Harvard admits its preferences

by Heather Mac Donald


On September 30, a federal district court judge in Boston upheld Harvard’s use of racial preferences in undergraduate admissions against the challenge that they discriminate against Asian-Americans. The case—Students for Fair Admissions v. Harvard College—will likely be appealed to the Supreme Court, the fifth time since 1978 that the Court has been asked to rule on racial admissions preferences. The Court should accept the appeal and, for the sake of its own institutional integrity, throw out its entire jurisprudence regarding college admissions. Pro-preference jurisprudence is an abomination, filled with patent fictions, logical contradictions, and vast gusts of rhetorical vapidity that should make any self-respecting jurist weep with despair. Its only purpose has been to paper over the vast academic skills gap between black students, on the one hand, and white and Asian students, on the other. In so doing, court doctrine has perpetuated the very problems it purports to solve.

Students for Fair Admissions’s suit against Harvard presented a new twist on anti-preference litigation: rather than arguing that Harvard’s preferences discriminate against whites in favor of blacks, sffa argued that Harvard discriminates against Asians in favor of whites. This shift reflected both reality and legal strategy. Asian students everywhere are the most penalized when meritocratic admissions are scrapped for a race-based system, since their academic qualifications surpass those of all other racial and ethnic groups.

But litigation calculus also influenced the changed focus. SFFA v. Harvard was filed in 2014, when Justice Anthony Kennedy was still on the Supreme Court. Kennedy had been a pivotal vote for upholding racial preferences. If sffa’s attorneys could convince him that his pro-preference jurisprudence was now harming Asians—theymselves a minority and thus part of the student “diversity” that preferences were supposed to enable—they would have a better chance of persuading him to reverse that jurisprudence, their thinking went. And using whites, rather than blacks, as the benchmark for anti-Asian discrimination avoided the appearance of pitting one minority group against another, a charge which left-wing preference supporters routinely make.

This calculation may have backfired. Regardless, winning any anti-preference challenge under
current precedent has become virtually impossible.

That line of precedent began in 1978 with *University of California v. Bakke*. Allan Bakke had been rejected from the University of California Davis medical school, which set aside sixteen places in its first-year class of one hundred for so-called underrepresented minorities. Justice Lewis Powell, writing the controlling opinion in an otherwise divided court, introduced the concepts that would tarnish all subsequent legal analysis in the area. UC Davis’s explicit set-asides violated Bakke’s right to be free from racial discrimination, Powell held. If a school left its desired level of minority enrollment officially unquantified, however, the Court would accept a series of cascading fictions on the way to upholding that school’s racial preferences. Those fictions clustered under the umbrella of “holistic review.” An admissions office that practices holistic review allegedly evaluates each applicant as a unique individual and not simply as the representative of a race; it treats an applicant’s race as just one smallish “plus” factor among many helping him get admitted; racial preferences are a plus for the preferred group but not a negative for the unpreferred group; even if a school has “minimum goals” for minority enrollment, those minimum goals are different from numerical quotas.

Powell never explained why an individual who is penalized because he is of the wrong race suffers a constitutional harm if that discrimination occurs in the name of an explicit quota, but not if the discrimination is in the service of a putatively less numerical racial “goal.” The other fictions were equally strained. A preference-practicing school is always going to have a target of minority enrollment, regardless of whether it states that target publicly; otherwise it would not need preferences in the first place. Preferences are by definition zero-sum; they catapult members of favored groups into finite college seats at the expense of disfavored groups.

Powell’s legacy did not end there. He also introduced the concept that would define the academic mission for the next four decades: diversity. The Davis medical school had defended its quota system on three grounds: as compensation for past discrimination; as a means of providing more doctors to underserved neighborhoods; and as a tool for creating “diversity” in its student population. Powell rejected the first two grounds. Universities were unqualified to make the policy judgments supporting a compensatory mission, he wrote. There was no guarantee that minority medical school graduates would practice in minority neighborhoods. But educational “diversity”—that was a goal Powell could get behind! As long as a university justified its preferences in the name of the supposed educational benefits of racial diversity, it will have stated a constitutionally legitimate purpose that withstands judicial scrutiny. Diversity benefits accrue above all to non-preferred white
students who would learn from the different worldview of preferred minority students. Powell thus institutionalized the core premise of today’s identity politics: that a person’s race is reliably linked to his outlook and life experience.

Referential admissions schemes would be challenged four times over the ensuing forty years; the Court, in upholding them, responded with ever more fantastical distinctions. Racial preferences are litigated under the Equal Protection clause of the Constitution’s Fourteenth Amendment. (Federally funded private universities are covered by Title VI of the Civil Rights Act of 1964, which embodies the same constitutional principles, the Court has held. It is that receipt of federal funding that subjects private universities to federal anti-discrimination law; they could avoid those legal strictures by foregoing federal funding.) Equal Protection doctrine requires that any government scheme using racial classifications be “narrowly tailored” to meet a “compelling” government purpose. In order for a court to determine whether a racial scheme is narrowly tailored, it needs to know the scheme’s specifics. This requirement created an impossible dilemma: if a university claimed that it needed a certain percentage of minority students in order to reap the educational benefits of diversity, it would have erected an illegal quota. But if a university left its goals for minority enrollment unspecified, a court would be unable to determine whether those enrollment goals were no broader than necessary to fulfill the mission of diversity.

The Court responded by embracing the contradiction, rather than resolving it. As Justice Kennedy wrote in the 2016 iteration of *Fisher v. University of Texas* (upholding racial preferences at the University of Texas),

> since the University is prohibited from seeking a particular number or quota of minority students, it cannot be faulted for failing to specify the particular level of minority enrollment at which it believes the educational benefits of diversity will be obtained.

On the other hand, asserting an interest in the educational benefits of diversity writ large is insufficient. A university’s goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.

How those goals can be measurable without being roughly numerical was a mystery. Enter the concept of “critical mass,” entailing a non sequitur of stunning proportions. It turns out if you call your quota for minority students a “critical mass,” you will sidestep the specification problem. The jurist in the Harvard case, U.S. District Judge Allison Burroughs, recapitulated the sleight of hand in her September 2019 opinion. In *Grutter v. Bollinger*, a 2003 Supreme Court decision upholding racial preferences at the University of Michigan’s law school, the “Supreme Court found that the law school’s goal of ‘enroll[ing] a critical-mass of minority students’ did not run afoul of the requirement that a school not attempt to attain ‘some specified percentage of a particular group merely because of its race or ethnic origin,’ ” Burroughs wrote. Instead, as distinct from a quota, the “concept of ‘critical mass [was] defined by reference to the educational benefits that diversity is designed to produce,’ including racial understanding, breaking down stereotypes, advancing
learning outcomes, and preparing students for a diverse workforce and society.”

But an explicit racial quota could also be “defined by reference to the educational benefits that diversity is designed to produce.” A school’s hidden target for minority enrollment does not become less of a target simply by calling it a critical mass and invoking the goal of diversity.

Plaintiffs challenging preferential admissions have had two options: they can try to work within the fictions of existing jurisprudence or they can ask a court to overturn the entire rotten infrastructure. SFFA’s 2014 opening salvo in the Harvard case did both. Judge Burroughs rightly threw out those counts in SFFA’s original complaint that sought to reverse the Bakke-Grutter-Fisher line of precedent, since a lower court does not have the authority to overrule Supreme Court precedent. SFFA will be able to resurrect those counts on appeal. For the remainder of the trial litigation, SFFA accepted the prevailing fictions, and in so doing demonstrated their hollowness once again.

SFFA argued that while Harvard could in theory use race just as a “plus” or “tip” within the context of “holistic review,” it was not doing so. Instead, it made race the “defining feature” of applications. While Harvard could in theory treat race simply as a plus for preferred groups, SFFA argued, it was instead making race a negative for unpreferred Asians. While Harvard could in theory evaluate each application on its individual merits despite employing racial preferences, Harvard in fact operated a de facto quota or “racial balancing” system, because the racial proportions of its admitted student body remained stable from year to year. The Asian-American share of the student body would be much bigger without these violations of existing racial preference doctrine, SFFA claimed, since by all objective measures, Asians were the most qualified of all applicant groups.

Harvard, for example, rates its applicants academically on a six-point scale. An academic rating of one indicates summa cum laude potential, as Harvard put it, a “genuine scholar,” and near-perfect scores and grades “combined with unusual creativity and possible evidence of original scholarship.” An academic rating of two indicates magna cum laude potential, superb grades, and mid- to high-700 SAT scores. More than 60 percent of Asian applicants to Harvard for the classes of 2014 to 2019 were rated 1 or 2, compared to 46 percent of whites, 17 percent of Hispanics, and 9 percent of blacks. An academic rating of four indicates adequate preparation, respectable grades, and low- to mid-600 SAT scores. Over 50 percent of black applicants were rated 4 or less, compared to 8 percent of Asians, 10 percent of whites, and 35 percent of Hispanics. If Harvard admitted students based on their academic qualifications alone, Harvard would be 43 percent Asian, 38.4 percent white, 0.7 percent black, and 2.4 percent Hispanic, according to a 2013 study by Harvard’s Office of Institutional Research.

Race per se does not influence the personal rating, the college maintained, but a student’s experience based on race might.
Instead, Harvard’s undergraduates in 2013 were 43.2 percent white, 18.7 percent Asian, 10.5 percent black, and 9.5 percent Hispanic.

Asians’ extracurricular accomplishments were just as lop-sided, and they receive better recommendations from alumni interviewers than other groups. Yet whites are admitted at higher rates than Asians in every academic tier, and blacks and Hispanics are admitted at much higher rates than Asians. According to sffa’s expert witness, Duke economist Peter Arcidiacono, an Asian male applicant from a middle-class family with a 25 percent chance of admission would have a 36 percent chance of admission if he were white, a 77 percent chance if he were Hispanic, and a 95 percent chance if he were African-American.

Students for Fair Admissions attributed these imbalances to Harvard’s monkeying with the most subjective, opaque element of its admissions criteria: the personal rating. Besides the academic rating, Harvard scores its applicants on a six-point personal rating, a six-point athletics rating, and a six-point extracurricular one. Harvard’s admissions officers testified at trial that the personal rating entails such judgments as an applicant’s “likability,” “integrity,” “helpfulness,” “courage,” and “kindness.” An admissions officer may ask himself if an applicant is “a good person” or has strong “human qualities.” Harvard’s website uses even more condescending language towards its desperate seventeen-year-old supplicants. “What choices have you made for yourself?” the admissions committee will ask about student suitors. “What about your maturity, character, leadership, self-confidence, warmth of personality, sense of humor, energy, concern for others, and grace under pressure?” How Harvard’s administrators and faculty would measure up under these probing questions was left unexplored.

Asian applicants receive lower personal ratings than whites with otherwise similar rankings on the other three scales. To analyze these disparities more precisely, sffa divided Harvard’s applicants over six years into ten academic deciles; each decile contained the same number of members—a tenth of all applicants—but the racial composition of each decile varied enormously. Blacks get higher personal ratings than everyone else, no matter their academic or extracurricular qualifications. Blacks in the seventh (i.e., third lowest) academic decile—meaning that 60 percent of applicants have better academic qualifications—have more than double the chance of receiving the two top personal ratings—one or two—than Asians in the top academic decile.

The battle over the significance of the personal rating in explaining Harvard’s admissions outcomes was the locus of the trial’s thorniest statistical wrangling. Arcidiacono created several complicated statistical models to show what Harvard’s admissions outcomes would look like absent impermissible racial balancing. Those models excluded applicants’ personal ratings because, sffa argued, those ratings were influenced by applicants’ race. They should be excluded, therefore, from a statistical model showing what admissions outcomes would look like without illegitimate racial considerations. sffa was determined to keep the personal rating out of its models because without it, the disparity between white and Asian admission rates becomes statistically significant, with whites admitted at a higher rate than Asians despite possessing similar or inferior
qualifications. With the personal rating included in the models, that disparity becomes statistically insignificant.

Harvard argued that the personal rating belonged in the admissions models, because it was not influenced by race. As a fallback position, the school engaged in the tortured semantic hair-splitting that characterizes racial preference jurisprudence. Race per se does not influence the personal rating, the college maintained, but a student’s experience based on race might.

Harvard’s core contention—that the personal rating is a race-neutral, unbiased assessment of applicants’ character—put the university in an awkward position. It was implicitly arguing that Asians really are less likable. Yet Harvard’s personnel denied this proposition on the stand. The judge, too, felt compelled to distance herself from this inference. “The Court firmly believes that Asian Americans are not inherently less personable than any other demographic group,” Burroughs wrote. If Asians are not “actually weaker in personal criteria,” in Burroughs’ s words, how to explain their lower personal ratings? Neither Harvard nor Burroughs resolved this question. Instead, Burroughs fell back on the fact that she found no credible evidence that Harvard bore overt racial animus against Asians, invoking admissions officers’ strenuous assertions during the trial that they would never intentionally discriminate against Asians or anyone else.

This personal ratings debate ultimately proved a sideshow. But it did provide one of the more hilarious instances of Harvard’s hypocrisy, in a trial filled with such hypocrisy. sfia had suggested that perhaps Harvard was implicitly (i.e., unconsciously) biased against Asians, whatever its conscious intent. Harvard professed to be outraged at such a suggestion. sfia “makes the extraordinary suggestion that Harvard must prove it ‘has uniquely escaped [the] infiltration’ of societal prejudice,” Harvard wrote in its final brief. To invoke the specter of implicit bias simply demonstrates that sfia lacks all evidence for bias, the righteous defendant sniffed.

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Harvard’s contempt for the implicit bias concept was rich, to say the least. Harvard hosts the Project Implicit website, which offers free computer tests of the test-taker’s implicit biases against people of color and other allegedly disfavored groups. One of the two developers of that test, known as the Implicit Association Test, Mahzarin Banaji, is a professor of social ethics in Harvard’s psychology department; Banaji consults with corporations and governments around the country, teaching them how to overcome their employees’ deep-seated prejudices. In every other context, Harvard embraces the idea animating Project Implicit: that nearly all members of our bigoted society are infected by unconscious bias. Faced on the stand with such an accusation itself, however, the college declares the concept
sffa’s emphasis on the insulting personal rating gap made for good PR. Even racial preference defenders like The New York Times struggled to come up with a politically correct explanation for the gap. sffa argued that Harvard’s alleged anti-Asian prejudice was a modern-day version of Harvard’s anti-Jewish prejudice in the first half of the twentieth century. Even back then the school’s resulting pro-wasp admissions quotas hid themselves under the guise of “holistic review.” But sffa’s effort to turn Harvard’s anti-Asian penalty into a matter of racial animus mistakes the radically different admissions game being played today. Harvard must limit Asian enrollment to make room for so-called “underrepresented minorities.” The presence or absence of any anti-Asian stereotyping on Harvard’s part is irrelevant. It could deem Asians the most personable students in the country and still be compelled to put a ceiling on their admissions if it wants to achieve “diversity.” Invoking alleged personal animus is a more easily grasped story line, but it masks the ineluctable arithmetic that drives contemporary admissions policy.

Surprisingly, Burroughs adopted Arcidiacono’s statistical model with the personal rating excluded, despite clearing Harvard of the charge of intentional bias against Asians. It didn’t matter. And the two reasons why it didn’t matter suggest both the possible flaw in sffa’s litigation strategy and the ultimate futility of any litigation under the Supreme Court’s current case law. In a key finding, Burroughs noted that the disparity in the personal ratings, even if unwarranted, “did not burden Asian American applicants significantly more than Harvard’s race-conscious policies burdened white applicants.” This was glaringly true. sffa had chosen to heavily build its case on the disparity in white-Asian admission rates. But that disparity paled in significance compared to the massive boost awarded blacks: Harvard’s pro-black preference vis-à-vis whites was ten times as large as any anti-Asian penalty vis-à-vis whites. And the Supreme Court has repeatedly upheld pro-black preferences of Harvard’s magnitude.

In a second key finding, Burroughs exposed the quaint irrelevance of the fierce personal rating battle. That battle was waged over whether the personal ratings were influenced by racial considerations. But whether they were or not, it ultimately didn’t matter because both parties admitted that the final rating Harvard assigned to candidates—the one that conclusively determined admission decisions—was influenced by race, and that Harvard was perfectly within its rights under existing precedent to inject race into that final rating. As Burroughs wrote: The “Court finds it unnecessary to delve further into the overall rating disparity because it is the odds of admission, not an apparent disparity in the odds of receiving a high overall rating, that is primarily at issue, and Harvard acknowledges and intends that race may be factored into the overall rating.”
As a practical matter, if Harvard were banned from any impermissible stacking of the personal rating deck, it would undoubtedly compensate by awarding an even greater preference to black students to guarantee its desired admissions outcome. So the whole personal rating kerfuffle was a legal dead end.

Though sffa hoped to win on the novel Asian v. white issue, it included more traditional arguments and data about Harvard’s black- and Hispanic-favoring preferences. It was in addressing those arguments that Burroughs exposed the logical bankruptcy and empirical bad faith of the Supreme Court’s preference jurisprudence, since she herself rebutted the key planks of that jurisprudence without realizing she was doing so.

Burroughs’s conclusions of law dutifully regurgitated the requisite doctrinal bromides:

1. “Harvard does not have a quota for students from any racial group”; it does not engage in racial balancing.

2. “Race has no specified value in the admissions process and is never viewed as a negative attribute.”

3. “Minimum goals for minority enrollment . . . [without a] specific number firmly in mind” is not “the functional equivalent of a quota.”

4. Harvard engages in “individualized review” of each applicant right up to the very last stage of the admissions process.

5. Race is never the “defining feature” of applications. It is just a “plus” or “tip.”

6. “Harvard’s admissions policy does not result in underqualified students being admitted in the name of diversity.”

None of this was true, as Burroughs’s opinion itself made clear. Harvard obsessively monitors race throughout every stage of its admissions process. The racial breakdown of the applicant pool is projected on a screen during every meeting of the admissions subcommittees and the full committee. The Admissions Dean and his close subordinates regularly read aloud from a “one-pager” that tracks the evolving racial status of the pool, to make sure that the Committee is meeting its “goals for minority enrollment” (in Burroughs’s words, quoting Grutter; emphasis in original). At the last stage of the admissions process, Harvard prepares a “lop list” itemizing the race, gender, athletic potential, legacy status, and financial-aid needs of the finalists, and the committee begins lopping off contestants until it whittles the class down to desired size and racial proportions.

Burroughs acknowledges these facts, which establish that Harvard is racially balancing and that it discards anything remotely approaching “individualized review” in the final stages of the
admissions process (if not before). Yet she concluded the opposite. As for Burroughs’s claim that race is but a slight plus or tip and never the defining feature of an application, she contradicts those assertions as well. In fact, by Harvard’s own calculations, race is the “determinative tip,” she writes, for more than half of the admitted African Americans, who “would most likely not be admitted in the absence of Harvard’s race-conscious admissions process.” (For the trial, Harvard had calculated that the current 14 percent black share of its student body would drop to 6 percent without racial preferences.)

This particular bit of doctrinal lore—that race is just the slightest of factors in the admissions process—creates yet another conundrum for universities. They forecast a cataclysmic decline in diversity if racial preferences were banned. Without racial preferences, Burroughs writes, “racial diversity at Harvard would likely decline so precipitously that Harvard would be unable to offer students the diverse environment that it reasonably finds necessary to its mission.” Yet the schools also have to argue that something so pivotal to the racial composition of their class is at the same time a negligible feature of the admissions process. Both positions cannot be true.

It is also not the case that race is just a positive and never a negative. Burroughs walks back that claim through empty qualifiers. Yes, she admits, Asians may face a “relative burden” (whatever that means). Yes, race-conscious admissions “will always penalize to some extent groups that are not being advantaged in the process.” Not to worry, however. Preferences do not “unduly” harm members of any racial group; moreover, it is “not clear” that the burden is “disproportionate.” Burroughs fails to lay out any test for what a “disproportionate” or “undue burden” would look like. She does not have to, since it is a foregone conclusion that any “burden” needed to engineer racial balance is by definition “due” and “proportionate.”

The most shameless tautology in preference dogma, however, is the claim that all students admitted via racial preferences are “highly qualified.” Harvard’s current admissions policy “does not result in underqualified students being admitted in the name of diversity,” Burroughs states in her factual findings. Harvard’s position in the case directly rebutted this claim. sffa had argued that the university could achieve comparable levels of diversity without racial classifications. It called as witness the Century Foundation’s Richard Kahlenberg, who proposed several alternative admissions schemes, including eliminating consideration of sat scores and placing more emphasis on students’ economic status. Harvard and
Burroughs rejected all of Kahlenberg’s proposals, because they would lower the academic caliber of the class. But the gap between Harvard’s current academic profile and what would result under Kahlenberg’s schemes was far smaller than the existing gap between Asian and white admits, on the one hand, and black admits, on the other. Under Kahlenberg’s models, the average freshman academic index (which takes into account high school grades and SAT I and SAT II scores) would drop from 227.8 to 225.9, a reduction of 1.9 or 0.83 percent. Harvard and Burroughs considered that drop intolerable. Yet Harvard’s black students have an academic index of 221.5—6.3 points or 2.7 percent below the average. In Burroughs’s words, a reduction of 0.83 percent in the academic index would “require Harvard to sacrifice the academic strength of its class,” but Harvard has already proved its willingness to sacrifice such strength in its admissions of black students on average. How blacks can be deemed “highly qualified” or even just “not underqualified” if their academic qualifications, writ large, would destroy Harvard’s academic profile was a puzzle that went unremarked upon by all parties.

Harvard invoked a parade of horribles that would ensue if racial preferences were ever held illegal. “If that day ever comes,” the university warned ominously in its final brief, the court would “send the message—and create the reality—that America’s universities are no longer its cradles of opportunity and its beacons of social mobility.” Except that Harvard doesn’t much care about serving as a cradle of opportunity and beacon of social mobility. Not only does it reject any increased enrollment of lower income students, it prefers wealthy blacks over poor blacks. At the dawn of the racial preference era, in the late 1960s, Harvard really did seek out lower-income blacks. They performed so poorly that Harvard soon shifted its focus to middle income and wealthy blacks. Currently, Harvard’s preference for well-to-do blacks compared to well-to-do whites is much larger than the preference it awards poor blacks compared to poor whites. Being black is worth far more than being poor in Harvard’s admission schemes. Preferring students of low socioeconomic status, as Kahlenberg had advocated, would net many more of those pesky Asians and whites than blacks, since poor white students on average greatly outperform middle- and upper-class black students.

Burroughs’s peroration reveals the political assumptions that drove her reasoning. Though she had kept the specter of racism offstage, by the end of her opinion, she could contain herself no longer. Justice Sandra Day O’Connor had speculated in 2003 that preferences would no longer be needed in twenty-five years. That prognosis may have been optimistic, Burroughs notes, since it failed to take into account the ongoing effects of “entrenched racism and unequal opportunity.” There is no evidence in the record regarding “entrenched racism,” but it is apparently so uncontroversial a fact that Burroughs feels entitled to take judicial notice of it. Burroughs could find no illegal discrimination against Asians at Harvard, despite powerful statistical evidence to the contrary, but she just knew that American racism is entrenched.

Far from discriminating against blacks, however, every mainstream institution in the country is twisting itself into knots to hire and promote as many underrepresented minorities as possible,
awarding them hiring advantages easily as large as college admissions preferences. Philanthropists across the political spectrum, elected officials, and government bureaucrats obsess about black uplift; taxpayers have funded trillions of dollars in government programs to engineer social and economic equality. Anti-racism has become a national religion, supported by an industry dedicated to ginning up examples of white bigotry. Yet Burroughs knows that racism is so entrenched that, long after 2028, preferences will still be necessary.

Her convictions about American bigotry also compel her to part ways with the “wise and esteemed” Toni Morrison, in Burroughs’s words. “Race is the least reliable information you can have about someone. It’s real information, but it tells you next to nothing,” Burroughs quotes Morrison as saying. This actually wise observation, if acted on, would dismantle the entire diversity edifice, since that edifice is premised on racial essentialism. Black students routinely gripe about being looked to in class for the “black view” on civil rights, current affairs, and history, among other things. But providing the black view is precisely why they have been admitted, absent competitive qualifications, in a diversity regime. Students cannot demand admission in the name of their unique and racially determined point of view and complain when they are asked to represent that view.

Burroughs rejects Morrison’s insight because whites are so benighted in their racial attitudes. “Although this [i.e., Morrison’s statement] has been said, it must become accepted and understood before we close the curtain on race conscious admissions policies,” she writes. Who, exactly, is not understanding the unreliability of race as a predictor of character and world view? The millions of Americans who long to be post-racial but are not allowed to be by the academic-corporate-media diversity machine that harangues them incessantly about the monumental importance of racial identity? And how is a judge to determine when Morrison’s statement has “become accepted and understood”? Such a judgment lies completely outside judicial competence.

Burroughs believes that only the racially engineered “rich diversity at Harvard and other colleges” will allow white Americans to gain the “tolerance, acceptance and understanding that will ultimately make race conscious admissions obsolete.” Students admitted to that utopian realm crafted by the seers and sages in college admissions offices will lead the country in knowing and understanding “one another beyond race, as whole individuals with unique histories and experiences. It is this, at Harvard and elsewhere, that will move us, one day, to the point where we see that race is a fact, but not the defining fact and not the fact that tells us what is important, but we are not there yet.” How, again, does Burroughs know that we are “not there yet?” She is deciding cases based on a set of assumptions that have not been aired in her courtroom. And the idea that Harvard or any other college stresses interpersonal understanding that goes “beyond race” is ludicrous. Nearly every college in the country cultivates racial separatism, whether through race-based freshmen orientations, social clubs, dorms, graduation ceremonies, seminars and conferences on “white privilege,” or racially designated diversity bureaucrats.

The biggest fiction of racial preference jurisprudence is that admitting students on the basis of
race rather than academic qualifications “break[s] down racial stereotypes,” a phrase endlessly regurgitated by judges and universities since first uttered by Justice O’Connor in Grutter. In fact, racial preferences either confirm whatever racial stereotypes students might bring with them to college or create those stereotypes in the first place. This truth, and the facts that lie behind it, should form a core part of sffa’s argument to the Supreme Court on appeal. Students admitted with academic qualifications far below those of their non-racially preferred peers struggle to keep up in classes whose instruction is pitched to a level of knowledge that they have not yet mastered. The so-called “beneficiaries” of racial preferences overwhelmingly end up at the bottom of the academic curve. They switch out of more demanding majors, above all in the stem fields, or drop out of college entirely.

Ideally, college admissions would be purely meritocratic and objective, selecting students on the basis of academic qualifications alone.

The effect of this academic mismatch is best demonstrated in law schools, since they have objective class rankings based, in the first year at least, on blind grading. Every minimally selective law school employs maximal racial preferences. At the end of the first year of legal education, 51 percent of black students in a large nationwide sample were in the bottom tenth of their class, compared to 5 percent of white students, according to an analysis by the ucla law professor Richard Sander. Two-thirds of black students were in the bottom fifth of their class. Only 45 percent of black law graduates passed the bar on their first try, compared to 80 percent of whites. Many failed to pass the bar at all after six attempts. Such results, readily observable by students but banned from public acknowledgment, are not a way to break down racial stereotypes.

They are a way, however, to stoke the academic grievance industry. A Harvard committee on diversity, hastily cobbled together after sffa filed its suit, warned that any diminution in Harvard’s ability to employ racial preferences would exacerbate the “ongoing feelings of isolation and alienation among racial minorities in Harvard’s community.” Those feelings of “isolation and alienation” are created by preferences that put racial minorities at a competitive disadvantage in the classroom. Awaiting those struggling students is an army of diversity bureaucrats to tell them that their discomfort is the result of Harvard’s racism. Students and diversocrats then jointly agitate for more diversity admissions, diversity hires, anti-bias training, and such academic racial redoubts as ethnic studies. Upon graduation, these preference “beneficiaries” take their predilection for seeing bigotry where none exists into the world at large, where they inject grievance politics into the media, big business, and government.

In its appeal to the Supreme Court, sffa should point out that artificially engineered diversity results in more segregation, not less. It should challenge the empirically dubious connection between diversity and education. It should decry a system that penalizes in students the very qualities that a university should most value: a passion for academic accomplishment. Ideally, college admissions would be purely meritocratic and objective, selecting students on the basis of academic qualifications alone. Not only is that the fairest, most transparent system, but it would
have the added advantage of putting out of business those legions of admissions bureaucrats who view themselves as artistes crafting an ideal community and whose self-righteous power now determines the very shape of American childhood.

Finally, sffa should broach the painful truth: racial preferences paper over the vast academic skills gap by catapulting minority students into academic environments for which they are unprepared. By allowing the country to turn its attention away from that skills gap, colleges are retarding the cause of racial progress, not advancing it.

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