

actual calculation of costs and benefits. Here, Judge Posner rarely gets down to specifics, assuming for the most part, again, that the Government's assessment of the benefits of a given "national security" measure *must* be accurate. But it is exactly here that many people—including many conservatives—would disagree with him. How do we know that the Government's assessment of the benefit of a particular policy is correct? The Government has repeatedly mistaken the benefits of particular security policies—witness the miscalculations in Iraq, the U.S. VISIT entry-exit program for foreigners, or even the imprisonment of U.S. citizens Brandon Mayfield and Donald Vance. How do we know whether the Government's assessment is accurate unless the Government is forced to make its case publicly? Or at least in camera, in an adversarial court setting (perhaps under the tried-and-true methods of the Classified Intelligence Procedures Act)? Posner favors the Government's position because he doubts the ability of judges to "bone up" on modern terrorism, but he understates the case when he says that "the judiciary... has no machinery for systematic study of a problem [like terrorism]." In fact, the adversarial system is such a problem-solving process—one that is used successfully to solve new and complex problems every day.

Early in the book, Posner briefly discusses his theory of constitutional decision-making; then turns to the individual topics of detention, interrogation, electronic surveillance, free speech, and profiling. In very cursory treatments of these complex topics, he raises many questions, but rarely brings the discussion to a satisfying conclusion. He dismisses, for example, the idea of an alternative to traditional habeas corpus proceedings for suspected terrorists, arguing that civilian courts should decide in the first instance whether someone is an enemy combatant subject to a trial by military tribunal. Why are civilian courts better able to decide whether a person captured on the battlefield is a combatant? We are not told. Posner does not mention the traditional forum for such decisions—the Article 5 hearings authorized by the Uniform Code of Military Justice.

It is perhaps Judge Posner's chapter on constitutional and judicial decision-making that will cause the most angst for conservative readers. Rejecting such venerable theories as Originalism and deference to precedent, Judge Posner argues that constitutional rights are not created by the constitutional text; rather, "the principal creators are . . . the justices of the Supreme Court... heavily influenced by the perceived practical consequences of their decisions rather than [] straitjacketed by legal logic." This statement appears to be a plug for result-oriented jurisprudence, which may not be a comfort to those who prefer less "subjective" approaches. Judge Posner's statement that "constitutional law is fluid, protean, and responsive to the flux and pressure of contemporary events" sounds much like Justice William Brennan's constitutional philosophy.

Posner's stance on other controversial issues is perhaps worthy of the label "pragmatic," but not comforting to those who prefer clear rules. He seemingly favors coercive interrogation techniques and torture when "necessity" requires it—but unlike Alan Dershowitz, who has famously argued that courts should ratify this use in advance, prefers the approach taken by Jack Bauer of "24"—act first and ask the lawyers later. Judge

Posner approvingly terms this kind of "pragmatic" approach to obtaining information "civil disobedience." (Query whether sitting federal judges should be hinting that it is acceptable for federal officials to break the law in this fashion.)

There are other highly tendentious assertions in the book. Posner states, for instance, that "[a]lthough there is a history of misuse by the FBI, the CIA, and local police forces of personal information collected ostensibly for law enforcement and intelligence purposes, it is not a recent history." In fact, such misuse is relatively common and growing as database-sharing increases and more government agents have access to valuable personal information. Government employees are no more trustworthy today than in the past. Convicted FBI Special Agent Robert Phillip Hanssen, one of the national security professionals Judge Posner trusts to make better decisions than federal judges, was not a product of the World War II era but the modern era of computers and the Internet.

The most interesting part of the book for those desiring a substantive discussion of emergency powers is actually the conclusion, wherein Judge Posner races through several theories of how democracies (and Constitutions) should handle the problem of national emergencies. The brevity of the discussion, however, leaves the reader wishing this section were larger, not relegated to an abbreviated conclusion.

Is it always true that one must trade liberty for security? Or are there security benefits to civil liberties? In the end, Judge Posner never confronts this argument. He hints at the idea ("Civil liberties can even be thought of as weapons of national security, since the government, with its enormous force, is, just like a foreign state, a potential enemy of the people."), but throughout the book fails to confront the matter squarely. In fact, there is a growing body of evidence that there are substantial security benefits to maintaining civil liberties, and that these benefits are overlooked by those who adopt a narrow view of security. Despite these drawbacks, it must be said, *Not a Suicide Pact* is provocative and eminently readable. It has the flavor of a stimulating and timely dinner conversation with one of America's leading intellectuals. And that Judge Posner is.

The Chosen: The Hidden History of Admission and Exclusion at Harvard

BY JEROME KARABEL

Reviewed by Gail Heriot*

The modern university got its start on September 2, 1945, on the decks of the U.S.S. Missouri, when representatives of Emperor Hirohito and the Imperial Japanese Army unconditionally surrendered to the Allied Forces. The end of the war meant that millions of American men and women would be coming home to resume lives that had been interrupted by war. Many hoped to enter college. Thanks to the G.I. Bill, signed into law a year earlier by President Franklin Delano Roosevelt, their hopes were within reach.

Some observers worried that America's colleges and universities would be overcrowded. These worries were, of

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course, borne out. Desks and chairs were in short supply; classes in Quonset huts were common. But everyone understood this problem to be temporary. New lecture halls would be built, furniture moved in, bookshelves stocked. It was just a matter of time. Others worried that academic standards at the prestigious schools would deteriorate. This concern proved unfounded and in retrospect almost laughable. With the larger pool of applicants to draw from, selective colleges and universities could afford to be even more selective. Average academic credentials of college freshmen began their inexorable climb.

Intentionally or not, higher education was transformed. No longer was it largely the province of established social elites; it became available to the great and growing middle class. And this went beyond the initial G.I. influx. As veterans headed for college, so did their sisters, brothers and, eventually, children. The legacy of the G.I. Bill was to make a college education an ordinary part of middle-class American life.

In years past, many had regarded prestigious institutions like Harvard, Princeton and Yale to be essentially gentlemen's finishing schools; (in some cases, ladies' finishing schools). Gaining entry was not overwhelmingly difficult for those who had completed the required course work, had the money, and, at least at many schools, were not too ... uh ... Jewish. Once admitted, outside of a few special programs, Ivy Leaguers were not expected to burn the midnight oil on academic pursuits too often. There was little need. A "gentleman's C" would still open doors after graduation. Long-time University President Francis Landey Patton referred to his beloved Princeton as "the finest country club in America."

By the end of World War II, this was changing. Admission to the top schools was more and more often awarded to the most academically promising students. As these institutions became less dependent upon alumni largesse, and dependent instead on government largesse, fewer children of wealthy alumni could expect a reserved seat simply by virtue of "legacy." Most were going to have to work for it. Although family preferences did not entirely disappear, they receded in importance, and began to be viewed as anachronistic. It was more important for schools to please the government than it was to please their wealthy alumni.

Standardized tests like the SAT had a special role to play in this story. They provided the common yardstick against which all applicants could be measured. The results helped disprove the notion that even the least graduate of a fancy private school was better college material than a public school graduate. More than one Idaho farm girl or son of a Flatbush deli owner was able to beat out a scion of wealth and privilege precisely because of these tests, making the Number 2 pencil as mighty a weapon for the destruction of class privilege as Americans had ever seen.

Were these rising standards a good thing? Some saw the new order in higher education as a matter of justice, the victory of Thomas Jefferson's "natural aristocracy among men," "virtue and talents" triumphing over the "artificial aristocracy, founded on wealth and birth." This view may have been overly romantic. But the new order did have a great deal to do with talent—at least academic talent. In general, Americans liked that. Yes, they might disagree over how to best measure such things, but few

questioned the idea of meritocracy. The various downsides to such a system, not all of which are fully appreciated today even, were thought to be (and are still thought by many to be) vastly outweighed by its benefits. Most important, the competitive environment created by these high standards—and accelerated by Sputnik in 1957 and the Civil Rights Act in 1964—caused prestigious schools to actually earn their prestige with academic excellence. To be sure, some changes occurred only slowly, and some of the problems that beset higher education today were already in evidence. But the twenty-year period after World War II was nevertheless a time of justifiable optimism.

Berkeley sociologist Jerome Karabel tells part of this story in *The Chosen*, but much of it gets lost in this very detailed volume. And Karabel has a different story to tell. Most of his book is devoted to describing how these three schools went from discriminating against Jews to discriminating in favor of African Americans, American Indians, and Hispanics. A stalwart defender of race-based admissions during the 1996 campaign for California's Proposition 209, he regards this as significant progress. The story of the G.I. Bill and the simultaneous rise of academically-based admissions is sandwiched awkwardly in-between—a mere transition period, hardly worth dwelling upon, except to point out its shortcomings.

It is not that Karabel does not recognize the powerful attraction that non-discriminatory, academically-based admissions have for Americans. Indeed, at times they seem to have a powerful attraction for him. For the most part, however, this is a book about the dark side of Ivy League admissions. It is calculated to leave the impression that admissions decisions have long been like sausages—the kind of things you will feel better about if you are not told what went into them. Karabel suggests that we should not be concerned that admissions policies remain somewhat sausage-like today, especially since administrators seem to have quite accidentally hit upon a policy of minority inclusion that is in the public interest.

What Karabel seems to be implicitly asking is: If no one has ever been admitted to the Ivy League based solely on academic criteria, why should anyone demand that be the criterion today? Why should academic standards not be lowered to admit more African Americans, American Indians, and Hispanics? Why should we not extend such preference to low-income students too, since that too would be in the public interest?

Karabel begins his story with Charles W. Eliot, President of Harvard from 1869 to 1909, (well before the days of Jewish quotas). Much of his life was dedicated to ensuring that a Harvard education would be available to all who met the school's academic standards. In his inaugural address, he stated, "The poorest and the richest students are equally welcome here, provided that with their poverty or their wealth they bring capacity, ambition, and purity." Under his watch, Harvard offered more scholarships than any other school in the nation.

Eliot was hardly an enemy of wealth and property: "The children of a democratic society should ... be taught at school, with the utmost explicitness, and with vivid illustrations," he wrote, "that inequalities of condition are a necessary result of freedom." But like many today, he believed that education

was special—without equal educational opportunity and the social mobility that results from it, the legitimacy of any free and democratic society would be suspect. That did not mean that Eliot believed everyone should be entitled to a Harvard education. Writing to Charles Francis Adams, son of John Quincy, and a member of the Harvard Board of Overseers who often opposed his efforts to keep tuition affordable, Eliot clarified:

You said at the start of this discussion about raising the College fee that you wanted the College open to young men who had either money or brains. The gist of our difference lies, I think, in this restricted alternative. I want to have the College open equally to men with much money, little money, or no money, provided that they all have brains. I care [not]... for young men who have no capacity for an intellectual life. They are not fit subjects for a college, whether their parents have money or not.

Many today are surprised to learn that for most of their history admission to Ivy League schools was by entrance examination. All who passed the test—and a few who did not—were welcome to register, often regardless of race or religion. (Harvard had a reputation for openness to African Americans; nevertheless even at Harvard, their numbers were small, perhaps as few as 165 total between 1871 and 1941. At Princeton, the least friendly to racial minorities of the three, African Americans occasionally attended in the 18th and 19th centuries, but not a single African American attended in the 20th century until 1945, and at least one was actively discouraged from enrolling.) Applicants who failed the exam could try again, and the bar was not set particularly high. Class size was thus not artificially limited. If a larger number of students than usual passed the exam, the class would be larger than usual. In significant part, as a result of these entrance examinations, the number of Jews in Ivy League schools skyrocketed during the 1910s, radically altering the composition of classes that had previously been overwhelmingly made up of the sons of prosperous Protestants. By 1923, Harvard's entering class was nearly 25% Jewish, Yale's was 13.3% and Princeton's almost 4%. Columbia's figure may have been as high as 40%, and the University of Pennsylvania's was similar. Most of these students were from families that had recently come to America.

None of this was particularly distressing to Eliot, who was still active on campus despite his retirement as president. It was a serious cause for concern, however, for Harvard's then-President A. Lawrence Lowell, who as a vice president of the Immigration Restriction League, an organization steeped in the new scientific racism, was very much a part of the anti-immigration tide in America. Lowell set out to do something about the "problem."

In her 1979 book, *The Half-Opened Door: Discrimination and Admissions at Harvard, Yale and Princeton*, Marcia Graham Synott documented the efforts to exclude Jews at those institutions in great detail. If anyone had been naive enough to believe that the sudden reduction in Jewish students in the Ivy League in the 1920s had been an unintended consequence of some otherwise legitimate admissions policy, Synott surely dispelled that belief. Karabel adds further detail to Synott's already extensive documentation.

Some of the pressure to limit Jewish enrollment came from alumni. One extreme case from an alumnus who had recently attended a Harvard-Yale game:

Naturally, after twenty-five years, one expects to find many changes but to find that one's University had become so Hebrewized was a fea[r]ful shock. There were Jews to the right of me, Jews to the left of me, in fact they were so obviously everywhere that instead of leaving the Yard with pleasant memories of the past I left with a feeling of utter disgust of the present and grave doubts about the future of my Alma Mater.

Like any college president, Lowell had to worry about the effect that such bitter feelings would have on fundraising. Alumni were the top donors; if they thought the beneficiaries of their generosity would be strangers rather than their children, they might become less generous. If students shared the alumni's bitter feelings, that too could cause problems. Lowell warned:

The summer hotel that is ruined by admitting Jews meets its fate, not because the Jews it admits are of bad character, but because they drive away the Gentiles, and then after the Gentiles have left, they leave also. This happened to a friend of mine with a school in New York, who thought, on principle, that he ought to admit Jews, but who discovered in a few years that he had no school at all.

It is unclear whether these fears were well-founded. Lowell's involvement in the Immigration Restriction League suggests that he may have had such feelings himself and, hence, over-estimated their hold on others. Lowell admitted that "the Hebrew problem," as he called it, was not that Jewish students who passed the entrance examination had character defects, as that term is conventionally defined. Their problem appears to be simply that they were Jewish, and usually members of the working class. They did not fit in among the polished sons of the established social elite. A common complaint was that they were "grinds," "greasy grinds" (in more familiar terms: "nerds").

Lowell wanted to deal with the problem in the way he wanted to deal with immigration—by publicly adopting a ceiling on Jewish enrollment. But he encountered fierce opposition he had not expected. Boston Mayor James Michael Curley declared, "If the Jew is barred today, the Italian will be tomorrow, then the Spaniard and the Pole, and at some future date the Irish." Samuel Gompers condemned the scheme on behalf of the American Federation of Labor. Newspapers across the country editorialized against it. And a frail Eliot fought it with all the energy he had left in his nearly ninety-year-old body. Obviously, many Americans, perhaps even a majority, strongly favored non-discriminatory admissions policies. To its credit, the Harvard faculty rejected Lowell's plan.

Lowell needed a Plan B. And he had one—a disingenuous one. Instead of an explicit quota, he argued for a character assessment of each applicant—a test that he had previously suggested "should not be supposed by anyone to be passed as a measurement of character really applicable to Jews and Gentiles alike." It was not that he thought the entrance examination system was not a good one. Indeed, he admitted that "apart from the Jews," there was no "real problem of selection, the present method of examination giving us, for the Gentile, a satisfactory result." He nevertheless wrote:

To prevent a dangerous increase in the proportion of Jews, I know at present only one way which is at the same time straightforward and effective, and that is a selection by a personal estimate of character on the part of the Admission authorities, based upon the probable value to the candidate, to the college and to the community of his admission.

Lowell knew that such a plan would have superficial appeal to traditional Ivy Leaguers. Indeed, Princeton and Yale were already quietly imposing such a plan. Even Eliot had emphasized the importance of good character and leadership ability in students—(though his administration did not take on the daunting task of deciding which applicants possessed those traits and which did not). Why not explicitly take them into account in the admissions process?

The problem, of course, was that, it required self-deception to believe that admissions officers would try to measure good character fairly and honestly. Further, it is devilishly difficult to do so. Efforts to employ objective measures can always be circumvented. Subjective measures will become too subjective, as admissions officers pick their personal favorites. In practice, “good character” at the Ivy League of the 1920s meant a diploma from one of the “right” prep schools and letters of recommendation from the “right” people. It meant being good with a football; even being tall and handsome. Most of all, it meant not being Jewish.

Lowell’s plan was nevertheless adopted at Harvard in 1926—the year of Eliot’s death. Shortly thereafter, Yale’s Dean Clarence W. Mendell paid a visit to Harvard’s admissions director. He reported that Harvard was “now going to limit the Freshman Class to 1,000.... They are also going to reduce their 25% Hebrew total to 15% or less by simply rejecting without detailed explanation. They are giving no details to any candidate any longer.” Lowell had finally gotten his quota.

The Jewish quotas lasted many years, and remnants of their existence—letters of recommendation, emphasis on sports and, to a lesser degree, other extracurricular activities—are still in place today. Once instituted, such requirements are difficult to terminate. By the late 1960s, the urge to create racial standards re-emerged. This time, however, the goal was to increase the number of African Americans (later, American Indians and Hispanics)—a change Karabel considers benign—though any “inclusion” necessitates another’s exclusion, and Jews have conspicuously lost in both scenarios.

The similarities in principle between the Ivy League of the 1920s and the University of California of present seem conspicuous. Just as Lowell was forbidden by his faculty and fear of bad publicity from engaging in explicit discrimination, University of California administrators are so forbidden by Proposition 209. And yet, the problem of “too many Asians and whites” remains. The solution—like Lowell’s—has been to institute what is called “comprehensive review” in undergraduate admissions.

Karabel does not engage in the debate over modern race-based admissions, noting that the need for racial diversity in higher education is something, he thinks, “we now take for granted.” Moreover, he contends, “The history of admissions at

the Big Three has ... been, fundamentally, a history of recurrent struggles over the meaning of ‘merit.’” For Karabel, this is the central issue. The definition of merit, he believes, “is fluid and tends to reflect the values and interests of those who have the power to impose their particular cultural ideals.” Affirmative action was born of “the political and social upheavals of the [1960s],” which changed the definition of merit “yet again, provoking a seismic cultural shift that elevated the values of ‘diversity’ and ‘inclusion’ to a central place in [Ivy League] selection policies”

But the the meaning of merit has not shifted; rather, the willingness to base admissions on merit has. Indeed, Karabel implicitly acknowledges this himself when, towards the end of the book, he drifts back into using the word “merit” in its conventional idiom. Once the semantics are cleared, the observation splits apart. Of course, the people who are in a position to influence admissions policy will tend to impose their own values and cultural ideals—who else’s would they impose? The question is not whether people tend to impose their own values and cultural ideals when making decisions, *but whether those decisions are consistent with the public interest.* And if not, what should be done about it. The “power relations” argument is a important one, however. During the campaign to pass Proposition 209, Karabel and fellow opponents of the measure frequently argued that admissions policies should be set by academics—not voters or elected officials. They held that state universities need to be insulated from politics, in order to perform the important task of educating. Their view had something in common with Justice O’Connor’s position in *Grutter v. Bollinger*, deferring judgment to the University of Michigan in deciding whether the need for racial diversity was a “compelling purpose” sufficient to justify racial discrimination. In a sense, that opinion insulated state universities from otherwise-applicable law. But if these policies are mere reflections of “power relations,” is such deference defensible?

Karabel describes Harvard, Princeton and Yale as “deeply conservative,” “surprisingly insecure about their status” and “intensely preoccupied with maintaining their close ties to the privileged.” Many of their actions, he believes—including the adoption of race-based admissions—are best understood as efforts to deal with “threats” to “the preservation of the larger social order of which they were an integral—and privileged—part.” According to Karabel, “the adoption ... in the late 1960s of vigorous race-based affirmative action” was “a decision made less in response to the moral claims of the civil rights movement (which after all, had been active since the mid-1950s) than to the palpable threat of social breakdown in the wake of the massive race riots of 1965-1968.”

On this point, I find myself much in agreement; (though, preservation of the social order is not, I think, a sinister goal). For all the talk of the benefits of diversity on campus, the adoption of race preferences was not motivated by such lofty ideals. Preferences were instituted in haste by administrators whose first priority was the prevention of future riots. But all of this starts sounding an awful lot like politics. And if it is all just politics, why should the decision-making authority not be vested in the democratic process?