Affirmative Action: A Necessary Remedy, A Troubled System

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In America today, it can be argued that some minority groups have a need for help with integration equally and fairly into society. However, the United States government has had clear difficulties in implementing effective and agreed upon remedial legislation. Both proponents and combatants of affirmative action in America have for the past half century debated the necessary steps, if any, the United States should take. There are long standing differences in opportunities for success between a predominately white American demographic and those groups in America who have faced past discrimination and oppression. This essay will address arguments and questions surrounding this topic such as the need for affirmative action, its history in America, how racial groups are created and who is included in them, how other nations deal with similar problems, and if there are any alternatives or solutions to the issue at hand.

Since 1619, when the first English settlers arrived in Jamestown, the life of nonwhites in America has been a disadvantaged one to say the least. For almost 250 years, blacks were subject to formal slavery and since their freedom in 1863 they have, along with other minority groups, faced sever socioeconomic discrimination. There are few who understand the hardships of being a minority and the opportunity-giving power of affirmative action programs as well as Randal Kennedy.

Kennedy, a black man raised in Washington D.C. through the 1950's and 1960's, was given great opportunities by affirmative action programs that lead to his acceptance at St. Alban's, Princeton University, and Yale Law School. Paying great respect to the remedial efforts put forth by these institutions, Kennedy acknowledges that "an affirmative action ethos played a role in [his] acceptance and flourishing at each of these selective, expensive, and powerful institutions (Kennedy, 5)." Although a beneficiary of affirmative action, he firmly believes that

such actions are not wrong, and in fact are necessary. In his book, *For Discrimination*, Kennedy articulates the reasons for the necessity of remedial actions:

> "Racial affirmative action partially redresses debilitating social wrongs. Racial minorities, and blacks in particular, have long suffered from racist mistreatment at the hands of the federal government, state governments, local governments, and private parties. This oppression has produced a cycle of self-perpetuating problems that will not resolve themselves without interventions that go beyond prospective prohibitions on intentional racial mistreatment. Past wrongs have diminished the educational, financial, and other resources that marginalized groups can call upon, and have thus disadvantaged them in competition with whites. Hence it is not enough simply to end racist mistreatment. Reasonable efforts to rectify the negative legacy of past wrongs are also morally required (Kennedy, 11)."

His take on the need for the government to address the racial problems in society is one with few flaws. Apart from the intentions of "invidious discrimination", the of suppressing a disfavored group of people, "remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society (Kennedy, 167)." The idea of a society in which everyone is equal indeed has its traces in the very wording of our country's Declaration of Independence, were it is stated that "all men are created equal". Kennedy makes it difficult to argue with his understanding of our society today and in which direction he thinks it should continue to chug on. The history of affirmative action in this nation and its complications are as follows.

In 1978, the United States Supreme Court came to a uniquely split decision in the country's first landmark case dealing with the idea of affirmative action. In the case of the

Regents of the University of California v. Bakke, Justice Powell became the deciding vote on the ruling in the case as there were four judges on either side. Powell frames the arguments of the case into four specific argumentative stand points. Three of these talking points were also those arguments put forth by the N.A.A.C.P. in their argument as the Amicus Curiae.

The first principle argument in the Bakke case was that the school's special admissions program was within its constitutional rights because their interest was in "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession (Amar, 905)." The argument presented by the N.A.A.C.P. was that it would not be unconstitutional to practice reverse discrimination. They believed the school had the right to allow admittance into their programs based solely on the factor of race regardless of qualifications because it was okay to single out racial groups if it were for remedial or beneficial purposes. Justice Powell quickly shut this argument down stating that, "preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids (Amar, 905)."

The second argument in the Bakke case was one of countering the effects of discrimination already present in society. Justice Powell acknowledged that there is and has been discrimination in society, but was reluctant to pass any kind of legislation allowing for the untested and unregulated preferential treatment of minority groups because there was no way that the UCD Medical School would have been able to justify its selection of which minority groups would be considered for special admissions. He notes that the University was unable to explain their four choices of minority groups, especially the Asians because of the "substantial numbers of Asians admitted through the regular admissions program (Amar, 905)."

The third argument in the Bakke case was that the special admissions program would increase the number of physicians who would practice in underserved, minority communities. The N.A.A.C.P. presented a strong case with statistical arguments that in the past it was shown that minority doctors often went back to serve underprivileged communities and white doctors were more reluctant to serve in communities in which white persons would be considered minorities. They also showed that there was a massive gap in the health of black and white Americans when it came to "life expectancy, infant mortality, maternal death rates, fetal death rates, and deaths among young children (Brief of the Naacp Legal Defense and Educational Fund, 28)." Justice Powell responded to these arguments as not demonstrating that special admissions to under-qualified minorities would have any direct impact on the problems presented to the court faced by under served communities. He thus considered it to be an invalid argument as to why legislation should be passed in favor of the special admission program.

The final argument in the Bakke case was one of diversity. Petitioner proposed that if the argument was framed so that the school's special admissions program was trying to attain a diverse student body for the educational benefits to all from experiencing an ethnically diverse learning environment, it would be constitutionally acceptable. Powell ruled in favor of the schools "right to select those students who [would] contribute most to the 'robust exchange of ideas' (Amar, 906)." It was within a state educational institution's First Amendment right to achieve its goal of bettering higher education through diversity.

To this day, the argument for affirmative action and preferential treatment of minority groups has only been constitutionally upheld by one idea; that state and federal institutions can use racial discrimination with the goal of achieving a more diverse student body, improving the learning environment by adding diverse perspectives and backgrounds.

This premise for the legal practice of discrimination was upheld again by the Supreme Court in 2003. In the case of *Grutter v. Bollinger,* the court came to a majority ruling upholding Justice Powell's previous decision that diversity is a legitimate compelling interest of a state institution, in this case the University of Michigan, in achieving diversity among it's student body. This case is very important in the ongoing debates over affirmative action because it firmly sets two criteria that an affirmative action plan must adhere to.

The first piece of criteria was laid out when Justice O'Connor gave the opinion of the court. "All government racial classifications must be analyzed by a reviewing court under strict scrutiny… But not all such uses are invalidated by strict scrutiny. Race-based action necessary to further a compelling governmental interest does not violate the Equal Protection Clause so long as it is narrowly tailored to further that interest (*Grutter v. Bollinger*, 539 U.S. 308)." An institution must be able to show that its use of race-conscious admissions or implementations of a critical mass number to assess its current standings compared to some population of comparison is adding "to the substantial, important, and laudable educational benefits that diversity is designed to produce, including cross-racial understanding and the breaking down of racial stereotypes (*Grutter v. Bollinger,* 539 U.S. 308)." In other words, implementers of affirmative action must be able to show an undeniable governmental interest.

The second piece of criteria is that affirmative action programs must "[bear] the hallmarks of a narrowly tailored plan (*Grutter v. Bollinger,* 539 U.S. 309)." This means that when considering any individual for consideration to a program, race can only be used as a single factor out of many that compile said individual's qualifications for admissions. No person may be admitted solely because of their race, as using that as a determining factor would go directly against the fourteenth amendment's Equal Protection Clause. It follows that the use of

any kind of quota system that sets aside a specific number or percentage of admissions space is not allowed because it would violate the above conditions.

These same criterion was reaffirmed in the case of *Fisher v. The University of Texas* in 2013. In this case the court found that the use of a quota system would be unconstitutional. The court also found that public institutions may use race as one of many deciding factors in admissions for the purpose of achieving a diverse student body and that, again, these systems would be subject to strict scrutiny under the courts (*Fisher v. The University of Texas,* 570 U.S.___).

Now that is has been made clear by the rulings provided by the Supreme Court as to how affirmative actions programs may be constitutionally implemented, a new question arises; who gets to benefit from them?

The United States has a long standing history of racial discrimination against many minority groups. However, I think it is hard to argue that any group has faced more challenges and systematic oppression than those of the black community. After centuries of living under the system of slavery in America, blacks have not only encountered systematic oppression from the past, but the ripple effects of oppression have reached far into the waters of the 20th and 21st centuries.

In the case *Bakke v. The Regents of the University of California*, the N.A.A.C.P. Legal Defense and Education Fund, Inc. submitted an interest of amicus, an external party argument in support of the University, in which they provide a history of remedial actions similar to affirmative action carried out by the United States, as well as the effects of removing such remedies that impact the black community today. Their hope was to convince the court that

blacks qualified as one of the minority groups that could be a beneficiary of affirmative action plans.

This legal defense team took a historical approach to interpreting the Fourteenth Amendment's Equal Protection Clause in an attempt to display that its original intent was to "allow implementation of race-specific remedial measures where substantial need for such programs was evident (Brief of the Naacp Legal Defense and Educational Fund, Inc., as Amicus Curiae, 2)." In the years between 1864 and 1866 Congress was presented with the Freedmen's Bureau Bill. It proposed to give power to the Government to provide aid and support, specifically to blacks and people who were once slaves. It was passed in 1866 and implemented programs in which freedmen could be the only beneficiaries. The N.A.A.C.P. then made the important connection that "the same legislators who comprised the two-thirds majority necessary to override President Johnson's second veto of the Freedmen's Bureau Act of 1866 also composed the two-thirds majority who approved the Fourteenth Amendment (Brief of the Naacp Legal Defense and Educational Fund, Inc., as Amicus Curiae, 53)." The original purpose of the amendment was to legitimize the remedial acts passed by congress in the previous years during the Reconstruction Era. The legislation became strewed and adopted into the arguments of those who opposed Reconstruction measures by claiming that providing specific services to help blacks directly took away those services for whites. The perpetuation of this argument has lead to the exclusion of blacks from important areas in American life.

The legal defense team provided a compelling statistic to the court to show the direct results of the cease of remedial actions in the late 19th century.

> "As late as 1948, a third of the approved medical schools in this country (26 out of 79) had an official policy of denying admission to black applicants solely on

> account of their race. The effects of this invidious discrimination are reflected in the disproportionately small number of black doctors now practicing in this country. While there is one white doctor for every 477 whites, there is is only one black doctor for every 2779 blacks (Brief of the Naacp Legal Defense and Educational Fund, Inc., as Amicus Curiae, 53)."

The clear underrepresentation of blacks in not only the medical field, but many other demographics across the nation gives strong reason to why the black community should be a recipient of remedial actions and programs.

But what about Asians? Lynn, a Cambodian immigrant, lived in San Francisco and came from an underprivileged background and poor family. Overcoming the odds, Lynn graduated from college with a high GPA and decent LSAT scores. In hopes of becoming a public interest attorney she applied to law school. The school had implemented an affirmative action program, but not to Lynn's advantage. The special admissions program at the school she applied to only gave preferential treatment to African Americans, Hispanics, and Native Americans. The law school "rejected Lynn and, instead, accepted a Hispanic applicant with a similar background, but lower LSAT score and GPA. The school chose the Hispanic applicant over Lynn because of its categorization of Lynn as 'Asian.' (Choy, 38 U.C. Davis Law Review 546)."

In both the *Bakke* and *Grutter* cases, the Supreme Court upheld the diversity argument in favor of affirmative action. Victoria Choy from the University of California Davis Law School points out a fatal flaw in the rational of the Supreme Court when it comes to Asian Americans. She articulates her argument by first explaining the court-recognized interest in obtaining diversity in state institutions. "The Supreme Court believes that the substantial benefits of student body diversity include promotion of cross-racial understanding and breaking down of

racial stereotypes. The Court also believes that a student body with the 'greatest possible variety of backgrounds' offers the benefit of promoting different viewpoints (Choy, 38 U.C. Davis Law Review 570)." The law school Lynn applied to did not consider Asian Americans as an important enough minority group to be considered for affirmative action. Thus they implied that it was not of high enough priority that they promote the "cross-racial understanding and breaking down of [Asian] racial stereotypes." By not including Asians as a preferred minority group, the Supreme Court directly contradicted its own goals set by the diversity rational.

Another issue then arises in light of the 'Lynn' situation. According to Choy, the law school that Lynn applied to did not consider her a minority because fifteen percent of the school's population was already categorized as Asian. This becomes very problematic because Lynn was an immigrant from Cambodia, a nation located in Southeast Asia. Apart from "only two Southeast Asians… Most of the other Asians that compromise the fifteen percent [were] either Chinese or Japanese (Choy, 38 U.C. Davis Law Review 547)." The question of how a minority group is determined must be addressed.

Excluding Russia and Turkey, countries which reside on both the European and Asian continents, Asia is comprised of forty-six countries. For the Supreme Court to categorize the different cultures and experiences of all of the different nations in Asia "as an ethnic group, rather than as a racial group consisting of many ethnicities" in fact fuels uniform stereotyping of the Asian world as all the same (Choy, 38 U.C. Davis Law Review 570). In categorizing all Asians as one group, the court fails to recognize important facts like how "the socioeconomic positions of Southeast Asians are similar to that of African Americans rather than that of whites" and "Southeast Asians and Filipinos are underrepresented in higher education institutions (Choy, 38 U.C. Davis Law Review 567)." Even though individuals from different ethnic backgrounds

considered themselves to be culturally different from others on the same continent, they are never the less grouped into the same category.

This leads to the question; if the way that individuals classify themselves racially is not legitimately recognized by the Supreme Court, by what standards are they recognized? Christopher Ford touches on the arguments surrounding the use of racial and ethnic categories by the U.S. Census Bureau, the official data source used in determining racial distributions across America. The U.S. Census is an entirely self reported census system that determines individuals racial and ethnic statistics based on three questions on the census data form. For the first question, "each respondent is asked to fill in one of several circles indicating 'the race that the person considers himself/herself to be' (Ford, 82 Cal. Law Review 1242)." The second and third questions pertaining to race and ethnicity are about if an individual has a "Spanish/Hispanic origin" and "what is this person's ancestry or ethnic origin? (Ford, 82 Cal. Law Review 1243)". However, according to the U.S. Census Bureau, even though in the 2010 census there were twenty-one race categories available for selection, all Americans are broken down into five racial groups: American Indian or Alaskan Native, Asian, Native Hawaiian and Other Pacific Islander, Black, or White, with those from Hispanic origin considered as an ethnic group.

This poses a major ethical dilemma. If the government allows for individuals to classify themselves based on race, why then does it disregard those individual's classifications and ultimately slot them into one of five categories. The Census Bureau developed a Race Assignment Rule which made it so "those who did not indicate an ethnic origin [one of the five mentioned before] were themselves assigned that of the person in the nearest 'proximity'… this 'race-modification' system allowed the 9.8 million 'other race' respondents to be folded back into the standardized categories (Ford, 82 Cal. Law Review 1243)." This reclassification of race

carried out by the government disregards the self identity of millions of people while allowing for an extremely broad categorization of the rest of America.

With 300 million people being labeled in one of five categories, it is not unwise to question the accuracy of the United States' racial classification methods. Akhil Amar touches on this subject asking if this system is "exhaustive". Are all of the people in America okay with being placed into only one of five racial categories? With the Census Bureau offering twenty-one race categories to select from, it seems the answer is an undoubtable no.

It is then logical to call into question the nature in which the United States uses race to allocate benefits today. If one were to get the opinion of most scientists, the notion of race as we see it today would likely not exist at all. There are only differences in phenotypes between humans, but we are all the same species. Because biologically there are no fine lines that separate what today are considered 'different races', "a person's racial identity is largely a social phenomenon, rather than a biological one (Ford, 82 Cal. Law Review 1239)." How accurate then could these classifications be if they are manufactured by our society, and indeed one that is ever changing? Today, notions of race are highly skewed as we are living in an age of "'postethnic America' in which one can no longer assume that everyone is [definitely] a member of one clearly definable group (Amar, 839)." Yet as a society we still use very broad labels of race to decide which of the five groups are eligible for preferred treatment.

The largest, still unresolved issue with affirmative action today is the debate over the constitutionality of implementing such programs. In America there is still controversy over if the Fourteenth Amendment's Equal Protection Clause allows for race-conscious action to be taken. In other countries around the world such as France and South Africa, issues dealing with the appropriate ways to implement affirmative action as well as the legality of giving groups

preferential treatment within the language of each countries constitution have been ongoing adjacent to United States. The article, *France Says Non to Affirmative Action: Will the U.S. do the Same?* by Elizabeth Dorminey makes for an excellent example of how the language of a country's constitution can frame the contexts in which the laws are created and applied. Dorminey suggests that in both France and the United States, "the principle of equality before the law is paramount and should guide both judges and legislators". Each has a similar constitution which gives equal protection of the laws to its citizens. Frances was ultimately able to reach the decision that equality under the law is more important than remedial legislation that actively discriminates against any group. The U.S. however still largely debates this topic and is less inclined to just accept affirmative action's unconstitutionality because of the large difference in historical racism in the United States as compared to France.

However, if you compare the situation in the United States with that of South Africa, more similarities arise. South Africa has a long history of discriminatory legislation barring blacks and other nonwhites from many portions of society. According to the South African 1991 Census, "approximately eighty-seven percent of the population was disadvantaged by formal race classifications during the decades of the apartheid (Ford, 43 UCLA Law Review 1957)." Since the Mandela presidency, there has been a large push for affirmative action programs and even some going as far as complete discrimination; positions that no longer offer opportunities to whites, and only blacks are eligible.

One distinct difference that allows for South Africa to make such drastic remedial changes is the wording of their constitution. The African National Congress states in it's bill of rights that it is legal to implement "special measures of a positive kind designed to procure the advancement and the opening up of opportunities including access to education, skills,

employment and land, and the general advancement in social, economic and cultural spheres, of men and women who in the past have been disadvantaged from discrimination (Ford, 43 UCLA Law Review 1964).” This constitutional language speaks directly to the issue of affirmative action and tries to cover all bases on which it can be legally implemented. The case is far different in American culture as amending the constitution seems to be a last option, if even one at all. American judges seem to be much more focused on trying to interpret the same wording of the constitution, particularly the Equal Protection Clause in the Fourteenth Amendment, prolonging this debate over the constitutionality of affirmative action.

The American Supreme Court could learn a thing or two from foreign governments like South Africa who are actively amending and changing their constitutions. Their updating of government allows for legislation deemed necessary by societal pressure to be passed and the recognition of disadvantages in certain parts of their society in hopes of fixing them. Ford speak to this directly in his section titled *Water the Roots, Not the Branches*. He finds that the example that South Africa sets “suggests that the most important route to real and lasting advancement for disadvantaged groups is less through resource transfers to individuals based upon ascribed identity characteristics than it is through broad efforts to provide meaningful access, earlier in life, to the institutions and mechanisms by which society cultivates [individual attractiveness] (Ford, 43 UCLA Law Review 2014).” It is much more effective to invest in the specific communities and backgrounds that are producing these underprivileged pupils. Giving them unhindered access to education, job training, and economic opportunities would allow those people “to achieve success in the academic and employment world as ‘naturally’ as possibly (Ford, 43 UCLA Law Review 2017).”

It remains unclear for how much longer this debate over which groups and races American society will agree to help, in both the academic and employment spheres. What is at the moment unchanging is the fact that there are still underrepresented people in all walks of life and that "promotions [in life] based on factors outside of the **[**individuals] control, such as race and sex, lead to frustration, discontent, and either apathy or hostility (Stevens, 40 Ed. Law Rep. 48)." If the American government is unwilling to adapt to new societal pressures and directly address the issues of affirmative action within the language of the constitution is likely that this debate will continue to foster within the realm of American politics for years to come.

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