

2015

## Judicial Histories and Racial Disparities: Affirmative Action and the Myth of the “Post Racial”

Alan A. Aja Ph.D.

*Brooklyn College - City University of New York*

Daniel Bustillo

*Columbia University*

Follow this and additional works at: <https://digitalcommons.hamline.edu/jplp>



Part of the [Civil Rights and Discrimination Commons](#)

---

### Recommended Citation

36 Hamline J. Pub. L. & Pol'y 26

This Article is brought to you for free and open access by the School of Law (historic) at DigitalCommons@Hamline. It has been accepted for inclusion in Journal of Public Law and Policy by an authorized editor of DigitalCommons@Hamline. For more information, please contact [digitalcommons@hamline.edu](mailto:digitalcommons@hamline.edu).

# Judicial Histories and Racial Disparities: Affirmative Action and the Myth of the “Post Racial”

Alan A. Aja, Ph.D.<sup>1</sup> and Daniel Bustillo<sup>2</sup>

## I. Introduction

Over the last 40 years, the legal merits and parameters of “affirmative action” policies have been challenged exhaustively from state to federal courtrooms. In the most recent landmark case, *Fisher v. University of Texas*,<sup>3</sup> the U.S. Supreme Court declined to make a decision, instead it continued to allow universities to consider race as a factor in admissions to achieve diversity. However, the court also opined that universities must *prove* that “available, workable race-neutral alternatives do not suffice” before considering race.<sup>4</sup> In addition, the court ruled – by a 7-1 margin – to send the case back to the U.S. Court of Appeals for the Fifth Circuit for further review to determine if the school passed the test of “strict scrutiny,” the highest level of judicial review.<sup>5</sup> The ruling advances the trend towards continued legal contestation of affirmative action policies – with *The New York Times* characterizing the ruling as “simultaneously modest and significant” and “likely to give rise to a wave of challenges to admissions programs at colleges and universities nationwide.”<sup>6</sup> Moreover, the ruling further symbolized the hastening away from explicit race-based policies and towards more class-based redress, a policy prescription gaining more steam amongst the left and right alike.

---

<sup>1</sup> Assistant Professor, Brooklyn College – City University of New York

<sup>2</sup> Doctoral Candidate Columbia University

<sup>3</sup> ,133 S.Ct. 2411(2013)

<sup>4</sup> *Id.* at 2421.

<sup>5</sup> *Id.*

<sup>6</sup> Adam Liptak, *Justices Step Up Scrutiny of Race in College Entry*, NY TIMES A1 (Jun. 24, 2013) [http://www.nytimes.com/2013/06/25/us/affirmative-action-decision.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/06/25/us/affirmative-action-decision.html?pagewanted=all&_r=0).

Contrary to popular belief, affirmative action does not refer to a specific law or policy, nor is it designed to redress past discrimination.<sup>7</sup> Conceptually, affirmative action refers to a set of positive anti-discrimination policies, stemming largely from a series of Executive Orders, intended to include stigmatized groups in preferred positions of society, with aims to promote institutional desegregation.<sup>8</sup> Empirical evidence consistently shows stigmatized groups- in particular blacks, Latinos and women-face daily obstacles in hiring, promotion, renting or buying, gaining access to education and everyday economic activities.<sup>9</sup> Although some social desegregation has been achieved in government employment and higher education as a result of affirmative action initiatives,<sup>10</sup> legal decisions concerning how affirmative action should be defined and carried out, or implemented, has directly hindered its efficiency in creating more equitable outcomes for currently stigmatized groups.

This article is organized in two interconnected segments. First the historical trajectory of affirmative action policies is documented, presenting a general chronological discussion of key landmark legal decisions from local to national levels. The second part of this article draws from empirical evidence to discuss the implications of these decisions on unprivileged groups, paying particular attention to African Americans and Latinos. In essence, we demonstrate that in the absence of race or group-based affirmative action policies, without measures of compliance and enforcement,

---

<sup>7</sup> WILLIAM DARITY JR., *Confronting Those Affirmative Action Grumbles*, in CAPITALISM ON TRIAL: EXPLORATIONS IN THE TRADITION OF THOMAS E. WEISKOPF, 215-223 (Jeanette Wicks-Lim et al. eds., 2013).

<sup>8</sup> *Id.*

<sup>9</sup> Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. OF SOC. 937, 937-975 (2003); DEIDRE ROYSTER, RACE AND THE INVISIBLE HAND: HOW WHITE NETWORKS EXCLUDE BLACK MEN FROM BLUE-COLLAR JOBS (2003); Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable Than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON.REV. 991, 991-1013 (2004), INSTITUTE ON RACE AND POVERTY, COMMUNITIES IN CRISIS: RACE AND MORTGAGE LENDING IN THE TWIN CITIES (2009).

<sup>10</sup> Stephen Steinberg, *Confronting the Misuse of Class-Based Affirmative Action*, 7 NEW POLITICS 28, 28-32 (1997).

U.S. institutions are increasingly homogenous and segregated. We conclude that while race-based criteria are the most effective criteria to remedy present-day violations of Title VI of the Civil Rights Act (non-discrimination clause), if class is to supersede race in the popular discourse and eventual policy implementation, “wealth” is a far superior proxy for class over “income.”

## II.1960s: The Foundations for Affirmative Action Policies

During the heat of the civil rights movement, important legal steps were taken to implement anti-discrimination measures in U.S. society. In 1961, President Kennedy signed Executive Order 10925, directing federal contractors to take “affirmative action to ensure that applicants are treated equally without regard to race, color, religion, sex or national origin.”<sup>11</sup> While the order was deemed a step forward by civil rights activists in eliminating employment discrimination, its narrow focus on federal contracting dealt with only one of many institutional spheres where racial discrimination was omnipresent. Moreover, critics of the move viewed it simply as an extension of previous ineffective presidential orders involving federal contracting with little legal basis for enforcement<sup>12</sup> given that it created the Committee on Equal Employment Opportunity (CEEO), which only maintained advisory power.

When the landmark 1964 Civil Rights Act<sup>13</sup> was signed, it created the legal cornerstone for the eventual “results-based” framework affirmative action would eventually employ. In this historic act, racial discrimination in public places and institutions was declared illegal, enforcement authorizations to desegregate public schools were incepted, some standards for voting rights were established, but more related to “affirmative action,” federal funds could be withheld from federal contractors if there was evidence of discrimination on the basis of color, race or national origin. As a

---

<sup>11</sup> Exec. Order No. 10,925 of 1961, 26 FR 1977 (1961).

<sup>12</sup> Bernard Anderson, *The Ebb and Flow of Enforcing Executive Order 11246*, 86 AM. ECON. REV. 298, 298-301 (1996).

<sup>13</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

result, the Equal Employment Opportunity Commission (EEOC) was born. The EEOC, though incepted as a federal agency to create and ensure a diverse workforce, in reality had a relatively small amount of power to actually litigate.

In 1965, prominent members and sectors of the business community began to vocally oppose attempts to fast-track “affirmative action” like policies in U.S. law and policy. In this same year, after a monumental speech at Howard University when President Johnson made his now famous words calling for “equality not just as a right but as a result,” he signed Executive Order 11246<sup>14</sup>, requiring all firms with \$50,000 or more in federal contracts, or with 50 or more employees, to take affirmative steps to increase minority representation in the labor force. Moreover, this act was different from previous orders and pieces of legislation because it introduced enforcement procedures and allocated funds to the Department of Labor to oversee its follow-through. In this order, Johnson also called for a “good faith effort” by contractors to hire underrepresented groups, requiring them to conduct self-audits and to create an effective affirmative action plan. Two years later, Executive Order 11375<sup>15</sup> was signed as an amendment to the previous order, changing the word “creed” to “religion” and making sex discrimination illegal, expanding rights and protections for women in facets of the growing service sector and ensuring their inclusion in affirmative action policies.

In the late 1960s affirmative action became more of a potent anti-discrimination tool as several federal bodies were given responsibility for the implementation and governance of anti-discrimination measures. In 1968, the Housing and Urban Development Act of 1968 (Fair Housing Act)<sup>16</sup> was signed, prohibiting discrimination in housing operated or funded by the federal government. The act gave powers to the Housing and Urban Development (HUD) agency and the Office of Fair Housing and Equal Opportunity to oversee and litigate cases of discrimination in

---

<sup>14</sup> Exec. Order No. 11,246, 30 Fed Reg. 12,319, 12,935 (1965).

<sup>15</sup> Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967).

<sup>16</sup> The Housing and Urban Development Act of 1968, 42 U.S.C. §§ 3601 - 3619.

housing sales or rent, and mortgage lending. A year later, under pressure from civil rights groups, President Nixon signed Executive Order 11478<sup>17</sup> further strengthening previous measures ensuring equal opportunity for employment in the public sector, but also called for affirmative steps in the advancement, training, and treatment of “minority” civilian employees. The order also deemed the Civilian Service Commission, the agency responsible for federal personnel management, responsible for equal opportunity and affirmative action in government employment.

Until the Department of Labor’s Philadelphia Plan, affirmative action only extended itself to institutions that received public funds. Expanding on previous key Executive Orders (11246, 11375), the Philadelphia Plan introduced “goals and timetables” for the employment of minorities in federal construction projects, and required local contractors, unions, and other organizations to sign equal opportunity contracts involving both public *and* privately funded construction.<sup>18</sup> Not only was the introduction of affirmative action to the private sector met with resistance (Congress nearly considered banning it), but the Department of Labor also declared that the plan would be implemented in other cities unless their governing bodies came up with affirmative action plans of their own.

By the early 1970’s, the potency of affirmative action as an anti-discrimination tool was cemented. Through a series of presidential orders and laws, not only was the public and private sector responsible for hiring and promoting historically and presently stigmatized groups, but governmental bodies were also acquiring the necessary power to ensure its implementation. It was this power, along with the designation of specific underrepresented “groups” to merit affirmative action’s benefits, which prompted legal challenges toward the conceptual and practical implementation of affirmative action initiatives. The next section highlights key court cases that illuminate the legal beginnings of public discourse and debate over the merits of affirmative action policies.

---

<sup>17</sup> Exec. Order No. 11,478, 34 Fed. Reg. 12985(1969).

<sup>18</sup> TERRY H. ANDERSEN, *THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION* (2004).

### III. Challenging Affirmative Action, 1970s

In the early 1970s, affirmative action policies were briefly strengthened through key orders and legislation. By the time Revised Order No. 4 (1972),<sup>19</sup> which extended previous executive orders to non-construction federal contractors was signed, President Nixon had already implemented Executive Order 11625 (1971)<sup>20</sup> directing federal agencies to develop plans and goals for a national Minority Business Enterprise (MBE) contracting program. Moreover, the Equal Employment Opportunity Act of 1972<sup>21</sup> was passed, an amendment to the Civil Rights Act of 1964,<sup>22</sup> which gave the EEOC full force of statutory law to enforce equal opportunity and affirmative action in governmental hiring. It is important to note here that this piece of legislation is deemed responsible for increasing the number of African Americans and women employed by the public sector.<sup>23</sup>

By now, the implementation of affirmative action in government contracts and employment was being met with more avid public resistance. Meanwhile, challenges seeking institutional desegregation began to proliferate on judicial dockets. For example, in *Griggs v. Duke Power*, (1971),<sup>24</sup> the Supreme Court agreed that aptitude tests and diploma requirements in hiring by Duke Power repeated past discrimination practices against minorities, violating civil rights legislation. As a result, the term “set-asides” using racial preferences came to fruition, and more companies began to implement race-conscious plans.

---

<sup>19</sup> Revised Order No. 4, 41 C.F.R. part 60-2 (1972).

<sup>20</sup> Exec. Order No. 11,625, 36 Fed. Reg. 19,967(1971).

<sup>21</sup> Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 103 (1972).

<sup>22</sup> Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

<sup>23</sup> Winfield H. Rose & Ping Ting Chia, *The Impact of the Equal Employment Opportunity Act of 1972 on Black Employment in the Federal Service: A Preliminary Analysis*, 83 PUB. ADMIN. REV. 245, 245-251 (1978).

<sup>24</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

The *Griggs v. Duke Power*, (1971)<sup>25</sup> case presented the important link between employment and education. Despite civil rights legislation introduced in previous decades, schools and universities remained highly segregated. Latinos and Asians were legally barred from attending some public schools in many states, and women were systematically excluded from both public and private universities and professional schools. Some of these realities were challenged in *San Antonio Independent School District v. Rodriguez*,<sup>26</sup> and *Adams v. Richardson*,<sup>27</sup> In the former, a state court found educational financing favored more affluent peoples and discriminated against neighborhoods with low property value. The Supreme Court accepted the case and disagreed, suggesting that the state's school financing system did not violate the Constitution, and remanded back to the state of Texas for resolution. In the latter case, a Federal Appeals Court approved a district order calling for federal education officials to enforce Title VI of the Civil Rights Act. The court discovered that President Nixon's Health, Education and Civil Rights offices were allowing states to practice racial discrimination. The decision also identified school districts that were once desegregated by law but were still "racially distinguishable." As a result, cities like Baltimore were required to implement plans for desegregation or risk a loss of federal funding.<sup>28</sup> In 1974, Congress passed the Equal Educational Opportunities Act (1974),<sup>29</sup> prohibiting states from denying educational opportunities on the basis of their race, color, national origin or sex. However, the power to use race-based integration policies such as busing were limited as they were met with resistance, and instead policies such as magnet schools, transfer programs, and neutrally drawn school zones were introduced as alternatives.

---

<sup>25</sup> *Id.*

<sup>26</sup> 411 U.S. 1 (1971).

<sup>27</sup> 351 F.Supp. 636 (1973).

<sup>28</sup> Research Frontiers at the University of Maryland, Division of Research, March 1, 2004, Vol. 3, No. 6.

<sup>29</sup> Equal Educational Opportunities Act of 1974, 20 USC §§1701-1758 (1974).

The aforementioned decisions epitomized one of the many phases of affirmative action policy conceptualization and implementation. In particular, these decisions were emblematic of a move towards the questioning of group or race-based policies as a means of providing equal opportunity, battling discrimination and ensuring integration in public education. The controversy was evident through the landmark legal cases, *DeFunis v. Odegaard and the University of Washington*,<sup>30</sup> and *Regents of University of California v. Bakke*,<sup>31</sup> the latter having a more profound impact on education policy and affirmative action.

In *DeFunis*, a white pre-law student argued that the Equal Protection Clause called for the elimination of racial barriers, suggesting racial categories should not be created to demonstrate how society is organized. The case was the first to introduce the term “reverse discrimination” and to question race as a factor for professional schools. The latter case, *Bakke*,<sup>32</sup> legitimized the use of race for university admissions when all other credentials are equal, but disallowed the use of “set-asides” for minority applicants in their admission policies. While recognizing the need to use race-based policies to achieve “diversity” in a student body, it called for educational institutions to distinguish between goals and quotas, finding the latter unconstitutional.<sup>33</sup>

While the Supreme Court had redefined the rule of affirmative action in higher education, it nearly contradicted itself in the employment arena. In *United Steelworkers v. Weber*, the Court upheld a Title VII challenge to affirmative action policies which reserved half (50%) of job openings and training programs for minorities as long as the plan did not adversely impact whites nor prevent them from advancement. Because the plan was seen as a temporary, or what the court called a “remedial rationale” designed

---

<sup>30</sup> , 416 U.S. 312 (1974).

<sup>31</sup> 438 U.S. 265 (1978).

<sup>32</sup> *Regents*, 438 U.S. 265.

<sup>33</sup> Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*. 99 HARV. L. REV. 1327, 1327-1346 (1986).

to eliminate racial and gender imbalances of the past, it was decided to be legally permissible.<sup>34</sup>

#### IV. The Hostile 1980s – Affirmative Action in Decline

In the 1980s, key legal decisions involving affirmative action in employment, education, and housing further changed the design and implementation of affirmative action policy. When Ronald Reagan was elected President, one of his first initiatives was an update to Executive Order 11246<sup>35</sup>, a decree instituted by President Carter consolidating the governance structure of affirmative action. Under Carter's order, the *Department of Labor* was responsible for the enforcement of affirmative action, dealing mostly with compliance reviews and regulatory policies. However, Reagan quickly dismantled the previous administration's process, introducing new sets of regulations. For example, the previous threshold of enforcing affirmative action to government contractors with \$50,000 or more in contracts was increased to \$250,000 or more. In addition, goals and timetables were labeled more as "guidelines," the need to comply was withdrawn and contractors were given more time to report hiring progress of stigmatized groups.

Anderson<sup>36</sup> argues effectively that the Reagan regime was the most visibly hostile toward affirmative action, but the judicial system was no different throughout the 1980s. In the arena of employment, key decisions reversed past rights guaranteed under the *Civil Rights Act of 1964*, and allowed affirmative action policies for temporary purposes only. For instance, in *Firefighter's Local Union No. 1784 v. Stotts*,<sup>37</sup> the Supreme Court's decision delimited the power of federal trial judges to prevent layoffs of minorities in order to maintain their representation in an organization. In addition, it was ruled Title VII could only provide relief to those who were actual

---

<sup>34</sup> *Rethinking Weber: The Business Response to Affirmative Action*, 102 HARV. L. REV. 658, 658-671 (1989).

<sup>35</sup> Exec. Order No. 12,086, 43 Fed. Reg. 46,501 (1978).

<sup>36</sup> ANDERSON, *supra* note 16.

<sup>37</sup> , 467 U.S. 561 (1984).

victims of illegal discrimination, inciting a debate brought up in *Wygant v. Jackson Board of Education*,<sup>38</sup> over whether Title VII allows any type of class-based, race-conscious belief to operate as designed to remedy historical discrimination or prevent it from occurring in the future.<sup>39</sup> The outcome of *Wards Cove v. Antonio*<sup>40</sup> temporarily squashed the debate, when the Supreme Court held 5-4 that statistical evidence of racial or gender inequalities in workforce was not sufficient alone to prove discrimination, removing the burden of proof of discriminatory impact away from the employer and onto the victim of discrimination (plaintiff).

On the upside, in *Johnson v. Transportation Agency*,<sup>41</sup> the Supreme Court upheld a plan that authorized the consideration of gender in promotion decisions, but once again allowed affirmative action based on a “remedial-rationale” of the policy. However, in *City of Richmond v. J.A. Croson Construction Company*,<sup>42</sup> deemed one of the most significant civil rights cases of the 1980s, the city of Richmond’s (Virginia) affirmative action plan of setting-aside 30% of contracts for minority contractors was struck down because it was not “narrowly-tailored” to accomplish a remedial purpose. The Supreme Court ruled that there must be “compelling interest” such as to remedy past discrimination, and that the city must use “strict scrutiny” when implementing affirmative action policies.<sup>43</sup> Explained differently, the Supreme Court ruled that state and local level affirmative action programs allowing claims of past discrimination do not justify “set-aside” programs, which Justice O’Connor argued were rigid versions of quotas.

### V. The 1990s: Defending Affirmative Action

---

<sup>38</sup> 476 US 267 (1986).

<sup>39</sup> Robert N. Roberts, *The Public Law Litigation Model and Memphis vs. Stotts*, 45 PUB. ADMIN. REV. 4, 527-532 (1985).

<sup>40</sup> 490 U.S. 642 (1989).

<sup>41</sup> 480 U.S. 616 (1987).

<sup>42</sup> , 488 U.S. 469 (1989).

<sup>43</sup> George R. La Noue, *The Impact of Croson on Equal Protection Law and Policy*. 61 ALBANY L. REV. 1, (1997).

In the early 1990's, Congress responded to some of the previous decade's hostile court decisions on civil rights. In the Civil Rights Act of 1991,<sup>44</sup> which amended the 1964 landmark law, Congress overruled the Supreme Court decisions (primarily *Wards Cove v. Atonio*,)<sup>45</sup> by re-placing the burden on employers to ensure and prove that they were not practicing discrimination against stigmatized groups. It also re-allowed women and under-represented groups to call for damages in cases of intentional discrimination in the workplace, strengthening their civil rights protections.

A year later, the need for affirmative action in housing was reaffirmed in *NAACP Boston Chapter v. Kemp*.<sup>46</sup> In that district case, all Boston-area HUD affirmative fair housing marketing plans were ruled to have failed in their "statutory mandate" to represent the racial composition of the city as a whole. As a result, the consent decree triggered affirmative action goals in similar urban contexts, requiring cooperation for dispersal of assisted housing in 137 cities and towns nation-wide.

In 1993, one of President Clinton's first decisions upon his election was an update to Executive Order 11246,<sup>47</sup> signing the toughest affirmative action decree known to date. The Order focused on the worst offenders of minority hiring and procurement, primarily the construction trades, and called for more aggressive actions including "debarment" of contracting licenses for contractors acting in non-compliance. Two years later, opponents of affirmative action went on the offensive, and federal hiring programs were once again debated in *Adarand Constructors, Inc. v. Federico Pena*.<sup>48</sup> In this case, the Supreme Court made a nearly identical ruling as in *Crosson*,<sup>49</sup> but this time restricted the use of affirmative action policies in federal highway construction contracts. According to the Court's majority, race-based preferential government policies,

---

<sup>44</sup> Civil Rights Act 1991, H.R. 1, 102d Cong., 1st session (1991).

<sup>45</sup> 490 U.S. 642 (1989).

<sup>46</sup> 721 F. Supp. 361 (1989).

<sup>47</sup> Exec. Order No. 11,246, 30 Fed.Reg. 12,319, 12,935(1965).

<sup>48</sup> 515 U.S. 200 (1995).

<sup>49</sup> *City of Richmond v. J.A. Crosson Constr. Co.*, 488 U.S. 469 (1989).

specifically those targeting disadvantaged groups, must receive the highest level of scrutiny. Moreover, the government would have to tailor preferential policies toward past discrimination, but not everyday grievances.

The *Adarand*<sup>50</sup> decision represented a major setback for affirmative action, and both President Clinton and Congress followed with subsequent decisions responding to pressure for reform. In July of 1995, while defending the need for affirmative action as a means toward alleviating institutional desegregation, President Clinton signed a memorandum calling for the elimination of any program that involved quotas, preferences for unqualified individuals, that “reverse discriminates” or continues as policy after equal opportunity has been achieved. Affirmative action was still alive, but in a limited form. The memorandum was followed by the approval of the Equal Opportunity Act (1995),<sup>51</sup> not just prohibiting discrimination in federal employment hiring on the basis of an individual’s race, sex, national origin or color, but also prohibiting any form of preferential treatment in hiring practices.

Amidst the controversies of affirmative action policies in the federal employment arena, race-based policies in higher education were also legally challenged. In 1995, the Board of Regents of the University of California voted to remove race/ethnicity, religion, color, or national origin as a consideration in admissions, contracting or hiring in the state higher education system. A year later in *Hopwood v. University of Texas Law School*,<sup>52</sup> a federal court ruled that admissions procedures illegally discriminated against white applicants, banning separate admissions and financial aid based on a person’s race or ethnicity. This decision challenged the historic *Bakke*<sup>53</sup> decision, which rejected quotas but argued race could be used as a factor for university admissions. Moreover, in *Hopwood*<sup>54</sup>

---

<sup>50</sup> *Adarand*, 515 U.S. 200.

<sup>51</sup> Equal Opportunity Act of 1995, S.1085, 104th Cong (1995).

<sup>52</sup> 78 F.3d 932, 948 (1996).

<sup>53</sup> *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978).

<sup>54</sup> *Hopwood*, 78 F.3d at 948.

“diversity” as a goal in intellectual institutions was not of “compelling interest” to the state.

As the new millennium approached, affirmative action, as a general set of institutional desegregation policies, was clearly in decline. After Proposition 209,<sup>55</sup> a law banning all forms of affirmative action in public employment, public education or public contracting, was passed in California in 1997, subsequent states followed with laws mirroring the decision. Washington State enacted Initiative 200 and Florida banned race as a factor in college admissions in 2000. Taken together, this represented a movement away from an explicit acknowledgement that racism and discrimination persist towards an internalization of the “post-racial,” the unwarranted belief that America has largely transcended its racial divide.

## **VI. Revitalization or Last Breath? The New Millennium**

In 2000 a federal judge ruled that the use of race as a factor for admissions at the University of Michigan was constitutional.<sup>56</sup> The university argued, and the judge agreed, that if legacies, athletes and other groups deemed beneficial to the university were given preferential treatment, so too could “minority” (read: blacks, Latinos) groups be seen as contributing to a diverse intellectual student body. In a separate challenge to the university’s law school admissions criteria, a judge saw no relationship between racial diversity and intellectual diversity. The case was reversed on appeal a year later, re-igniting nearly 30 years of judicial contradictions and interpretations surrounding affirmative action’s legal validity.<sup>57</sup>

After the Board of Regents of the University of California took back some of their 1997 decisions in 2001, reinstating some affirmative action policies in the university system hiring and admissions policies, the Supreme Court also partially revived and redefined the policy. Agreeing to hear the aforementioned University

---

<sup>55</sup> California Civil Rights Initiative, Prop. 209 (1996).

<sup>56</sup> *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (2001).

<sup>57</sup> *Grutter v. Bollinger*, 288 F.3d 732 (2002).

of Michigan cases in 2003, the Supreme Court ruled that there is a “compelling interest” to acquire education and training in a diverse student body. While disallowing a system used by the undergraduate institution that gave additional points for admission based on an individual’s racial identification, it did allow race to be used alongside other criteria as long as there was no strong emphasis on it. Moreover, the law school was allowed to admit a “critical mass” of minority students in order to ensure a heterogeneous student body, declaring the value of diversity in public institutions.

In 2007, divisions within the U.S. Supreme Court continued to manifest themselves in contradictory opinions, with the cases of *Parents Involved in Community Schools v. Seattle School District No. 1* and *Meredith v. Jefferson County*, as the battlegrounds<sup>58</sup>. In these cases the courts ruled that public school systems could not seek to achieve or maintain integration through measures that take explicit account of a student’s race.<sup>59</sup> These rulings invalidated programs in Seattle, WA and metropolitan Louisville, KY that sought to maintain school-by-school diversity by limiting transfers on the basis of race or using race as a “tiebreaker” for admission to particular schools.<sup>60</sup> Importantly, both programs had been upheld by lower federal courts and were similar to plans in place in hundreds of school districts around the country. However, in a separate opinion on *Parents Involved in Community Schools v. Seattle*, Justice Anthony Kennedy wrote that achieving racial diversity, “avoiding racial isolation,” and addressing “the problem of de facto resegregation in schooling” were “compelling interests” that a school district could constitutionally pursue as long as it did so through programs that were sufficiently “narrowly tailored.”<sup>61</sup> The opinion produced by *Parents Involved in Community Schools v. Seattle* case contained the infamous and simplistic statement by Chief Justice John Roberts that, “the way to

---

<sup>58</sup> 551 U.S. 701 (2007).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>62</sup>

Most recently, in *Fisher v. University of Texas at Austin*, the Supreme Court – by a 7-1 margin – ruled that the U.S. Court of Appeals for the Fifth Circuit misinterpreted precedent and should re-evaluate the case of plaintiff Abigail Fisher, who claimed that the university unconstitutionally discriminated against her.<sup>63</sup> While not outlawing affirmative action programs, the Court continued to reinforce the notion that such programs must meet a test known as “strict scrutiny.” The opinion provided by Justice Kennedy indicates that a university’s use of affirmative action will be constitutional only if it is “narrowly tailored” and an indispensable component of achieving diversity.<sup>64</sup> Accordingly, the practical implications of this decision indicate that courts will need to ascertain and determine that the use of race as a component of admission decisions is indeed “necessary.”<sup>65</sup>

Despite the unpredictability of how states will interpret the *Fisher* ruling, at present, the future of race-based affirmative action remains uncertain. Thus, how far, or to what extent, can affirmative action go to achieve goals of equal opportunity, integration and diversity in employment, education, housing and all aspects of public life given the constant legal redefinition of its parameters? An examination of the empirical evidence from various spheres in which affirmative action has been employed as an anti-discrimination tool and a look at the prevailing sentiments impacting opinions pertaining to affirmative action policies are starting points in addressing this question.

## VII. Post-Racialism and the Conundrum of Persistent Disparities

---

<sup>62</sup> *Id.*

<sup>63</sup> *Fisher v. Univ. of Texas*, 133 S.Ct. 2411(2013)

<sup>64</sup> *Id.* at 2418

<sup>65</sup> *Id.* at 2419.

In an era that renders positive anti-discrimination measures as unnecessary, a position undoubtedly contradictory considering the aforementioned (and discussed below) empirical evidence that yields otherwise, this section addresses the propagation that the Civil Rights movement was successful and that we've entered an era of race-neutrality or "color-blindness," where race is viewed as a thing of the past. We begin, for example, with a July 2013 Gallup poll that indicated two-thirds of Americans were found to believe that college applicants should be admitted solely based on merit, with only 28% believing an applicant's racial and ethnic background should be taken into account to promote diversity on college campuses. According to the poll a full three-quarters of white Americans believe that college admissions should be solely based on merit. Conversely, the very same poll finds that a majority of Americans – 58%—still support affirmative action programs more generally.<sup>66</sup>

The meritocratic underpinnings and color-blind centrality of the above poll are key in understanding how the perception of "post-racialism" is hostile to structures, policies and alternative narratives which attempt to bring to light and ameliorate persistent racial disparities. To explain, we turn to economists Darrick Hamilton and William Darity, Jr. (2010),<sup>67</sup> who describe the propagation of post-racialism as a shift from an acknowledgement of some form of societal social responsibility for the condition of black America to a more overt position and ethic of individual personal responsibility. This rhetoric posits that discrimination and other social barriers are largely of a by-gone era, and that blacks must cease playing the 'victim role'.<sup>68</sup> The authors note that the post-racial narrative often acknowledges the existence of racial discrimination; however, it conversely makes the process of redress for specific oppressed

---

<sup>66</sup> Jeffrey M. Jones, *In US, Most Reject Considering Race in College Admissions*, GALLUP POLITICS, (Jul. 24, 2013), <http://www.gallup.com/poll/163655/reject-considering-race-college-admissions.aspx/>.

<sup>67</sup> Darrick Hamilton & William Darity, Jr., *Can 'Baby Bonds' Eliminate the Racial Wealth Gap in Putative Post-Racial America?* 37 REV. OF BLACK. POL. ECON.3, 4, 207-216 (2010).

<sup>68</sup> *Id.* at 208.

groups more difficult due to a “rising tide lifts all boats” mentality.<sup>69</sup> In addition, what seems to be missing from the post-racial narrative is an explicit acknowledgement of the overwhelming preponderance of empirical evidence that indicates the measure of inequality.

In a recent reflection of the present state of race relations in the United States, long-time race and inequality scholar Lawrence Bobo provides three potential definitions of post-racialism, which he refers to as *laissez-faire racism*.<sup>70</sup> According to the author, in the post-racial era, a new pattern of attitudes and beliefs have emerged, leading to a more covert, sophisticated, culture-centered, and subtle racist ideology, qualitatively less extreme and more socially permeable than Jim Crow racism.<sup>71</sup> Bobo frames the perniciousness of the narrative by asking, “In an era of widespread talk of having achieved the post-racial society, do we have real evidence that attention to and meaning of basic race categories are fundamentally breaking down?”<sup>72</sup>

Turning to an examination of the empirical evidence on the veracity of having achieved a post-racial society, we can answer that it is in short supply. As an example, while the face of poverty remains societally stigmatized as a person of color, the evidence shows this stigmatization to be false. According to recent (2013) figures calculated by the Census Bureau, two-thirds of those below the poverty line identify as white.<sup>73</sup> Moreover, while proportionally poverty rates for blacks and Latinos are nearly three times higher than that of whites, the overwhelmingly predominant face of the poor is white. More than 19 million whites fall below the poverty line for a family of four, a figure nearly double the number of poor blacks..<sup>74</sup>

---

<sup>69</sup> *Id.*

<sup>70</sup> Lawrence Bobo, *Somewhere Between Jim Crow and Post-Racialism: Reflections on the Racial Divide in America Today*, 140 *DAEDELUS* 2, 11-36 (2011).

<sup>71</sup> *Id.* at 9.

<sup>72</sup> *Id.* at 14.

<sup>73</sup> Mark Rank, *Poverty in America is Mainstream*. *NY TIMES*, Nov. 2, 2013, at SR12.

<sup>74</sup> Hope Yen, *80 Percent of Americans Face Near-Poverty, Unemployment: Survey*, *THE HUFFINGTON POST* (Jul. 28, 2013),

In the realm of employment, the latest figures provided by the Bureau of Labor Statistics note that the overall black unemployment rate was estimated at 12.9% and at 9% for Latinos, compared to 6.3% for whites and an overall national rate of 7.2%.<sup>75</sup> The figures from the Bureau of Labor Statistics for 2012—broken down by educational attainment—present a starker underscoring of the reality.<sup>76</sup> For instance, in 2012 the unemployment rate for whites with less than a high school diploma was 11.4%, but for black Americans with less than a high school diploma the rate was estimated at 20.4%. The unemployment rate in 2012 for whites with a bachelor’s degree or higher was 3.7%, but for black Americans it stood at 6.3%.<sup>77</sup> These trends are well rooted in a historical context as the overall unemployment rate for black Americans has always been roughly double that of whites and for Latinos roughly one and a half times that of whites.<sup>78</sup> Research has also demonstrated that even after taking educational attainment into account, black men are overrepresented or “crowded into” low-wage jobs and underrepresented or “crowded out” of high-wage jobs, determining that the most likely explanation is labor market discrimination.

Large racial disparities in income and wealth also persist. In 1940, when the U.S. decennial census began collecting wage and earnings data by race, the typical black male earned less than 45 percent of what the typical white male earned, and by 1980 the earnings gap fell to a little over 70 percent where it has more or less

---

[http://www.huffingtonpost.com/2013/07/28/poverty-unemployment-rates\\_n\\_3666594.html/](http://www.huffingtonpost.com/2013/07/28/poverty-unemployment-rates_n_3666594.html/)

<sup>75</sup> *Overview of BLS Statistics on Unemployment*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/bls/unemployment.htm> (last modified Dec. 16, 2013).

<sup>76</sup> *Id.*

<sup>77</sup> *The Employment Situation – February 2014*, BUREAU OF LABOR STATISTICS (Mar. 7, 2014) <http://www.bls.gov/news.release/pdf/empisit.pdf/>.

<sup>78</sup> ALGERNON AUSTIN, DARRICK HAMILTON, AND WILLIAM RARITY, JR., *Whiter Jobs, Higher Wages: Occupational Segregation And The Lower Wages Of Black Men*, ECONOMIC POLICY INSTITUTE (2011), available at [http://www.epi.org/publication/whiter\\_jobs\\_higher\\_wages/](http://www.epi.org/publication/whiter_jobs_higher_wages/)

remained.<sup>79</sup> At the household level, median adjusted household income for blacks is now 59.2% that of whites, up slightly from 55.3% in 1967.<sup>80</sup> Moreover, white families possess substantially more wealth than black and Latino families.<sup>81</sup> Prior to the 2007 Great Recession, data from the 2005 Survey of Income and Program Participation (SIPP) revealed a white household median net worth of approximately \$135,000 and a black household median net worth of a little over \$12,000.<sup>82</sup> Thus, the typical black family had less than 9 cents for every dollar in wealth of the typical white family. After the Great Recession, this gap nearly doubled with the typical black and Latino family having about a nickel for every dollar in wealth held by the typical white family, with the typical black household having \$5,677 in net worth and the typical Latino household \$6,325.<sup>83</sup> A more recent report from the Institute on Assets and Social Policy at Brandeis University<sup>84</sup> indicates that the wealth gap almost tripled from 1984 to 2009, increasing from \$85,000 to \$236,500 with the median net worth of white households in the study growing to \$265,000 over the 25-year period compared with just \$28,500 for black households.<sup>85</sup> Data from the Survey of Consumer Finances has also been used to demonstrate that in 2010, whites on average had

---

<sup>79</sup> James P. Smith & Finis R Welch, *Black Economic Progress after Myrdal*, 27 J. ECON. LIT. 2, 519-564 (1989).

<sup>80</sup> Drew Desilver, *Black Incomes are Up, but Wealth Isn't*, PEW RESEARCH CENTER (Aug. 30, 2013), <http://www.pewresearch.org/fact-tank/2013/08/30/black-incomes-are-up-but-wealth-isnt/>

<sup>81</sup> Paul Taylor, Richard Fry, & Rakesh Kochhar, *Wealth Gaps Rise to Records Highs Between Whites, Blacks, Hispanics: Twenty-to-One*, PEW RESEARCH CENTER (July 26, 2011), <http://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/>

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Thomas Shapiro, Tatjana Meschede, & Sam Osoro *The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide*, in IASP RESEARCH AND POLICY BRIEF (2013), available at <http://iasp.brandeis.edu/pdfs/Author/shapiro-thomas-m/racialwealthgapbrief.pdf>

<sup>85</sup> *Id.*

six times the wealth of blacks and Latinos.<sup>86</sup> In fact, after adjusting for inflation, the median net worth for black households in 2011 (\$6,446) was lower than it was in 1984 (\$7,150), while white households' net worth was almost 11% higher.<sup>87</sup> Taking all of the aforementioned into account, what is absolutely clear from the empirical evidence is that the racial wealth gap exceeds \$100,000 and is expanding.

With the aforementioned socioeconomic racial disparities as sober frames, the question then becomes what has been the effect of attempts to address these persistent disparities through affirmative action measures? This section addresses the practical implications of affirmative action policies, drawing from scholarly studies that measure progress of institutional desegregation. Problems with this type of analysis are two-fold; First, because affirmative action is not one coherent policy, but rather redefined over the last 50 years through a series of executive and administrative orders and judicial decisions, deciphering any impact depends on what Anderson has called the “ebb and flow” surrounding the implementation of the policy.<sup>88</sup> Second, affirmative action has been carried out in housing, employment, higher education and other spheres where the inclusion of underrepresented groups is the mission, making for a difficult general assessment. However, as this section will underscore, there is ample evidence that overall, decisions by state and federal courts on affirmative action have almost immediate impacts on the extent of desegregating US institutions. Moreover, research shows that in the absence of measures of compliance, violations of Title VII continue to persist.

\*\*\*

Researchers first began to assess the impact of affirmative action policies in the 1970s. In the early years of affirmative action,

---

<sup>86</sup> Signe-Mary McKernan et al., *Less than Equal: Racial Disparities in Wealth Accumulation*, URBAN INSTITUTE (Apr. 2013), <http://www.urban.org/uploadedpdf/412802-less-than-equal-racial-disparities-in-wealth-accumulation.pdf>

<sup>87</sup> *Id.*

<sup>88</sup> Anderson, *supra* note 10.

it was found that upon initial enforcement, black male employment among federal contractors was more abundant in clerical and operative occupations, but less so in management jobs.<sup>89</sup> Rose and Chia<sup>90</sup> drew similar conclusions, questioning the impact of the Equal Employment Opportunity Act of 1972,<sup>91</sup> the law giving statutory validity to affirmative action measures in the governmental employment arena.<sup>92</sup> Using numerical data provided by the Civil Service Commission in 1974, initial assessment of minority-hiring progress was disappointing. The authors found too few blacks in higher-level governmental agency positions and too many in lower-level positions.<sup>93</sup> The reasons, the authors suggest, point to the context of the times; affirmative action was still young, and working in government was seen as a last resort of unemployment given its long-standing history of hostility toward African Americans.<sup>94</sup>

A few years later Clynch and Gaudin focused on the integration of women in the workforce and drew similar conclusions about the public sector, but found some progress in the private sphere. Prior to this study, no scholars had made a comparative analysis of affirmative action's implications in both the private and public sectors.<sup>95</sup> Examining female/male employment patterns in private and naval Maritime shipyard jobs (occupations traditionally held by men), female employment increased by 4% in private shipyards, but only 0.5% in government facilities.<sup>96</sup> The authors gave a plausible explanation: while increase in female employment was not dramatic in either setting, the slight progress in the private sector

---

<sup>89</sup> George Burman, *The Economics of Discrimination: The Impact of Public Policy* (1973) (unpublished Ph.D. dissertation, on file with the University of Chicago Library).

<sup>90</sup> Rose, *supra* note 21.

<sup>91</sup> Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 103 (1972).

<sup>92</sup> Exec. Order No. 11,478, 34 Fed. Reg. 12,985, 3 C.F.R. 803 (1969).

<sup>93</sup> Rose, *supra* note 21.

<sup>94</sup> *Id.*

<sup>95</sup> Edward J. Clynch & Carol A. Gaudin, *Sex in the Shipyards: An Assessment of Affirmative Action Policy*, 1 FEM. STUD. 1, 75-103 (1972).

<sup>96</sup> *Id.*

may have been due to the governance structure of affirmative action.<sup>97</sup> Private companies, looking to acquire contracts from the government, needed to abide by affirmative action requirements or risk losing them.<sup>98</sup> Monitoring government agencies, on the other hand, required more time and resources due to their bureaucratic components.<sup>99</sup>

The aforementioned study, along with the work of Goldstein and Smith<sup>100</sup> and Heckman and Wolpin,<sup>101</sup> make general assessments about the impact of affirmative action on employment in its early stages: the representation of women and African Americans in employment sectors was beginning to increase, but they were over-represented in lower-level occupations. Leonard challenged these assessments and painted a contradictory picture for the late 1970s.<sup>102</sup> The author agreed that the presence of blacks and women had indeed grown among federal and non-federal contractors, but also found an increase in demand for stigmatized groups in higher-skilled jobs.<sup>103</sup> The author points to the vigorous enforcement of affirmative action during this time period, suggesting progress had come when government intervention was stronger.<sup>104</sup>

While affirmative action matured as a policy in the late 1970s, with positive consequences for women, Latinos, African Americans, Asians and other stigmatized groups, the hostility toward affirmative action during the Reagan regime marked significant declines for above groups in both public and private employment.

---

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Morris Goldstein & Robert S. Smith, *The Estimated Impact of the Antidiscrimination Program Aimed at Federal Contractors*, 29 IND. & LAB. REL. REV. 4, 523-543 (1976).

<sup>101</sup> James J. Heckman & Kenneth I. Wolpin, *Does the Contract Compliance Program Work? An Analysis of the Chicago Data*, 29 IND. & LAB. REL. REV. 4, 544-564 (1976).

<sup>102</sup> Jonathan S. Leonard, *The Impact of Affirmative Action on Employment*, 2 J. LAB. ECON. 4, 439-463 (1984).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

Carlson's robust intra-occupational review of U.S. Census data makes this clear, illustrating that race/sex occupational inequality declined significantly from the 1960s to 1970s, but from 1980 to 1989 increased dramatically.<sup>105</sup> Leonard also makes similar observations, pointing to a lack of enforcement by government agencies under the Reagan years as important factor in institutional desegregation.<sup>106</sup>

By the early 1990s, Reagan's attempt to weaken and dismantle affirmative action extended into Bush Sr.'s tenure, with evidential effects on stigmatized groups during these years. For example, studies by the GAO<sup>107</sup> and the Fair Employment Council of Washington (1993)<sup>108</sup> found significant discrimination against designated minority groups in the employment sector, primarily African Americans and Latinos. The former study found that Latinos were offered 25% fewer job interviews than whites, and received 34% fewer jobs than whites.<sup>109</sup> The latter report, consisting of a series of tests undertaken over two years, found that blacks (24%) and Latinos (22%) were treated significantly worse than whites while searching for employment (despite equal qualifications).<sup>110</sup> An Urban Institute<sup>111</sup> report made similar findings in the housing arena, with both equally qualified Black and Hispanic testers experiencing discrimination 50% of the time in their negotiations with real estate agencies, compared to 20% for whites.

Upon incremental rejuvenation of affirmative action during the early 1990s and into the Clinton era, a White House Staff Report

---

<sup>105</sup> Susan M. Carlson, Trends in Race/Sex Occupational Inequality: Conceptual and Measurement Issues, 39 SOC. PROBLEMS, 3,(1992.)

<sup>106</sup> Leonard, *supra* note 102.

<sup>107</sup> U.S. GENERAL ACCOUNTING OFFICE, IMMIGRATION REFORM: EMPLOYER SANCTIONS AND THE QUESTION OF DISCRIMINATION , (1990), *available at* <http://www.gao.gov/assets/150/148824.pdf>

<sup>108</sup> Fair Employment Council, EEO Testing Manual, Fair Employment Council of Greater Washington, Washington (1993).

<sup>109</sup> U.S. GENERAL ACCOUNTING OFFICE, *supra* 107.

<sup>110</sup> Fair Employment Council, *supra* 108.

<sup>111</sup> MARGERY TURNER, MICHAEL E. FIX & RAYMOND J. STRUYK, OPPORTUNITIES DIMINISHED, OPPORTUNITIES DENIED (1991).

to the President<sup>112</sup> hailed the necessity of affirmative action policies, illustrating the positive impact of anti-discrimination legislation in improving minority representation in education along with federal and private employment and earnings.<sup>113</sup> The report cited that not only did the quantity and quality of education for black workers improve their earnings by 20% (overall) since the 1960s, the growth of women in professional schools also coincided with increased anti-discrimination measures.<sup>114</sup>

While the White House staff did question why earnings gaps still existed between blacks and whites and males and females, and also admitted that progress had been stifled during the 1980s, the authors vehemently defended the need for affirmative action.<sup>115</sup> However, by the late 1990s, attacks on affirmative action began to resurface in U.S. courtrooms. The decision to disallow race as a factor in admissions in *Hopwood v. University of Texas Law School*<sup>116</sup> not only adversely affected minority enrollment in the state of Texas, but also impacted other states in the Fifth Circuit where the ruling was made.

In a study by the *Civil Rights Project* at Harvard University,<sup>117</sup> the dismantling of affirmative action in higher education was found to have almost immediate effects. Upon approval of Proposition 209<sup>118</sup> in California, the landmark act prohibiting the use of race, ethnicity, sex or national origin in public education (including employment and contracting), the authors found evidence of an overall decline in minority enrollment in state

---

<sup>112</sup> George Stephanopoulos & Christopher Edley, Review of Federal Affirmative Action Programs, White House Staff Report (1995).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> 78 F. 3d 932,948 (1996)

<sup>117</sup> Erica Frankenberg, Chunmei Lee & Gary Orfield, *A Multiracial Society with Segregated Schools: Are we Losing the Dream*, THE CIVIL RIGHTS PROJECT (2003), available at <http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/a-multiracial-society-with-segregated-schools-are-we-losing-the-dream/frankenber-multiracial-society-losing-the-dream.pdf>

<sup>118</sup> California Civil Rights Initiative, Prop. 209(1996).

universities in a short amount of time.<sup>119</sup> For example at UC-Berkeley and UCLA respectively, Latino enrollment dropped from 14.5% to 7% and 15.8% to 11% in one academic year (1997-1998).<sup>120</sup> In academic hiring, the number of women faculty fell 22 percent throughout the state.<sup>121</sup>

Finally, in examining the overall state of the evidence pertaining to affirmative action, Holzer and Neumark<sup>122</sup> determined that affirmative action had a significant redistribution effect coupled with relatively small economic efficiency consequences, which indicates low levels of “waste” or deviation from an optimal allocation of resources.<sup>123</sup> In addition, Holzer and Neumark<sup>124</sup> also determined that affirmative action improved opportunities and outcomes for its beneficiaries, while also generating positive external benefits to others.<sup>125</sup> Crucially, they also determined that the costs borne by whites, in terms of lost jobs or lost positions at elite colleges and universities, and the costs borne by employers had been limited.

### VIII. Moving Forward - Defending and Expanding Affirmative Action

Despite evidence of both continued inequities based on race and the effectiveness of affirmative action as an anti-discrimination policy and means of institutional desegregation, the societal assault on affirmative action as a policy remedy continues. Citizens of all stripes, including post-racial liberals, have engaged in the dichotomy of passive and active formation of a coalition designed to deconstruct a policy that is deemed threatening to the dominant power structure. This threat is contained in its very existence, which forces the society

---

<sup>119</sup> Frankenburg, *supra* note 117.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> Harry J. Holzer & David Neumark. *Assessing Affirmative Action*,. (Nat’ Bureau of Econ. Research, Working Paper No.w7323, 1999).

<sup>123</sup> *Id.* at 5.

<sup>124</sup> Harry J. Holzer & David Neumark, *Affirmative Action: What Do We Know?*, 25 J.POL’Y ANALYSIS & MGMT. 2463-490 (2006).

<sup>125</sup> Holzer & Neumark, *supra* note 122.

adopting it to acknowledge the reality and persistence of systemic racism and not simply as some abstract historical notion, an admission which may be the biggest source of “grumbling” against affirmative action.<sup>126</sup> From a political perspective, Democrats and Republicans have implemented a tacit agreement not to speak about race. When was the last time affirmative action was mentioned by either party? As illustrated above, there is ample empirical evidence to indicate that affirmative action works and therein, shall we say, lies the rub.

The central question surrounding race-based affirmative action continues to be ignored on a persistent basis: *Has structural racism/inequality diminished to such an extent that policy prescriptions such as race or group-based affirmative action are no longer needed?* There are reasons (wealth gaps, employment gaps, persistent mass incarceration and on and on) to conclude that the answer is a resounding no.<sup>127</sup> Unfortunately, privileged power structures in American society are unwilling to engage in the process of overcoming the mental mythology of a zero sum game, where affirmative action policies are viewed as insidious plots designed to tear down all the good work done by privileged folks over the years.

With this in mind, we borrow from John A. Powell<sup>128</sup> who provides a useful frame in turning away from the effects of post-racialism or what he terms “false universalism” and turning instead towards a policy of “targeted universalism.”<sup>129</sup> The author asks, “How are we to understand racial conditions in society, and what is the proper role of public policy and law for addressing or avoiding racial questions?” in an attempt to move away from what he sees has become an overly individualistic approach to race, racism and racialization.<sup>130</sup> Addressing the issue of post-racialism, he further

---

<sup>126</sup> Darity, Jr., *supra* note 5

<sup>127</sup> Pew Research Center, *Race in America: Key Data Points*, (August 27, 2013), <http://www.pewresearch.org/key-data-points/race-in-america-key-data-points/>

<sup>128</sup> John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785, 785-806 (2008).

<sup>129</sup> *Id.* at 803.

<sup>130</sup> *Id.* at 785.

states that, “[t]he post-racialists see the civil rights activists and the explicit racists as locked in a struggle that has already been won”<sup>131</sup>

A consequence of this turn towards post-racialism and race-blindness or neutrality in the design of policy and programs, powell effectively argues, is that this false universalism will not serve to address the needs of marginalized groups but instead will most likely exacerbate existing inequalities.<sup>132</sup> Accordingly, false universalism fails to address the situational differences of varied groups of people in relation to institutional and policy dynamics.<sup>133</sup> As an alternative, powell calls for engaging in the work to ensure that our institutions do the work we want them to do by adopting strategies that are both targeted and universal.<sup>134</sup> A targeted universal strategy is one that while inclusive of the needs of both the dominant and the marginal groups, pays particular attention to that of the marginal group.<sup>135</sup>

Whether categorized as six affirmative action grumbles<sup>136</sup> or nine nifty arguments against affirmative action,<sup>137</sup> attempts at nullifying affirmative action policies have continued unabated. For example, it is increasingly argued that if affirmative action is to survive in higher education, a preferred form is to substitute family income for race as a fairer criterion for selective college admissions.<sup>138</sup> Undoubtedly, class and race-based affirmative action policies are not mutually exclusive and both could contribute to the effective desegregation of universities, but race-based affirmative action is specifically designed to combat persistent racial

---

<sup>131</sup> *Id.* at 787.

<sup>132</sup> *Id.* at 797.

<sup>133</sup> *Id.* at 796.

<sup>134</sup> Powell, *supra* note 128, at 797.

<sup>135</sup> *Id.*

<sup>136</sup> Darity, Jr., *supra* note 5.

<sup>137</sup> Stanley Fish, *The Nifty Nine Arguments Against Affirmative Action in Higher Education*, 27 J. BLACKS HIGHER EDUC., 79-81 (2000).

<sup>138</sup> Alan Aja, William A. Darity Jr. & Darrick Hamilton, *If Not Race Then Wealth: Why Universities Should Avoid Income as Proxy for Race-Based Admissions Policy*, THE HUFFINGTON POST, Jan. 10, 2013, [http://www.huffingtonpost.com/alan-a-aja/college-admissions-income\\_b\\_2452191.html/](http://www.huffingtonpost.com/alan-a-aja/college-admissions-income_b_2452191.html/).

discrimination while class-based policies are not.<sup>139</sup> Ideally, the two approaches should serve as complementary, non-mutually exclusive, desegregation and anti-discriminatory tools.<sup>140</sup> Solely class-based affirmative action will not be effective in reaching sites of discrimination, if discrimination occurs on the basis of race, and it cannot replicate that which can be accomplished by race-based affirmative action<sup>141</sup>.

Despite the relatively mixed signals provided by the U.S. Supreme Court during the past decade, to ensure that preferred positions of society include presently stigmatized groups is becoming increasingly difficult. Despite the compelling empirical evidence that demonstrate that in the absence of strict group or race-based affirmative action policies, institutions are more socially segregated and increasingly racially and ethnically homogenous, we are instead moving toward systematically violating both the spirit and practical implementation of the monumental Civil Rights Act of 1964. As Justice Sotomayor stated in response to the prevailing view of the court in the *Fisher* case, “the way to stop the discrimination on the basis of race is to speak openly and candidly on the subject of race, and to apply the Constitution with eyes open to the unfortunate effects of centuries of racial discrimination.” Given those “unfortunate effects,” we conclude that when government intervention is stronger, and measures of compliance and enforcement are set in place, affirmative action policies can be effective tools toward desegregating relatively elite positions of society and deterring marketplace discrimination.

---

<sup>139</sup> Darity, Jr., *supra* note 5.

<sup>140</sup> Aja, Darity, Jr. & Hamilton, *supra* note 137.

<sup>141</sup> William Darity, Jr., Ashwini Deshpande & Thomas Weisskopf, *Who Is Eligible? Should Affirmative Action be Group- or Class- Based?*. 70 AM. J. ECON. & SOCIOLOGY, 238-268 (2011).