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DOING AFFIRMATIVE ACTION

*Stephen Clowney**

Sometime this year the Supreme Court will announce its holding in *Fisher v. University of Texas at Austin*, a case that asks whether colleges may continue to consider race when making admissions decisions.¹ Most Court watchers predict that the five conservative justices will vote to curtail the use of racial preferences.² Lost in the weighty discussions about the scope of the Equal Protection Clause and the meaning of the Civil Rights struggle is any clear and concise explanation of how selective colleges actually make admissions decisions and how they work to fulfill the goals of affirmative action.³ This Essay seeks to fill the gap.

I draw the following conclusions from the two years I worked in the Admissions Office at Princeton University. As part of the job, I interviewed hundreds of high school seniors and evaluated thousands of college applications. I also helped to implement the University's full battery of affirmative action policies. To put a fine point on it, I routinely pushed to reject white applicants with higher SAT scores and GPAs in favor of less credentialed black students.⁴

Based on that experience, I argue that many opponents of racial preferences misunderstand how selective universities make admissions decisions and, as a result, their policy arguments are weaker than generally

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1. *Fisher v. Univ. of Tex.*, 631 F.3d 213 (5th Cir. 2011), *cert. granted*, 132 S. Ct. 1536 (Feb. 21, 2012).

2. *See, e.g.*, Ian Haney-Lopez, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1782 (2012).

3. For a look at the specifics of the University of Texas's admissions process, *see* Jonathan W. Rash, *Affirmative Action on Life Support: Fisher v. University of Texas at Austin and the End of Not-So-Strict Scrutiny*, 8 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 25, 29–30 (2012). Rash provides a wonderfully concise account of the parties' merits briefs and the lower courts' opinions. I note, however, that none of the briefs in *Fisher* offer a perfectly honest account of how admissions officers make decisions, the pressures that admissions professionals face within university systems, and the consequences of university admissions policies.

4. Racial preferences also benefit students of Hispanic, American Indian, Eskimo, Aleut, and Native Hawaiian ancestry. I've focused this essay on the black–white binary for clarity and because most of the discussion of affirmative action focuses on the advantages that black students receive.

believed. More specifically, I rebut three major critiques put forth by skeptics of affirmative action. First, I claim that racial preferences are less robust than most critics imagine. Second, I argue that affirmative action imposes fewer costs on both whites and blacks than critics indicate. Finally, I show that racial preferences have less weighty moral consequences than critics believe. In fact, an attack on affirmative action—divorced from a larger project of increasing fairness in college admissions—amounts to an attack on black social mobility.

I. HOW GENEROUS ARE RACIAL PREFERENCES?

Every scholar who studies admissions at elite universities acknowledges that, on average, black students enter the first-year class with less glittering numerical credentials than their white peers. Of greatest concern to critics of affirmative action, black high school seniors do not perform as well as their white counterparts on the SAT. Opponents see this disparity as conclusive proof that black students receive exceptionally large and unfair bonuses in the admissions process.

This critique misunderstands how admissions officers at selective colleges actually reach their verdicts. Decisions about who to admit do *not* hinge on the strength of an applicant's SAT score and GPA alone. Elite universities, in fact, weigh a host of factors when assessing the strength of an application. In no particular order of importance, they evaluate the following: standardized tests scores, grades, strength of the high school program, extracurricular activities, teacher evaluations, personal statements, leadership potential, parents' occupations, work experience, and interviews. In a process that places so much weight on soft, qualitative factors over hard, quantitative data, simply demonstrating that one group has a higher average SAT score does not prove that it submits stronger overall applications. Students with top scores do not always craft more thoughtful essays, garner better teacher recommendations, or hold more editorial positions on the school newspaper.

In fact, the opposite may be true. Take, for example, the plight of Midwesterners. Year after year, high school seniors from the Midwest best everyone on the SAT,⁵ yet in my experience, students from Iowa, Illinois, and Indiana submit less engaging applications than the students pouring out of the Northeast. Seniors from competitive high schools in places like New York City or suburban Boston seem, on average, more sophisticated about the process. They aggressively cultivate relationships with teachers, they do not hesitate to engage in gentle self-promotion, and they work to avoid cliché essay topics. In contrast, a junior varsity baseball player from suburban Indianapolis who treats his teachers with stoic reserve and claims

5. Catherine Rampell, *Why the Midwest Rules on the SAT*, N.Y. TIMES ECONOMIX BLOG (Aug. 28, 2009, 6:54 PM), <http://economix.blogs.nytimes.com/2009/08/28/why-the-midwest-rules-on-the-sat/>.

that a volunteer trip to Haiti changed his perspective on race relations stands little chance of receiving an acceptance from an elite university—even if he scores well on the college boards. Or consider Asian American students. They outperform their white counterparts on a kaleidoscope of standardized tests,⁶ yet many admissions professionals express disappointment with the overall quality of their applications. The specific complaint is that the performance of Asian Americans, as a group, does not match whites' performance in extracurricular activities—especially athletics.⁷ Along the same lines, I witnessed Princeton pass on a high school senior with a 4.0 GPA, 1600 SAT score, and five scores of 800 on the SAT II because he had not bothered to participate in any extracurricular activities. The simple takeaway is this: those with the highest SAT score and most impressive GPAs don't always craft the most appealing applications.

What does all this tell us about affirmative action? The focus on mushier qualitative factors means that even if the data establish that black students enter college with lower SAT scores, scholars know little about the actual race-based preferences that minority students receive. The relevant question is not how strong are students' GPAs or SAT scores but how strong are students' complete applications. Unfortunately, current scholarship on affirmative action says very little about how black students compare with their peers on the soft variables knit into most applications. Empirical studies do not account for the importance of personal statements, extracurricular activities, letters of recommendation, or leadership potential because it is difficult to obtain and measure such information.⁸

Based on my admittedly impressionistic observations from within the admissions office, I submit that there are three reasons to believe that black high school seniors may outperform whites on the subjective components of the application. First, race continues to serve as a rough proxy for class and social disadvantage. To the extent that admissions officers value applicants who overcome economic hardship or the constraints of limited opportunity—and they do!—the files of minority students have special resonance. Recent empirical studies support this claim: elite private institutions do grant preferences to applicants from lower socioeconomic

6. *E.g.*, on the 2010 SAT, the average score for whites was 1580, and the average score for Asian Americans was 1636. See COLLEGEBOARD, 2010 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 3 tbl.8 (2010), available at <http://professionals.collegeboard.com/profdownload/2010-total-group-profile-report-cbs.pdf>.

7. JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* 503 (2006). Rachael Cederberg, a former Princeton admissions officer, witnessed an admissions professional complain about “yet another Asian student who wants to major in math and science and who plays the violin.” Scott Jaschik, *Too Asian?*, INSIDE HIGHER ED (Oct. 10, 2006, 4:00 AM), available at <http://www.insidehighered.com/news/2006/10/10/asian>.

8. THOMAS J. ESPENSHADE & ALEXANDRIA WALTON RADFORD, *NO LONGER SEPARATE, NOT YET EQUAL: RACE AND CLASS IN ELITE COLLEGE ADMISSION AND CAMPUS LIFE* 83–84 (2009).

backgrounds, and this “bonus” disproportionately advantages the applications of racial minorities.⁹

Second, black students may benefit from the emphasis that selective universities place on the personal statement. Admissions officers emphasize that the most compelling essays reveal something honest about the applicant that does not appear in the remainder of their file. Despite the warnings, student writing often descends into a string of clichés, even in applications submitted by the strongest students. Although high school seniors from all racial categories fall into these traps, black students seem more careful about avoiding the common pitfalls. They tend to write about a broader spectrum of human experience and seem less reliant on platitudes and chestnuts to advance their themes. Perhaps growing up marked as “different” encourages black writers to develop sharper skills of anthropological observation. Or maybe the narratives crafted by minority students simply feed the personal biases of admissions officers. I can only relate that after reading hundreds of very similar stories from white private school kids, it’s difficult not to applaud the essay of a black student from rural Louisiana who argues that Hermione Granger is the intellectual successor of Cicero.

Finally, minority applicants often garner noticeably stronger, more enthusiastic teacher recommendations and alumni interview reports than white applicants with similar credentials. Several possibilities could explain the divergence. One account is that black high achievers simply do a better job getting to know their teachers. Others argue that the legacy of racism ensures that any black student with good grades stands out in a crowded high school classroom. As Stephen Carter writes about his high school experience, “[T]eachers (black and white alike) were unaccustomed to the idea that a black kid could sit among the white kids as an equal, doing as well, learning as much, speaking as ably, arguing with as much force. In their experience, I was so different that I had to be exceptional.”¹⁰ Whatever the root cause of the strong recommendations, the superlatives heaped on smart black students strengthen their applications, sometimes enough to outweigh less-than-exceptional test scores.

To sum up, opponents of racial preferences have hoisted the SAT-score differential between white and black applicants to demonstrate that less qualified minority students consistently displace hard-working whites. The facts on the ground, however, paint a far muddier picture. Determinations of merit at selective colleges and universities are multidimensional, and often the very highest test scores do not accompany the most compelling applications.

9. *Id.* at 93–94, 98, 112–13.

10. STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 53 (1991).

II. HOW HARMFUL ARE RACIAL PREFERENCES?

Critics of affirmative action also tend to misrepresent the cost of racial preferences in two ways. First, opponents overstate the harm that racial preferences impose on blacks. Affirmative action, so the story goes, generates suspicion about all black triumphs because it forces the public to ask, “Would this fellow be my doctor/lawyer/president if not for the boost he received on his college application?”¹¹

From the perspective of a university admissions office, this is a weak argument. It assumes that other admissions decisions are uniformly merit-based and that no other groups receive special treatment. However, history reveals that the process of competitive admissions at Princeton and many other places is, irrefutably, an affirmative action program for white people. In the 1920s, the University began to elicit information about applicants’ “character” and “manliness” as a device to limit the number of Jews on campus.¹² Today, the emphasis on leadership and extracurricular participation suppresses the numbers of Asian American admits at top universities.¹³ College admissions decisions, like many other structures in American life, have effectively shielded whites from unwanted competition with racial outsiders. And yet, no one argues that the accomplishments of Steve Forbes (Princeton class of 1970), William Ford, Jr. (’79), or Jeff Bezos (’86)—or white people more generally—are corroded by the long history of set-asides.

More deeply, the argument that affirmative action drives the public’s suspicion of black achievement and that the elimination of affirmative action will put black professionals on a level playing field with whites profoundly misunderstands the fluid nature of American racism. California provides a relevant example. White applicants to the University of California schools have begun to allege that UC Berkeley still considers race—despite the state’s affirmative action ban—because the University has admitted greater numbers of minorities in recent years.¹⁴ The problem here is not affirmative action. The problem is that any time black people succeed in an arena that is traditionally dominated by whites, “there’s some sense that the fix is in.”¹⁵

11. See *Gutter v. Bollinger*, 539 U.S. 306, 364–65, 372–73 (2003) (Thomas, J., concurring in part and dissenting in part).

12. KARABEL, *supra* note 7, at 119–28.

13. See *The Changing Face of West College*, PRINCETON ALUMNI WKLY. (Princeton University, Princeton, N.J.), Nov. 9, 1988, at 22, available at <http://books.google.com/books?id=diFbAAAAYAAJ&lpg=RA4-PA3&ots=5Vwif5QCN7&dq=%22The%20Changing%20Face%20of%20West%20College%22%20PRINCETON%20ALUMNI%20WEEKLY&pg=RA4-PA18#v=onepage&q&f=false>; see also KARABEL, *supra* note 7, at 503.

14. Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235, 1245 (2011).

15. Ta-Nehisi Coates, *The Vanessa Williams Rule*, THE ATLANTIC (May 18, 2010, 9:40 AM), <http://www.theatlantic.com/entertainment/archive/2010/05/the-vanessa-williams-rule/56874/>.

Opponents of affirmative action overstate its harm in a second way: they exaggerate the amount of damage that racial preferences inflict on white applicants. Critics hammer the point that any competitive admissions process creates opportunity costs.¹⁶ With a finite number of places at stake, they argue that the decision to accept Candidate A, a black student with average SAT scores, inevitably forces a university to refuse better-qualified white applicants. As a result, nearly 40 percent of Caucasians now “believe it likely they or someone they know were rejected from a college due to an unqualified black applicant being admitted.”¹⁷

This argument also falls flat when viewed from the perspective of an admissions officer at a selective college. I offer three pieces of evidence. First, racial preferences assist far fewer minorities than the public assumes. Only the top 20 percent of colleges use affirmative action policies.¹⁸ This distinction makes intuitive sense, as most schools (community colleges, for example) do not have robust admissions standards. Even at the schools with the most persnickety admissions criteria, affirmative action programs affect a smaller number of students than most imagine. In the early 2000s, Princeton enrolled roughly 100 black students in each class of 1,100. At least half of those applicants had strong enough credentials (including SAT scores) to gain admission without any reliance on racial preferences. Thus, the total opportunity cost of affirmative action for black students—the country’s most prominent symbol of government-backed inclusion—was fifty spots in the Princeton freshman class. That is just one spot for each state.

Second, the costs imposed on the few white students who are excluded by the use of racial preferences appear vanishingly small. Take, for instance, the fifty white applicants who did not gain admission to Princeton as a result of the University giving racial preferences to black students. I would wager that, based on their credentials, many of these applicants received acceptances from the likes of Harvard or Yale, and that most won significant scholarships from silver-spoon institutions. No white student affected by affirmative action would need to enroll at a second-rate school.¹⁹ Thus, the entirety of the harm inflicted on these students is the pang of not getting accepted by a “first choice” college. Considering that it is impossible for individuals to know *ex ante* where they would have the best college

16. See WILLIAM G. BOWEN & SARAH A. LEVIN, RECLAIMING THE GAME: COLLEGE SPORTS AND EDUCATIONAL VALUES 249–50 (2003) (describing the opportunity costs of admitting recruited athletes).

17. Roland G. Fryer Jr. & Glenn C. Loury, *Affirmative Action and Its Mythology*, J. ECON. PERSP., Summer 2005, at 147, 158.

18. *Id.*

19. I want to be careful not to overstate the point. It is possible that a qualified white applicant might face rejection from all seven Ivy League schools. I only claim that a white student who barely missed the cut at Princeton would likely receive acceptances from many other terrific, if slightly less selective, institutions.

experience, the distance from New Haven to Providence hardly seems worth upending a longstanding national commitment to equality of opportunity.

Finally, a major underlying premise of the legal attack on affirmative action—that eliminating racial preferences will improve the life opportunities of hard-working whites—is factually incorrect.²⁰ To illustrate, imagine the fallout of a Supreme Court decision that announces the end of affirmative action. Universities would rush to conform their admissions processes to the new legal standard. However, neither of the two likely paths to compliance seems destined to benefit whites: Some universities, under pressure to maintain diversity, will simply tweak their definitions of merit to include qualitative factors that track closely with race (e.g., experience with prejudice, neighborhood composition, family wealth, social disadvantage). This path would more or less preserve the status quo.²¹ Other colleges will adapt more objective criteria to ward off further lawsuits. This approach, too, would do little for the enrollment of whites. The most sophisticated analysis of elite university admissions indicates that Asian Americans, not whites, would secure nearly four out of every five places that blacks and Hispanics would surrender in the first-year class.²²

Opponents of affirmative action have forcefully and consistently argued that the program is bad policy because of its material costs to both black and white students. However, critics have greatly overstated the downside of affirmative action. Racial preferences do not cause doubts about the competence of black professionals, and they certainly do not undercut the life opportunities of whites.

III. HOW IMMORAL ARE RACIAL PREFERENCES?

Of course, some critics will complain that the exact size of the harm is irrelevant, as there are ethical reasons to oppose affirmative action, separate from its practical consequences. For those who believe strongly in individual rights, affirmative action is anathema if it leaves even one student in a worse position by dint of his skin color. The underlying principle is that no one should receive differential treatment based on the immutable circumstances of his birth. From the perspective of an admissions officer, it is odd that the activists who hold these views so rarely mention that the college admissions process is riddled with inequalities much larger in scope than racial preferences. Condemning affirmative action while ignoring the many other

20. See, e.g., Yxta Maya Murray, *Merit-Teaching*, 23 HASTINGS CONST. L.Q. 1073, 1074 (1996) (“Underlying the struggle against affirmative action programs is the premise that such programs ‘sin[fully]’ take advantage of ‘innocent’ whites, who are entitled to equal opportunity access to jobs . . .”).

21. See Richard Thompson Ford, *Fisher Cut Bait: Affirmative Action Will Live on Even If the Supreme Court Kills It*, SLATE (Oct. 12, 2012, 1:21 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/10/affirmative_action_at_the_supreme_court_the_future.html.

22. Thomas J. Espenshade & Chang Y. Chung, *The Opportunity Cost of Admission Preferences at Elite Universities*, 86 SOC. SCI. Q. 293, 298 (2005).

sordid policies enacted by universities undermines the moral force of the campaign against racial preferences.²³ The naked attacks on affirmative action, uncoupled from a larger discussion about fairness in the admissions process, look like nothing more than unprincipled strikes at black social mobility.

Most people are aware that selective colleges give preferences to legacies and recruited athletes. However, most probably do not understand the intensity of the preferences or the pressure that athletic directors exert on admissions officers, even at Ivy League schools. A recent study of elite universities discovered that recruited athletes were four times more likely to gain admission than similarly situated nonathletes, an advantage comparable to having scored almost 200 points higher on the SAT.²⁴ The archetypical example from my tenure involved a top lacrosse recruit who referred to a fellow student as a “Dick Head” during an official group interview with an admissions officer. Even though “D.H. Smith,” as he became known in the office, had an undistinguished academic record (and impossibly poor impulse control), we admitted him. The administration valued the lacrosse program, and the lacrosse coaches valued D.H. Smith’s potential.

Such preferences given to athletes and legacies not only keep out other talented individuals, they also have racial effects that aren’t widely understood. Although white students comprise approximately half the applicants at selective colleges, they account for about 75 percent of the legacies and a nearly identical proportion of the recruited athletes.²⁵ This is especially problematic at Ivy League institutions, as many of the varsity sports—squash, rowing, lacrosse, fencing, field hockey—are the exclusive domain of elite (and largely white) East Coast prep schools. Just as affirmative action “artificially” reduces white enrollment, the preferences handed to legacies and recruited athletes depress acceptances for high school seniors with minority backgrounds.

Other, darker currents also affect admissions decisions. Admissions professionals, for example, face a steady stream of hassles from influence peddlers. Most attempts to sway an officer’s thinking arrive in the form of ham-fisted phone calls from guidance counselors, which can easily be deflected with a polite thank you. However, a strong letter from a university

23. Some critics of affirmative action would surely argue that racial preferences are more repugnant than bonuses based on legacy status, wealth, or athletic prowess because race is an immutable characteristic that reveals little about a student’s values, opinions, or academic prowess. A similar argument, however, could be made about legacy status, parents’ wealth, or athletic ability; the average eighteen-year-old has little to no control over where his parents went to college, how much money his parents earn, or the quantum of athletic talent he possesses.

24. Thomas J. Espenshade, Chang Y. Chung & Joan L. Walling, *Admission Preferences for Minority Students, Athletes, and Legacies at Elite Universities*, 85 Soc. Sci. Q. 1422, 1428–29 tbl.2, 1431 (2004).

25. Espenshade & Chung, *supra* note 22, at 298, 301.

trustee, a well-connected professor,²⁶ or a prominent politician²⁷ is more difficult to ignore. Recommendations like these, from individuals who can exert power over university policy, most certainly alter the outcome of admissions decisions.

Money, too, plays a role in the backrooms of most admissions offices. As many suspect, colleges give preferences to the children of large donors.²⁸ More problematic, universities also relax their admissions standards for the offspring of *potential* donors. Each year, development officers across the country identify applicants from well-heeled families. Then, these development professionals arrive in admissions offices to negotiate over which heirs and scions to admit. This spectacle is, invariably, the most exasperating moment of the admissions cycle. How many spaces will the “development admits” chew up?²⁹ How badly will they distort the class? As with legacy and athlete preferences, the bonuses handed to those who pull the university’s economic sled accrue primarily to white students as a result of the uneven distribution of wealth in America.³⁰

Given the pervasive inequalities in the admissions process, it should surprise no one that admissions officers rarely complain about affirmative action policies. I never heard anyone utter a harsh word about racial preferences—either publicly or privately—in two years of work. Why? Maybe the politics of admissions teams skew to the left (although that was not my experience). More likely, in their day-to-day professional lives, university personnel witness many admissions decisions made for far less meritorious reasons than promoting diversity. Opponents of racial preferences must understand that their war on affirmative action—isolated from a larger project of instilling fairness in college admissions—will always raise suspicion. Based on the casualties, the fight against affirmative action looks like nothing more than an assault on black people and black social mobility. The bonuses handed to legacies and athletes are not state secrets, yet those who protest so loudly against racial preferences seem utterly uninterested in combating the particular inequalities that favor whites. To destroy affirmative action while ignoring other contested aspects

26. Haelin Cho, *Former Stanford Admissions Officers Allege Preferential Treatment for Children of Faculty, Donors*, STAN. DAILY, July 19, 2012, available at <http://www.stanforddaily.com/2012/07/19/former-stanford-admissions-officers-allege-preferential-treatment-for-children-of-faculty-donors/>.

27. Jodi S. Cohen et al., *Relatives of Lobbyists, Campaign Donors Got Lawmakers’ Help to Enter U. of I.*, CHI. TRIB., Feb. 25, 2012, available at http://articles.chicagotribune.com/2012-02-25/news/ct-met-uofi-cloutadmissions-20120225_1_admissions-scandal-clout-lists-relatives.

28. See generally DANIEL GOLDEN, *THE PRICE OF ADMISSION: HOW AMERICA’S RULING CLASS BUYS ITS WAY INTO ELITE COLLEGES—AND WHO GETS LEFT OUTSIDE THE GATES* 21–48 (2006).

29. E.g., Daniel Golden, *Many Colleges Bend Rules to Admit Rich Applicants*, WALL STREET J., Feb. 20, 2003, at A1, available at http://online.wsj.com/public/resources/documents/Polk_Rich_Applicants.htm.

30. *Id.*

of the admissions game sends a message that critics want to retain one corrupt system that helps their friends but will do everything in their power to destroy the systems that benefit others.³¹ Whatever the moral force behind an anti-affirmative action campaign, it is swallowed by the absence of an attack on the other inequities lurking in the admissions process.

CONCLUSION

Affirmative action continues to suffer blistering abuse from politicians, judges, and the press. While it is certainly possible for people of good faith to disagree about the wisdom and efficacy of racial preferences at selective universities, I worry that the most opinionated individuals seem to hold only the woolliest notions of how admissions officers fulfill their duties. At the very least, the justices who will decide *Fisher* should understand how affirmative action works before upending its promise. When they shape the law and craft policy, they should appreciate that racial preferences at elite schools are less generous, less costly, and less morally problematic than the public imagines.

31. I would not include Justice Thomas in this particular collection of “critics” because, to his absolute credit, Justice Thomas has staked a strong position against both affirmative action and legacy preferences. *Grutter v. Bollinger*, 539 U.S. 306, 368 (2003) (Thomas, J., dissenting in part).