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## A New Thinking about Affirmative Action

Frank H. Wu

*UC Hastings College of the Law*, [wuf@uchastings.edu](mailto:wuf@uchastings.edu)

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# A New Thinking about Affirmative Action

By Frank H. Wu

**A**s a strong supporter of affirmative action, I am often asked to debate the topic. Whether the forum is a television show or a college campus, I always try to decline.

I would like to explain why I do so. A debate is not what we need, and affirmative action is the wrong place to begin. Typically, opponents of affirmative action argue along misleading but effectively divisive lines suggesting that racial quotas benefit unqualified minorities to the detriment of more qualified whites.

Indeed, those of us who support systematic efforts to achieve racial justice can reform the very terms of the discussion. We make a mistake continuing a dispute defined by the other side.

I'd like to offer an alternative framework. I am both more modest and more ambitious than to believe I can persuade people to agree with me on this controversial subject. Instead, I'd like to provoke them into thinking for themselves.

We need new paradigms of civil rights. Rather than engaging in debate, with its angry slogans, rhetorical tricks, and entertainment value, we should strive for dialogue, leading to consensus, and producing action. Serious racial inequalities require a commitment by each of us to what we can do, individually, as well as collectively.

After all, "affirmative action" is only a label given to a wide variety of programs that have been developed as remedies, as a means to an end, in the public and private sectors, voluntarily and through litigation, and out of political compromise. They have in common the use of race to respond to racism. As a matter of constitutional law, their essential feature is that their methods refer to race.

Rather than focusing on affirmative action, we should concentrate on the realities of racial discrimination. Taking up so-called "reverse discrimination" at

the outset shifts our attention away from "the American dilemma," implying incorrectly that the responses to racial bias are the trouble. The better conversation considers three aspects of the issue: problems, principles, and pragmatism.

## Problems

First, we must begin where it is proper to begin. The problem is racial discrimination in all its forms. Of course, our society as a whole has made progress within the past generation. Our advances should be neither denied nor taken for granted.

We no longer see the literal signs of legal segregation—"whites only"—of the Jim Crow era. We have reached a basic understanding that stereotypes are unethical. A majority of us support genuine equality of opportunity.

Yet, we continue to face problems of racial bigotry. These wrongs cannot be dismissed as merely theoretical or historical. They are concrete and they are contemporary. By whatever indication of social science or real-life daily experiences, people of color, and especially African Americans, continue to face dissimilar life prospects compared with whites. Whether it is infant mortality, life expectancy, housing segregation, educational outcomes, employment opportunities, or the glass ceiling, virtually every study continues to confirm that there are differences that correlate to race to greater or lesser degrees. While some of these variations can be attributed to a limited extent to class or disadvantage, even controlling for every other factor, people of color, and particularly African Americans, fare worse by objective criteria.

Furthermore, we are beginning to appreciate that racial discrimination can manifest itself in several ways. There is the obvious and the egregious, but there

also is the subtle and condoned. Both types deserve our attention.

Extreme situations still persist; shocking incidents continue to occur. We all recognize and condemn the hate crimes, in which people are targeted for violence, even death, on the basis of their skin color. We know that a company that adopts a policy prohibiting the hiring or promotion of minorities is violating a moral norm and settled law. Prosecutions of gruesome murders and civil lawsuit settlements in the hundreds of millions of dollars remind us that notwithstanding all of our progress there regrettably remain individuals and institutions that will practice their prejudices.

We may not realize or be willing to acknowledge the prevalence of the other type of racial bias. It consists of unconscious decisions that have unconscionable consequences. They are actions that are perhaps minor in isolation, but which together generate major effects as a cumulative pattern. It may be racial profiling by government officials, which results in suspicions of African American men who are arrested for traffic violations at rates five times higher than that of the general population. Or it may be a law firm that does not in fact have an explicitly discriminatory policy, but simply has never and does not now have any nonwhite attorneys among its ranks. It is a preference, which many of us share despite ourselves, for people who look like us.

This systematic version of racial discrimination is dangerous and contributes to the anomalous cases. It is structural and forms part of our culture, but its nature renders it much more readily denied. It doesn't take a hardcore racist sitting behind a big desk in a fancy office writing memos stating "No Latinos are allowed here" to send the message that some people are welcome while others don't belong. A specific perpetrator might not be identifiable, and may not actually exist in a classic sense of assigning guilt under the common law, but an injustice may be done and be every bit as harmful.

## Principles

Second, we must challenge ourselves to be principled. What is at risk is whether we will all be regarded as stakeholders

in an open society. What is at stake is the identity of our institutions, elite and democratic. Our principles conflict. We profess our beliefs in many ideals, sincerely and in good faith, but some of them are mutually incompatible.

Affirmative action reflects the ideals of integration and equality. It is part of a commitment to communities that are racially diverse, egalitarian, and inclusive. It contains the recognition that we share our fate and that coalitions bringing together groups require lasting commitment.

Likewise, color blindness is an aspiration. The risk, however, is that color blindness, as a hope will be confused with color blindness as a reality. We will become blind not to race but to racism.

The color blindness of ideologues is misleading. Anti-affirmative action propagandists promote color blindness as a legal doctrine and not as a moral principle. Writers such as Gary Becker,

Richard Epstein, and Clint Bolick wish to prevent the government from recognizing race for remedial purposes. They also defend the right of individuals to rely on race for invidious reasons. They rationalize the latter rule as a consequence of freedom of association or the right to contract. They are recommending the worst of all possible combinations, prohibiting public responses to race but promoting private practices of racism.

Even worse, they are joined by a resurgent trend of pseudo-scientific social Darwinism. These writers confirm the worst racial stereotypes, arguing that they are true and therefore form a proper basis for judgment. For example, Richard Herrnstein and Charles Murray, announced in *The Bell Curve* that African Americans are genetically inferior with respect to intelligence, and that intelligence determines socioeconomic status. Dinesh D'Souza responded to

them in *The End of Racism*, refuting their claim with his own pronouncement that African Americans are culturally pathological, thus dooming themselves by their own behavior to their lot in life. They urge people to practice "rational discrimination," by which it is common sense to assume that African American men are dangerous, criminal, or violent—regardless of the overall consequences of such assumptions.

Meritocracy also is an aspiration. Its central notions are that people should set high standards and individuals should work hard. Its underlying premise is that rewards are generally distributed fairly; people receive what they deserve, and vice versa.

Yet, affirmative action at its best compels us to realize that merit comes in many forms and the process can be made more fair. Merit does deserve praise. It just shouldn't be circumscribed too rigidly. Few of us would benefit from a rigid competition in which privileges are distributed on the basis of grades and test scores set in high school or even earlier. We all have skills and talents that cannot be measured by quantifiable means. For example, a professional who is willing and able to move or return to an impoverished neighborhood that otherwise would lack medical or legal services is displaying traits that are meritorious.

We can see this at any university. The higher education setting is where affirmative action has been most significant. At any school, even with its general missions of advancing knowledge, teaching, and learning, merit is evaluated in several ways and should be evaluated accordingly. The faculty is a good example. Among the faculty at every school, there are always a few whom the students hate. Students avoid their classes whenever possible, and attendance at their lectures decreases over the semester. These same professors may have won Nobel prizes or Pulitzer prizes, been awarded major grants, or conducted research that is leading to a cure for cancer, or otherwise brought renown to the school. They have merit as scholars, but not as teachers.

There are, those faculty members whom the students love. Students fill their classes to capacity and applaud at the end of their lectures. They have

## Suggested Reading on Affirmative Action

Dozens of books address affirmative action. Here are ten of the best, with minireviews, presenting all of the possible arguments on the controversial subject.

- The case for affirmative action is presented in Barbara R. Bergmann's, *In Defense of Affirmative Action* (1997), and Charles R. Lawrence III and Mari J. Matsuda's, *We Won't Go Back: Making the Case for Affirmative Action* (1997). Bergman argues that even racial quotas are necessary to achieve integration. Lawrence and Matsuda suggest that community-based programs can be used to achieve social transformation.
- In *The Remedy: Class, Race, and Affirmative Action* (1997), Richard D. Kahlenberg, argues for class-based affirmative action as an alternative policy; Terry Eastland, in *Ending Affirmative Action: The Case for Color-Blind Justice* (1997), offers a principled case against any remedies that incorporate race.
- John David Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (1996), provides an academic study of the historical origins of affirmative action. Lydia Chavez, *Color-Bind: The Campaign to End Affirmative Action* (1998), updates the topic with a journalistic account of California's Proposition 209, from the perspective of both the pro and con campaigns.
- Two excellent case studies show how affirmative action can be successful for not only its direct beneficiaries, but also society generally. Charles C. Moskos and John Sibley Butler, *All That We Can Be: Black Leadership and Racial Integration the Army Way* (1997), discuss why the Army is the only segment of society in which "whites are routinely bossed around by blacks." William G. Bowen and Derek Curtis Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998), analyze affirmative action in higher education with data from the country's most selective institutions.
- Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal* (revised 1995), contains a comprehensive compilation of information on race. George E. Curry, *The Affirmative Action Debate* (1996), has compiled a collection of historical documents and original essays on affirmative action.

# Affirmative Action Roundup

Historically, race has shaped our country's jurisprudence, producing important legal decisions on the issues of slavery and segregation. Today, affirmative action is the race related issue that consumes us and our courts. Two of the most recent cases addressing racial remedies have been decided by the courts of appeal, not the U.S. Supreme Court. Each deserves greater attention than it has been given by the popular media.

In 1996, the Fifth Circuit Court of Appeals decided the case of *Hopwood v. University of Texas* (78 F.3d 932 (5th Cir. 1996)). The court's holding, which struck down the affirmative action program in use at University of Texas, represents perhaps the greatest defeat for supporters of affirmative action. In accepting the plaintiff's claim of reverse discrimination, however, even the Fifth Circuit recognized that affirmative action could be appropriately used in some instances.

Following the U.S. Supreme Court decision in the 1995 case of *Adarand Constructors v. Peña* (515 U.S. 200 (1995)), which concerned federal government contracting set-asides, the Fifth Circuit applied the demanding standard of "strict scrutiny" to affirmative action. Essentially, it treated affirmative action as the constitutional equivalent of chattel slavery—because it was an official use of race, it would be treated as "suspect" regardless of whom it benefited, the history, or the context.

Yet even the Fifth Circuit accepted that the defendants could satisfy the crucial prong of the test, "compelling

state interest," if they could demonstrate that affirmative action was a remedy for present discrimination or present effects of past discrimination. The subtle phrasing is important: past discrimination is not enough, unless it has demonstrable present effects. For the Fifth Circuit—but not explicitly according to the U.S. Supreme Court—racial diversity also was not a satisfactory goal.

The *Coalition for Economic Equity v. Wilson* (110 F.3d 1431 (9th Cir. 1997)) case in the Ninth Circuit followed the passage by California voters of a referendum that ostensibly prohibited racial discrimination but which was meant primarily to abolish affirmative action. On appeal of a preliminary injunction, the appellate court reversed the trial court, which had held in favor of the plaintiffs challenging proposition 209. As with the *Hopwood* case, the U.S. Supreme Court declined to grant certiorari.

The 1997 Proposition 209 litigation was unusual in several respects. It was the result of a ballot measure and the review was of the preliminary injunction. The plaintiffs who supported affirmative action argued that the measure violated equal protection because it altered the political process to prevent racial minorities from seeking legislative enactment of affirmative action. They also argued that it was pre-empted by federal law. The California government has tried and continues to experiment with means of achieving racial diversity, particularly in higher education, while complying with Proposition 209.

These cases are only part of the

story. The U.S. Supreme Court, especially the members urging restraint by the bench, has tried to distinguish between evaluating the merits of policy choices and rendering judgments on constitutional limits. The political dynamics have exaggerated the effects of judicial decisions. Although constitutional theories are important, it may turn out that the more significant issue is whether institutional leaders will seek pragmatic approaches that strive for racial justice while passing legal tests.

Some colleges have responded to *Hopwood* with risk-averse strategies. They have chosen to avoid litigation at the cost of diversity. Other schools, most notably the state-supported University of Michigan, have taken a different stand. They are making the effort, with academic research, educational campaigns, and aggressive lawyering, to persuade the public that affirmative action benefits everyone.

In Texas and California, the consequences of eliminating affirmative action—the much lower numbers of African Americans and Hispanics enrolled at the top campuses—have prompted everyone to consider effective alternatives. These responses will raise the very compromise the late Justice Powell devised in his *Bakke* opinion: The notion that racial diversity forms a "compelling state interest."

Eventually, the U.S. Supreme Court will confront again "the American dilemma" in this new form. As it has in the past, its ruling in the future can contribute to racial justice.

shelves of citations honoring their teaching excellence. These same faculty members, however, may be thought of rather poorly by their academic colleges, or may be utterly unknown because they have published nothing and have developed no original ideas. They have merit as teachers but not as scholars.

None of us is able to excel in each

and every dimension of merit. Applying a one-dimensional meaning of merit would result in over emphasis of one of these factors at the expense of the others.

In many contexts, it becomes apparent that a color blind meritocracy isn't what affirmative action opponents support at all. They are inconsistent in their color blindness and selective in their

meritocracy. They allow alumni preferences in college admissions, which overwhelmingly benefit whites. Alumni preferences favor "legacies"—children of privileged whites of predominantly Protestant background, whose parents (most likely, fathers) attended Ivy League institutions in an era when they recruited from elite East Coast prep schools,

setting maximum limits on Jewish students and enrolling few white ethnics from poor urban origins. At some top universities, the admissions rates for "legacy" children is twice as high as that for the general applicant pool, resulting in many less qualified persons being granted coveted seats in the class. Ironically, while opponents of affirmative action claim it may impose a stigma on beneficiaries, alumni preferences appear to engender the opposite effect of pride. A student can say he is the third generation of the family to matriculate; he is a member of the same dining club as his

## **Racially conscious remedial programs have aided their direct beneficiaries as well as everyone else.**

father; or that building over there is named after his grandfather.

Incidentally, many supporters of this so-called meritocracy also argue for imposition of maximum quotas on foreign graduate students. They do so based on the stereotype of the calculus teaching assistant who can't speak English. Their efforts are color conscious, as their objections are primarily leveled against nonwhite immigrants. Their efforts are also anti-meritocratic, because it is exactly the possibility of competition from these students that they wish to avoid or limit.

In contrast to groups in competitive conflict and individuals pursuing nothing more than self-interest, affirmative action appeals to the better side of human nature. It suggests that we can cooperate on improvements.

### **Pragmatism**

Third, we must consider policies that work. Pragmatism is an American tradition that applies well to affirmative action. As an intellectual movement, pragmatism has been philosophy applied. It means analyzing the consequences of actions rather than considering abstractions. It forces us to ask whether we would be better off or worse off with each of the options we are presented. It does not depend on false either/or dichotomies, choosing between programs that help now or

promises of help deferred.

Pragmatism frames the question. Instead of whether this affirmative action program should be abolished or that affirmative action program should be reformed, we should ask, "what will we do to address racial discrimination?"

We have a series of choices. Considering each in turn makes the case for affirmative action more compelling.

We could do nothing. That would ensure failure. Racial equality will happen neither by accident nor by chance. Racial progress has occurred through a combination of internal and external

forces—grassroots civil rights movements and protests coupled with several important Supreme Court decisions and corporate responsibility. Market forces are powerful and can produce amazing results, but eliminating bias does not appear to be among them. Some people have enough of a preference for negative color consciousness that they will pay the price. Exclusion commands a premium.

We could exhort people to be color blind. Such will is necessary but not sufficient by itself. Attitude changes within families and across generations have been crucial to racial reforms. They are not enough though. Lawyers know well that no matter how strongly stated, admonitions are only so many words to be heeded as much in the breach. Rules require enforcement mechanisms.

We could enact legislation forbidding racial discrimination. The many civil rights acts, with their provisions for lawsuits, have served an important function in reducing racial discrimination. They are no panacea. They respond only to cases with "smoking gun" evidence. Litigation is among the least preferable means for resolving society's disputes. It is after-the-fact, complex, contentious, expensive, inefficient, uncertain, and generates additional conflicts.

Affirmative action, then, becomes a much more attractive response. It too is only a partial measure, but it has been effective. Recent studies have proven

that racially conscious remedial programs have aided their direct beneficiaries as well as everyone else. They also have confirmed that without the use of race the same outcomes could not have been obtained.

Charles Moskos and John Sibley Butler, two respected sociologists, one white and one black, produced the empirical data that tracked the success of the United States Army in its transition from a segregated military branch formed through conscription to an integrated fighting force made up of volunteers. (Charles C. Moskos and John Sibley Butler, *All That We Can Be: Black Leadership and Racial Integration the Army Way* (1997).) William Bowen and Derek Bok, former presidents of Princeton and Harvard, respectively, undertook a comprehensive review of college admissions at the most selective institutions throughout the country, over the course of more than a generation. (William G. Bowen and Derek Curtis Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (1998).)

Both teams of scholars concluded that affirmative action was responsible for the positive transformations of the institutions they examined. They have refuted stereotypes of affirmative action as counterproductive. The beneficiaries themselves have demonstrated, with their accomplishments, that what counts is the content of their character rather than the color of their skin. They have been able to do so only with an opportunity that would not otherwise be available.

The research increasingly is showing that everyone benefits from diversity. In a global economy that is highly competitive, our nation gains nothing if 10 percent of the population is left behind, portrayed with images of inferiority, and sent messages of exclusion. A company or a school that is all white, with no minorities, will not be successful in a diverse democracy.

For all these reasons, affirmative action is just. It deserves to be continued. It can lead to much more.

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*Frank H. Wu is an associate professor of law at Howard University. His book, Beyond Black and White, is forthcoming.*