How Affirmative Action Failed Us

Faiz Surani

Lawrence Lowell had a problem. In the early 1920's, the President of Harvard University grew increasingly alarmed about a "knotty" issue that threatened "imminent. . . danger" to the institution: "the Hebrew question."[1] What Lowell was referring to, of course, was the growing proportion of Jewish students in Harvard's student body.

Lowell first sought to institute a quota limiting the number of Jewish students to no more than fifteen percent of the student body.[2] After this bid was rejected, Lowell then put forward an admissions process that would "reduce the number of Jews by talking about other qualifications than those of admission examination."[3] Lowell's decision was not entirely uncontroversial. The chair of the university's admissions committee worried that Lowell's proposal would "begin a system of racial discrimination at Harvard." But who could argue with its results? "[S]uch discrimination would inevitably eliminate most of the Jewish element which is making trouble," the chairman conceded.[4] And thus, "holistic review" was born.

Today, affirmative action occupies rarified air along with abortion and guns rights as one of the most divisive wedge issues in American politics.[5] Proponents claim that the practice is a necessary remedy to America's ugly history of racial discrimination against minorities and has a demonstrated effect of diversifying academic, governmental, and corporate institutions.[6]

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[1] Kristine E. Guillaume, *SFFA Argues Harvard's 'Holistic' Admissions Rooted In Tactics Once Used to Limit Jewish Admits*, The Crimson (2018).

[2] Mia C. Karr and Hannah Natanson, *The Lightning Rod: Race and Admissions at Harvard*, The Crimson (2017).

[3] Guillaume, *supra* note 1.

[4] *Id.*

[5] Frank Newport, *Affirmative Action and Public Opinion*, Gallup (2020).

[6] Connor Maxwell and Sara Garcia, *5 Reasons to Support Affirmative Action in College Admissions*, Center for American Progress (2019).

On the other hand, detractors argue that affirmative action is inherently discriminatory and harms both the groups it is intended to serve and those not favored by its policies.[7]

For much the same reasons, affirmative action has also become a fraught legal issue. Since the practice became widespread in the 1960's, challenges have made their way to the Supreme Court several times. Each time, deeply divided Courts have narrowly upheld the practice while disagreeing over the standard, permitted scope, and merit of affirmative action. In recent years, new developments in the practice and the rightward turn of the Supreme Court have again brought these constitutional questions to the fore. It seems, then, that the Court will soon have an opportunity to make a decisive ruling where past Courts have not. When it does so, it ought to invalidate affirmative action as inconsistent with the structure and interpretation of the Equal Protection Clause. Ultimately, there is no amount of "good" discrimination that can offset the pernicious kind. There is only discrimination, and so long as it is tolerated within our legal system, it will poison efforts to create a more equal society.

It first behooves us to define affirmative action with some precision. The term does not refer to any one policy or practice, but rather an amorphous blob of efforts to achieve greater representation of historically disadvantaged groups in academic, corporate, and governmental settings. While these pursuits often took vastly different forms, legal historian Melvin Urofsky has classified them into two general categories: "soft" affirmative action and "hard" affirmative action.[8]

The former category, "soft" affirmative action, is about "doing away with barriers, opening doors to groups previously kept out, [and] genuine outreach."[9] Some manifestations of these policies include efforts by compa-

[7]Richard Sander and Stuart Taylor Jr., *The Painful Truth About Affirmative Action*, The Atlantic (2012).

[8]Melvin Urofsky, The Affirmative Action Puzzle: A Living History from Reconstruction to Today, 13 (2020) (e-book).

[9]*Id.*

nies to diversify their applicant pools, college outreach programs to underrepresented communities, and notably, Title VII of the 1964 Civil Rights Act, which outlawed discrimination on the basis of protected classes.[10] These kinds of programs are generally uncontroversial nowadays; as essayist Louis Menand put it, "[a]part from stone-cold racists, everyone is happy, or claims to be happy, with affirmative action in [this] sense."[11]

The second category, "hard" affirmative action, has proven considerably more controversial. Urofsky characterized this group of policies as those "involv[ing] quotas" and explicit preferences for underrepresented minorities as a way of "offset[ing] the effect of previous [discriminatory] practices."[12] In short, while "soft" affirmative action aims for color-blindness, "hard" affirmative action emphasizes color-consciousness, whereby past discrimination is remedied by present preferences. It is these preferences, particularly race-based ones, that have been the focus of numerous legal challenges and bitter public debate, and they are the focus of this paper.

Most historians mark the start of the modern affirmative action movement with President John F. Kennedy's Executive Order 10925.[13] The Order established the President's Committee on Equal Employment Opportunity and ordered government contractors to "take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, creed, color, or national origin."[14] While the Order was relatively limited in scope, it had some key successes ending discriminatory practices among government contractors and laid the groundwork for Kennedy's future civil rights efforts.[15] EO 10925 was a form of "soft" affirmative action, praised by even the most vociferous critics of

[10] *Id.*

[11] Louis Menand, *The Changing Meaning of Affirmative Action*, The New Yorker (2020).

[12] Urofsky, *supra* note 8, at 163.

[13] *Id.* at 33.

[14] John F. Kennedy, *Executive Order 10925—Establishing the President's Committee on Equal Employment Opportunity*, The American Presidency Project (1961).

[15] Urofsky, *supra* note 8, at 113.

later affirmative action policies as both fair and necessary.[16] Tragically, Kennedy was assassinated not long into this pursuit and Vice President Lyndon Johnson ascended to the presidency. Johnson wasted little time picking up where Kennedy left off. In addition to presiding over the passage of the 1964 Civil Rights Act and 1965 Voting Rights Act, Johnson promulgated several additional executive orders to speed the process of equal opportunity and pay in federal contractors. In one of his most celebrated speeches, his 1965 commencement address to Howard University, Johnson called for the first time for policies of "hard" affirmative action.[17] But the bulk of Johnson's focus was on "soft" policies, and he did not aggressively pursue positive action to diversify institutions beyond ensuring equal opportunity.

Then, unexpectedly, came the greatest affirmative action champion of them all: Richard Milhous Nixon.[18] Nixon, together with his Labor Secretary George Shultz, pursued a great number of affirmative action policies including support for minority-owned businesses and hard racial quotas for federal contractors.[19] Most notably (and despite considerable opposition from within his own party) Nixon aggressively pursued equal opportunity within traditionally white labor unions with his Philadelphia Plan, which Democratic presidents Kennedy and Johnson were loath to do.[20] It was these hard

[16] *Id.* at 115.

[17] Lyndon B. Johnson, *Commencement Address at Howard University: "To Fulfill These Rights"*, Teaching American History (1965).

[18] President Nixon's record on issues of race is singularly complex. On the one hand, his emphasis on states' rights and law-and-order politics is widely perceived by historical scholars as part of an attempt to sow racial divisions and appeal to Southern Democrats for electoral purposes. On the other hand, Nixon pursued affirmative action programs far more aggressively than arguably any president before or after, established significant governmental support for minority-owned businesses,[a] and facilitated peaceful school desegregation on a large scale.[b] In recent years, historians have begun to reexamine the traditionally dim view of Nixon's record on race in light of these aspects of his tenure.[c]

[19] Urofsky, *supra* note 8, at 218.

[20] *Id.* at 237 ("The Senate minority leader, Everett Dirksen, at a meeting in the White

[a] Urofsky, *supra* note 8, at 215.

[b] Gareth Davies, *Richard Nixon and the Desegregation of Southern Schools*, 19 Journal of Policy History 367 (2007).

[c] Dean J. Kotlowski, *Nixon's Southern Strategy Revisited*, 10 Journal of Policy History 207 (1998)

policies that sowed the seeds of opposition to affirmative action.

Early "soft" affirmative action programs largely went without credible challenges, but quota programs soon became controversial. The first major challenge to these preferential programs came in the 1974 case *DeFunis v. Odegaard* when Marco DeFunis, a white law school applicant, sued the University of Washington School of Law on the grounds that affirmative action had caused him to be rejected. The case promised to be a landmark holding on the practice but the Court avoided ruling on the merits over the objections of four dissenters because DeFunis was nearing law school graduation by the time the case was heard.[21]

Of all the major affirmative action challenges, *Regents of the University of California v. Bakke* was perhaps the most closely watched in its own time.[22] The case arose when Alan Bakke, a white former Marine officer, was rejected from UC Davis Medical School. Bakke filed suit, alleging the school's set-aside of 16 out of 100 seats for minority students violated his Equal Protection rights.[23]

The Court's decision was such a mess that it was not until 25 years later, in *Grutter v. Bollinger*, that the Court would actually clarify which parts of it were binding.[24] Justice Powell delivered the opinion of the Court, assembled from two different five-justice majorities, which struck down UC Davis' quota system as unconstitutional and ordered Bakke admitted. At the same time, a majority of the Court found that affirmative action programs were permissible in some situations, thus preserving it at least in part. *Bakke*, in its

House told Nixon, 'As your leader in the Senate, it is my bounden duty to tell you that this thing is about as popular as a crab in a whorehouse.' He warned the president that it could split the party and that he himself would not be able to support the scheme.").

[21] *DeFunis v. Odegaard*, 416 U.S. 312 (1974)

[22] Urofsky, *supra* note 8, at 356.

[23] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

[24] *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) ("We do not find it necessary to decide whether Justice Powell's opinion is binding under *Marks*. It does not seem useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it.") (internal citations and quotations omitted).

multiple-majority, six-opinion glory, would be the last word for the Supreme Court on public affirmative action programs for the next quarter-century.

Bakke's uncertain reign would last until 2003, when the Court handed down *Grutter v. Bollinger*. In *Grutter*, Justice Sandra Day O'Connor wrote for the five-justice majority holding that the University of Michigan's Law School affirmative action program was constitutional. The Court found that the school had a "compelling interest in obtaining the educational benefits that flow from a diverse student body."[25] It then found that it was permissible under strict scrutiny for the university to use race as a "factor" (and only a factor, no more!). At the same time, the Court emphasized that "race-conscious admissions policies must be limited in time" and contemplated a future where "the use of racial preferences [would] no longer be necessary."[26] Overall, the net effect of *Grutter* was to solidify *Bakke*'s reasoning as the governing standard over affirmative action policies.

The Supreme Court would hear a few other cases over the years: *Weber v. United Steelworkers*[27] and *Fisher v. University of Texas* (2016)[28] to name a couple. These largely mirrored the aforementioned cases and fell along the same bitterly divided ideological lines.

Across the major affirmative action cases of the past half-century, there is a common theme: the absence of a decisive, landmark ruling to firmly embed the validity of affirmative action into the legal canon. Even as it repeatedly upheld them, the Court's discomfort with color-conscious policies was apparent. It proscribed quota systems, emphasized the temporary nature of the practice, and vacillated on what governmental interests, if any, are compelling under strict scrutiny.

The upshot of the Court's ambivalence is that affirmative action law stands on relatively shaky ground, despite the practice's now-lengthy history. His-

[25] *Id.* at 317.
[26] *Id.* at 342–343.
[27] *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979)
[28] *Fisher v. University of Texas*, 136 S.Ct. 2198 (2016) (*Fisher II*).

torian Nancy Woloch neatly summarized this paradox when she described affirmative action as "both transient and permanent, precarious and enduring."[29] Every succeeding Court since the practice began has been confronted with the same jurisprudential snafu, and thus far without fail, they have left it worse than they found it.

One rare point of consensus in the Court's affirmative action jurisprudence is that race-based programs must be subject to strict scrutiny.[30] The current status quo for affirmative action is that quotas are not allowed but race can be considered as a "factor." In effect, the Court has told institutions that so long as they make their race preferences sufficiently nebulous, those preferences can muster strict scrutiny. But that flies in the face of the exacting narrow tailoring requirements that the Court has typically imposed in Equal Protection cases. One can't shake the impression that calling the machinations of holistic review "narrowly tailored" badly misconstrues both words.

What we're left with is systems like Harvard's "holistic" admissions process, which is currently subject to a challenge likely to make its way to the Supreme Court. Harvard's admissions officers, an expert analysis in *Students for Fair Admissions v. Harvard* showed, "consistently rated Asian-American applicants lower than others on traits like 'positive personality,' likability, courage, kindness, and being 'widely respected'" even as those applicants scored higher in empirical academic measures and in interview evaluations.[31] Here, we find how practice deviates from theory in stark relief. Because the Court chose to demand less clarity rather than more, the high-minded goals of affirmative action are brought to bear at schools like Harvard to defend base prejudices. Available evidence makes it difficult to deny that these bizarre, prejudiced admissions standards result from the Court's muddled race-as-a-factor standard. Today, holistic systems like Harvard's are stan-

[29] Urofsky, *supra* note 8, at 14.

[30] *Fisher v. University of Texas*, 570 U.S. 297 (2013) (holding 7-1 that the lower court should have applied strict scrutiny and remanding accordingly).

[31] Anemona Hartocollis, *Harvard Rated Asian-American Applicants Lower on Personality Traits, Suit Says*, The New York Times (2018).

dard practice at nearly every major American university, and many selective high schools are beginning to adopt the same policies as well.[32] In truth, banning quota systems made affirmative action programs *less* narrowly tailored, not more.

None of this is to say in some way that affirmative action has run its course, achieved its goals, or that the racism it was intended to address is no more. As Lyndon Johnson said in his 1965 commencement speech at Howard University, "you do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair."[33] He was entirely correct when he said it, and he is still correct today. One looking for evidence of these modern-day chains need look no further than, well, every institution of modern American society.

From zoning policy to policing to healthcare, systemic racism seeps into all aspects of life for Black Americans. And given the undeniable evidence of these inequities, it is not enough to say, as some critics of affirmative action do, that the practice is discriminatory and, *ipso facto*, immoral and intolerable. That would be to apply a different standard to Black-favoring discrimination than to the countless instances of white-favoring discrimination. As Richard Nixon's Labor Secretary George Shultz observed, the United States had a racial quota for centuries, long before Lyndon Johnson first uttered the phrase "affirmative action": zero.[34]

What, then, is the harm of allowing these benevolent efforts to go forward? There are two distinct issues that tip the scale against them: one of efficacy and one of externalities.

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[32] Eliza Shapiro, *New York City Will Change Many Selective Schools to Address Segregation*, The New York Times (2020).

[33] Johnson, *supra* note 17.

[34] Menand, *supra* note 11.

Turning first to efficacy:[35] Justice O'Connor closed her 2003 majority opinion in *Grutter* with a bold prediction: "The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[36] Though that clock is still running, academic analyses in recent years have shown that prediction to be wishful thinking at best and naivete at worst.[37] Still, it raises the question: what are we still doing here? Every generation of policymakers and advocates since the Civil Rights era has believed it will be the last one to preside over affirmative action policies. Lyndon Johnson in 1968 framed his administration's policies as a temporary aberration with the intent of returning to a "true merit system" as soon as practicable.[38] The Court upheld private affirmative action plans in the 1979 case *Weber v. United Steelworkers* on the condition that the plans be transitional in nature and have a defined statistical or temporal end in mind.[39] In 1991, Yale Law School professor and self-described "affirmative action baby" Stephen L. Carter mused that his "bright and diverse students of color [had]. . . a good [shot] at being the last members of the affirmative action generation — or what is better still, the first members of a post-affirmative action generation."[40]

Affirmative action was most effective when it addressed immediate problems with defined goals: diversifying discriminatory apprenticeship programs[41]

[35]There are many arguments propounded by affirmative action opponents above the practical effects of affirmative action, particularly in the context of college admissions. Two of the most common are the argument that affirmative action cheapens minority achievement and "mismatch theory," the idea that minority students who ostensibly benefit from the practice will be unprepared academically to succeed at the institution they otherwise would not get into. This paper does not engage with these ideas because the research on these theories is far from settled and too often verges into racial stereotyping. Conor Friedersdorf, *Does Affirmative Action Create Mismatches Between Students and Universities?*, The Atlantic (2015).

[36]*Grutter v. Bollinger*, 539 U.S. 306, 310 (2003).

[37]Alan B. Krueger, Jesse Rothstein, and Sarah Turner, *Was Justice O'Connor Right? Race and Highly Selective College Admissions in 25 Years*, College Access: Opportunity or Privilege 35 (2006).

[38]Urofsky, *supra* note 8, at 154.

[39]*United Steelworkers of America v. Weber*, 443 U.S. 193 (1979).

[40]Stephen L. Carter, Reflections of an Affirmative Action Baby, 5 (1991).

[41]Urofsky, *supra* note 8, at 160.

and mandating government contractors pay equally,[42] for instance. But today affirmative action is asked to achieve a task for which it is woefully inapt: cancelling out the negative effects of all racism in our society. This too can be traced to the Supreme Court's jurisprudential failure. By banning quota systems in favor of "individualized inquiry"[43] and vague goals of diversity, it created the conditions for universities and other institutions to treat the practice as a racism cure-all. That is why the practice has dragged on with no expiration date, because the measure of its success is now progress on the colossal task of ending racism as a whole.

Still, perfect is the enemy of good. And as an old adage about software development goes, "worse is better," if an apparently "worse" solution is simpler and easier to implement.[44] Unfortunately, affirmative action is not only inadequate, but also actively impedes more effective remedies to societal inequities.

University of Illinois professor Walter Benn Michaels once described race-based affirmative action as "a kind of collective bribe rich people pay themselves for ignoring economic inequality."[45] Indeed, affirmative action in academic settings and otherwise overwhelmingly favors upper-class Americans.[46] A study conducted in the years before the passage of Proposition 209 (banning affirmative action in California), "only a third of the black students entering [UC Berkeley] could be considered lower income."[47] Further, in the largest study of affirmative action ever undertaken, William Bowen and Derek Bok found that "in the twenty-eight elite schools they surveyed, just 14 percent of minority students came from homes earning less than $22,000 a year."[48] The same pattern holds for those adversely affected by the

[42] *Id.* at 153.

[43] *Grutter v. Bollinger*, 539 U.S. 306 (2003)

[44] Richard P. Gabriel, *The Rise of Worse is Better*, Dreamsongs (1989).

[45] Walter Benn Michaels, *Diversity's False Solace*, The New York Times (2004).

[46] Fascinatingly, study after study has shown the greatest beneficiaries of affirmative action programs to be *white* women, not people of color. Victoria M. Massie, *White women benefit most from affirmative action — and are among its fiercest opponents*, Vox (2016).

[47] Urofsky, *supra* note 8, at 759.

[48] *Id.*

practice: "Affirmative action rarely affected upper-class white males; they had been well educated and had no trouble getting into good colleges. . . the price [was] paid. . . overwhelmingly by individuals from blue-collar white groups."[49]

This is the core danger of affirmative action. It creates a kind of Potemkin equality, whereby the uppermost echelons of society diversify without lifting up much of anyone. Black Americans with the good fortune to have already broken into the upper classes benefit immensely from affirmative action policies, while the disproportionately high fraction of Black Americans in poverty continue to suffer under the same racist structural impediments to upward mobility.[50] Systemic problems require systemic solutions, and the fight over affirmative action typifies our failure to come to grips with that fact.

We come next to the problematic externality of affirmative action: its tendency to worsen racial divides rather than heal them. This is perhaps the most difficult aspect of affirmative action to broach, because it goes to the heart of the racial resentment that animates our current political divides. It is easy to dismiss all resentment towards the practice, particularly white resentment, as plain racism. But that is neither correct nor productive. As Urofsky writes,

> While it is true that racism certainly played a role in the swelling chorus opposed to affirmative action, many other considerations played a part as well. Chief among these was the heavy-handed grab for power by the Equal Employment Opportunity Commission, which blatantly ignored the plain language of the 1964 Civil Rights Act. Another is the fact that the civil rights movement

[49] *Id.* at 481.

[50] *See, e.g.*, Stephen L. Carter, *Affirmative Distraction*, The New York Times (2008) ("Those who suffer most from the legacy of racial oppression are not competing for spaces in the entering classes of the nation's most selective colleges. Millions of them are not finishing high school. We countenance vast disparities in education in America, in where children start and where they come out.").

> that so many whites supported had emphasized color blindness. Critics constantly quoted Martin Luther King Jr., who hoped that his children would "not be judged by the color of their skin but by the content of their character.[51]

Importantly, most scholars of race agree that "blue-collar white reaction to affirmative action played a major if not *the* major role in winning this group away from the Democratic Party and supporting Ronald Reagan in the 1980 election."[52] Further, even though affirmative action is typically fairly popular in polling,[53] when respondents are asked about specific "hard" affirmative action policies, support drops precipitously, including among Black Americans.[54] Adding all this together with the prejudices the practice has been shown to encourage — against Jews, against Asian-Americans, and so on, it is the uncomfortable truth that affirmative action has in great part exacerbated racial divides and stifled the healing process that was at one time supposed to obviate the need for the practice.

Finally, it is worth examining what is likely to come next for affirmative action. Since *Fisher II* was handed down in a 4-3 decision, two of the four members of the majority have been replaced by considerably more conservative jurists: Brett Kavanaugh[55] for Anthony Kennedy and Amy Coney Barrett for Ruth Bader Ginsburg. This development, combined with the aforementioned weakness of affirmative action precedent, would seem to establish a six-justice majority in favor of ending, or at the very least severely curtailing the practice. It remains to be seen when and what case it will do so, but one prime candidate is the *Students for Fair Admissions* lawsuit, which there is little doubt will be appealed to the Supreme Court.

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[51] Urofsky, *supra* note 8, at 444.

[52] *Id.* at 475.

[53] Newport, *supra* note 5.

[54] Urofsky, *supra* note 8, at 477.

[55] Though Justice Kavanaugh has never presided over an affirmative action case either on the Court or the D.C. Circuit, he once criticized a Department of Transportation affirmative action policy as a "naked racial set-aside." Charlie Savage, *Leaked Kavanaugh Documents Discuss Abortion and Affirmative Action*, The New York Times (2018).

If affirmative action is to lose at the high court, it matters a great deal how it loses though.[56] The Supreme Court should, when the time comes, find modern affirmative action incompatible with Equal Protection, but its reasoning will determine whether it simply ends a regime of failed policy or instead undermines a broad array of anti-discrimination measures.

For a preview of the latter possibility's consequences, take *Shelby County v. Holder*.[57] In that case, Shelby County, Alabama challenged the constitutionality of the 1965 Voting Rights Act's preclearance provisions. The preclearance provisions mandated that certain state and local jurisdictions, as determined by a formula set out in the law, seek approval from the Attorney General when making any changes to their voting laws to ensure those changes did not unduly disenfranchise voters on the basis of race. Chief Justice John Roberts, in a 5-4 decision, struck down the coverage formula, effectively nullifying the preclearance provisions. The Chief Justice, with echoes of Justice O'Connor's "25 years" declaration, wrote that the formula was "based on decades-old data" and that racial disparities in voting in the covered jurisdictions had since vanished.[58]

The effect of the decision was immediate. Many of the jurisdictions immediately imposed a variety of voting restrictions — including, but not limited to, voter-identification laws, polling place closures in minority communities, and voter roll purges — that, predictably, led to minority disenfranchisement.[59]

The question, then, is whether the Court will learn from history or be doomed to repeat it. If it chooses to again embrace the fiction that racism has left the stage and strikes down affirmative action as no longer necessary, that

[56] In the immortal words of then-Solicitor General Elena Kagan: "If you are asking me, Mr. Chief Justice, as to whether the government has a preference as to the way in which it loses, if it has to lose, the answer is yes." Transcript of Oral Reargument at 40, *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

[57] 570 U.S. 529 (2013).

[58] *Shelby County v. Holder*, 570 U.S. 529, 546 (2013).

[59] P.R. Lockhart, *How Shelby County v. Holder upended voting rights in America*, Vox (2019).

would bode extraordinarily poorly for other protections that are integral to protecting minority communities. On the other hand, if it dismisses modern affirmative action practices for what they are — nebulous, ineffective, and wildly overbroad, it will have made the correct decision and done a great service to the country.

Affirmative action is not a menace to society. It is not morally wrong. It pursues the admirable, unrealized goal of racial equality. It is also illegal and ineffective. Affirmative action is an anomaly in Equal Protection jurisprudence, permitted too long by overly accommodating majorities of the Court. It is time for the Court to put an end to that accommodation.

Beyond the difficult legal and practical issues presented, affirmative action is emblematic of the broader problems with a racialized politics. So long as advocates maintain racial divides as a way of achieving equity, demagogues can exploit those divides to cleave Americans further apart. Such was the case with Nixon and Reagan's Southern Strategy, and so too may be the case with Asian Americans in the near future. Affirmative action has not solved the problem it set out to solve. Ending affirmative action will not solve the problem. Rooting out prejudice is the arduous, essential work of a generation, but we will not end discrimination by perpetuating it.

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