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VIRGINIA LAW REVIEW ONLINE

VOLUME 109 DECEMBER 2023 185–192

ESSAY

THE ZERO-SUM ARGUMENT, LEGACY PREFERENCES, AND THE EROSION OF THE DISTINCTION BETWEEN DISPARATE TREATMENT AND DISPARATE IMPACT

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In a complaint recently filed with the Department of Education,[1] a group of civil rights organizations allege that Harvard University's legacy preference unlawfully discriminates against minority applicants in violation of Title VI of the Civil Rights Act of 1964.[2] In response, the Department of Education has opened an inquiry.[3] Interestingly, the Complainants deploy the argument made by Chief Justice Roberts in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* (*SFFA*) that "[c]ollege admissions are zero-sum," and so, a "benefit provided to some applicants but not to others necessarily

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[1] Complaint Under Title VI of the Civil Rights Act of 1964 at 3, Chica Project, Afr. Cmty. Econ. Dev. of New Eng. & Greater Bos. Latino Network v. President & Fellows of Harvard Coll., No. 01-23-2231 (Off. of C.R., U.S. Dep't of Educ. July 3, 2023) [hereinafter Complaint].

[2] The organizations include Chica Project, African Community Economic Development of New England, and Greater Boston Latino Network.

[3] Letter from Ramzi Ajami, Regional Director, Off. of C.R., U.S. Dep't of Educ., to Michael A. Kippins, Laws. for C.R. (July 24, 2023), http://lawyersforcivilrights.org/wp-content/uploads/2023/07/Harvard-Complaint-Case-01-23-2231.pdf [https://perma.cc/7J4V-ENKF].

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advantages the former group at the expense of the latter."[4] Using this argument, the complaint alleges that a legacy preference cannot simply be viewed as a benefit to the relatives of alumni; it must simultaneously be viewed as a detriment to applicants who have no relation to alumni, a group we might call "non-legacies."[5] Because minority applicants are disproportionately represented among the non-legacy group, the legacy preference has a disparate impact on minority applicants.[6] The complaint goes on to argue that the preference for legacies has no educational benefit, making this disparate impact unlawful.[7]

I am not sure that Complainants need the zero-sum argument to state a claim for disparate impact, but it certainly strengthens their argument, both logically and rhetorically. What I want to explore is whether Complainants could have done even more with the zero-sum argument. In particular, I am interested in exploring whether the zero-sum argument implicitly erodes the firm doctrinal distinction between disparate treatment and disparate impact, or, at the least, exposes an important conceptual linkage between the two forms of discrimination.

In *SFFA*, Chief Justice Roberts asserts that under current doctrine race can never be a "negative."[8] In his view, "our cases have stressed that an individual's race may never be used against him in the admissions process."[9] None of the other Justices or litigants take issue with that assertion. Rather, Harvard College and the University of North Carolina ("UNC") claim that their admissions policies do not make race a negative; it is a plus for some applicants in some contexts but never a minus.[10] Chief

[4] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2152 (2023).

[5] Complaint, supra note 1, at 3.

[6] Peter Arcidiacono, Josh Kinsler & Tyler Ransom, Legacy and Athlete Preferences at Harvard, 40 J. Lab. Econ. 133, 135 (2022) (modeling the effect of removing admissions preferences at Harvard for legacies and athletes and concluding that the racial composition of the class would be significantly different (and less white) without them).

[7] Complaint, supra note 1, at 24 (emphasizing that "[i]n light of the most recent pronouncement from the Supreme Court, it is difficult to see how fostering 'a vital sense of engagement and support'—one of Harvard's stated goals for Donor and Legacy Preferences—could qualify as an educational necessity sufficient to justify disproportionate impact under Title VI").

[8] *Students for Fair Admissions*, 143 S. Ct. at 2175.

[9] Id. at 2168.

[10] Brief in Opposition at 22, Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (No. 20-1199); Brief in Opposition by University Respondents at 7, Students for Fair Admissions, Inc. v. Univ. of N.C., 143 S. Ct. 2141 (2023) (No. 21-707).

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Justice Roberts finds this argument "hard to take seriously" because university admissions are "zero-sum."[11] In his view, a plus in the admissions process given to Black and Latinx students, for example, is a minus to white students and others not eligible for this benefit. To put the claim in a formal fashion, we might restate it as follows: in contexts like admissions, where the number of positive outcomes is limited, considering Trait X as a plus for Applicant A necessarily requires the decision-maker to treat the *lack* of Trait X as a minus for Applicant B. Let's call this the *Zero-Sum Claim*.

In what follows, I examine the *Zero-Sum Claim* in the context of the recently challenged legacy preference and explore the implications of its underlying logic for the doctrinal distinction in U.S. anti-discrimination law between disparate treatment and disparate impact.

The first part of what the *Zero-Sum Claim* asserts is that if Harvard affords a preference to members of some minority groups, it necessarily advantages those applicants at the expense of applicants who are not members of these groups. The validity of this point was disputed by the Justices who dissented in *SFFA*.[12] In their view, while only some applicants could garner a plus for minority race, all applicants were able to garner plusses for the various forms of diversity that each applicant was able to bring, and so non-minority students were not disadvantaged.[13] In addition, all students benefit from the educational benefits of a diverse student body, so no one is disadvantaged.[14] Whether this part of the *Zero-Sum Claim* holds up, I leave for another day. This Essay proceeds on the assumption that Chief Justice Roberts has the better argument on this point, and that if a college affords a preference to people with Trait X, it advantages people with X *at the expense* of people without X.

One might think that this is all there is to the *Zero-Sum Claim* and that the important argument is the one I've just put to the side. But, while it is easy to miss, the *Zero-Sum Claim* actually goes a step further. Chief Justice Roberts not only claims that the groups not benefited are at a competitive disadvantage, he also asserts that the race of those applicants is treated as a negative in the admissions processes at Harvard and UNC.

[11] *Students for Fair Admissions*, 143 S. Ct. at 2169.
[12] See id. at 2249 (Sotomayor, J., dissenting).
[13] Id.
[14] Id.

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In other words, this competitive disadvantage is the equivalent of giving these non-minority candidates a minus.[15]

How could this be so? After all, no one asserts that Harvard actually subtracts points from the point tally of these applicants. Rather, people without X are at a disadvantage, and are burdened by the preference, because they are ineligible for points that others can accumulate. If admissions spots are scarce and competition for them is fierce (as is the case with respect to admissions at elite institutions like Harvard and UNC), then if two students are similar in other respects but one is an underrepresented minority and the other is not, the one who is an underrepresented minority will have more points. If the number of points determine who is admitted (and let's assume that is the case), then between two otherwise similar students, non-minority status functions as a negative for that candidate.

This argument works by drawing attention to the *effect* of the racial preference. The preference does not itself constitute an aversion for non-minority candidates. Rather, the preferences are *effectively*, *functionally*, a detriment to applicants who are non-minority because of the competitive nature of college admissions. But here's the rub. Current doctrine draws a firm distinction between policies that explicitly treat people differently on the basis of some trait (disparate treatment) and those that have that effect (disparate impact). A racial preference provides a plus to candidates of particular races. It does not formally or explicitly provide a minus to non-minority applicants. Rather, *it has that effect*. Similarly, Harvard's legacy preference provides a benefit to applicants who are legacies. It did not formally, explicitly provide a minus to applicants who are not legacies. Rather, it has that effect.

The Chief Justice's *Zero-Sum Claim* rests, albeit inadvertently, on the assumption that the effects of a policy matter to whether the policy treats the race of an applicant as a negative. In so doing, the argument erodes the distinction between disparate treatment and disparate impact. This feature of the *Zero-Sum Claim* is important. While the logic of the *Claim* does not *dissolve* the distinction between disparate treatment and disparate impact, the fact that the effect of a benefit transforms that benefit into a "negative" takes a meaningful step toward softening the distinction between these two forms of discrimination that are embedded in current doctrine.

[15] Id. at 2169 (majority opinion).

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A few caveats are in order, however, that lessen the force of the argument I have just offered. First, the *Zero-Sum Claim* applies only to contexts that could be described as zero-sum, that is, to situations of scarcity in which people are directly competing against each other for limited resources. Disparate treatment can occur in situations that do not have this structure and so the argument would not be relevant in these other contexts.

Second, the Chief Justice does not need the *Zero-Sum Claim* to find Harvard's admissions policy involves disparate treatment on the basis of race. The fact that members of some races get a plus is sufficient for the policy to constitute disparate treatment on the basis of race. Nonetheless, the opinion contains the further assertion that race can never be used as a negative.[16] It is unclear what work this addition does, as the admissions policies have other constitutional flaws in the Court's view, including that they impermissibly stereotype,[17] lack a clear end point,[18] and that the interests that allegedly justify the use of race are defined too amorphously to satisfy strict scrutiny.[19] Given all these other problems with the admissions policies at issue, the argument that rests on the *Zero-Sum Claim* is potentially superfluous.[20]

Third, the *Zero-Sum Claim* asserts that a benefit to some races is effectively a negative for members of other races. This form differs from the standard disparate impact claim in which a differentiation on facially neutral grounds (test scores, a legacy preference, etc.) is alleged to have a disparate impact on a group defined by a protected trait (race, for example). To say that a benefit for people with X is a detriment for people without X is not the same as saying that a benefit for people with X is a detriment for people with Y. Because disparate impact claims have this latter form, one more step is needed to fully dismantle the distinction

[16] Id. at 2175.

[17] Id. at 2169–70.

[18] Id. at 2170–72.

[19] Id. at 2166.

[20] One might wonder why the Court needs to stress that race may never be used as a negative. Given that the opinion does not explicitly overrule *Grutter v. Bollinger*, 539 U.S. 306 (2003), it does not say that diversity is not a compelling interest, nor that narrow tailoring can never be achieved. Instead, the Court finds that the use of race in the admissions processes of Harvard and UNC do not satisfy *Grutter*. Part of the reason they fail is that race is used as a negative. This argument thus leaves open whether the use of race as a positive is still permissible in contexts that are not zero-sum and thus in which a positive for some is not automatically transformed into a negative for others. See *Students for Fair Admissions*, 143 S. Ct. at 2165–75.

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between disparate treatment and disparate impact, which is likely why the Complainants challenging Harvard's legacy preference made only a disparate impact claim and not, at the same time, a disparate treatment claim.

So, the modest first claim I am making is this: the fact that a benefit to some people becomes a negative to others because of its *effect* in a zero-sum context lessens the clarity of the distinction between disparate treatment and disparate impact. Of this modest claim, I am quite confident. At the same time, I wonder whether it is possible to advance a stronger argument: that Complainants challenging Harvard's legacy preference might have alleged that this policy makes race — specifically, the races of non-white students — a negative.

Let's try out that argument.

1. The legacy preference provides a benefit for legacies.
2. In a zero-sum context, a benefit to people with X becomes a detriment to people without X if the benefit has that effect. [The *Zero-Sum Claim*]
3. Thus, a benefit to legacies is a detriment to non-legacies in the Harvard application process. [Modest Conclusion]
4. Legacies are predominantly white.
5. Thus, the legacy preference not only has the effect of disadvantaging applicants who are non-legacies, it also functionally disadvantages non-white applicants.
6. Therefore, the legacy preference constitutes not only a preference for legacies but also, at the same time, a negative for both non-legacies and non-whites. [Strong Conclusion]

Step six dismantles the distinction between disparate treatment and disparate impact.

Chief Justice Roberts might respond to this argument by disputing that steps 1–5 lead to the conclusion in step 6. To do so, he might point out that a legacy preference will functionally disadvantage *all* non-legacies, but it does not disadvantage all non-white applicants (as some non-white applicants are also legacies). And so, the legacy preference does count as a minus for non-legacies but not as a minus for non-white applicants.

Is this rebuttal effective?

It certainly describes a feature that distinguishes the two cases. But merely pointing out a difference does not tell us that the difference matters. One could hardly explain to two plaintiffs with similar cases that one won and the other lost because the former was wearing a blue shirt

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and the latter was not. So, the question we must consider is whether the difference this rebuttal refers to is a *relevant* difference. Does it matter that all non-legacies will be burdened by the legacy preference and only some, most, or nearly all non-white applicants will be burdened by it?

The answer to this question depends on how strongly to take the implicit premise of the *Zero-Sum Claim*. When Chief Justice Roberts explains why the race-based preference for minority applicants is a negative for those who are not members of the racial groups preferred, he explains his reasoning as follows: "How else but 'negative' can race be described if, in its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been?"[21] According to this rationale, the progression to step 6 is easily defensible. The legacy preference functionally disadvantages non-legacies because, in its absence, non-legacies would be admitted in greater numbers than they otherwise would have been. Check. Now, let's try it for racial minorities. The legacy preference functionally disadvantages non-white applicants because in its absence, members of this group (non-whites) would be admitted in greater numbers.[22] Again, check.[23]

If the reason that the racial preference in *SFFA* makes race a negative for some applicants is that in "its absence, members of some racial groups would be admitted in greater numbers than they otherwise would have been," then the legacy preference at Harvard also makes race a negative for some applicants because in the absence of the legacy preference, members of some racial groups would have been admitted in greater numbers than they otherwise would have been.[24]

At this point, I expect that some readers are still skeptical. Perhaps I have not stated the objection as forcefully as I might. Consider this version of the objection, one that insists that I am stretching the *Zero-Sum Claim* beyond where it will go. The benefit to legacies is *necessarily* a detriment to non-legacies. However, the benefit to legacies is only

[21] Id. at 2169.

[22] Arcidiacono et al., supra note 6, at 153 (modeling the effect of abandoning legacy, athletic, and other preferences in the admissions process and determining that without legacy preferences, the percentage of underrepresented minorities admitted would increase and the percentage of white students admitted would decrease).

[23] See *Students for Fair Admissions*, 143 S. Ct. at 2169. This is precisely the argument Chief Justice Roberts offers in *SFFA* concluding that race is a negative in the admissions processes at issue, because "respondents also maintain that the demographics of their admitted classes would meaningfully change if race-based admissions were abandoned." Id.

[24] Id.

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contingently a detriment to non-white applicants. This difference between the two cases might be thought especially important because if the connection is a necessary one, then perhaps I am not entitled to say that it is the *effect* of the preference that makes the benefit equivalent to a negative. If this objection is a good one, it challenges my assertion that the *Zero-Sum Claim* erodes the disparate treatment / disparate impact distinction.

This challenge is also unsuccessful, however. It is true that the relationship between legacies and non-legacies is reciprocal (everyone is either a legacy or a non-legacy) and so a benefit to a legacy is simply a lack of benefit to a non-legacy. But to make the jump from an absence of benefit to a *negative*, which is after all what the Chief Justice asserts in the *Zero-Sum Claim*, the Court must look outside of the necessary truth that "X" and "not X" stand in a necessary relationship to each other. He must refer to the fact that admissions at Harvard and UNC are competitive and admissions spots are scarce. It is these *contingent* facts about university admissions at Harvard and UNC that makes the racial preference a negative for those not preferred.

As a result, the fact that a legacy preference is also a "negative" to non-legacies is not actually necessary; it is a contingent fact that depends on the competitive environment at the schools. But once this contingency is conceded, the implications of the argument widen. In the competitive zero-sum environment of admissions, a legacy preference also makes race a negative for students of color seeking acceptance to competitive schools like Harvard.

One might wonder about the implications of the argument just offered. If the *Zero-Sum Claim* erodes the distinction between disparate treatment and disparate impact, then courts will need to determine how both should be treated. They could decide that disparate impact claims will be treated like disparate treatment claims (leveling up), or they could instead decide that disparate treatment claims will be treated like disparate impact claims (leveling down). Either is possible. The point of this piece is conceptual, rather than normative, and so it does not provide reasons to favor one approach over the other. That said, I welcome the implicit recognition that the *Zero-Sum Claim* provides for a view that disparate treatment and disparate impact are often different in degree rather than in kind and normatively less different than constitutional doctrine currently acknowledges.