

Affirmative Discrimination and the Bubble

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Introduction

If the higher education bubble deflates or bursts, what will be the fate of affirmative action in the shrinking academic world?

Before addressing that question, let me define some terms. I will be talking only about programs that discriminate or grant preference on the basis of race, ethnicity, or sex—“affirmative discrimination,” to borrow Nathan Glazer’s felicitous phrase. Sometimes—indeed, typically—“affirmative action” and “diversity” programs involve such discrimination, but not always. The original meaning of affirmative action, for example, as President Kennedy used it in an executive order involving government contractors in 1961, meant taking positive steps, proactive measures—affirmative action, get it?—to ensure that discrimination was *not* occurring. Measures like that raise no moral or legal problems today, and their economic costs are likely to be less as well. In fact, to the extent that racial discrimination is inefficient and irrational—and it is—avoiding it will save colleges money.

But the kind of discrimination and preference that I *am* talking about is widely used against students as well as faculty, and it is found in admissions and hiring and in the privileges and opportunities available after initial selection—for example, scholarships and internships for students, and promotion and funding sources for faculty. As a general matter, for both

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students and faculty, African Americans receive the most preferential treatment, followed by Latinos. Whites are discriminated against, and often Asians are discriminated against even more, at least in admissions. Racial and ethnic groups receiving preferences are frequently labeled “underrepresented minorities,” or URMs.

Interestingly, while women are commonly given preferential treatment for faculty positions, this is less true with respect to student admissions; in fact, it is likely that in undergraduate admissions to many liberal arts schools, women are now discriminated against. But that’s a story for another day.

In this essay, I will offer some tentative answers to a series of questions, which I have tried to arrange in a logical sequence. Did affirmative action help cause the higher education bubble in the first place? What are the costs of preferences? Will the purported benefits of preferences diminish if the bubble bursts? Does the outcome of a cost-benefit analysis really matter; that is, even if preferential programs cost money, will they likely be scaled back as money becomes scarcer, or is the commitment to these programs so stubborn that they will be defended at all costs? Finally, with or without a burst bubble, where are racial preferences likely headed?

Did Preferences Help Cause the Bubble?

To what extent did affirmative discrimination help inflate the bubble in the first place?

It is likely that the turn the civil rights movement took in the 1960s—away from equal opportunity and toward equal results—caused a lowering of academic standards and helped inflate the bubble.

Here’s how: Education as an important pathway out of poverty and into the good life has long been part of the American dream. So it was natural that those seeking to improve the lot of African Americans would also seek to improve their education—first by desegregating it so that they had the same opportunities, and also by raising the number of African Americans entering higher education. But the focus on numbers rather than nondiscrimination meant, inevitably, a lowering of academic standards, since simple nondiscrimination would not lead to the numbers desired, at least not immediately.

More students ended up going to college—and going to particular, selective colleges—than their academic qualifications would merit. At the same time, the education offered to them declined in quality. This was due to

affirmative action in faculty hiring and a decline in the academic qualifications of the students. Further, the curricula were watered down, since both students and faculty were not up to the rigors of the old curricula. And even with the watered down curricula, students were less likely to graduate, particularly because they were “mismatched” to the school attended, and surely a student who does not complete college cannot claim to have received just as good an education as a student who has graduated.

So: more and more students getting a worse and worse education. Hmmm, yes, that would help inflate the bubble, all right.

By the way, studies conducted by the Center for Equal Opportunity over the years have documented the extent of preferences at schools all over the country and the mismatch effect on graduation rates.¹ And others—on both sides of the aisle—have likewise confirmed the extent of preferences and the presence of a mismatch effect.²

Are There Costs to Preferences?

Now that we’ve established that preferences helped create the bubble, the next obvious question to ask is: Are there continuing costs of preferences so that the post-bubble, sobered-up, cost-cutting academy will want to eliminate them?

Yes. There are economic costs to “diversity,” and there are more intangible costs to the university, too, which may ultimately lead to financial costs.

The economic costs are direct and indirect. For starters, it costs money to staff an office for diversity. And the more complicated the selection process, the more time and money it costs to insert extraneous considerations into it. Another expense: the use of racial and ethnic preferences and discrimination keeps the university’s lawyers busy, and may result in lawsuits that necessitate hiring high-priced outside counsel.

And consider this. If a company does not produce the best product it can, then it will sell less of that product. Note that it cannot be argued

¹These studies are posted on the Center for Equal Opportunity website at <http://www.ceousa.org/content/blogcategory/78/100/>.

²See, for example, William Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Princeton, NJ: Princeton University Press, 1998), chaps. 2 and 3; Richard H. Sander, “A Systemic Analysis of Affirmative Action in American Law Schools,” *Stanford Law Review* 57, no. 2 (November 2004): 367–473; and Stephen Cole and Elinor Barber, *Increasing Faculty Diversity: The Occupational Choices of High-Achieving Minority Students* (Cambridge, MA: Harvard University Press, 2003).

persuasively that this is not so if *all* companies are hampered in the same way, because the demand for any good is not inelastic. Thus, if universities produce an inferior product by hiring other than the most qualified teachers, then there will be less demand for that product. Students are getting less of what they would like, and those who fund the university for its research capability (government, industry, etc.) get less, too. So preferences have this additional, somewhat more indirect cost.

And then there are the less tangible costs of such discrimination. Consider this list for student and faculty discrimination: It is personally unfair, passes over better qualified students and faculty, and sets a disturbing legal, political, and moral precedent in permitting racial discrimination; it creates resentment; it stigmatizes the so-called beneficiaries in the eyes of their classmates and colleagues, teachers and deans, and themselves, as well as future employers, clients, and patients; it fosters a victim mindset, removes the incentive for academic excellence, and encourages separatism; it compromises the academic mission of the university and lowers the overall academic quality of the student body and faculty; it creates pressure to discriminate in grading and graduation, and promotion and tenure; it breeds hypocrisy within the school; it encourages a scofflaw attitude among college officials; it mismatches students and faculty with institutions, guaranteeing failure for many of the former; it papers over the real social problem of why so many African Americans and Latinos are academically uncompetitive; and it gets states and schools involved in unsavory activities like deciding which racial and ethnic minorities will be favored and which ones will not, and how much blood is needed to establish group membership.

Finally, the costs that are less tangible can also translate ultimately into more tangible ones. For example, the mismatching of individuals and institutions also has economic costs. It's a waste of tuition money for the student, and a waste of resources for the school, when an underqualified student fails to graduate, especially if he likely would have graduated had he attended a school where his qualifications were on par with the other students'.

One would suppose, in the bursting-bubble world, that students who are most likely to stop going to a particular school are the ones who would likely not graduate if they did attend. If indeed the evidence is correct that racial preferences lead to a "mismatch effect" that in turn leads to lower graduation rates for members of "preferred" racial and ethnic groups, there ought to be

some reluctance among such individuals to accept the preferences being afforded them (at least to the extent that they are aware of the preferences and the mismatch effect, which, sadly, is often not the case).

Here's another angle: How will URMs behave and how will they be treated in the post-bubble world? Now, just because there are fewer URMs, net, interested in going to school doesn't necessarily mean there will be less affirmative discrimination, because those going will still be sought after, and those who opt out may be going to less selective schools that are less likely to use preferences. But URMs *are* more likely to avoid mismatching and worthless majors in the post-bubble world, and there are reasons to suppose that universities *will* be more wary of mismatching and offering worthless majors—to anyone—in that world, too. In particular, the phenomenon of switching from STEM majors to, say, ethnic studies—or dropping out altogether—will become less common and accepted, and if a higher percentage of URMs have as a goal actually graduating with a STEM degree, they are more likely to refuse affirmative action.³

Will the Purported Benefits Diminish if the Bubble Bursts?

So there *are* costs to affirmative discrimination. But we must also consider the purported benefits, and the effect of a bubble-burst on these benefits, and how they are assessed.

The remedial rationale for racial preferences is the only one that anyone really believes in. America has a long, sad, tragic history of discrimination against African Americans, in particular, and there is a visceral feeling that somehow we would like to make up for it. Addressing this feeling through affirmative discrimination is not logical—slavery and legal discrimination are long past, while today's recipients of university admission preferences were born around 1993—and the Supreme Court has rejected it. The feeling survives, however. But if universities are scaled back financially, it is less likely that they will be seen as the logical vehicle for redressing historical and societal discrimination.

³On the connection between STEM majors and mismatch, see Gail Heriot, "Want to Be a Doctor? A Scientist? An Engineer? An Affirmative Action Leg Up May Hurt Your Chances," *Engage* 11, no. 3 (December 2010): 18–25. A slightly revised version of this piece appears in this issue of *Academic Questions*.

Even the diversity rationale is weakening as it becomes harder and harder to use race and ethnicity as a proxy for the experiences individuals have had or the perspectives they have gained. What's more, if schools return to offering more rigorous curricula, the "educational benefits" from having random conversations with someone who happens to have a different skin color will likely be discounted as well.

And as for the "role model" justification for faculty hiring preferences, not only has the Supreme Court rejected it, but the rationale for it will weaken as our society becomes increasingly multiracial. Besides, if there are fewer students of X race, then logically there is also less need to provide such students with faculty role models of X race.⁴

Do the Costs and Benefits Really Matter?

Of course, the fact that a rational person would conclude that the costs of racial preferences outweigh the benefits is not dispositive if nonrational people are making the decisions. To the extent that the academics who defend preferences are nonrational, the preferences will remain hard to dislodge.

This may well be the case, and one suspects that a strong ideological bias ensures that preferences will have to be pried out of the cold, dead fingers of many academics. Moreover, much of the defense is perfectly rational, at least from the standpoint of the defender, who may owe his position to that ideology. This can be so in three ways: (a) the individual's job exists only because of the diversity aim (e.g., vice dean for diversity); (b) the individual knows that his having been hired is likely owed in part to racial preferences, as are future promotions and tenure; and (c) the individual's academic specialty is nurtured by diversity politics (e.g., some ethnic studies programs and certain approaches to other disciplines—say, in sociology).

That said, it is also likely that these folks will have the hardest time defending their net benefit to the university in a post-bubble world. And if *they* go, gone too, of course, is their effectiveness in defending preferential

⁴See *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986); Roger Clegg, "Martin Luther King vs. Role Model Nonsense," *Inside Higher Ed*, January 19, 2006, <http://www.insidehighered.com/views/2006/01/19/clegg>; and Elia Powers, "Faculty Gender and Student Performance," *Inside Higher Ed*, June 21, 2007, <http://www.insidehighered.com/news/2007/06/21/gender>, which discusses a University of Toronto study that found that "a student's performance and interest in a given subject are not affected much by the professor's gender."

programs, which also might embolden the remaining academics enough to point out the emperor's nakedness, since most of them have their own misgivings about such programs.⁵

The departments that lead to less remunerative majors (for example, women's studies) are the ones more likely to be cut back, and they are also the ones that are most likely to use preferences. These departments are also often less rigorous and, therefore, are the ones most likely to engage in discriminatory faculty hiring. Likewise, if the bubble-burst results in schools changing curricula so that they better prepare students for jobs, this is likely to result in less politically correct curricula.⁶ On this point, if schools go back to teaching—that is, focusing on professors telling students things they need to know and then testing them to see if they have learned those things—then the “educational benefits” of a racially and ethnically diverse student body become less plausibly a “compelling” interest for the school.

Where Are Preferences Headed Anyway?

Another way to approach the problem is to ask where preferences are headed even if the bubble doesn't burst, and then to ask what effect a bubble-burst would have on this trend. The bubble-burst will cause soul-searching about all kinds of things, and that soul-searching will likely involve a reconsideration of pervasive preferences—especially if, at the same time, other pressures against their use are reaching a critical mass. If the momentum is away from affirmative discrimination to begin with, a bubble-burst would further lead to its diminished support.

Those pressures and that momentum are indeed building. Preferences are unpopular with most Americans, as is evidenced by the fact that when put to

⁵Nearly a decade ago I wrote in “When Faculty Hiring Is Blatantly Illegal,” which appeared in the November 1, 2002, *Chronicle of Higher Education*:

A 1996 national study conducted by the Roper Center for Public Opinion Research found that 60 percent of professors surveyed felt their institutions “should not grant preference to one candidate over another in faculty employment decisions on the basis of race, sex, or ethnicity.” In 2000, the Connecticut Association of Scholars commissioned the Center for Survey Research and Analysis at the University of Connecticut to conduct a survey of the respective faculties at UConn, the Connecticut State University System, and the state's community-college system. Majorities at all three (52, 61, and 75 percent, respectively) said their institution “should not grant preference” on the basis of race, ethnicity, or sex in faculty employment decisions.

⁶See Walter Olson, *Schools for Misrule: Legal Academia and an Overlawyered America* (New York: Encounter Books, 2011), which is reviewed in this issue of *Academic Questions*.

a popular vote, red and blue states alike have rejected them: California, Michigan, Washington, Arizona, and Nebraska. Only in Colorado did they escape—and by just a razor-thin margin. A similar ballot initiative will be placed before Oklahoma and likely Utah voters in 2012; and its governor ended admission preferences in Florida as a means of avoiding a ballot initiative there. To this list of states we can add two others that, for a period of time as a result of court decisions in recent years, did not engage in racial admissions discrimination at their top state schools: Texas and Georgia. In light of this list, which represents about 37 percent of the U.S. population, how plausible is it that the Supreme Court will now find that higher education demands the use of such discrimination? A Texas case representing this issue is headed to the Supreme Court—a Court in which Justice O'Connor will not be able, again, to cast the fifth vote for racial preferences. She has been replaced by Justice Alito.⁷

The latest census data also undercut the case for preferences. The fastest growing groups are Latinos and Asians, and Latinos now outnumber blacks. What claim do recent immigrants and their children have on remedial preferences? What is the historical justification, indeed, for giving Latinos an admission preference not only over whites but also Asians, as many schools do? Is there a history of Asian subjugation of Latinos in this country?

More fundamentally, in an increasingly multiracial and multiethnic society—one in which, indeed, the census also tells us that individual Americans (beginning with our president) are themselves multiracial and multiethnic—it is simply untenable for our institutions to sort Americans by skin color and the birthplace of their ancestors, and to treat some better than others depending on which little box is checked on an admissions application or employment form.

By the way, 2012 will also see the publication of at least two important books that are likely to challenge the continued use of racial preferences in higher education: one by Stuart Taylor and Richard Sander, and the other by Russell K. Nieli. Prof. Sander continues to build the case that racial preferences in admissions have actually hurt rather than helped African Americans as a result of the mismatch effect. If preferences are not even

⁷I have written frequently on the legal vulnerabilities of universities' affirmative discrimination. See, for example, "Attacking 'Diversity,'" *Journal of College and University Law* 31, no. 2 (2005): 417–36; and "A Half-Dozen Push-Backs for Faculty Hiring Committee Meetings," *National Association of Scholars*, March 22, 2010; reposted March 17, 2011, http://www.nas.org/polArticles.cfm?doc_id=1872.

helping their principal “beneficiary,” then how can they possibly be defended?

Conclusion

The bottom line is that there are lots of reasons why the bubble-burst may be bad for preferences, and few if any that would be good for preferences. If the bubble deflates, it is likely that affirmative discrimination will diminish. And that would be a welcome development.