Unequal protection

In the first of three pieces on race-based preferences around the world, we look at America's pending Supreme Court decisions on diversity at universities

Making history in 1964Ms Fisher has her day in court
WILLIAM POWERS is the president of the University of Texas at Austin (UT-Austin). Lino Graglia holds an endowed chair at its law school. Both have kindly demeanours, impressive records and that crucial perk of academic success, offices with great views: Mr Powers looks out over the heart of the university's campus, Mr Graglia at its football stadium.

They also hold strong and opposing opinions on whether admissions to their state-run university ought to take account of race. Mr Powers believes that using "race as one factor in an overall holistic view of the candidate" helps the university build a diverse campus, an achievement which has "an educational value for all of our students". Mr Graglia thinks "lower[ing] standards to admit members of preferred groups" is "a bad idea".

America has a number of policies and practices designed to increase the presence of minorities in various areas of life from which they have historically been excluded. But the role of such affirmative action in university admissions has garnered the most attention. Schools and universities provided many of America's desegregation battlegrounds. And gaining entry to America's elite universities is difficult; the perception, right or wrong, that race can in some circumstances trump merit strikes many as unjust, not least because universities play a large role in social mobility.

The Supreme Court is about to weigh in on the matter. In March it agreed to hear a case that could determine whether a state may ban affirmative action in university admissions on the basis of a referendum. In 2006 a majority of Michigan's voters approved such a measure, but last November a federal appellate court ruled that the measure violates the equal-protection clause of the constitution, which requires states to treat all citizens equally, by preventing affirmative-action supporters from pressing their case to individual universities. And the court will soon rule on a suit brought against UT-Austin by Abigail Fisher, a white woman who was not admitted to the university.

Non-discrimination discrimination

Ms Fisher contends that by rejecting her at the same time as it accepted minority candidates with less impressive academic records UT-Austin violated the equal-protection clause. The university contends that the state's "compelling interest" in having a diverse student body justifies taking race, among many other factors, into account when judging applications.

In a 2003 ruling, Grutter v Bollinger, the Supreme Court recognised that such an interest existed. But in her majority opinion Sandra Day O'Connor said that the court expected the use of racial preferences to further that interest would, within 25 years, no longer be necessary. Since John Roberts became chief justice in 2005 the court has grown increasingly sceptical of race-conscious laws. In a 2007 opinion Justice Roberts wrote: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

If Ms Fisher wins, universities may find their ability to practise affirmative action curtailed or gone. A decision in favour of the state of Michigan in the other case would have a similar effect. Voters have banned affirmative action at universities in at least eight states, and they could do so in more.

Richard Sander, the author, with Stuart Taylor, of a book-length study of affirmative action's effects entitled "Mismatch", estimates that an end to the policy will affect between 20% and 25% of American universities which between them account for around 30% of America's roughly 20m university students. That ending would not be out of step with the national mood, as those state-level bans imply. Many see a world that has outgrown affirmative action. Legally codified racism is a distant memory. In the nation's two biggest states whites are no longer a majority; this will be true in the nation as a whole within a few decades. Before the 1960s, when the foundations of affirmative action were first laid down, most blacks were poor, few served in public office and almost none were to be found flourishing at the nation's top universities, corporations, law firms and banks. None of that is true today.

The Civil Rights Act that Lyndon Johnson signed in 1964 proscribed discrimination on grounds of race. It also explicitly stated that none of its provisions required employers "to grant preferential treatment to any individual or to any group". But American law and policy soon began moving in a different direction. In 1968 the Department of Labour required contractors to have "goals and timetables" for increasing minority representation. In 1971 the Supreme Court ruled that the act forbade "not only overt discrimination but also practices that are fair in form, but discriminatory in operation."

A slew of affirmative-action programmes aimed at correcting that discrimination-in-operation followed. They were intended to boost minority employment and remedy systemic discrimination in hiring and admissions: both worthy endeavours. But because race-based affirmative action is a blunt and gameable instrument, it often helps successful or well-connected applicants rather than truly needy ones.

Diverse opinions

Real progress was made during the era of affirmative action. A 1998 study conducted by William Bowen and Derek Bok (former presidents of Princeton and Harvard) found that in 1960 5.4% of blacks between the ages of 25 and 29 had graduated from college; by 1995 that share had jumped to 15.4%. Blacks went from barely 1% of law students in 1960 and 2.2% of medical students in 1964 to 7.5% and 8.1% by 1995. They almost doubled their representation among the nation's doctors and almost tripled it among America's engineers and lawyers.

But that was not all due to affirmative action. Thomas Sowell, an economist, points out that black education levels began rising, and poverty levels falling, as blacks started to move out of the South in the 1940s and 1950s. And even if Mr Bowen and Mr Bok are correct, and

affirmative action did greatly benefit blacks in the first couple of generations after segregation, it does not follow that it should remain in place today, when most blacks at university are from middle- or upper-class families and many are recent immigrants never touched by pre-1960s discrimination.

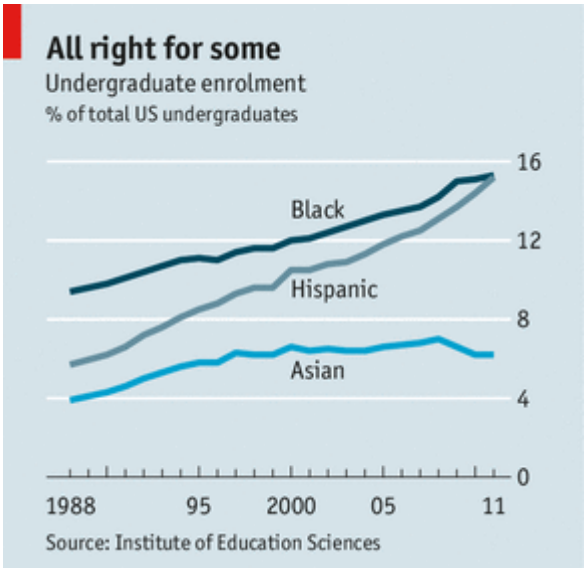
Making history in 1964

Hence the shift in goals from remedying racial injustice to fostering diversity: hence the insistence of university administrators that race is just part of an "overall holistic view" of each candidate. Not everyone believes them. During oral arguments in Ms Fisher's case Sonia Sotomayor, a justice who has acknowledged that she benefited from affirmative action in her early career, said that the UT-Austin's programme "sounds awfully like a quota to me".

Such diversity programmes tend to benefit black and Hispanic applicants; unfortunately, they tend to penalise both whites and Asians. Ron Unz, a software developer and magazine publisher, examined Asian-American enrolment numbers at elite colleges in a 2012 article poignantly titled "The Myth of American Meritocracy". He found that the proportion of Asian-Americans at Harvard rose from around 5% in the early 1980s to more than 20% by 1993. After that, however, the proportion started to decrease, even as the numbers of college-age Asian-Americans rose. Mr Unz found similar patterns at other Ivy League universities. At the California Institute of Technology, by contrast, a first-rate university with race-neutral admissions, Asian-American enrolment rose.

In 1997 Thomas Espenshade of Princeton analysed the scores on SATs, a widely used test for college admissions, that different races needed in order to get into private universities. He found that Asian-Americans' SAT scores had to exceed those of whites by 140 points out of 1,600, those of Hispanics by 270 points and those of blacks by 450 points. A study by Mark Perry of the American Enterprise Institute, a think-tank, found that black students with average grades and test scores were almost three times more likely than Asians with similarly average qualifications to get into medical school.

Given this, it is unsurprising that in the decade after voters in California barred race-conscious university admissions, Asian-Americans entered the state's elite colleges in far greater numbers. The share of Asian-Americans at UC Berkeley rose by nearly ten percentage points, from 37.3% in 1995 to 46.6% in 2005. The number of blacks and Hispanics enrolled fell, particularly at the flagship schools, Berkeley and UCLA.



What was more surprising was that in the entering class of 2000 a record number of black students graduated on time. Mr Sander and Mr Taylor argue that previously low black graduation rates were a result of the mismatch which occurs when a student granted preferential admission winds up at an institution for which he is not academically suited. He begins at a marked relative disadvantage and falls behind quickly. His grades get lower and lower and in the worst cases he loses confidence and fails to graduate.

Mr Sander and Mr Taylor attribute a host of bad outcomes to mismatch. For example, more black than white high-school seniors aspire to science and engineering careers, but once in college twice as many black students as white abandon those challenging fields. Black law students fail the bar exam at four times the rate of whites. Some worry that if the Supreme Court forbids race-conscious admissions, blacks and Hispanics will, in effect, be shut out of elite institutions. Mr Sander and Mr Taylor argue that though a ban might lower the number of blacks at top-tier law schools, it would be likely to increase the number of black lawyers in practice by boosting their rates of graduating and passing the bar exam.

That would not solve the diversity issue that UT-Austin puts at the heart of its case. The issue is not just a fetish of lefty academics. Lewis Powell in 1978 and Justice O'Connor in 2003—both nominated to the Supreme Court by Republican presidents—recognised diversity as a "compelling state interest". Dozens of large corporations—including Dow Chemical, Halliburton, Shell and Walmart—have filed a brief in support of UT-Austin, noting that they have "found through practical experience that a workforce trained in a diverse environment is critical to their business success." A joint brief filed by counsels to several government departments said that the "Department of Defence has concluded that a highly qualified and broadly diverse officer corps is essential to military readiness." A paper by Barbara Wolfe and Jason Fletcher of the University of Wisconsin and Yale School of Medicine has found that there is a positive link between attending a university with greater student-body diversity and higher earnings and family income.

But universities can ensure diversity without race-based affirmative action. After a 1996 ban on race-conscious-admissions by a Texas court (later abrogated by Grutter) public universities in Texas began automatically admitting students who had graduated in the top 10% of their high-school classes. By 2004 the percentage of black and Hispanic students enrolled equalled or exceeded the share before the ban, largely because of America's lamentable residential segregation. (Ms Fisher's suit concerns the race-conscious process for allocating spaces reserved for those who graduate from high school beneath the top decile, as she did.)

Ms Fisher has her day in court

Universities are by and large pretty bad at enrolling poor students, but there are signs of improvement. Some now use a range of demographic data to target financial aid, outreach and, when needed, small preferences to those they feel need it most. Admissions staff need to understand that the constrained lives of poor students—with summer jobs rather than flashy unpaid internships, or with the care of younger siblings squeezing out after-school activities—can lead to less obviously interesting applications than those of richer students.

The mismatch effect could still apply, but Mr Taylor and Mr Sander argue that it need not. Universities can improve their recruiting efforts to find talented low-income students. They can provide intensive summer programmes for students from shaky academic backgrounds. They can free up more spaces for deserving poor students by removing preferences awarded to the children of alumni. Administrators may find it harder and costlier to sort through such socioeconomic data rather than just looking at which race box an applicant has ticked. But they should do so.

Though it has shown itself to be sceptical of race-conscious policies, the Roberts court may not deliver a broad judgment against affirmative action even if it finds for Ms Fisher. It may prefer to use the Michigan case to confirm the right of voters to ban the policy instead. If its ruling in either case helps bring America's experiment with well-intentioned discrimination in universities to a close, though, it will not be because the country has entered, as many said when Barack Obama was first elected, a "post racial" period. It has not. Blacks and Hispanics still lag behind whites in income and education levels, and still exceed whites in incarceration rates. But one set of injustices does not excuse another.

Fonte: The Economist, London, v. 407, n. 8833, p. 23-25, Apr. 27th – 3rd May 2013.