

Making Sense of the Affirmative Action Debate

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I. INTRODUCTION

No issue is currently more controversial or more divisive than affirmative action. Those who support affirmative action argue that it is an essential technique to remedy the long legacy of racism in American society. Opponents of affirmative action contend that it is reverse discrimination and that it is simply wrong for the government ever to use race in conferring benefits such as government contracts, jobs, or admissions to schools.

Both advocates and foes of affirmative action cloak their positions in noble rhetoric. Supporters of affirmative action describe a history of subjugation of African Americans that includes the horrors of slavery, the government mandated segregation of the Jim Crow laws, and racial discrimination in every facet of society. Opponents, in contrast, speak of the imperative for a color blind society where every person is treated as an individual and evaluated on his or her own merits.

An enormous amount is at stake in this debate. Jobs, admission to colleges and universities, government licenses and contracts, and elected political office are the tangible benefits at issue. More generally, the debate is about how American society should think about and deal with race. Enormous disparities remain between whites and blacks in every measure of educational and economic achievement. Must this be tolerated or can the government use affirmative action as a step towards greater equality?

The major problem with the debate over affirmative action is that it treats affirmative action as if it were one type of government action for a single purpose. Both defenders and attackers of affirmative action frequently fail to recognize that affirmative action can take many forms to achieve many different goals. Far too often, debates about affirmative action involve opponents attacking the most extreme forms of affirmative action, such as rigid quotas adopted

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based on a general desire to help minorities, while supporters defend using race to help proven victims of past discrimination. A meaningful discussion of affirmative action cannot focus on affirmative action as if it is a monolithic concept, but rather must focus on what types of race-based actions are permissible under what circumstances.

Part II of this essay considers the different purposes that affirmative action might serve: remedying past discrimination; enhancing diversity; increasing the political power of minority groups; providing role models; enhancing the wealth and services provided to minority communities. The initial focus of the affirmative action debate should be on which, if any, of those goals are a permissible basis for using race in decisionmaking.

Part III considers some of the forms that affirmative action can take. Techniques of affirmative action in hiring or admissions, for example, can range from efforts to encourage minorities to apply for positions, to goals and timetables, to rigid quotas.

Part IV concludes by arguing that some types of affirmative action are desirable and, indeed, essential under some circumstances. Part IV also responds to some of the major objections to all affirmative action efforts.

The central thesis of this essay is that the debate over affirmative action will be inherently misguided so long as it treats affirmative action as if it were a unitary concept. A meaningful discussion of affirmative action must be particularized, focusing on what specific types of actions are permissible under what circumstances.

For the sake of clarity and simplicity, affirmative action, as used throughout this essay, simply refers to the government's use of race in decisionmaking to benefit racial minorities. Gender-based affirmative action is also an important and related topic, but not the focus of this paper.

Also, the primary focus of this paper is on government affirmative action efforts, although the same analysis often applies when affirmative action is undertaken by the private sector. The primary difference, of course, is that government actions are limited by the Constitution, whereas the Constitution does not apply to private conduct. Because this paper focuses on whether and when affirmative action efforts are, and should be, constitutional, the focus is on government efforts.

II. THE GOALS OF AFFIRMATIVE ACTION

Affirmative action is used to achieve many different objectives. An essential starting point in the debate over affirmative action must

be to identify which goals are permissible, or even compelling, and which are unacceptable.

A. *Remedying Past Discrimination*

The most frequently identified objective for affirmative action is to remedy past discrimination. No one can deny the legacy of racism that has plagued American society. Those who advocate affirmative action aver that it is not enough to stop current discrimination. Efforts must be made to erase the effects of past discrimination, and this necessarily involves affirmative action. Those who oppose affirmative action argue that it is sufficient to prohibit race discrimination and to allow all persons to be considered based on their merits.

The problem is that remedying past discrimination can mean many different things and cannot be treated as a single concept. For example, in its most limited sense, remedying past discrimination can mean providing a benefit to an individual who personally suffered past discrimination. If a person can prove that he was denied a job on account of race, a court order to hire that person is a form of affirmative action; the person is now being hired to remedy past discrimination. Even the most conservative members of the Supreme Court who vociferously oppose affirmative action are willing to accept it under those circumstances.¹ Remedying past discrimination in that limited sense means using race to help a person who is a proven victim of race discrimination.

Remedying past discrimination also can have a broader meaning: it can be used to remedy a class of persons who were the subject of discrimination, even though the benefits are not limited to the individuals that were the proven victims of the discrimination. The Supreme Court's decision in *United States v. Paradise*² is illustrative. A federal district court found that the Alabama Department of Public Safety had engaged in intentional racial discrimination in hiring and promotions.³ As a remedy, the court ordered that every time a white was hired or promoted, a qualified black had to be hired or promoted, until the effects of the past discrimination were eradicated.⁴

The beneficiaries of this order were not limited just to individuals who could prove that they were denied jobs or promotions. The

1. *Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 520 (1989) (Scalia, J., concurring in judgment).

2. 480 U.S. 149 (1987).

3. *Id.* at 153.

4. *Id.*

reality is that many blacks never applied because they knew of the discrimination; therefore, it would be far too limited to restrict the remedy to those who could prove that they personally suffered. The Supreme Court upheld the federal court order as an appropriate remedy for past discrimination.⁵

Similarly, in *Fullilove v. Klutznick*⁶ the Court upheld a federal law that set aside public works monies for minority businesses because it concluded that Congress had found a history of discrimination in the construction industry.⁷ Again, affirmative action was used to help a group that had suffered past discrimination, though the remedy was not limited to those who could prove that they had specifically suffered discrimination.

When affirmative action is employed in a fashion to remedy past discrimination the issue inevitably becomes what type of proof of prior discrimination is needed; how specific must it be? Must it be proof of discrimination by a single department or agency, as in *Paradise*, or may it be proof of discrimination in a more general sector of society, as in *Fullilove*?

Even more broadly, affirmative action might be used to remedy general social discrimination. In other words, those efforts are based on the legacy of racism and discrimination that pervaded all aspects of American society. For example, preferential treatment for minorities in hiring or admissions to schools can be justified in light of the history of discriminatory treatment. In one sense, that approach to affirmative action is about trying to place minorities in the same position they would be in if the centuries of discrimination had not occurred. In another sense, this type of affirmative action is sometimes described as reparations; that is, giving the class of persons who have suffered a form of compensation.

One of the problems with the affirmative action debate is that supporters and foes of affirmative action often mean different things when they discuss affirmative action to remedy past discrimination. Frequently, opponents of affirmative action argue why reparations are not appropriate and they point to other groups that also have suffered a long history of discrimination but do not benefit from affirmative action. In contrast, supporters of affirmative action often speak of remedying past discrimination in a more limited sense of helping the victims, individually or as a class, that have suffered discrimination. The key point, of course, is that it is not enough to

5. *Id.* at 185-86.

6. 448 U.S. 448 (1980).

7. *Id.* at 473, 477-78.

speak of whether affirmative action is justified to remedy past discrimination. There must be a much more particularized definition of what that means.

Within that discussion, there then needs to be consideration of what it means to be a victim of past discrimination. What counts as past discrimination and how particular must the proof be and how narrowly tailored must the remedy be?

B. Enhancing Diversity

Another important objective of affirmative action is enhancing diversity. Entirely apart from remedying past discrimination, race might be used to provide more diversity than would exist through a completely color-blind system.

That particular justification for affirmative action is most frequently invoked with regard to decisions by colleges and universities, both in admitting students and in hiring faculty members. The argument is that race is a powerful factor influencing a person's experiences and perceptions. Therefore, education is enhanced when there is a diverse student body and faculty.

For example, in sixteen years of teaching constitutional law, I have had classes that were almost all white and classes where there were a substantial number of minority students. The discussions about race and affirmative action were vastly different depending on whether there were a significant number of minority students. I have no doubt that my students learned more and benefited more from the discussion when minority students were present.

In *Regents of the University of California v. Bakke*,⁸ Justice Lewis Powell argued that colleges and universities have a compelling interest in having a diverse student body.⁹ Ideally, such diversity would exist through color-blind admissions and hiring policies. But this is still not the case today because of the legacy of discrimination, so affirmative action is used to enhance diversity.

Although increasing diversity is most frequently used to justify affirmative action in the educational context, there are other situations where this goal is invoked. For example, in *Metro Broadcasting Inc. v. FCC*¹⁰ the Supreme Court upheld a federal system to give preference

8. 438 U.S. 265 (1978).

9. *Id.* at 314 (opinion of Powell, J.). In *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996), *cert. denied*, 116 S. Ct. 2581 (1996), the Fifth Circuit held that achieving diversity in a student body is not a compelling interest.

10. 497 U.S. 547 (1990).

to minority businesses in licensing of broadcast stations.¹¹ Justice Brennan, writing for the Court, emphasized the value of diversity of views and programming over the broadcast media and accepted the government's argument that racial diversity in licensing will enhance this goal.¹² Discussing affirmative action to enhance diversity requires consideration of the circumstances where diversity is valuable, the extent of diversity without affirmative action, and the degree of diversity that should be sought through affirmative action. Rarely, though, do discussions about affirmative action become that specific.

C. *Increasing the Political Power of Minorities*

The reality is that African Americans, Latinos, and Asians are underrepresented in elected office relative to their proportion of the population. Through much of American history, the franchise was denied to minority voters. Although the Fifteenth Amendment declares that the right to vote shall not be denied on account of race, it was met "by a near century of 'unremitting and ingenious defiance.'"¹³ The 1965 Voting Rights Act¹⁴ and its 1982 Amendments¹⁵ were crucial to ensuring the enfranchisement of minorities and the ending of techniques designed to dilute their political power. Even after the law ordered that minorities be allowed to vote, and even after discriminatory techniques such as literacy tests were abolished, there still remained ways in which minority political strength was diluted such as with at-large elections and by dividing the minority population into different districts.

One possible goal of affirmative action is enhancing minority political power, such as by drawing election districts to increase the number of minority representatives likely to be elected. Again, though, the argument can take many different forms and care must be taken to identify the precise reason why such an effort is undertaken.

11. *Id.* at 552.

12. In June, 1995, the Supreme Court overruled *Metro Broadcasting*, though it did not focus on the issue of the value of diversity in broadcast licensing. See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995). *Metro Broadcasting* held that the appropriate constitutional standard in reviewing federal affirmative action efforts is intermediate scrutiny—whether the government's action is substantially related to an important government purpose. 497 U.S. at 564-65. In *Adarand*, the Court held that strict scrutiny should be used in reviewing federal affirmative action efforts—whether the government's action is necessary to achieve a compelling government purpose. 115 S. Ct. at 2113.

13. *Miller v. Johnson*, 115 S. Ct. 2475, 2501 (1995) (Ginsburg, J., dissenting) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966)).

14. 42 U.S.C. § 1973 (1994).

15. 42 U.S.C. §§ 1973, 1973b, 1973aa-1a, 1973aa-6 (1994).

One possibility is simply using race to group voters because of the likely common interests that track racial lines. As Justice Ruth Bader Ginsburg recently observed: "To accommodate the reality of ethnic bonds, legislatures have long drawn voting districts along ethnic lines. Our Nation's cities are full of districts identified by their ethnic character—Chinese, Irish, Italian, Jewish, Polish, Russian, for example."¹⁶

Race also might be used in drawing political districts to achieve rough proportionality in representation. If a state is 25% African American, election districts might be drawn so that one fourth of them are majority black so as to create the possibility that the representation will parallel the demographics of the population.

Most generally, it might be argued that the only way to remedy the legacy of discrimination is to provide racial minorities political power. That requires drawing election districts in a manner likely to increase the number of minority voters.

It should be noted that recent Supreme Court decisions have been very hostile to using race to increase minority political representation. In *Shaw v. Reno*¹⁷ in 1993, in *Miller v. Johnson*¹⁸ in 1995, and in *Bush v. Vera*¹⁹ and *Shaw v. Hunt*²⁰ in 1996, the Court strongly disapproved using race in drawing election district lines and said that it would be tolerated only if strict scrutiny is met.

D. Providing Role Models

Affirmative action also can be justified as a way to provide role models in society. For example, affirmative action in hiring faculty members can be justified as a means to providing positive role models for minority students. At the same time, white students undoubtedly benefit from seeing minorities in positions of authority and by having these positive role models.

More generally, affirmative action in college and university admissions might be justified because of the likelihood that this will supply good role models in the long term. For instance, increasing the number of black doctors and black lawyers will provide desirable role models in the future.

16. *Miller*, 115 S. Ct. at 2505 (Ginsburg, J., dissenting).

17. 113 S. Ct. 2816 (1993).

18. 115 S. Ct. 2475 (1995).

19. 116 S. Ct. 1941 (1996).

20. 116 S. Ct. 1894 (1996).

It should be noted that the United States Supreme Court has rejected that as a justification for affirmative action. In *Wygant v. Jackson Board of Education*,²¹ the Court declared unconstitutional a school system's plan to lay off white teachers with more seniority instead of minority teachers with less seniority.²² Justice Lewis Powell, writing for the Court, explained that providing role models for black students was not a sufficiently compelling objective to support affirmative action.²³ Justice Powell declared:

The role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose Moreover, because the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices, it actually could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small percentage of black students.²⁴

Evaluating the Court's position requires careful analysis of the importance of role models in society. How important is it to be provided such role models and what degree of affirmative action is necessary to supply the appropriate number? Again, unfortunately, discussion of affirmative action rarely gets this specific.

E. Enhancing the Wealth and Services Provided to the Minority Community

The legacy of discrimination is that minority communities have less access to professional services and, more generally, are more economically disadvantaged than white communities. Affirmative action can be justified as a way to deal with these problems. For example, affirmative action in medical school admissions might be explained as a way to improve the delivery of health care services to communities currently underserved.²⁵ The hope is that training more African American doctors will increase the number of doctors desiring to practice in the African American community.

More generally, affirmative action in awarding government contracts can be justified as a way of benefiting economically disadvan-

21. 476 U.S. 267 (1996).

22. *Id.* at 283-84.

23. *Id.* at 274-76.

24. *Id.* at 275-76.

25. The State of California offered this as one of its justifications for affirmative action in *Regents of the University Of California v. Bakke*, which concerned admissions to the University of California, Davis, Medical School. 438 U.S. 265, 306, 310-11 (1978).

taged areas. Preferences for minority businesses and set-asides ideally will help to cure the enormous disparities in wealth and poverty between whites and minorities.

Again, though, it must be noted that the Supreme Court has been hostile to that rationale for affirmative action. In *Regents of the University of California v. Bakke*,²⁶ Justice Powell explained that there was no proof that training more black doctors would mean that there would be more doctors actually practicing in black communities.²⁷ Also, there might be other ways of achieving that goal more directly—such as by providing incentives for doctors to work in areas that are underserved. More generally, the Court never has accepted affirmative action as a legitimate form of wealth transfer.

The basic question is whether it is permissible to use affirmative action to increase the wealth and services provided to minority communities. Often that argument is not considered separately either because it is seen as politically unpalatable or because it is subsumed in arguments about the need for affirmative action to remedy past discrimination.

F. Conclusion

The five justifications for affirmative action are not exhaustive of all the possible goals that might be advanced. Nor are they mutually exclusive. Particular affirmative action plans obviously might be justified on more than one of those grounds. However, not all of the rationales might be applicable in all circumstances. For example, the desire for diversity might be seen as a powerful reason for affirmative action in college admissions, but it *is less* likely to be used to justify set-asides in awarding government contracts.

The central point is that care needs to be taken in identifying the particular reason for affirmative action in specific circumstances. Affirmative action can be undertaken for many different reasons and meaningful discussion requires attention to the justification in each context.

III. THE TECHNIQUES OF AFFIRMATIVE ACTION

Although the goals for affirmative action are varied, the means of affirmative action are even more numerous. There are a vast array

26. 438 U.S. 265 (1978).

27. *Id.* at 310, 311 n.47.

of techniques for affirmative action depending on whether it is affirmative action in employment, in education, in contracting or licensing, or in political representation.

For example, just in the context of employment there are many different forms that affirmative action can take. Affirmative action can be voluntarily undertaken by a government employer or it can be involuntarily imposed by a court. Affirmative action might be limited to encouraging minorities to apply. Even if the ultimate hiring process is color-blind, it is still affirmative action to the extent that more is done to encourage minorities to apply than is done for whites.

Affirmative action might take the form of aggressive recruitment of minorities for particular positions. Again, even if the decision-making will be race neutral, affirmative action can be active steps to find qualified minorities and encourage them to apply for particular positions.

Alternatively, affirmative action can be through goals and timetables. An employer can declare that its objective is to have a certain percentage of minorities in specific positions by a designated point in time. Goals and timetables have been a key aspect of affirmative action efforts used by the federal Equal Employment Opportunity Commission.²⁸ Goals and timetables also have been extensively used in many states.

Those goals and timetables do not create quotas or set-asides. For example, in California, for state civil service jobs all applicants must score in the top three rankings on state civil service exams.²⁹ No extra points are given for race or gender (although extra points are given to veterans). Gender, race, and ethnicity may be considered by employers in selecting individuals from the lists of those who have satisfactory test scores.

The goals and timetables for hiring for state jobs have been successful in many areas. There is no doubt that affirmative action programs account for an increase in employment of women and minorities, especially in more senior positions. A recent study found that

The composition of the public work force at the higher salary levels went from being more than 90 percent white in 1975 to less than 70 percent in 1993. The percentage of Asian-Americans, African Amer-

28. See, e.g., *Local 28 Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986) (considering the permissibility of goals and timetables).

29. See, e.g., CAL. GOV'T CODE § 19057.1 (West 1993) (professional, scientific and administrative positions or open employment lists); CAL. GOV'T CODE § 19057.2 (West 1993) (management positions); CAL. GOV'T CODE § 19057.3 (West 1993) (Department of Corrections positions).

icans, and Hispanics at those levels went from 3 percent or less per group in 1975—the year after Governor Reagan made California's affirmative action program official—to 9.9 percent, 9.3 percent, and 11.7 percent respectively.³⁰

“Since 1978[,] when the S[tate] P[ersonnel] B[oard] first reported the results of the State's affirmative action plans[,] representation of ethnic minorities increased from 22.7% to 41.8%[,] a gain of more than 19% of all full time employees.”³¹

Employers also can engage in affirmative action by using race as one factor among many in hiring decisions. For example, as a law school faculty member, I have seen our appointments committee pursue many objectives simultaneously: faculty to teach particular subjects; individuals with prestigious academic credentials; and racial diversity. There are many factors being considered and race is one of them.

Another form of affirmative action is race-norming. For example, an employer that uses tests in hiring might choose to hire the top performing white, the top performing black, the top performing hispanic, and the top performing Asian. Likewise, even without the use of a test, an employer could rank applicants by race and choose the top from each racial list.

Affirmative action could take the form of set-asides if there are qualified applicants. An employer could say that a certain percentage of slots are held for qualified minorities. If there are less than that number of qualified minority applicants, then the slots will go to whites. If there are more than that number of qualified minority applicants, then more minorities would be hired than the percentage specified in the set-aside.

At its most extreme, affirmative action can take the form of rigid quotas where a certain percentage of slots are designated exclusively for minorities. To understate the obvious, such quotas are the most controversial form of affirmative action and the example that critics most frequently focus on when attacking affirmative action.

This list of affirmative action techniques in employment is not exhaustive even in that context. Nor are the techniques mutually exclusive; an employer can use many of these simultaneously. Also,

30. REBECCA LA VALLY ET AL., CAL. SENATE, SENATE REP. NO. 795-S, THE STATUS OF AFFIRMATIVE ACTION IN CALIFORNIA 35 (1995) (prepared by the Office of Research, California Senate).

31. *1 Discrimination and Affirmative Action: Are There Any Facts Out There? Hearings Before the Assembly Judiciary Comm., California State Legislature A-119* (1995) (statement of Laura M. Aguilera, Chief, Affirmative Action and Exam Services Division, California State Personnel Board).

the line between many of those techniques often is blurred. Conceptually, there is a difference between goals and timetables as opposed to quotas, but in practice the distinction is often hard to draw.

Likewise, in admissions to colleges and universities there are a great many forms that affirmative action can take. As with employment, it can include everything from encouraging minorities to apply, to aggressive recruitment, to enrichment and outreach programs, to using race as one factor in admissions decisions, to goals and timetables, to race norming, to set-asides, to quotas. And this list, again, is by no means comprehensive. For example, colleges and universities might use scholarships targeted for minority students³² or special programs designed for minorities as a way of increasing minority enrollment.

All too often the debate about affirmative action proceeds as if affirmative action is a single type of government action that always takes the same form. That is incorrect and inevitably produces an unproductive dialogue. Opponents of affirmative action direct their criticism at the most extreme techniques, such as rigid quotas, while supporters focus on much more modest efforts.

IV. THE NEED FOR AFFIRMATIVE ACTIONS

I hope that Parts II and III have helped to explain why the discussion of affirmative action must be contextualized. Debate about whether affirmative action is good or bad is inherently misleading because affirmative action can take so many different forms to achieve so many different goals. To be productive and enlightening the debate must be about what types of affirmative action are appropriate to achieve which objectives.

For example, as a law school professor, I strongly believe that it is essential that there be diversity in the classroom. Education is immeasurably enhanced when students are exposed to others different from themselves, in background, class, and race. Ideally, the admissions process would produce a diverse student body without any attention to race. Unfortunately, that is not the reality of American society. The legacy of past discrimination and the continuing enormous disparities in educational expenditures for black and white children mean that completely race-blind admissions often will result

32. See *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995) (declaring unconstitutional a scholarship program for minority students).

in an entering class with little diversity. Therefore, as the Supreme Court approved in *Bakke*, it is desirable for colleges and universities to use race as one factor in admissions decisions to increase the diversity of their student bodies.³³

There are circumstances where more aggressive affirmative action efforts are required. For example, as mentioned earlier, in *Paradise*³⁴ a federal district court found that the Alabama Department of Public Safety had systematically excluded blacks from employment, and if hired, had discriminated against them in promotions.³⁵ The Court ordered that for a period of time, 50% of the hires and 50% of the promotions had to go to African Americans.³⁶ The Supreme Court upheld this as a constitutional remedy for proven past discrimination.

On the other hand, there are certainly instances when particular types of affirmative action are inappropriate. Few would defend a quota, such as the one used in *Paradise*, in the absence of past discrimination or other compelling circumstances.

Those who oppose all affirmative action have a heavy burden to meet: they must show that all affirmative action efforts under all circumstances are inappropriate. Frankly, I think that it is impossible to imagine that this burden could be met. Yet, by treating affirmative action as if it were a unitary concept, opponents can avoid that burden, simply by arguing against the worst forms of affirmative action under the most extreme circumstances.

Consider the arguments typically advanced against affirmative action and why they fail. One frequent argument against affirmative action is that the Constitution commands the government to be color-blind. That argument takes its inspiration from the powerful words of Justice John Harlan, dissenting in *Plessy v. Ferguson*:³⁷ "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."³⁸ Few would deny that ideally government would be color-blind in all of its decision-making.

Yet, color-blindedness is a means to the end of equality and not synonymous with equality. There are times when government must be color-conscious in order to achieve equality. For example, if it is proven that the government engaged in intentional race discrimination in hiring and promotions, then a remedy necessarily must be crafted

33. *Regents of the Univ. of Cal. V. Bakke*, 438 U.S. 265 (1978).

34. 480 U.S. 149 (1987).

35. *Id.* at 153.

36. *Id.*

37. 163 U.S. 537 (1896).

38. *Id.* at 559 (Harlan, J., dissenting).

in terms of race. Those who have been treated wrongly by an employer are entitled to a remedy that would place them where they would have been without the discrimination. Commanding color-blindedness is not a sufficient remedy for these victims of proven discrimination.

Nor is color-blindedness appropriate in circumstances where color might make a difference. For example, in a racially tense city, it might be very desirable to assure that a significant number of African American police officers are assigned to a predominantly African American community. Likewise, for the reasons discussed above, racial diversity is often extremely important in colleges and universities. If color-blindedness fails to produce diversity, then there are times when color-consciousness is necessary.

The simple reality is that our race matters in our background, our heritage, the way we are treated, and the way we perceive the world. There are times when it does not make sense to pretend that this is not so or to insist that color-blindedness be followed even where color matters greatly.

A second argument that often is made against affirmative action is that it wrongly interferes with decision-making based on merit. That argument rests on many assumptions. For example, there is the assumption that decisions truly would rest on merit absent affirmative action efforts. Consider admissions to colleges and universities. The selection process long has favored those whose parents or relatives have attended the institution. Many colleges admit athletes who do not meet the usual definition of merit. Sometimes universities give preference to applicants from diverse geographic areas.

In the employment context as well, it would be a mistake to assume that all hiring is merit-based except for affirmative action. The reality is that nepotism and favoritism for friends and family has always existed.

Moreover, the argument based on merit assumes that the traditional measures of merit are accurate and are exhaustive of the definition of merit. For instance, in law school admissions the assumption is that grades and LSAT scores accurately measure who is most deserving of admission *and* that those are exhaustive of how merit should be evaluated. Yet, both parts of this assumption seem highly problematic. Undergraduate grades and LSAT scores often fail to predict many of the skills needed to succeed in law school and especially to excel as an attorney. More importantly, "merit" must include all that makes a person deserving of entrance. Because of the importance of diversity, merit often should include what a person will add to the education of other students.

That is perhaps even clearer in the context of faculty hiring. Faculty members are hired, in part, because of what they can teach

students. In choosing a new faculty member, a school often will consider what the teacher can add to the education of students beyond what is already present on the faculty. For example, if a law school does not have a corporations teacher, it likely will make hiring one a priority because it believes that adding a corporations teacher will do the most to add to its students' education. By the same notion, if a school has no black faculty members, it can believe that adding black faculty and the experiences and perspectives they bring to the school can do a great deal to enhance the education of its students.

A third argument frequently made against affirmative action is that affirmative action is inherently undesirable because it inevitably harms innocent people. At the outset, it should be noted that affirmative action does not in all circumstances injure others. For example, if affirmative action takes the form of aggressive advertisement of positions in minority communities and active recruitment of minority applicants, it is difficult to see how any one can claim an injury deserving of consideration.

Another illustration where affirmative action occurs without real injury is when race is used in drawing election districts to increase the number of minority representatives. All people are equally represented; one person, one vote is maintained. No one's political strength is diluted. Creating an additional majority black district seems to harm no one, except perhaps for a white candidate who has less chance of being elected.³⁹

Moreover, in matters such as employment, education, or government contracting, benefitting minorities inevitably means taking away something from whites. To describe the injury of whites as an argument against affirmative action is to assume that whites are presumptively entitled to what they have and that their *loss* is a harm to be avoided. The entitlement, however, must be established in each context and cannot be assumed. For example, if an employer engages in overt discrimination and fails to hire a black solely because of race, the remedy might be that the particular victim must be hired. Virtually no one questions the propriety of this remedy even though its effect is to deny a white person who is personally innocent of wrong-doing of the position.⁴⁰

39. In *United States v. Hays*, 115 S. Ct. 2431 (1995), the Supreme Court held that individuals do not have standing to challenge districting based on race if they are not a member of the district because they have not suffered an injury. *Id.* at 2435-37. As Justice Stevens argued, it is difficult to see why the injury exists in any circumstances and why it varies depending on whether the person is inside or outside the district. *Id.* at 2440 (Stevens, J., concurring in judgment).

40. See Kathleen Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80-81 (1986).

In other words, the question is whether affirmative action is justified in favoring some over others based on race. If the answer supports affirmative action, then some might be hurt by that. But affirmative action still is justified in order to achieve the desired advantages.

That, of course, is not to say that affirmative action always is justified or to ignore the harms to those who lose as a result of affirmative action. The point is that there must be careful consideration of whether affirmative action is justified in particular circumstances; such an analysis must consider who will be hurt by the affirmative action effort. Once it is decided that affirmative action is nonetheless justified, it is not sufficient to attack it just by pointing to its victims. There needs to be a much more detailed discussion about whether the harms are justified by the need for affirmative action under the circumstances.

A fourth argument against affirmative action—one increasingly in vogue—is that it should be based on social class and not on race. The contention is that affirmative action exists to help those who have been disadvantaged and therefore social class, and especially income, are better targets for such efforts.

Under some circumstances that argument makes sense. But in other instances, substituting social class for race is insufficient. For example, if affirmative action is used to remedy proven discrimination against a racial minority, it is not an adequate remedy to help those with less income. The remedy must be targeted to the victims of the prior discrimination.

Also, if the goal of affirmative action is to increase the diversity in the classroom, social class should not be substituted for race. Ideally, diversity will mean differences among the students both as to race and income. Social class should be added to the criteria used in admissions. But it should not replace race because it does not replace the need for minority students regardless of their income.

Many contend that what is really wrong with affirmative action is that it does not treat people as individuals, but instead looks at people as members of minority groups. The flaw in that argument is that people are both individuals and members of racial groups. Often it is essential to recognize their race in order to treat them appropriately and properly. If an employer or an educational institution has engaged in race discrimination, the remedy is necessarily directed to members of that racial group. Where race is relevant, it makes no sense to ignore that characteristic and focus on all of the other and less relevant characteristics.

For example, Justice Kennedy recently objected to affirmative action in drawing election district lines on the ground that it wrongly stereotyped blacks and treated them as members of a group and not as

individuals.⁴¹ But any black person is both an individual and a member of a racial group. As discussed above, sometimes color is relevant and in those instances appraising the person requires considering his or her race. Election district lines long have been drawn to keep ethnic communities together. That is, based on the recognition that groups often share common interests and goals. Likewise, drawing election lines to create majority African American or Latino districts recognizes that such individuals are both individuals and members of a group, and that group identity can matter.

Finally, opponents of affirmative action sometimes argue against it based on the reactions of the larger white society. The argument is that affirmative action exacerbates racial tensions. Also, that affirmative action stigmatizes minorities because others then assume that any minority who is hired or admitted is there because of affirmative action.

It is very questionable why the reactions of the white majority should doom affirmative action.⁴² Desegregation and the end of Jim Crow caused enormous tensions. Yet, few would deny that the changes were necessary regardless of the tensions engendered. Similarly, the focus of affirmative action has to be its necessity in particular circumstances and not on whether whites like it.

At the same time, the question of stigma is a complicated one. Are blacks, as a group, better off having more spaces in colleges and universities with the danger of stigma; or would they be better off with few slots, but less stigma? Affirmative action might create stigma. Yet at least under some circumstances, minorities are probably much better off with more jobs or positions in schools even though the cost is such stigma.

None of this is to say that the arguments against affirmative action are always wrong under all circumstances. There are instances where affirmative action is undesirable and where these harms will be manifest. Some affirmative action efforts undoubtedly have been misguided. My point is that there are many situations where these harms do not result from affirmative action and it is wrong to assume that they are an inherent and inevitable part of all affirmative action efforts.

41. *Miller v. Johnson*, 115 S. Ct. 2475, 2485-87 (1995).

42. This argument is developed in David Straus, *The Myth of Colorblindness*, 1986 SUP. CT. REV. 99.

V. CONCLUSION

This essay is ultimately a plea for a change in the way that affirmative action is discussed. Countless times, I have been invited to participate in debates about whether affirmative action is good or bad. A practice that is as varied as affirmative action cannot be deemed either good or bad. It all depends on the goals sought and the means chosen. Therefore, discussions about affirmative action should not be at the general level concerning its overall desirability. Rather, the conversation must be about specific practices under particular circumstances.

There are instances where affirmative action is essential and times when it is unnecessary. There are techniques of affirmative action that are highly questionable and means that are easily defended. A meaningful discussion of affirmative action thus must focus on context. Unfortunately, that is what has been all too often lacking in the debates about affirmative action.