

Should Affirmative Action Be Abolished?

Affirmative action is the term used for policies designed to remedy the effects of past discrimination against minority groups in the United States. Affirmative action is controversial, however, because many people believe it encourages preferential treatment of certain groups and encourages so-called reverse discrimination. In this Point/Counterpoint Sidebar, Ward Connerly, writing for the Heritage Foundation, claims that affirmative action is an unfair, outmoded practice and should cease. American University law professor Jamin B. Raskin, in an article for *Z Magazine*, argues that affirmative action is still needed to remedy past discrimination in American society.

“With Liberty and Justice *For All*”

By Ward Connerly

When we become citizens of this nation, at birth or otherwise, we get a warranty. That warranty is supposed to [be] honored by every government franchise in every village and hamlet of this nation. It is not transferable, and it is good for the life of the vehicle. We are guaranteed the right to vote; the right to due process; the right to be free, not to be enslaved, as long as we conduct ourselves in accordance with the laws of our nation; and the right to equal treatment under the law, regardless of our race, color, sex, religion, or national origin. These are rights which attach to us as individuals, not as members of a group.

This warranty has not always been honored for some of us. Because of the color of our skin or the place from whence we came, some of us were denied the right to vote; we were enslaved; we were denied due process; and the equal treatment granted to others was not ours to enjoy.

In my lifetime, I can give testimony to America's meaner instincts and their consequences upon my life. To reflect upon this nation's past, with my racial background, it is tempting to mock that pledge, to devalue the warranty, and to be embittered by those who would urge me to forget the past.

One need only invoke a few memories to become enraged and to feel entitled to all of the preferences that can be presented:

* Rosa Parks relegated to the back of the bus, * Drinking fountains for "whites only," * Restrooms for "men," "women," and "colored," * George Wallace standing in the schoolhouse door saying "segregation now, segregation forever," * Images of black people being hosed in the streets simply because they demanded that the warranty be honored, * And my thirty-year-old uncle being called "boy" by a ten-year-old white kid. Because we were treated like animals, there are some who say "America owes us." But the past is a ghost that can destroy our future. It is dangerous to dwell upon it. To focus on America's mistakes is to disregard its virtues.

This nation has a passion for fairness. That passion is evidenced in our Constitution, in the Bill of Rights, in executive orders, in court decisions. But most of all, it courses

through the arteries of our culture. "Do unto others as you would have them do unto you" is the centerpiece of virtually all of our religious faiths.

That great American pastime—baseball—is a reminder of the intensity of our passion for fairness as we exhort the crowd to "kill the umpire" if he makes what we consider an unfair call. As we drive home at the end of the day, our hands gripping the steering wheel, our bumper kissing the one ahead, when to our right a vehicle speeds along the curb and merges ahead of us at the moment when an opening appears, our passion for fairness surfaces. The protrusion of one of our fingers signals our belief that one of the rules of fairness has been violated. In every sport I can think of—baseball, basketball, football, tennis—one is expected to play between the white lines. To do otherwise is unfair and carries a penalty.

Our passion for fairness seeps out of every pore of our existence. Great leaders understand that passion. In his early days, when members of his own church were urging him to "cool it," Dr. Martin Luther King, Jr. appealed to America's sense of fairness and morality. It was Dr. King's appeal to fairness that resonated throughout the land and inspired Americans of all races and colors to travel to the deep South and to put their lives on the line in defense of what they considered the right thing, the fair thing to do. Affirmative action has its roots in that passion for fairness. When President Lyndon Johnson explained affirmative action to the nation, it is significant that he said, "You can't bring a man to the starting line who has been hobbled by chains and expect him to run the race competitively." Fairness dictated that the nation pursue affirmative action to compensate black Americans for the wrong that had been done. Affirmative action was a technique for jump-starting the process of integrating black Americans into the fabric of American society, for changing the culture of America from an exclusive society into an inclusive one.

I believe affirmative action was meant to be temporary. It was meant to be a stronger dose of equal opportunity for individuals, and the prescription was intended to expire when the body politic had developed sufficient immunity to the virus of prejudice and discrimination. It was not meant to be a system of preferences that would harm innocent people. The rationale for affirmative action thirty years ago was a moral one.

Three decades later, affirmative action is permanent and firmly entrenched as a matter of public policy. It has its own constituency that is prepared to defend its continuation at any cost, not because of any moral imperative, but because it has become the battleground for a political and economic war that has racial self-interest as its centerpiece.

Affirmative action, as most of us originally understood the term, enjoyed the support of a majority of Americans. Many Americans still support this concept as long as it does not involve preferences. Preferences, on the other hand, were wrong at the outset and are wrong today.

Affirmative action has become a system of racial preferences in my state. Jobs are solicited with explicit acknowledgment that we want a woman or an African-American or a Hispanic for this position. Contracts are set aside for certain groups, with the taxpayers paying what amounts to an affirmative action tax. This is the result of contractors who set up shell minority and women-owned businesses to front for white-owned businesses in order to benefit from the minority set-asides.

Wealthy sons and daughters of underrepresented minorities receive extra points on their admissions applications to the university, based solely on their race, while higher-

achieving Asians and whites from lower-income families are turned away from the university. Families are forced to mortgage their homes to send their children out of state to an institution comparable to Berkeley and UCLA. A racial matrix is used at most of our campuses which establishes a racial pecking order that distributes extra points on the basis of one's racial background.

When this nation began its use of affirmative action decades ago, America's racial landscape was rather clear. There was the dominant white majority and the oppressed black minority. Today, we have several dozen racial and ethnic categories in California. There is no dominant majority and there is no oppressed minority. Within a few years, the group which will numerically be the largest is Hispanic. Our racial tensions are no longer just black and white. They are black and Korean, black and Hispanic, white and Hispanic, Russian and Hispanic. Every conceivable racial conflict is present and lurking somewhere beneath the surface in California. How, then, do we decide who among us should receive a preference?

A direct product of our diversity is the emergence of a whole new set of racial configurations and problems which defy the old racial order. Yet affirmative action operates as if the old order was still in place, as if our racial dilemma was still black against white...

California is as close as any society on the face of the Earth to being that promised land where racism is considered repulsive and has no place. But this promised land can become a battle zone if we allow the continued tribalization of California.

We can point with pride to the fact that the mayor of one of America's favorite cities, San Francisco, is a black man: Willie Brown. The mayor of one of the largest cities in the nation, Los Angeles, for years was a black man: Tom Bradley. Our two United States Senators are women.... Although I as a Republican don't always agree with the political judgment of my fellow Californians, I believe no one can dispute their egalitarian impulses...

I am terrified at the prospect of what can become of us if we maintain our existing preference policies. In police departments, in fire departments, in middle-class homes throughout California, there is a growing perception that if I am white, I and my kids will not have an equal opportunity to succeed. No matter where it comes from, if anyone among us believes the warranty is not being honored, we have a duty to investigate the legitimacy of their complaint and to make it right if their complaint is proven to be valid. Throughout this debate, you will hear about blacks being stopped in white neighborhoods, about white women clutching their purses as black men approach, about the difficulty of black men getting a taxi in urban centers late at night, about the glass ceiling, about the lack of role models, about the percentage of black males in prison, and about the shortage of women in the Congress. All of these complaints warrant our attention, but none of them, no matter how true, justifies a suspension of that warranty that I talked about.

There are those who say that racism and sexism are not dead in America, and they are correct. But racism and sexism in our society do not justify our government giving a preference to Jose over Chang because Susan's father discriminated against Willie's father fifty years ago. Not in America.

If you are a student of history, you know that every now and then, the opportunity to alter the course of human events presents itself. Such is now the occasion for the people of this nation.

Every now and then, the challenge confronts us to step out from among the crowd to perform extraordinary acts. Such is the moment for the Republican Party.

The challenge is to end the corrosive system of racial preferences that has evolved in our nation, a system that has the potential to fatally damage the most fundamental values of our democracy, and to do so in a way that does not unleash the meaner instincts of some and the fears of others. The opportunity is to resume that noble journey of building an inclusive family of Americans in which men and women of all races and colors can work and play in harmony, with mutual respect and expecting nothing more than an equal opportunity to compete, and from that competition to build that more perfect union of which our forefathers dreamed.

The vehicle for this journey is the California Civil Rights Initiative. This initiative is simple and direct: No government agency shall discriminate against anyone on the basis of race, sex, or national origin, and no government agency shall give anyone preferential treatment for any of those reasons.

Two days ago, I appeared on a talk show with Congresswoman Maxine Waters. She argued that the California Civil Rights Initiative will create divisiveness. That may be true, but we are not the ones creating the divisiveness. Those who cling to the notion that preferences must continue are the ones responsible for dividing our society.

Ask the student who works hard for four years to earn a 4.0 grade point average only to be denied admission to Berkeley or UCLA in favor of someone with a 3.0, merely because UC wants racial diversity, whether she thinks we are being divisive.

Ask the poor Vietnamese student who is turned away from Berkeley or Irvine, despite his high grades, in favor of a wealthy underrepresented minority whether he thinks we are being divisive. Ask him whether he is satisfied with the explanation that we are getting too many Asians at those campuses.

Ask the daughter of a third-generation Chinese-American family whether she thinks we are being divisive when we say that it is unfair for applicants who are in this country illegally to get a preference over her.

Ask the parents of James Cook, one of only two California students admitted to Johns Hopkins University in 1994 only to be denied admission to UC San Diego medical school because he is white, whether they think we are being divisive. Ask them and thousands of other middle-class families, who are forced to take out \$80,000 to \$100,000 second mortgages on their homes to send their kids out of state to college because racial preferences prevent them from being able to attend UC, whether they think we are being divisive.

Ask the high-achieving black or Chicano student who works hard and gains entry to college solely on the basis of his merit, but who then must endure the nagging question of whether he was admitted because of affirmative action, whether he thinks we are being divisive. Ask him whether he thinks it's fair that his accomplishments are devalued.

Do we not believe it was divisive when those from an earlier period said that slavery is immoral and should be ended? Was it not divisive when our nation's people fought among themselves over this very issue? Was it not divisive when we sent troops into Montgomery and Selma, Alabama, to protect the rights of people like Rosa Parks and

James Meredith to ensure their right to sit wherever they wanted on the bus and to attend a college that wasn't segregated?

Yes, those were divisive times. But the seeds of division are planted not by those of us who seek to eliminate racial and ethnic preferences; they are planted by those who believe that our skin color and gender and how we spell our last name should entitle us to the harvest of diversity—college admission, government employment, and contracts....

I find it interesting that a nation which claims to have the heart to solve an ethnic war in Bosnia shouldn't have the stomach to prevent one here at home. If there is any lesson that we can learn from the rest of the world, it is that America's experiment with democracy will fail if we divide our people into racial enclaves and allocate jobs, contracts, and college educations on the basis of group identity....

And so, my friends, we find ourselves poised at this moment in the life of a great people, trying to define the character of our nation. Throughout America, we are restructuring our institutions. Our nation is desperately trying to embrace policies which place greater reliance on the rights and responsibilities of individuals. The debate about affirmative action must be seen in that context.

This issue will define the political parties in our nation for generations to come. The challenge for Republicans will be to convince all Americans that preferences are not in the national best interest, that a preference for some means a loss of liberty and the pursuit of happiness for others. We have to convince black Americans, a group which has become addicted to the drug of a powerful central government, that their rights can be no more secure than anyone else's when we empower government to make decisions about people's lives on the basis of a government melanometer which measures melanin levels. None of our rights are secure in a game of racial self-interest.

I will never abandon my faith that America can become Ronald Reagan's "shining city on the hill," a society in which a person's gender or race or ethnic background are irrelevant in the transactions of their government. Let us not mourn the death of affirmative action. Instead, let us proclaim our belief that the spirit of equal opportunity, which affirmative action engendered, has become a permanent feature of America's social, economic, and political landscape. Let us have faith in our own sense of fair play.

About the author: Ward Connerly, University of California regent and chairman of the American Civil Rights Institute, is noted for his efforts to end racial preferences.

Connerly served as chairman of the California Civil Rights Initiative campaign, aimed at dismantling all affirmative action programs in the state. Its ballot initiative, Proposition 209, was passed by California voters in 1996.

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"Affirmative Action and Racial Reaction"

By Jamin B. Raskin

The assault on affirmative action is the logical culmination of the popular campaign against "political correctness," which began in the late 1980s. The enemies of the thing called "PC" have enjoyed kicking around multiculturalism and deconstruction the last several years, but the real political energy behind the anti-PC campaign has always come

from boiling white resentment over affirmative action. Now it is likely that the days are numbered for this exceedingly modest program to desegregate American life.... The hysteria over affirmative action proceeds in the face of massive evidence of continuing white male dominance in society. The Glass Ceiling Commission, created by Elizabeth Dole when she was Secretary of Labor in the Bush administration, ... found that white men occupy 97 percent of senior management positions in Fortune 1000 and Fortune 500 corporations. African-Americans are found in about one-half of one percent of these top jobs, and there are even fewer Hispanics and Asian-Americans. In the private sector generally, African-Americans have just 2.5 percent of executive positions and black men who have professional degrees still earn less than four-fifths of the salaries earned by their white equivalents. Black women, facing double bias, earn three-fifths the amount that white men earn. Of course, African Americans and other minorities, as well as women generally, form a greater presence in the public sector (one reason the public sector is in danger), but the ranks of top leadership are still almost all-white. There are no African-American governors in the United States....

Anti-Affirmative Action Rhetoric: An Historical Echo

The complaint against affirmative action today boils down to the idea that "statist" university and government bureaucrats are compromising "traditional" and "historic" notions of "objective merit," "color-blindness" and "neutrality" by showing "preferential treatment" toward "unqualified" racial minorities and women. This "reverse discrimination" causes "unfairness" to that most victimized social group, white men, and, perhaps worst of all, "stigmatizes" its intended beneficiaries—minorities themselves.... The critics of affirmative action invite us to believe that we live in a color-blind society in which the last vestige of racial discrimination is affirmative action itself. This extraordinary vision of American society simply cannot be squared with the facts of how whites and racial minorities live, how much they earn and what kind of wealth and power they have. The grim statistics of disparity force us to choose between the hideous "Bell Curve" vision of various races having differing aptitudes and the far more plausible conclusion that different ethnic and racial communities have equal potential to flourish but different levels of access to wealth, power and the good life. Surely as a society we should choose the second interpretation as a matter of both empirical belief and moral faith. If we believe in the equal potential of all human beings and we therefore cannot justify the dominance of the "white race" over all others "in prestige, in achievements, in education, in wealth, and in power," then stepped-up race-conscious affirmative action by all of our principal institutions must be taken in order to integrate and liberate American society.

The Meaning of Meritocracy

This assertion, however, leads us directly to the conservatives' central argument: that affirmative action undermines the regime of merit, which requires neutral distribution of social rewards according to objective criteria. Even just restating the argument begins to erode confidence in it because it is so obvious that each of its key terms is wholly empty outside of the processes of historical definition. Merit is neither self-defining nor self-

revealing; it is an ever-changing concept that is historically, socially and institutionally contingent—and often contested. It is impossible to define merit without asking what kinds of institutions we want to have and for what purposes. As Stanley Fish writes, "merit is not an abstract, independent standard but one that follows from the traditions and practices of a community whose presuppositions are not at the moment the object of scrutiny or skepticism." Once a particular conception of "merit" is challenged, it may be revised and transformed until the new conception is itself overthrown and the process repeats itself. The words that inevitably follow in the rhetorical train of "merit," such as "neutral" and "objective," are either totally abstract and empty or, in the real world, transparently loaded down with the freight of particular historical, social, political and institutional meanings.

Consider the example of law schools. A century ago, they had, roughly speaking, all-white, all-male faculties and all-white, all-male student bodies. The criteria then used for admission—race, gender, college attended, grades, family and social connections—worked to reproduce an elite bar that served the legal needs of emerging large-scale corporate capitalism. That system was not really altered until the LSAT was introduced a few decades ago and agitation for social change lowered barriers for women and minorities to enter. At each step, voices were heard to say that neutral definitions of "merit" were being diluted in favor of some diluting trend.

But what qualities now warrant admission to law school? One can think of dozens: the extent to which a person would make an excellent brief-writer; the extent to which a person would make an excellent oral advocate; the extent to which a person would make a great legal scholar or great legal teacher; how well a person has performed on standardized exams, including the LSAT; the extent to which a person would enrich discussion in class; the extent to which the person has overcome adversity and demonstrates determination to succeed; the extent to which the person has empathy and compassion for people in vulnerable positions; the extent to which the person is part of a community in which she could find clients; how much business background a person has; the extent to which a person volunteers and serves others; the extent to which the person received good grades in college in law-related subjects; the quality of the application essays; the extent to which the person received good grades in college generally or in high school or in elementary school; the extent to which the person has worked during school, or worked in a law-related capacity; the extent to which the person is likely to go to a large law firm and give the law school large contributions as an alumnus; the extent to which the person will work to serve the poor and disempowered and thus bring recognition and praise to the law school; the extent to which a person will uplift an historically oppressed community through creative legal tactics—or keep it down through the same; the extent to which the person will use law to promote or undermine environmental protection; the extent to which the person has had the benefit (or hindrance) of coming from a family of lawyers or being the first person in her family even to apply to law school; and so on ad infinitum.

Each of these criteria presents itself as a perfectly plausible consideration for law school admission today. How to choose among them? Surely it comes down to the school's self-definition and conscious (or unconscious) institutional project. But it is unlikely that any law school actually narrows its criteria down to just a few of these to the exclusion of all others. Rather, my experience has been that members of admissions committees tend to

proceed on a series of general assumptions and hunches that incorporate all of these considerations and respond more or less idiosyncratically to the rationales for admission presented by an applicant's paperwork. Of course, many law schools place heaviest emphasis on college grades and LSAT scores but these should not be controlling criteria since neither is perfectly predictive of "success" and both are flawed in important ways. Of the two, grades appear to have a better capacity to predict "performance" in law school, but then again law school performance itself is defined with respect to grades, and who is to say that law students with better grades end up making better lawyers? LSAT scores may best reflect whether the student took an LSAT preparation course, which are guaranteed to raise your score by 10 or 12 points or you get your money back. Of course, not everyone has the money or the time to take such a course. There are also a host of questions about whether a high-pressure, carefully-timed competitive multiple-choice examination is the best way to test someone's ability to make a good and productive lawyer. The skills that permit someone to excel on such a test may predict how well they do on the bar exam or even how they would be as an associate [at] a large corporate law firm. But how well does excellence at taking the LSAT predict whether the person will work for justice, serve her community, exercise wisdom or change our way of looking at important legal issues?

Speaking personally, I favor a progressive lessening of reliance on the LSAT and a loosening of compulsive and unreflective attitudes about grades. But even schools that place most emphasis on the LSAT and grades do not use them exclusively; even they include room for discretion and judgment by admissions committee members. Thus, as soon as we stray from the illusive clarity of numerical criteria, we are thrown into the realm of value judgments about what kinds of institutions we want to create and what kinds of purposes we want them to serve. Is there something illegitimate about recognizing race, gender, ethnicity and socioeconomic background in this process?

No Escape from Race-Consciousness

The first point to make is that it is almost impossible not to take these factors into account without closing your eyes. When a law school applicant puts down on her application that she has spent the last three years raising her children, or that he spent twenty hours a week working his way through college, or that her parents are immigrants from Thailand, or that English is his second language, or that she was college vice-president of the Hispanic Students Association, or that she plans to work as a civil rights lawyer because her brother was a victim of race discrimination, or that she lives on an Indian reservation and plans to return there, then the complicated social facts of race, gender, class and ethnicity—which are partially constitutive of all of us as individuals—leap off the page and make themselves part of the consciousness of the admissions decision.

These facts that are so wrapped up with our selves cannot be blinked away; they inform admissions deliberations at every turn. If a student is poor, does his hard work as a pizza delivery person count in his favor or does the related fact that he had no meaningful extracurricular activities outside of work count against him? How should his summer delivering pizza be measured against a wealthier student's summer working as a paralegal at a law firm or volunteering at a homeless shelter? Does an applicant's knowledge of English as a second language suggest that law school will be too difficult for her or

that she will be able to serve a lawyer-poor language minority community? Should a family full of lawyers be used to indicate likely success in law school and in finding a job or should it be used to discount the significance of the applicant's superb essay dealing with constitutional law? It is absurd to think that race, gender, and class ever were—or ever could be—"irrelevant" to the admissions process, which is all about making value judgments and deeply political choices....

The Civil Rights Movement and Affirmative Action

In defending affirmative action, it is necessary to go beyond the idea of sharing power and resources in a culturally plural society. It is essential to recall the political and spiritual project of the modern Civil Rights movement that made affirmative action both necessary and possible. The Civil Rights movement never had as its conscious political project the creation of "affirmative action" or "set-aside" programs in various white-controlled institutions like universities, corporations, and labor unions. Affirmative action, rather, came about as part of the dominant society's effort to respond to the movement's growing insistence on fundamental social change to end oppressive conditions pervasive in the African-American community....

It is a measure of both the vanishing of a popular energized civil rights movement and the nation's economic retraction that this modest program, seen as so unassuming and unobjectionable at the beginning, is now reviled in many places, deeply controversial and profoundly vulnerable. Thus, progressives who ought to be promoting far more radical proposals to reduce class power and race inequality in America are left holding the bag for a program designed by the establishment to assimilate social changes in a safe way and at a cautious speed....

We need a defense of affirmative action that links up with a thoroughgoing critique of American meritocracy and power relationships. We need to revive a progressive challenge to the background social assumptions about education and employment in America: that higher education is for the elite only and should not be free to the people; that privately created and administered standardized exams are the best way to ascertain merit and distribute students across various levels of colleges; that the best teachers should teach the best students; that no one has a right to a job or productive work; that extreme hierarchy and role-division is inherent in the workplace; that radical disparities between the wages of people who handle things and people who handle words are natural and necessary; that work commonly done by women is inherently less worthy than work commonly done by men; that unions are an albatross and must be as authoritarian as employers; and that the society must operate on the principle of constant and fierce individual competition or else face ineluctable economic decline....

To transcend the destructive politics of division and derision surrounding affirmative action (if we still can), we need to reaffirm the equality of all peoples in a culturally pluralist society and to posit a universal politics of freedom and equality for the next century. But a vigorous defense of affirmative action right now is central to such a politics. For in a society where the lines of race and gender double as lines of class and power, even the idea of affirmative action for minorities and women is an affront to the structure of domination and inequality. Our job must be to make affirmative action the

first line of defense in a politics which insists that all citizens have a right to equal participation in the fruits of our social life.

About the author: Jamin B. Raskin, a professor at American University Washington College of Law, is a lecturer and a frequent contributor to *The Nation* and several law reviews.

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