

ARTICLES

A Libertarian Analysis of *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*

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For most commentators, the Supreme Court decision concerning so-called affirmative action places both Harvard and the University of North Carolina in the same category. They either support or oppose this finding for both schools equally. The present article diverges from that pattern. It ends up supporting this decision but for very different reasons in each case. The University of North Carolina finding is a slam dunk, in this view. But the Harvard finding is far more complicated, resting upon the resolution of the question, Is this really a private or a public university?

This decision,¹ as it concerns the University of North Carolina (UNC), is dead-on, open-and-shut, clearly and fully compatible with the libertarian philosophy.² UNC is a government institution, and that organization³ should be prohibited from treating its citizens differently, at least on the basis of race. Exceptions only exist when required for the job at hand. For example, if the police wish to infiltrate a black (or white) gang, they could hardly employ



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1 *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181 (2023), https://www.supremecourt.gov/opinions/22pdf/20--1199_hgdj.pdf.

2 This is a philosophy of just law. There are three foundational principles of libertarianism. First, the nonaggression principle: it shall be illegal to threaten or initiate violence against innocent people or their property. Second, private property rights are based upon initial homesteading and any transfer compatible with the first principle, such as barter, buying, selling, gift-giving, gambling, inheritance, investing, etc. Third, the major focus of the present article, free association: no one should be compelled to associate with anyone else against his will. For the major articulations of libertarianism, see Rothbard (1998, 2006) and Kinsella (1996).

3 Assuming it is justified to exist in the first place, which many adherents of this philosophy would adamantly deny. In the view of Rothbard (2006; emphasis added by present author), "For centuries, the State (or more strictly, individuals acting in their roles as 'members of the government') has cloaked its criminal activity in high-sounding rhetoric. For centuries the State has committed mass murder and called it 'war'; then ennobled the mass slaughter that 'war' involves. For centuries the State has enslaved people into its armed battalions and called it 'conscription' in the 'national service.' For centuries the State has robbed people at bayonet point and called it 'taxation.' In fact, if you wish to know how libertarians regard the State and any of its acts, simply think of the State as a criminal band, and all of the libertarian attitudes will logically fall into place." For more in this vein, see Block (2005); Casey (2018); DiLorenzo (2010); Dominiak and Wysocki (2022); Guillory and Tinsley (2009); Hoppe (2011); Huebert (2010); King (2010); Long (2004); McConkey (2013); Molyneux (2005); Murphy (2005); Powell and Coyne (2003); Rothbard (1998, 2006); Salerno (2020); Smith (2017); Stringham (2007); Tinsley (1999); Woods (2014).

a white (or black) person to do so. This hardly applies to UNC. Thus, this institution of higher learning has no right whatsoever to discriminate against whites, Asians, or anyone else in admissions or as regards anything else for that matter. Pigment should be entirely irrelevant to all such decisions.

Nor should a public university be able to discriminate on the basis of any other characteristic, up to and including intelligence. As it now happens, UNC most certainly does discriminate regarding this category: it accepts students for admission based on high school grades and entrance exams such as the SAT. Less intelligent people may thus be excluded. But why should a public institution be allowed to discriminate on this basis? Neither the sanitation nor the fire department does any such thing, nor are the police or courts guilty of such disparate treatment of citizens based on intelligence. Rather, they treat all members of society equally.

I full well realize that if UNC and public universities were prevented from such discriminatory behavior, this would be their death knell, because even the grading system—and not only admissions—would have to go. Where is the justice in giving smart students better grades and failing out those who earn an F. Again, other government agencies do no such thing. But if this did not occur—if all students had to be treated equally regardless of intelligence—learning would be all but impossible. However, as a libertarian, this eventuality does not concern me in the slightest: under this system, it is not a proper role of government to be involved in education in the first place. The utter failure of the public sector of our educational system, due to these stringent but justified requirements, would merely shift all students to the private sector, and this would be entirely compatible with the freedom philosophy.

Harvard, however, is entirely a different matter. In sharp contrast to UNC, it is a private organization. As such, it is entitled to free association. No private person, or group thereof, should be compelled to associate in any manner, form, or shape with anyone else against his or its will. The problem with slavery, rape, and other such crimes is that the victim is compelled to associate with the criminal perpetrator in each case. If the owners of Harvard want to accept for admission only a limited percentage of Asians, Jews, whites, and members of other such high-performing groups—that is, if they wish to discriminate against what they regard as excessive numbers of students from these sources—they have every right to do exactly that. Similarly, historically black universities should enjoy the same options and indeed must do so if they wish to preserve their traditions.⁴ And the same applies to religiously oriented universities, such as Brigham Young University, which may wish to limit its community to Mormons, to Yeshiva University and Jews, or to the

⁴ Whether this is wise or ethical is an entirely different matter, completely irrelevant to libertarian theory.

dozens of Catholic universities and the members of their communities. This argument is so powerful that, indeed, the lawyers for Harvard were derelict in their duty to defend their client on this ground of free association; if they were doing their job, they would have emphasized this consideration. Case closed.

Or is it? No, we go too quickly here. There is an issue that can be raised against Harvard on this ground: Is it really a private institution, deserving of the rights of free association?

One strike against such a status is that this college receives massive amounts of government money (see Adams 2020). There are only twenty-two institutions, such as Grove City College and Hillsdale College, in the entire country that accept not a penny of government money.⁵ They and only they, on this criterion—not Harvard and its ilk—would be justified in engaging in racial discrimination (not that they do, but that is another matter).

This is indicative but not definitive. A state that taxes more revenue than would be justified from a limited-government, free-enterprise point of view⁶ is in effect a robber gang. That certainly pertains to the present situation. As such, any innocent person or group would be justified in relieving this illicit organization of these ill-gotten gains. Thus, Harvard's racist practices can escape legal opprobrium, at least on these grounds of accepting government money.

A more serious criticism of the supposed private status of Harvard concerns the issue of the deep state or ruling class (see Block 2006; Burris 2012). The latter description is somewhat out of fashion among libertarians, given its Marxist antecedents. But this is one rare issue upon which libertarians and communists can make common cause: the *Übermenschen* exploit the *Untermenschen*. Of course, these schools of political economy differ, and differ widely, on the specifics. For the one group, the criminals are businessmen, capitalists, and profiteers—landowners in particular and the bourgeoisie in general. For the other, the guilty parties are the deep state and all its minions, including corporate or woke capitalists, labor unions, bureaucrats, and, of course, (excessive) government.

⁵ Here is a list of them per Clancy (2017): Aletheia Christian College (Idaho), Bethlehem College and Seminary (Minnesota), Boyce College (Kentucky), Christendom College (Virginia), Faith Bible College (Maine), Grove City College (Pennsylvania), Gutenberg College (Oregon), Hildegard College (California), Hillsdale College (Michigan), Mid-America Baptist Theological Seminary (Tennessee), Monticello College (Utah), Mount Liberty College (Utah), New College Franklin (Tennessee), New Saint Andrews College (Idaho), Patrick Henry College (Virginia), Pensacola Christian College (Florida), Principia College (Illinois), Sattler College (Massachusetts), Southern Baptist Theological Seminary (Kentucky), Southwestern Baptist Theological Seminary (Texas), Weimar University (California), Wyoming Catholic College (Wyoming).

⁶ That is the moderate libertarian position; the anarcho-capitalist libertarians would aver that no tax above zero is justified.

What then is the case for considering Harvard as part and parcel of the ruling class—indeed, not merely a member of this nefarious group but a strong leader of it, perhaps located at the very apex? The case is simple and overwhelmingly powerful. The list of Harvard graduates and professors who have entered (illegitimate) government service is legion. There is a large revolving door between members of the Harvard community and statism (see Douthat 2006).

And what is actually taught at this world class university?⁷ Apart from perhaps as much as 1 percent of the faculty, and not counting apolitical fields such as mathematics, physics, and chemistry, its professors are virtually all socialists and government interventionists. Yes, Robert Nozick taught there too, but he is the exception who proves the rule.

Thus, libertarians can support the Supreme Court finding not only against the racist admission policies of UNC but also against Harvard.

A referee of this journal questions the link between the idea of “stealing” from the predatory state and discrimination in admissions. What is the analytical link between seizing back one’s stolen property and freedom of association? In my view, there is no link between the two, apart from the fact that both are elements of political economy. The position I take is that the reason why public bodies should not discriminate is indeed because they receive public funds; if they did not, they would not be public bodies and thus would be justified in discriminating to their hearts’ content. I reject the notion that they may not discriminate because civil rights law requires public bodies not to refrain from so doing. Civil rights law is for the most part contrary to libertarianism. The matter of public funding certainly offers evidence that they are public bodies.⁸ I do not believe it is logically possible for private individuals to “steal” back their funds from the state. Robbery is a crime, while relieving the government of its ill-gotten gains is a virtue.

What about legacy admissions? This appears to be the new rallying point of the Left. Baked in their desire for racism by the Supreme Court, they are determined that the Right not keep its pet program of giving a boost in admissions to the children and grandchildren of previous students,

7 Actually, world class is something of an insult. A more accurate appellation would be “most prestigious university on the planet.”

8 But it is not definitive. To respond fully to this query, we must resort to libertarian ruling class theory, according to which members of this category are statist, but not all who receive government money should be counted as such. In the view of Rothbard (2018) on this matter, “All States are governed by a ruling class that is a minority of the population, and which subsists as a parasitic and exploitative burden upon the rest of society. Since its rule is exploitative and parasitic, the State must purchase the alliance of a group of ‘Court Intellectuals,’ whose task is to bamboozle the public into accepting and celebrating the rule of its particular State. The Court Intellectuals have their work cut out for them. In exchange for their continuing work of apologetics and bamboozlement, the Court Intellectuals win their place as junior partners in the power, prestige, and loot extracted by the State apparatus from the deluded public. The noble task of Revisionism is to de-bamboozle: to penetrate the fog of lies and deception of the State and its Court Intellectuals, and to present to the public the true history of the motivation, the nature, and the consequences of State activity. By working past the fog of State deception to penetrate to the truth, to the reality behind the false appearances, the Revisionist works to delegitimize, to desanctify, the State in the eyes of the previously deceived public.” For more on this, see Block (2006); Burris (2012); Domhoff (1998); Donaldson and Poynting (2007); Hughes (1977); Kolko (1963); Mises (1978); Oppenheimer (1975); Raico (1977); Rothbard (2018).

particularly those whose parents donated heavily to their alma maters. The evil forces of diversity, equity, and inclusion, having been balked by the students-for-fair-admissions case, are now more intent upon ridding admissions of policies which favor the children of previous students, since they are disproportionately white.

Should public universities (including Harvard!) be allowed to engage in this type of racial (in effect) discrimination? Of course not. We have already established, at least to our own satisfaction, that public universities (including Harvard!) should be compelled to refrain from all racial discrimination, whether direct, as in “affirmative action,” or indirect, as in this case. Apart from a mere handful of all institutions previously mentioned, this applies to pretty much all other universities.

We cannot end this discussion without at least mentioning the flaws in affirmative action, apart from its injustice. If we want to cure cancer and other dreaded diseases, extend life, stop war and crime, fight poverty, establish colonies on the moon and Mars, etc., we shall need our best team to accomplish these tasks. So-called affirmative action places our benchwarmers on the front lines in these endeavors. This policy is thus antilife.⁹

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⁹ See Block (1992, 1998); Block, Snow, and Stringham (2008); Block and Williams (1981); Cingos (2013); Derbyshire (2012); Gordon (1998); Levin (1987); Mercer (2003); Block and Mulcahy (1997); Sowell (1990); Wax (2022); Block, Whitehead, and Hardin (1999); Whitehead and Block (2004); Williams (2011); Woods (2004).

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