
BOOK REVIEWS

A CONFLICT OF PRINCIPLES: THE BATTLE OVER AFFIRMATIVE ACTION AT THE UNIVERSITY OF MICHIGAN

BY CARL COHEN

Reviewed by Roger Clegg*

Note from the Editor:

This book review discusses the contentious issue of affirmative action. The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. Whenever we publish an article that advocates for a particular position, as here, we offer links to other perspectives on the issue, including ones opposed to the position taken in the article. We also invite responses from our readers. To join the debate, please e-mail us at info@fedsoc.org.

- Richard Rothstein, *The Colorblind Bind*, THE AMERICAN PROSPECT (June 22, 2014), available at <http://prospect.org/article/race-or-class-future-affirmative-action-college-campus>.
 - Janet Napolitano, *How to Diversify a Campus, In Spite of the Supreme Court*, THE WASHINGTON POST (April 25, 2014), available at https://www.washingtonpost.com/opinions/how-to-diversify-a-campus-in-spite-of-the-supreme-court/2014/04/25/e229a030-bbcc-11e3-a75e-463587891b57_story.html.
 - Eric Hoover, *Colleges Seek Diversity, but 'Admissions Calculus' Hasn't Changed*, THE CHRONICLE OF HIGHER EDUCATION (July 21, 2015), available at <http://chronicle.com/article/Colleges-Seek-Diversity-but/231769/>.
 - Fisher v. University of Texas at Austin, SCOTUSBLOG, available at <http://www.scotusblog.com/case-files/cases/fisher-v-university-of-texas-at-austin-2/>; Special Feature: Fisher II Symposium, SCOTUSBLOG, available at <http://www.scotusblog.com/category/special-features/fisher-ii-symposium/>.
 - Carl Cohen, *Affirmative Action Actually Hurts Campus Race Relations*, POPE CENTER COMMENTARIES (September 15, 2015), available at <http://www.popecenter.org/commentaries/article.html?id=3259>.
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This book is important for anyone who cares about the use of race and ethnicity in making university admissions decisions, the practice widely referred to as “affirmative action.” The author, University of Michigan professor Carl Cohen, was not only an observer but also a key participant in the long struggle against the use of racial and preferences at his school. So the book is part memoir, part history, part policy—and all excellent. Because of the part he played in this fight, Professor Cohen has insights, knowledge, and perspectives unavailable to anyone else.

The book begins with some political and legal background, and then turns specifically to the use of racial and ethnic admission preferences at the University of Michigan. Professor Cohen played an important role in uncovering the extent to which race was weighed in admission decisions, which was in turn an important contribution to the legal challenge that followed and that resulted in a pair of Supreme Court decisions in 2003, *Gratz v. Bollinger* (undergraduate)¹ and *Grutter v. Bollinger* (law school).²

Those decisions, while limiting the extent to which discrimination would be allowed, still permitted it, and so the

stage was set for the successful ballot initiative that amended the state constitution in Michigan to ban the use of racial, ethnic, and gender discrimination and preference in state employment, contracting, and education—including university admissions. That ballot initiative was then challenged in a lawsuit, which also found its way to the Supreme Court, and the Court upheld the ban on racial preferences.

I especially enjoyed Professor Cohen’s discussion of some of the relevant social science research (pages 206-08), his debunking of the supposed benefits of racial diversity (pages 241 and 253-55), and his useful litany of the costs of racial preferences (pages 245-46). The appendices of the book are likewise useful, and include the Freedom of Information Act requests that Professor Cohen filed, the 1996 report he wrote on what he found as a result of those requests, and the text of the ballot initiative that was passed in 2006.

I see by the word-count feature on my computer that I still have several hundred words left to write in this review, and so I turn now to the only thing I didn’t like about this book. That is its title, which suggests an equivalence between the two sides that, as the rest of the book documents, does not exist. The documentation is rancor-free, to be sure—Professor Cohen is unfailingly gracious; more on that later—but there’s no denying my conclusion: There is no “conflict of principles” here because the pro-racial-preference side is, by and large, unprincipled.

This is perhaps most obvious in the scofflaw attitudes of universities, which is something I know about, so allow me to

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A CONFLICT OF PRINCIPLES is available for order on [Amazon.com: http://www.amazon.com/Conflict-Principles-Affirmative-University-Michigan/dp/0700619968](http://www.amazon.com/Conflict-Principles-Affirmative-University-Michigan/dp/0700619968).

give some chapter and verse on this.

You would think that, as the twenty-five year clock set in 2003 by Justice O'Connor in *Grutter v. Bollinger* has been ticking—"We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today"—schools that use racial and ethnic preferences would be weaning themselves off them. But this isn't happening, as studies published by the Center for Equal Opportunity show. Our post-*Grutter* study of undergraduate admissions at the University of Wisconsin found the severest discrimination that we've ever seen, before or after *Grutter*. We found the worst law school discrimination we ever saw at Arizona State, also post-*Grutter*. We likewise found severe post-*Grutter* law school and undergraduate discrimination in, respectively, Nebraska and Ohio. And we even found law school, undergraduate, and medical school discrimination at the University of Michigan (before voters banned it)—and indeed worse undergraduate discrimination than there was in the system that the Supreme Court struck down in *Gratz v. Bollinger*. Fewer schools may be using preferences; many states have banned them, and most schools don't use them since they are nonselective.³ But those that continue have doubled down.

Nor have things improved since the Supreme Court's more recent decision in *Fisher v. University of Texas* ("*Fisher I*").⁴ That case required universities to reevaluate their use of racially selective admissions policies; presumably, if the costs of racial preferences were found to outweigh the purported benefits, or if less discriminatory means could achieve similar benefits, the discrimination would have to stop. Consider one obvious potential cost, much discussed in the run-up to *Fisher I*: Recent empirical research provides strong evidence for the "mismatch" theory, which posits that racial preferences cause significant harm to the very students who are supposedly the *beneficiaries* of racial admission preferences.⁵ Even if some academics continue, in the face of all this evidence, to dispute the mismatch effect,⁶ any fair reading of *Fisher I* would require schools to determine that the benefits of using racial preferences outweigh any obvious costs, and one would think that this would in turn include at least a consideration of the possible mismatch effects on minority students.

There is, however, no evidence that universities have undertaken this type of introspection in the wake of *Fisher I*. To the contrary: Last year, the Center for Equal Opportunity sent public records requests to twenty-two public universities seeking information detailing how the institutions had considered the costs of their racially selective admissions policies after *Fisher*. In particular, CEO sought to find out how the universities had considered the mismatch effect on their students. Astonishingly, half (eleven) of those institutions responded that they had *zero* documents responsive to the request.

The response at the remaining eleven universities was no better. Two universities sent documents that confirmed that they had failed to consider the costs of mismatch at their schools. Seven of the institutions refused to honor the request—saying it failed to meet their requirements for some reason or another. One university quoted a price for searching for the documents that was too expensive for CEO—even though CEO engaged in extensive attempts to negotiate around the cost difficulty.

The last request went to the University of Texas itself, which is still going back and forth with CEO on it.

During the same time period as CEO's requests, state-based affiliates of the National Association of Scholars likewise asked universities for documents confirming that they had considered the costs of racial preferences and investigated race-neutral methods of achieving the same benefits. NAS's requests met the same fate. Not a single university responded with documents showing it had seriously considered race-neutral alternatives as *Fisher I* requires, and not a single university responded with documents showing it had seriously considered the costs of their racially preferential admissions policies. Stanford and Yale are destroying student records that would likely open them to charges of illegal racial discrimination.⁷ There are many more such examples of intransigence.⁸

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I hate to end the review on this dyspeptic note, not so much because I regret casting aspersions on the character of those supporting racial discrimination in university admissions, but because it suggests that Professor Cohen is to be faulted for not sharing this dyspepsia. To the contrary: That's to Professor Cohen's credit.

So let me wrap things up by quoting from a tribute to the late Irving Kristol written by Peter Wehner in *Commentary* (a magazine to which Professor Cohen contributes as well, by the way). In it, Mr. Wehner makes an important point, and so I keep this passage on my desk. It's a message implicit in Professor Cohen's book, too—and it's an important message for conservatives generally, in my humble opinion.

A fifth quality of Irving Kristol's that conservatism today would be wise to replicate is what his friend Charles Krauthammer called "his extraordinary equanimity."

His temperament was marked by a total lack of rancor. Angst, bitterness and anguish were alien to him. That, of course, made him unusual among the fraternity of conservatives because we believe that the world is going to hell in a handbasket. That makes us cranky. But not Irving. Never Irving. He retained steadiness, serenity and grace that expressed themselves in a courtliness couched in a calm quiet humor.

When you think about some of the leading figures on the right today, words like "steadiness" and "serenity," "grace" and "calm quiet humor" are not ones that immediately come to mind. Instead the tone and approach we often hear can best be described as apocalyptic, brittle, angry, and embittered. This approach to politics, by the way, was not simply stylistic; it was rooted in a deep understanding of conservatism itself. Kristol believed conservatism was "antiromantic in substance and temperament." "Its approach to the world," he wrote, "is more 'rabbinic' than 'prophetic.'"

It also would help for conservatism to embody a kind of cheerfulness that was a hallmark of Kristol. As his writings show, he was deeply realistic. He certainly didn't sugarcoat things. In fact, he described himself as "cheerfully pessimistic." But one sensed that deep down, the needle leaned a bit more in the direction of cheerfulness than pessimism.

In any event, as long as I've been alive (and well before I was born) there have been people on the right issuing dark warnings of the decomposition and dissolution of the West; people who warn about impending tyranny and America's march toward Gomorrah. I'm all for cursing the darkness when necessary, and have done a bit of it myself now and then. But that cast of mind, without any leavening agent, can lead to despair and radicalism. Those attitudes were unknown to Irving Kristol. He seemed very much at home in the world in the best sense and nudged it along in the right direction when he could. And my how he did.⁹

I will note in passing here that Cohen's tone in this book is quite opposite from that of one of today's leading civil rights commentators on the Left, Ta-Nehisi Coates.

Now, I don't know what Professor Cohen thought of Irving Kristol or whether he would describe himself as a conservative or neoconservative on any issue other than racial preferences (he has served as chair of the Michigan affiliate of the ACLU, and for years as a member of its national board of directors). And "serenity" and "calm" and "quiet" are not the words I would choose to describe Professor Cohen; "animated" and "passionate" and "exuberant" are more like it. But I admire both men, and an important part of each's charm is his "extraordinary equanimity" and "total lack of rancor."

So perhaps I shouldn't even complain about the too-generous title that Professor Cohen chose for his wonderful book.

Endnotes

1 539 U.S. 244 (2003).

2 539 U.S. 306 (2003).

3 Note that, where schools are not using racial preferences, students continue to receive a perfectly good education, showing that racial discrimination is not necessary.

4 133 S. Ct. 2411 (2013).

5 Gail Heriot, *A "Dubious Expediency": How Race-Preferential Admissions Policies on Campus Hurt Minority Students*, THE HERITAGE FOUNDATION SPECIAL REPORT, No. 167 (August 31, 2015). See also RICHARD SANDER & STUART TAYLOR, JR., *MISMATCH: HOW AFFIRMATIVE ACTION HURTS STUDENTS IT'S INTENDED TO HELP, AND WHY UNIVERSITIES WON'T ADMIT IT* (2012).

6 See Richard Sander, *A Reply to Critics*, 57 STAN. L. REV. 1963 (2005), available at <http://www2.law.ucla.edu/sander/Systemic/critics/ReplyCritics.pdf> (the pioneer of mismatch theory summarizes criticisms of the theory and responds to them).

7 Peter Schmidt, *Students' Requests for Their Admissions Records Prompt Colleges to Purge Documents*, THE CHRONICLE OF HIGHER EDUCATION (March 20, 2015), available at http://chronicle.com/blogs/ticker/students-requests-for-own-admissions-records-prompt-colleges-to-purge-documents/95831?cid=at&utm_source=at&utm_medium=en.

8 See, e.g., Roger Clegg, *Scofflaw Universities*, NATIONAL REVIEW ONLINE (July 22, 2015), available at <http://www.nationalreview.com/phi-beta-cons/421439/scofflaw-universities-roger-clegg>; Richard D. Kahlenberg, *How a New Report May Hasten the End of Racial Preferences in Admissions*, THE CHRONICLE OF HIGHER EDUCATION (July 23, 2015), available at <http://chronicle.com/article/How-a-New-Report-May-Hasten/231837/>; Sara Harberson, *The Truth About 'Holistic' College Admissions*, LOS ANGELES TIMES (June 9, 2015), available at [http://www.latimes.com/opinion/op-ed/la-oe-harberson-asian-american-](http://www.latimes.com/opinion/op-ed/la-oe-harberson-asian-american-admission-rates-20150609-story.html)

[admission-rates-20150609-story.html](http://www.latimes.com/opinion/op-ed/la-oe-harberson-asian-american-admission-rates-20150609-story.html); Roger Clegg, *Lee Bollinger's Mask Slips*, NATIONAL REVIEW ONLINE (September 17, 2014), available at <http://www.nationalreview.com/corner/388205/lee-bollingers-mask-slips-roger-clegg>; Brief for Richard Sander as Amicus Curiae, Fisher v. University of Texas, No. 14-981 (2015), available at <http://www.scotusblog.com/wp-content/uploads/2015/09/Sander-brief-for-Fisher-v-University-of-Texas-corrected.pdf>.

9 Peter Wehner, *A Cheerful Conservative*, COMMENTARY (May 12, 2014), available at <https://www.commentarymagazine.com/politics-ideas/conservatives-republicans/a-cheerful-conservative/> (emphasis added).

