1-1-2005

In Defense of Narrow Tailoring

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widely diverse people, cultures, ideas, and viewpoints." Grutter framed diversity's value to professional competence in general terms applicable to the basic workforce preparation function of elementary and secondary schools. It is not necessary to abolish affirmative action; indeed, this policy has allowed many thousands of individuals to overcome the debilitating effects of the "peculiar institution" called slavery. Instead, if affirmative action policy is to work, it must be policy directed toward economic and social equality for all. Such redirection can increase social welfare by correcting misallocations of labor resources, decreasing wage disparities, and increasing color-blindness in merit attained. This redirection is achieved by fostering endowments through early education and giving all an equal start. As stated by Robert Woodson,

Rather than demanding concessions and special exemptions from standards, we should return to a focus on practice, performance, and personal responsibility. "Affirmative action" should no longer be equated with demands for special treatment. Instead, it should refer to strategies that are employed to equip our young people to meet and exceed the highest standards of performance.

It is truly a time for mending, not ending.

Affirmative action was initially developed to help Americans. Since that time, other minority groups have demanded similar treatment, thereby weakening the effectiveness of affirmative action. Contemporary action must return to narrow tailoring toward African Americans in order to accomplish its original purpose.

Seen as a way to give African Americans equal opportunity in education and employment, affirmative action was first implemented in response to the Civil Rights Movement of the 1960s. Initially, affirmative action was developed to help a specific group. Over time, however, other minority groups demanded that compensatory action be applied to them. Consequently, affirmative action plans began losing their legitimacy. Yet, some political observers have contended that the original purpose for affirmative action was to create diversity, rather than to help African Americans. The upshot of this rationalization has been the misapplication of affirmative action in higher education. Such missteps have served to weaken contemporary affirmative actions, and in order to reverse this trend, affirmative action plans must return to narrow tailoring towards African Americans. Without narrow tailoring, African Americans will continue to experience the negative effects of past discrimination.

African Americans have a unique history in America when compared to other minorities. Specifically, African Americans were the only group brought to the United States unwillingly on slave ships. Afterwards, the majority of them were traded and sold, and their enslavement was ultimately written into formal law. Not surprisingly, after the abolition of slavery, the supposed

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new freedom for African Americans really did not substantially materialize. Even today, the effects of segregation, discrimination, and hatred toward blacks continue to linger.

In the meantime, other minority groups have immigrated to America hoping to find a better life, and many have been able to do so with relative success. Because of the distinct historical experiences of African Americans, including institutionalized discrimination and segregation, some instrument of policy was needed to compensate that group. That instrument has come to be known as affirmative action.

Segregation of African Americans has consisted of two parts: *de jure*, which is codified and institutionalized segregation, and *de facto*, which is segregation by default resulting from societal norms and prejudices. Therefore, the principle purpose of affirmative action is to eliminate *de facto* segregation.

Only forty years ago, the Supreme Court and U.S. Congress began an effort to eradicate *de jure* segregation, beginning with the *Brown v. Board of Education* decision and the Civil Rights Act of 1964. According to the Civil Rights Act, "all persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion or national origin." The Civil Rights Act served as a first step toward establishing such a standard in American society.

The catalyst for these structural changes in our government was a movement initiated by African Americans that has come to be known as the Civil Rights Movement. The Movement articulated a philosophy of change based on the constitutional principles of equal rights and the universal human privileges of liberty and the pursuit of happiness.

However, eliminating *de jure* segregation was only a first step in eliminating the century-old effects of prejudice. Indeed, segregation historian Howard Rabinowitz was accurate when he argued:

> The north's *de facto* segregation proved more entrenched, more difficult to overcome than the south's primarily *de jure*-based system. Today, *de jure* segregation

is a thing of the past, but in many areas, especially housing and public education, *de facto* segregation persists in the nation's cities.

Essentially, the struggle against *de facto* segregation is an effort to redefine societal norms and standards. It is this *de facto* segregation that continues to burden African Americans. In her majority opinion in *Adarand v. Pena*, Justice Sandra O'Connor added, "the unhappy persistence of both the practice and the effects of racial discrimination against minority groups in this country is an unfortunate reality."

This unfortunate reality should be addressed by viewing the issue through a narrow lens. Government policy designed to compensate for past discrimination should be narrowly tailored to address identifiable past instances of discrimination. Thus, policymakers must determine beforehand which groups do in fact suffer the effects of past discrimination. To that end, looking at the economic disparity that still persists in America can be insightful.

In a report done by the Pew Hispanic Center, white households in 2003 had a median net worth of more than fourteen times that of blacks. Moreover, net worth increased 17 percent for white households and 14 percent for Hispanic households between 1996 and 2002. In contrast, household net worth for blacks actually decreased by sixteen percent. This disparity between African Americans and other groups is not a result of some inherent lack of ability on the part of African Americans as some might be tempted to theorize. Rather, these differences can be directly attributed to a persistent context of *de facto* segregation, which other minority groups have not similarly suffered.

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The north's de facto segregation proved more entrenched, more difficult to overcome than the South's primarily de jure-based system. Today, de jure segregation is a thing of the past, but in many areas, especially housing and public education, de facto segregation persists in the nation's cities.2

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severs racial barriers, while at the same time creating better job opportunities for African American graduates. The need for affirmative action for African Americans was highlighted again during the recent 2001 recession in which the wealth gap for blacks widened still further. One of the main reasons African Americans have disproportionately suffered has been their general lack of educational opportunity.

Without the ability to accumulate wealth, black parents are less likely to send their children to college. Without the ability to go to college, future generations become less capable of accumulating wealth. Developing and implementing affirmative action plans can reverse this injurious cycle. However, such plans must be narrowly tailored for African Americans.

Unfortunately, affirmative action is now under attack because government organizations, including universities, have not adhered to the necessary principle of narrow tailoring, a doctrine established in the landmark case Bakke v. Regents of the University of California. In the Bakke case, the University of California, Davis Medical School set aside a strict 16 percent student-body quota for "educationally or economically disadvantaged minorities." Bakke, a prospective medical student, was denied admission at UC Davis's medical school, while a handful of minority students with lower test scores were granted admission.

Bakke's lawyers later argued in court that his denial was a direct result of the racial quota. Therefore, he had been the subject of discrimination. Michael Rosman, general counsel at the Center for Individual Rights, wrote about Justice Lewis Powell's majority opinion. According to Rosman,

Justice Powell, in an opinion only for himself, applied strict scrutiny to the Davis program. He concluded that "academic freedom," although not a specifically enumerated Constitutional right, was a "special concern" of the First Amendment and thus a sufficiently compelling interest to meet strict scrutiny.

The assumptions made by Justice Powell in his decision have subsequently fueled contemporary arguments against affirmative action. Although Justice Powell's reasoning, now referred to as the "diversity rationale," met the Court's requisite "strict scrutiny" and "compelling governmental interest," it was not narrowly tailored. Justice Powell's broad application of affirmative action plans has opened up a Pandora's box of complications in subsequent affirmative action cases and equal rights amendments in state legislative actions.

In the City of Richmond v. J.A. Croson decision only three years ago, Justice O'Connor affirmed the need for narrow tailoring. She asserted, "Affirmative action [strategies] had to be limited to compensation for specifically identifiable past discrimination." This contradicts Justice Powell's diversity rationale by demonstrating that diversity is not a sufficient governmental interest.

The application of the diversity rationale in many affirmative action plans has resulted in a broad scope being applied for determining who can benefit from "tilting the scale" based on race for creating diversity. This has meant that not only the African Americans who still suffer the effects of past discrimination may be considered, but also any minority group, whether or not they have experienced any lingering effects of past discrimination. Thus, Justice Powell's inappropriate argument has led to the rejection of too many affirmative action plans in higher education, especially in those most diverse states of California, Washington, and Texas.

The upshot is that Justice Powell's diversity rationale has reversed the goal of affirmative action, which has traditionally been to undo the current effects of past discrimination for African Americans. Moreover, it has spoiled the affirmative action plans of many well-meaning schools. For example, after the 1998 California vote to ban the use of race in government decision making, including college admissions, the UCLA Law School still "produced an extraordinarily diverse class, but black enrollment subsequently dropped by 72 percent," a mocking result since Justice Powell's intent was to uphold affirmative action.

3 City of Richmond Appellant v. J.A. Croson Co. Supreme Court of the United States 488 U.S. 469.
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Future university affirmative action plans being tried before the Supreme Court will not stand on the diversity rationale alone. It simply does not meet the requirement of previous Court decisions for narrow tailoring. This consequence has been shown in three recent cases where "in all three, the majority held that the only constitutional justification for affirmative action is as a remedy for past discrimination." Justice Powell was right in that "students—even those with interests remote from the humanities and social sciences—do learn from diverse views, values, and attitudes of classmates who come from various backgrounds."

Yet, the problem is that affirmative action is not necessary to create diversity. Furthermore, since affirmative action is not necessary for diversity, its elimination has already begun. Still, affirmative action remains necessary for something far more important: equal protection and equal opportunity for African Americans. There has never been a group in American history that has experienced the lingering effects of discrimination like African Americans. Therefore, they alone should benefit from any compensatory action.

Ibid., 598.
Ibid., 602.

An Examination of Affirmative Action as an Ineffective Policy

Elizabeth Little*

Affirmative action, as a policy, has not served its desired purpose because it has failed to benefit the intended group, the application has created unnecessary stigma and backlash, and it has reinforced discrimination as a solution.

In The Souls of Black Folk, W. E. B. Du Bois states, "The problem of the Twentieth Century is the problem of the color-line." Du Bois speaks of a color-line that negatively divides the races, placing people of color below the supposedly superior white race. The color-line excludes and oppresses those in the minority. Unfortunately, a color-blind society does not exist, and the color-line continues to stand in the way of equality. In order to create a just society, the United States must work towards the elimination of the color-line as it has existed throughout history. In the past, the struggle for racial equality was fought in the courtroom and through legislative policies. Analyzing the success of any policy requires a detailed look at the intentions, the application, and the overall results of the policy. The policy of affirmative action was adopted in order to remedy past racism and create an environment of equality. Unfortunately, affirmative action as a policy has not served its desired purpose because it has failed to benefit the intended group, the application has created unnecessary stigma and backlash, and it has reinforced discrimination as a solution.

In order to judge the effectiveness of affirmative action, it is essential to understand the judicial and social environments that led to the adoption of affirmative action as a government policy. In May 1896, in Plessy v. Ferguson, the

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