

Courts and the Making of Public Policy

Affirmative Action

Peter Edelman

The Foundation for Law, Justice and Society

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Executive Summary

- The 1960s were years of racial progress in the United States, but also of anger that not more was achieved. One response to the civil unrest in America's cities was an executive order issued by President Johnson requiring firms contracting with the federal government to implement affirmative action to increase the employment of African-Americans.
- Affirmative action policies proliferated as steps to accelerate the inclusion of African-Americans, and other groups, in university student bodies and companies; and to increase their participation in government contracts. Such steps generally included some level of preference and means of taking race into account.
- A backlash against affirmative action quickly developed, leading to a series of Supreme Court decisions. Opponents attacked affirmative action as reverse discrimination. Some argued that it marked recipients with a modern-day version of inferiority, implying that beneficiaries could not have achieved their particular status without extra, undeserved, assistance.
- The Supreme Court's tightening of the rules determining affirmative action began with situations where government and other public entities had intervened voluntarily, to remedy past discrimination. The cases mainly involved government contracts, employment, and education.
- The Court did not ban such efforts. But it held that they must be justified by a compelling state interest, narrowly designed to remedy the discrimination in question. It banned affirmative action that was rooted in past 'societal discrimination'.
- In recent years, the Court has approved a new theory of affirmative action, which should not be based on past behaviour, rather on the promotion of diversity for the future. It applied it to college and university admissions. However, in 2007, it refused to apply it to voluntary actions by states and school boards, which wanted to set policies to promote racial desegregation below college level.
- Looking to the future, other alternatives are, or should be, on the table. One is the possibility of substituting economic integration for race-based policies. This is being tested in a few school systems, and in some post-secondary contexts. The challenge for America more broadly is to commit to ending the continuing and disproportionate poverty amongst African-Americans, and other minority communities. This is the affirmative-action challenge of the twenty-first century.

Affirmative Action

Introduction

Affirmative action refers to steps taken to accelerate the achievement of genuine equality, and full inclusion, of groups accorded formal equality under the law, in American society. The term came into official use in September 1965. President Johnson issued an executive order requiring companies doing business with the US government to take affirmative action to achieve 'the full realization of equal employment opportunity'.

Thus, affirmative action was developed as a strategy to remedy discrimination. In some ways, it was nothing new. The Freedmen's Bureau, created after the Civil War to help former slaves acclimatize to their liberated status, was an earlier form of affirmative action. The logic of affirmative action in the 1960s was analogous. Passing laws to prohibit discrimination had not guaranteed swift progress toward economic justice. African-Americans, impatient with the pace of change, demanded more active measures. They punctuated their demands with a wave of civil unrest. Affirmative action was meant to speed up the process.

Colleges, employers, public agencies purchasing goods and services, and others, began adopting affirmative action policies. These allowed race to be taken into account in selection processes, in order to remedy past discrimination. Action provoked reaction. A backlash against race-conscious remedies ensued. The argument against affirmative action as a remedy for discrimination posited that it was a zero-sum game, necessarily causing reverse discrimination against whites. Others, including some African-Americans, argued that affirmative action cast doubt on the validity of the achievements of its beneficiaries, both in the eyes of others and among African-Americans themselves.

Over the years, the Supreme Court has become more conservative, and increasingly sceptical of affirmative action. It has struck down a number of affirmative action plans. Controversy has continued to the present day. The new Roberts Court threw out two voluntary school desegregation plans in 2007, adopting an even more conservative stance.

The nature and significance of the problem

Why are we still talking about affirmative action? Because we have still not achieved the professed ideal of affording equal opportunity to all to participate in the political, economic, and social life of our country. The idea of accelerating towards full inclusion seems innocent enough. More controversial is that it generally involves the temporary utilization of group preferences to hasten the narrowing of the gap. The discussion here is primarily about race. But the issues addressed could apply to gender, and perhaps to other minority groups.

The term 'affirmative action' encompasses a wide array of possible activities and policies. Some are quite uncontroversial. Others are generally viewed as unacceptable. Among those thought to be innocuous, or not really affirmative action at all, are college or employment recruitment strategies. Examples include policies that place special emphasis on recruiting at schools with a predominant population of particular groups, or special programmes encouraging minorities and women to become engineers. At the other end of the spectrum are quotas in admissions or recruitment policies, which require the selection of a fixed minimum number of members of a particular group, regardless of their qualifications. There is clearly a balance to be struck. The centre-ground, which has shifted over time, is the battleground for the opposing sides.

The middle way, at least as concerns education, employment, and contracting, can be described as remedies, plans, or policies that would result in the selection of someone qualified to perform the task, who is nevertheless arguably less qualified than the other applicants not chosen. So, in effect, there is some degree of preference based on a person's status as a member of a particular racial group.

Positive discrimination arises in many situations. It is a heated subject of political discussion, and for various policymaking bodies. It has been the subject of numerous Supreme Court decisions. President Clinton examined the issue, amidst intense partisan and media debate, leading to his now oft-quoted decision to 'mend it, not end it'. Election initiatives in a number of states have asked voters to decide, in the words of the proposition adopted in California, whether the state may 'not discriminate against, or grant preferential treatment to' members of certain named groups. The proposition stated that it should be implemented 'to the maximum extent that federal law and the United States Constitution permit'.

The controversy of affirmative action

The discussion here focuses on affirmative action in judicial settings, and on its validity under the US Constitution as a policy or remedy imposed by a court order, or adopted by a unit of government or other public entity. Private actors are free to prefer or reject a person on any basis, unless there is a statute or law preventing them from doing so. When a statute prohibits discrimination by private actors, a question may arise as to whether an actor has violated that statute in acting to help a protected group overcome past discrimination, and whether a statute that is interpreted to permit the private 'affirmative action' is constitutional as applied.

For purposes here, affirmative action is discussed mainly in relation to the limits on public actors, as imposed by the Supreme Court. Insofar as the Court continues to permit affirmative action in various forms, an examination of whether specific relevant bodies should adopt such policies is beyond the

scope of this brief. I shall, however, consider other policy possibilities in lieu of affirmative action, and to examine measures that may reduce the need for it in the first place.

The arguments of proponents

One major proponent was the late Justice Thurgood Marshall. In 1989, He emphasized two interrelated points in a dissent in *City of Richmond v. J. A. Croson Company*. The first was that there is 'a profound difference' between 'governmental actions that themselves are racist, and government actions that seek to remedy the effects of prior racism'. The second was to stress his belief that it is wrong to 'believe this Nation is anywhere close to eradicating racial discrimination or its vestiges'.

Justice John Paul Stevens echoed the first point in a 1995 dissent in *Adarand Constructors, Inc. v. Peña*: 'There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial discrimination'. There is a clear 'difference' he continued, 'between a "No Trespassing" sign and a welcome mat'.

Justice Ruth Ginsburg echoed the second point in 2003 in *Grutter v. Bollinger*: 'It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land'.

Reinforcing Marshall and Ginsburg's points, academic advocates for affirmative action stress that the need for it cannot be understood without appreciating that persistent racism in the United States is deeply rooted in structural inequality, unconscious racism, institutionalized patriarchy, and anti-subordination theory.¹

Affirmative action's adherents argue that the purpose of the Fourteenth Amendment was to protect the rights of the newly freed former slaves.

1. Lawrence, C. R. III and Matsuda, M. J. (1997) *We Won't Go Back: Making the Case for Affirmative Action*. Boston: Houghton Mifflin Company.

Conversely, it does not concur with its original purpose for whites to claim that the Fourteenth Amendment protects them from the measures designed to effectuate its purpose. The Court pronounced in 1879, in *Strauder v. West Virginia*: 'securing to a race recently emancipated...all the civil rights that the superior race enjoy.' Thus Justice Stephen Breyer argued in his dissent in the 2007 *Seattle* and *Louisville* cases (*Parents Involved in Community Schools v. Seattle School District No. 1*): 'There is reason to believe that those who drafted an Amendment with this basic purpose in mind would have understood the legal and practical difference between the use of race-conscious criteria in defiance of that purpose, namely to keep the races apart, and the use of race-conscious criteria to further that purpose, namely to bring the races together.'

The arguments of opponents

Opponents argue that the Equal Protection clause, in its plain meaning in the language, guarantees every person equal protection in law, regardless of who benefits and who is burdened. Opposing racial classifications, regardless of who benefits, Justice Clarence Thomas, in a 2003 dissent in *Grutter*, spoke of 'the benighted notions that one can tell when racial discrimination benefits (rather than hurts) minority groups, and that racial discrimination is necessary to remedy general societal ills'. Or, as he said in a 1995 concurrence in *Adarand*: 'So-called 'benign discrimination' teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete...without their patronizing indulgence'.

Chief Justice John Roberts put the argument succinctly in the *Seattle* and *Louisville* cases in 2007, writing: 'The way to stop discriminating on the basis of race is to stop discriminating on the basis of race.' Justice Anthony Kennedy expressed the argument, in his opinion in the same case, thus: 'To make race matter now, so that it might not matter later, may entrench the very prejudices we seek to overcome.'

The stakes are high. Those who decry the Supreme Court's narrowing of permitted applications of affirmative action, or the decision of government

and other public entities not to engage in constitutionally permitted affirmative action, argue that the pace of achieving full inclusion of African-Americans in American society has been seriously compromised. In states that have curtailed the use of affirmative action in university admissions, the proportion of African-Americans attending college or professional school at the state's best public universities has decreased markedly.

Meantime, critics of the continued use of affirmative action, especially in university admissions, argue that its beneficiaries are stigmatized, or that it helps some, at the unfair expense of others.

Analysis

A typology of situations in which race-conscious remedies have been discussed includes:

- a court finding that a public entity or official has engaged in unconstitutional racial discrimination;
- a unit of government or other public entity announcing an official finding that it has engaged in past discrimination, which it wishes to remedy;
- a public entity deciding to contribute to remedying societal discrimination;
- a public entity deciding to promote diversity in a set of future outcomes.

Cases of judicial finding of discrimination

The classic paradigm of race-conscious remedies being imposed following a judicial finding of discrimination arises from the line of cases following *Brown v. Board of Education*. Initially, it was not clear how states and school districts were supposed to implement *Brown*, other than to repeal laws that required, or permitted, segregation. A year later, the Court made clear that this was not sufficient. States and school systems had to move 'with all deliberate speed' to eliminate 'obstacles' to desegregation 'in a systematic and effective manner'. Succeeding decisions stated more and more explicitly that the remedy had to involve affirmative steps toward desegregation.

In *Swann v. Charlotte-Mecklenburg Board of Education*, a unanimous Court made clear that

race-conscious measures, including the busing of students to schools outside their neighbourhoods, would be appropriate, in some instances, to remedy constitutional violations. The Court said that the 'frank, and sometimes drastic, gerrymandering of school districts and attendance zones' would be occasionally necessary. It used the term 'affirmative action' to describe what the courts have the authority to do when presented with evasive plans by school authorities.

It should be noted that even though the Court used the term 'affirmative action' in *Swann*, the general thinking at the time was not that school desegregation remedies were forms of affirmative action in the same sense of President Johnson's executive order. Rather, they were remedies to rectify unconstitutional discrimination. The assimilation of school-desegregation policies into the sphere of affirmative-action analysis stemmed from the Court's decisions in the *Seattle* and *Louisville* cases in 2007.

The *Swann* Court was unanimous. In later cases, however, when the matter was a judicial finding of state discrimination related to employment, it split. Still, the result was the same. Following a finding of egregious discrimination by the state of Alabama in its promotion policies for state troopers, the Court upheld an order in *United States v. Paradise* that 50 per cent of promotions should go to African-Americans, until the imbalance caused by the discrimination was corrected.

It is not clear that today's Court would decide *Paradise* in the same way. Nonetheless, it stands, along with the school cases, for the proposition that affirmative action, in the sense of numerically based race-conscious remedies, is acceptable when ordered by a court as part of a decree to cure unconstitutional discrimination.

Conceptually, these are relatively straightforward cases. The school cases do not take away education from one student to give to another in the same way as admission to a selective university. *Paradise* involved a job sector where substantial

hiring and promotion were occurring all the time. It is hard to argue that the remedial promotion policy was taking away opportunities from specific individuals. In addition, the courts need a degree of discretion to fashion remedies that will be as effective as possible in erasing the damage caused by the defendant's discrimination, even though others who were not victims of that discrimination will benefit from the remedy.

Governmental action to remedy past discrimination

The second category has evoked a more negative reaction from the Court, although not one of total impermissibility, at least not yet. This is the category of affirmative action plans adopted to rectify past discrimination by the proponent entity. Typically, a plan would concern employment or government contracts.

After some uncertainty in the 1980s, the Court struck down an affirmative action plan adopted by the city of Richmond, Virginia, to remedy its own past discrimination in awarding government contracts, in *City of Richmond v. J. A. Croson Company*. For the first time, the Court agreed that the proper standard of review for the constitutionality of such a plan is 'strict scrutiny'. This meant that the unit of government has to have a 'compelling interest' in acting, and the statute or policy has to be 'narrowly tailored' to the problem. The Richmond plan offered preferential treatment to Eskimos and Aleuts, among others. The Court concluded it was therefore not sufficiently narrowly tailored. Writing for the Court, Justice Sandra Day O'Connor emphasized: 'Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction.'

Six years later, in *Adarand Constructors, Inc. v. Peña*, a case raising the question of whether federal affirmative action policies should be reviewed according to the same sceptical standard as those of states and localities, the Court held that they should be. But Justice O'Connor went out of her way to remark 'We wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact"'.

In the wake of *Croson* and *Adarand*, governments around the country rewrote their affirmative-action policies in the field of contracting, setting out a much stricter factual predicate in terms of their own past behaviour, and drafting the details more carefully. For the moment, the type of affirmative action addressed in *Croson* and *Adarand* can be implemented in compliance with constitutional strictures. And the departure of Justice O'Connor leaves Justice Kennedy the final word on future directions.

The legal limits of affirmative action

The Court has firmly rejected affirmative action intended to remedy past societal discrimination, in other words, discrimination in society at large, or initiatives taken by actors other than the government itself. To some extent, this category overlaps with the recent recognition of pursuing diversity as a justification for affirmative action. Both involve actions taken by an entity which is not itself regarded as having engaged in past unconstitutional discrimination. The Court has recently recognized the validity of taking race into account when handling college and graduate school admissions, as part of a policy of promoting diversity within the student body, and in the world outside the university. But whatever the genuine merits of initiatives taken by actors not regarded as past perpetrators of discrimination to contribute to the remediation of past discrimination by others, the Court has said clearly that it is not constitutionally acceptable.

Circumstances when a public entity seeks to promote diversity

The idea of pursuing diversity as a legitimate basis for affirmative action was introduced into a judicial context by Justice Lewis Powell in the *Regents of the University of California v. Bakke* in 1978. Although he was the only Justice advocating it, his vote carried special power given the circumstances of the case. His was the fifth vote to invalidate the admissions policy of the University of California at Davis medical school. But his was also the fifth and only vote supporting the notion that a differently designed admissions policy, which took race into account, could be justified on diversity grounds. For nearly thirty

years, his single vote in *Bakke* was the basis for admissions policies at hundreds of colleges and universities across the country.

Many observers thought the de facto hold of *Bakke* had been eroded with the changes in the Court's membership. But in 2003, in *Grutter v. Bollinger*, the Court, with Justice O'Connor writing the Court's opinion, and supplying the fifth vote, upheld the University of Michigan Law School's admissions policy, on a similar premise to that propounded by Justice Powell in *Bakke*.

The reach of *Grutter* was unclear. Where else would it apply? Could public employers now hire more diversely; assuming such diversity could not otherwise be regarded as a legitimate job qualification, owing to the desirability of having people from different backgrounds in the workforce, and the value of a more diverse workforce to serve a diverse clientele? Could the pursuit of diversity be the basis of decisions made in elementary and secondary education?

The Seattle and Louisville cases of 2007

The latter question was squarely confronted in the *Seattle* and *Louisville* school cases in 2007. Both school systems had adopted pupil admissions policies that permitted considerations of racial diversity to determine the outcome in tie-break situations between whites and minorities. White parents sued in both instances, claiming reverse discrimination. Such policies would have been valid as part of a remedy for unconstitutional segregation. But Louisville had been released from a court decree to remediate its history of unconstitutional segregation. Seattle had never been subject to such a decree; although there was considerable evidence of past discrimination that Seattle officials had identified themselves whilst voluntarily adopting desegregation policies over the years. Four members of the Court, including the new Chief Justice Samuel Alito, who had replaced Justice O'Connor, wanted to maintain that all racial classifications were invalid, except to remediate judicially determined discrimination. Justice Kennedy supplied the fifth

vote, saying that pursuing diversity could justify some pro-desegregation policies, but not the approach in question in the two companion cases. His reasoning kept alive a modicum of Supreme Court support for voluntary school desegregation measures. However, liberal commentators expressed disappointment and even anger at the outcome, emphasizing the areas of possibility left open by Justice Kennedy's concurrence.

Justice Breyer, writing in dissent, was livid, charging that the plurality opinion:

'distorts precedent...misapplies the relevant constitutional principles...announces legal rules that will obstruct efforts by state and local governments to deal effectively with the growing re-segregation of public schools...threatens to substitute for present calm a disruptive round of race-related litigation, and...undermines Brown's promise of integrated primary and secondary education that local communities have sought to make a reality.'

Justice Breyer's point was that analysis of the validity of voluntary school desegregation policies had never previously been couched in the parlance of affirmative action. Such initiatives had always been considered by the Court as ways to remedy discrimination and pursue desirable outcomes for society: 'A longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it', citing in support of his observation a statement by Chief Justice Burger on behalf of a unanimous Court in *Swann*.

As of early 2008, the future of affirmative action rests with Justice Kennedy, as do so many other matters. The current Court has yet to explicitly overrule any earlier case. However, Kennedy's concurrence in the *Seattle* and *Louisville* case accepts the underlying premise of the plurality opinion of Chief Justice Roberts: that school voluntary desegregation policies should be judged according to the kind of analysis the Court has

developed in affirmative-action jurisprudence. This is a major change, ameliorated to some extent by Justice Kennedy's view that analysis of diversity, based on *Grutter*, can justify some voluntary race-conscious school policies. Kennedy's view of the reach of Justice O'Connor's statements in *Adarand* and *Grutter* is likely to set the course for the future of affirmative action as a matter of constitutional law for a considerable number of years to come.

Current issues and future choices

As the United States moves away from segregation mandated by law in many parts of the country, with anti-discrimination laws now having been on the statute books for more than four decades, it is unsurprising that some people are asking whether an accelerated process of affirmative action is still necessary. They point to the enormous achievements of many African-Americans. They ask whether the African-American community, as a group, is still in a position to need special consideration. Others, like Justice Marshall, and many scholars, point out that it will take a long time to erase the vestiges of segregation.

Justice Thomas's view, that taking race into account is always corrosive except in cases where there is proof of extraordinarily deep-seated and continuingly resistant and unconstitutional discrimination, may be an overstatement. However, it is obviously the view of a substantial group. A healthy debate over future policy might produce other, less divisive, directions.

A special focus on the poverty of minorities

Whilst it is true that a substantial segment of the African-American population has moved into the middle class and beyond, a disproportionate number still remain in poverty. Some 24 per cent of African-Americans are defined as living in poverty. White poverty hovers at around 10 per cent.²

Although African-American poverty did decrease markedly during the 1990s, this stark disparity has persisted for decades. It suggests the need

2. US Census Bureau (2006) *Income, Poverty, and Health Insurance in the United States*, p. 11.

for special focus on poverty in general, and on the poverty of minorities especially. Overall, there are some 36.5 million people living in poverty in America. The poverty rates of Hispanic and Native Americans are roughly equivalent to those of African-Americans.

Increasing attention is being paid to economic approaches, rather than to race or ethnicity. Discussion has focused on economic integration within public school systems. A few examples of such policies are promising.³ Texas implemented a policy of guaranteeing admission for the top 10 per cent of every high school class in the state to its public university system, an approach that has a clear economically integrative effect and, indirectly, a de facto effect on increased racial and ethnic diversity.⁴

Such policies are urgent, especially in the face of the continuing consignment of new generations of minority children to poverty, failing schools, damaged communities, and poorly functioning families; resulting in the disproportionate imprisonment of young black men, and single mothers raising children in circumstances of poverty and social exclusion.

The actions required are complex. The solutions are not simple, especially because some of them relate to behaviour and values. Areas of important concern are employment, income, and public benefits. Much of what can be done in these areas is not substantively or economically complicated, although it is not simple politically. A higher minimum wage, income supplementation through the Earned Income Tax Credit and similar schemes, funding for child care, help with the constantly rising costs of rental housing, and reform of the unemployment benefit system are all reasonable measures, provided there is the political will. Such policies would resonate with and improve the circumstances of children and families.

More complicated, but of equal urgency, is improving public schools, creating clear pathways to jobs and a productive adulthood for every young person, and providing health coverage for all. Here the precise policies are not so straightforward, and their conceptualization and implementation require hard work, and the participation of many actors: both public and private, national and local.

These are just some of the areas requiring attention. Reports and other literature spelling out the necessary policies abound.⁵ The key conclusion of this policy brief is to suggest that affirmative action cannot be discussed in isolation. Discrimination and exclusion exist at all income levels amongst women, the disabled, gays and lesbians, and other minorities. All these groups require continued attention, whether in a form that can appropriately be denoted affirmative action, or in other ways.

Within minority communities especially, there are widening gaps between rich and poor. There is continuing and disproportionate poverty in these communities, as compared with the country as a whole. As long as the causes of this poverty are not tackled at their roots, there will be streams of people for whom solutions will come, if at all, only after great damage has been done. The ongoing debate over affirmative action remains important. But the far greater challenges are education, employment, income, and family- and community-building to end poverty and ensure families can earn a living wage, based mainly on work, with appropriate policies of public support. These challenges will not be met through litigation over permitted constitutional parameters to effect policy; but by organizing, advocacy, and public policy informed by notions of personal and community responsibility.

3. The Century Foundation Task Force on the Common School (2002) *Divided We Fail: Coming Together*.

4. Guinier, L. and Torres, G. (2002) *The Miner's Canary: Enlisting Race, Resisting Power, Transforming Democracy*. Cambridge: Harvard University Press.

5. Center for American Progress Task Force on Poverty (2007) *From Poverty to Prosperity: A National Strategy to Cut Poverty in Half*. Washington: Center for American Progress.

Schorr, L. (2004) 'The O'Connor Project: Intervening Early to Eliminate the Need for Racial Preferences in Higher Education', *Judicature*, 88: 2.

The Foundation

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Peter Edelman is a professor of law, formerly associate dean, at Georgetown University Law Center. He has served as a law clerk to Justice Arthur J. Goldberg on the Supreme Court, as legislative assistant to Senator Robert F. Kennedy, and as Assistant Secretary for Planning and Evaluation in the US Department of Health and Human Services, under President Clinton. He is the author of numerous articles on constitutional law and poverty.

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our website at www.fljs.org
or contact us at:

The Foundation for **Law, Justice and Society**

Wolfson College
Linton Road
Oxford OX2 6UD
T · +44 (0)1865 284433
F · +44 (0)1865 284434
E · info@fljs.org
W · www.fljs.org