attainment of a diverse student body ... is a constitutionally permissible goal for an institution of higher education." Justice Harry Blackmon further observed in *Bakke* that "in order to get beyond racism, we must first take account of race." Forty years later, we are still taking account of race and the debate over doing so shows no sign of abating.

Opponents of race-based preferences contend they are inherently discriminatory and violate the Equal Protection Clause of the Fourteenth Amendment. Specifically, because the merit-based applicant who was rejected had stronger academic credentials than the race-based applicant who was accepted, the former was subject to disparate treatment. And yet, the race-based applicant brings diversity to the university whereas the merit-based applicant may not. (An African-American applicant accepted on the merits is not considered a race-based admission.) Whether "diversity" should be defined exclusively in terms of race and gender is an unsettled question.

THE ECONOMIC ELEMENTS

It is instructive to examine the Harvard case through the lens of economics. To do so, we attribute to Harvard an objective function—in essence, what the institution seeks to maximize. As a first approximation, suppose Harvard's objective is to maximize the

expected value of its prestige. A reasonable metric for prestige is the accomplishments of its graduates. This may include the number of U.S. presidents, senators, Supreme Court justices, Nobel laureates, endowed university chairs, industrialists, etc., who have graduated from the university. Harvard then selects its inputs (students) to maximize the expected prestige it derives from their accomplishments. The optimal set of inputs is not necessarily aligned with Harvard admitting those students and only those students with the strongest academic credentials. Would we then say that Harvard is discriminating simply because its entering class was not based solely on academic merit? Other prestigious universities may have different objective functions and so their entering classes may well reflect a different student composition.

In this function, U.S. presidents are counted in the ranks of the non-merit applicants that Harvard admitted. Did Harvard's admissions algorithm identify certain traits in these students that were not accurately reflected in the objective academic metrics, or did the Harvard brand deliver on its promise—a reputational premium that elevates Harvard graduates above all others? It is noteworthy that all nine Supreme Court justices are Ivy League law graduates and five are Harvard alumni.

It is also conceivable that Harvard's departure from objective academic metrics is an implicit indictment of those metrics in

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foretelling post-graduate accomplishments. Standardized tests may not be particularly reliable indicators of “creative genius.” Grade inflation, SAT “coaching” (not to mention the “occasional” bribe), and widespread use of academic tutors among select income strata introduce even more noise into the signal. The regressive aspects of placing undue weight on “objective” academic metrics under these conditions should not be discounted. The rationality axiom applies: Harvard would have no incentive to depart from an admissions standard that reinforces its reputation as one of the world’s foremost educational institutions.

Various admissions practices by Harvard and other prestigious universities have been labeled “discriminatory,” but are they really? The term “discriminatory” in this context means that on the basis of objective academic metrics, including grade-point average and SAT scores with adjustments for social-personality indicators that are front and center in the Harvard case, a less-qualified applicant is admitted over a more-qualified applicant. But it is not necessarily discriminatory

when one takes a more holistic view as to the value conferred upon the university in departing from an exclusively merit-based standard. Saying otherwise would be akin to arguing that a baseball team discriminated simply because it drafted a baseball player with a lower batting average over another player with a higher batting average. A comprehensive analysis would also account for other dimensions of performance (e.g., fielding ability, slugging percentage, team leadership, etc.).

Legacies and athletes / To continue with this line of reasoning, it is important to recognize that universities also employ preferences for talented student athletes and for the offspring of wealthy alumni—so-called “legacy preferences.” A 2004 *Social Science Quarterly* article estimated that “legacies” received a “bonus” in the admissions process roughly equal to 160 points on the combined SAT standard exam that, at that time, had a maximum score of 1,600. The article also estimated that athletes received a similar bonus of about 200 points. In comparison, African-American applicants received a bonus of roughly 230 points and Hispanics 185 points. As Yale law professor Peter Schuck observed in a 2004 *Yale Law Review* article, “A preference for legacies and athletes, for example, may maximize the alumni contributions and loyalty that in turn support the institution’s academic mission.”

The value of legacies lies primarily in their families’ ability to contribute to university coffers. The university would fully expect to be compensated in direct proportion to the degree to which the legacy admission falls short of the standard set by the marginal, merit-based admission. To date, proposals to eliminate legacy preferences have not gained much traction. This is somewhat

surprising because it could be argued that legacy preferences “entrench the aristocracy” and are therefore the college equivalent of hereditary succession. The recent college cheating scandal may be expected to increase scrutiny of legacy preferences even though it is seemingly a difference in kind.

Universities experience financial shortfalls from funding requirements for recurring infrastructure projects: buildings, libraries, and ever-changing information technology. These shortfalls are exacerbated by sharp reductions in state support for universities. Nonetheless, there are natural limits on the degree to

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which prestigious universities can substitute legacy (or race-based) admissions for merit-based admissions. Given the intense competition for the “best and the brightest” among elite universities, it is necessary to reconcile Harvard’s purported discrimination with its standing as one of the preeminent universities in the world. If Harvard were truly leaving that much academic talent on the table, why would other prestigious universities not leverage the opportunity to appropriate this talent in a bid to wrest away Harvard’s esteemed reputation?

Athletic preferences are seen as more egalitarian and therefore have been subject to considerably less derision. Nonetheless, just as legacy preferences are an important source of funding, so are talented athletes. Universities are still required to keep the lights on and various fiscal constraints may force them to depart from strict, merit-based admission standards even though this may not represent the first-best outcome (i.e., the optimal outcome in the absence of constraints). This implores the question as to whether admitting an academically able student that contributes handsomely to university endowments while rejecting an academically superior student that does not is dispositive of discrimination. Should universities necessarily be precluded from making these types of tradeoffs and are there unintended consequences in doing so?

A frequent refrain is that eliminating racial preferences would yield a more-able student body. The implicit assumption in this argument is that slots freed up by eliminating racial preferences would be filled with merit admissions. But as University of Virginia law professor Glen Robinson and I observed in a 2012 *Economist’s Voice* article, “In a system in which other non-meritocratic elements other than race play an important role there is no reason

to think that the slot filled by the race-preferred candidate will be filled by another candidate of higher ‘quality.’” Should universities respond to the elimination of racial preferences by increasing legacy admissions, the result may well be the opposite of what was expected; we may have a less-able student body.

CONCLUSION

This article contends that defining discrimination exclusively in terms of a departure from merit-based admissions may be too narrow because it fails to account for the value conferred on the university by other types of admissions. Most students bring academic talent, others bring diversity or athletic prowess, and still others bring financial resources. On what basis can we credibly claim that a university that trades off academic talent for diversity or financial resources (to a degree disciplined by market forces) is discriminating and not simply selecting the optimal set of inputs to maximize its objective function in furthering the university’s institutional mission?

The court in the Harvard discrimination case may further delineate the boundaries of university discretion insofar as the admissions calculus is concerned. Whereas the court’s job is to enforce the law dispassionately, a ruling that eliminates or even tightly circumscribes the use of racial preferences while leaving athletic and legacy preferences largely intact would send a message that is

likely to cut against the grain in the arena of social discourse: not all preferences in college admissions are created equal. R

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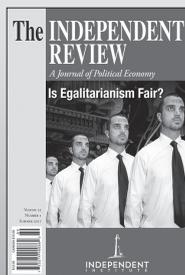
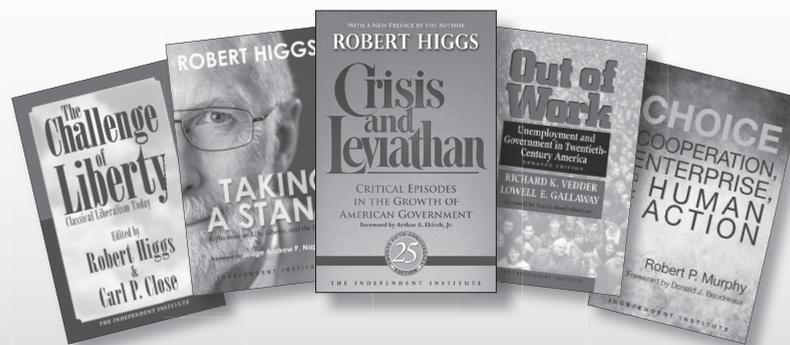
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