BENCH VERSUS TRENCH: A JUDGE AND AN ACADEMIC DEBATE THE AFFIRMATIVE ACTION CASES

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Abstract
The following dialog on the proper roles of government and universities in meeting a vexing social challenge
grew out of an evening of wine and cordial disagreement between two friends with different backgrounds and
perspectives. The problem: How does the nation provide equal educational opportunity in an ethnically
diverse democracy with both a troubled history of racial injustice and a constitutional commitment to
individual freedom. Readers are invited to decide for themselves how justice can be found.

Keywords
affirmative action, discrimination, equal opportunity
JUDGE HOFFMAN: I sympathize with college admissions officers because their job, at least at the margins, is anything but objective. But that very lack of objectivity is what makes the government's use of race so dangerous. It is one thing to give state colleges the freedom to make highly subjective, almost gestalt, decisions about admissions using every bit of information available about a candidate (including race and height and spelling proficiency), but quite another to allow them to measure the impact of those bits of information, and then adjust their weight, all in an effort to make sure the student body is "diverse." Ensuring "diversity" in this manner is just post-Bakke newspeak for quotas.

PROFESSOR GOLDSMITH: These cases were about the role of the government in the guise of public universities. But as the Court reminded us, "given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." Concordant with this tradition, most faculty members and members of boards of regents at state universities see themselves less as agents of state government than as representatives of an even older institution whose dual mission is the exploration of new knowledge and the education of the young. (You may deem this irrelevant, but in this imperfect world it is no more irrelevant than the reflections of personal experience that so color Justice Thomas’s dissent.)
HOFFMAN: You are wrong to suggest that the Court was, at least explicitly, fashioning some sort of exception to equal protection when it comes to the ancient tradition of education. I suppose the ancient tradition of making a living might also justify less scrutiny when it comes to government doling out contracts, but we know from Adarand that that is not correct. No, if you are going to defend these opinions you’ll need to do so in classical equal protection fashion, just as the majority tries to do. After paying lip service to the unique role of higher education, the majority proceeds quite traditionally: first concluding that diversity is a compelling state interest and then concluding that the Michigan Law School’s method of achieving that compelling state interest was narrowly tailored. They are wrong on at least the first count. The Equal Protection Clause was, and should continue to be, all about disabling government from making the very kind of group-based decisions inherent in the word “diversity.”

GOLDSMITH: The history of the Equal Protection Clause has not been characterized by clarity of application, and its interpretation in the domain of education has been evolving since 1868. In hindsight, Plessy v Ferguson seems an abomination and Brown v Board of Education of Topeka an enormous step away from generations of rank discrimination. In the ensuing social change—where race, economic status, history, and access to quality education are mercilessly entangled—many colleges and universities have sought to extend the reach of educational opportunity. This initiative has put these institutions of higher education at the forefront of social change. Inevitably, conflicting interests have been seen to clash: both the interests of different individuals and the interests of
HOFFMAN: Being in the “forefront of social change” is not synonymous with “being constitutional.” The very purpose of the Bill of Rights was to restrain government, even (and perhaps especially) a well-intentioned government, from encroaching on individual rights. The equal protection cases have made it clear that among these presumptively unencroachable rights is the right to have government actions, both benefits and detriments, distributed without regard to race. To overcome this presumption, the state must show a compelling state interest and must also show that the race-conscious program is narrowly tailored to meet that compelling state interest. So tell me again, what is compelling about racial diversity in the classroom?

GOLDSMITH: Students learn an enormous amount from each other. Much of this learning is informal, but it is no less important for life than what is encountered in the classroom. Justice Scalia argues that classroom diversity is a goal of elitist institutions, and Justice Thomas puts it down as “racial aesthetics.” Both of these views trivialize the educational process as well as an educational goal of great importance to our pluralistic democracy. To the extent that affirmative action is a hallmark of “elitist” institutions that educate a disproportionate share of our future leaders, I would argue that the state has an even more compelling interest. The decision of the Court was in fact strongly influenced by testimony that the educational process and educational outcomes are positively influenced by classroom diversity. My own experience as a teacher in an “elitist”
university is consistent with this view, and from the role of education, the distinction between public and private is immaterial.

HOFFMAN: OK. So Yale is a better university as a result of a more diverse student population. I accept that proposition, and, in any event, as a private university its judgments on these matters are not generally subject to government review. But if it were a public university, supported by taxpayers, a second question has to be asked—are its admissions policies fair? Certainly, Yale was a fairer university once all the old racial, gender, religious and ethnic barriers were eliminated. But is it a fairer university when the old barriers are turned into gateways for some races and new barriers for others?

GOLDSMITH: You bet it is fairer! It is fairer because many institutions have become proactive in seeking talent and promise in places that were formerly ignored: public schools, among young women, and among previously underrepresented ethnic, racial, and economic groups. To characterize expanded opportunity for some as barriers for others bestows special privilege on groups that have been previous beneficiaries of discrimination.

HOFFMAN: But of course because the spaces are limited, one race’s gateway is in fact another race’s barrier. The majority buys into this remarkable piece of pseudo-science that there is an apparently unspecifiable “critical mass” of numbers of students of any given race necessary to achieve diversity. How is that “critical mass” analytically
different from a quota, except that with quotas at least the institutions are admitting what they are doing. If Barbara Grutter was rejected by the Michigan Law School because it needed one more minority student to reach “critical mass,” how was her injury constitutionally different from the injury suffered by Allan Bakke? Or by the black applicant who gets denied admission in favor of an equally qualified white applicant when the admissions officer overshoots the critical mass for blacks? What in the world is wrong with requiring state colleges and universities to base their first order admission decisions on well-recognized predictive indicators, like SAT scores and high school grades, and then, at the margins, to allow them subjective discretion to consider all other factors other than those forbidden by the Constitution?

GOLDSMITH: Although informed by experience, every aspect of education is more an art than a science, so let’s not hide behind the pejorative “pseudo-science.” It’s true that the national standardized tests, and high school grades, have predictive value. For example, high SAT scores correlate with future grades, particularly during the first two years of college. The problem is that they also correlate with past educational opportunity, including access to commercial courses that offer to increase a student’s SAT score by up to 100 points. An admissions system that limits judgment of a young person’s potential to a single number is an inadequate measure of promise while also creating a false sense of entitlement for both admission and scholarship support.

HOFFMAN: Aha! Now we are the crux of the matter. The University of Michigan Law School’s affirmative action plan is constitutional because diversity is a compelling state
interest (which, as I’ve argued above, assumes away the constitutional issue), and because, as a result of past discrimination, diversity could not be achieved without some measure of preference given to members of groups that suffered that past discrimination. At least that is an honest explanation. Unfortunately, that “preference” is nothing other than our unconstitutional friend, the quota.

GOLDSMITH: Affirmative action, as approved by the Court and as practiced by the University of Michigan Law School and other “elitist” institutions, is an effort to employ a richer set of predictive criteria that can compensate to some extent for economic disparities in opportunity. These, for example, can include evidence of leadership or involvement in activities that convey interest and concern about important social issues. They have nothing to do with your example of “height,” or indeed skin color per se. In this context race is a social concept that embraces a dimension of experience that is relevant to the desire for classroom diversity. There is no numerical quota assigned to any applicant group, which was crucial to the Law School’s admission process surviving the Court’s close scrutiny. I have argued above that in our pluralistic democracy, expanding the search for talent is essentially a moral act. In this context the concept of “critical mass” expresses the educationally valid goal of eliminating the improper, and indeed unnecessary burden of tokenism. This requires the honest expectation that every student that is admitted can do the work, benefit from the experience, contribute to the education of others, and graduate on time. The resulting diversity is in the interests of all the students who are admitted and it is in the interests of society.
HOFFMAN: But of course it is not in the interests of the students denied admission because of their race, and that’s the constitutional rub.

GOLDSMITH: What’s all the fuss is about? During the six years from 1995-2000, the University of Michigan Law School admitted an average of 1226 students from an average applicant pool of 3604, for an admission rate of 34%. The average number of African-Americans admitted per year was 100, or 32% of those applying. Chief Justice Rehnquist interprets these numbers as evidence for a quota, but a more obvious alternative would be that the system comes close to being race-neutral. Justice Thomas makes much of the 4-5(!) African-Americans admitted each year with LSAT scores below the national average, although there were also some white students admitted with below average scores. My conclusion from these numbers is that the Law School’s use of race along with other factors is indeed tinkering at the margins, although tinkering for an appropriate and important educational purpose.

HOFFMAN: So now “tinkering at the margins” is the compelling state interest?

GOLDSMITH: No. The compelling state interest is the quality of education as it impacts the larger social scene. But you are straying from my argument. With an average of 2378 applicants who were rejected each year, some of this number, likely even many, were qualified for admission. For any one of the 1857 whites to attribute their rejection to the success of 100 African-Americans, however, indicates a sense of privilege that itself verges on racism.
HOFFMAN: It verges on racism only because the government is using race to make admissions decisions. It was no comfort to Allan Bakke that only a handful of minority applicants displaced him, any more than it was comfort to a qualified Jewish applicant at the turn of the century that Yale didn’t accept Jews and that his place was taken by a single hypothetical Gentile. Only a system designed by clever and shameless lawyers could possibly be called “race-neutral” when it uses race to reach “critical masses” of racial diversity. You would be better off re-fighting the quota battle. To correct past racial prejudice, and to meet the current state interest in diversity, why can’t state universities simply say “We want our campus to look like America, so we will design admissions systems that will insure a set percentage of students from each cognizable racial category?” The answer, of course, is that the Constitution demands the government’s racial neutrality. Well-intentioned social policies aimed at correcting 400 years of race discrimination by imposing 25 years of government reverse discrimination are simply not the kind of compelling state interest for which we should scuttle our profound commitment to equal protection.

GOLDSMITH: If we have such a profound commitment to the equal protection clause, perhaps we should also pay more attention to the economic conditions that lead to disparity of opportunity in the first place. *Brown v Board of Education* called attention to that dimension of the problem. But I think it is an error to view affirmative action as correcting past injustice. Nothing can correct the past. What we can do is look at the present and think about the future. The present disparity of opportunity is a reality that
can be addressed by seeking talent and promise in ways that go beyond metrics that, however useful, are known to restrict the search. This is not discrimination, reverse or otherwise. What the next 25 years will bring remains an open question.

Morris B. Hoffman is a state trial judge in Denver, Colorado, and the unofficial judge-in-residence at the Gruter Institute for Law and Behavioral Research, where he first met Professor Goldsmith. His views here do not necessarily reflect the views of his colleagues on his Court, nor, obviously, his colleagues at Gruter. He forgives Professor Goldsmith’s claim to be in the “trenches” on this issue; after all, how often can academics make such a claim?

Timothy H. Goldsmith is Professor Emeritus, Department of Molecular, Cellular and Developmental Biology, Yale University and a biologist critic of legal enthusiasms. He regularly participated in graduate biology admissions decisions at Yale, where undergraduate admissions are the responsibility of an admissions staff with the training and experience to select each class from a sea of applications roughly ten times larger than the number of available places. He forgives Judge Hoffman everything, knowing that even Rhesus Macaques find it necessary to reconcile.
