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WHAT WOULD BE THE IMPACT OF ELIMINATING AFFIRMATIVE ACTION?*

BY ERWIN CHERMERINSKY**

No topic in our society is more controversial or divisive than affirmative action. A justice on the United States Supreme Court writing a majority opinion once declared: "When a man has emerged from slavery and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation where he takes the rank of a mere citizen and ceases to be a special favorite of the laws."

The justice was Joseph P. Bradley. The year was 1883 and the decision was the Civil Rights Cases. It is astounding that less than two decades after the Civil War, the Supreme Court declared that racial discrimination was at an end and the need for affirmative action was over. Such, of course, could not have been further from reality.

For almost 100 years after the Civil War, Jim Crow laws segregated every aspect of Southern life. Black children were born in different hospitals than white children. They had to play in different parks, attend different schools, drink out of

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separate water fountains, eat in separate restaurants, use separate bathrooms, be buried in separate cemeteries. As we all know, it wasn't until 1954, just a little over 40 years ago, that the Supreme Court finally declared that separate could never be equal. But it wasn't until the 1960's and 1970's that real efforts were made to implement that decree. As we all know, it wasn't until 1964 that a federal law outlawed private discrimination in public accommodations and employment. By the 1970s and the 1980s, it was clear that simply prohibiting discrimination was not enough. It was surely necessary, but it just wasn't sufficient.

In 1975, among employees of the State of California, only 3% were African-American. If you look at contracting done by the entire State of California in 1975 only 1% went to minority-owned businesses. At about the same time the University of California at Davis Medical School discovered that although their admission process was entirely race blind, the history of discrimination meant that on average they would admit less than 1 black student a year.

It was from this reality that affirmative action was born. Affirmative action is now under unprecedented assault. The assault comes from the United States Supreme Court. The assault also may come next November, if the proposed California Civil Rights Initiative [CCRI] to eliminate all affirmative action is adopted. There are proposals similar to CCRI being introduced in 12 states. Additionally, legislation has been introduced in Congress that would do the same thing as CCRI would do for California.

This afternoon I want to discuss what would be the impact of eliminating affirmative action. To do this, I want to focus on what I see as the myths of affirmative action and then the realities of affirmative action. I believe that the popular discussion of this important and divisive topic is very much distorted by certain myths. I would identify for you three myths of affirmative action.

The first myth is that discrimination against minority racial groups and women is a thing of the past. Those who oppose affirmative action seem to believe that invidious racial

discrimination against minorities and discrimination against women is something that is a part of prior American history — something that's now disappeared. There's no doubt that racism and sexism in our culture is an embarrassment for society. That the United States Constitution had slavery written into its texture and fabric is one of the profound embarrassments of that document. The long legacy of racism and sexism is such a national embarrassment that it's not surprising that there would be a psychological temptation to believe that discrimination is in the past. Everything's different now. Some openly proclaim that such racism and sexism is over.

Richard Epstein, a professor at the University of Chicago, wrote in his book *Forbidden Grounds*: "Anyone who works in academic circles and I dare say elsewhere knows full well that all the overt and intentional discrimination comes from those who claim to be the victims of discrimination imposed by others." It's an astounding statement. He's saying nowhere in our society is a member of a racial minority group or a woman ever intentionally discriminated against. My only response can be to ask Professor Epstein what planet he lives on. For the sad reality is that racial and sexual discrimination remain a part of our society.

An interesting study was done a little over a year ago by the Urban Institute. They decided they would try to measure the extent of racial discrimination in employment. They recruited college students, both white and black — students who looked quite presentable. The college students differed in no regard except for their race. The experimenters gave the college students identical resumes so that the white student and black student presented the same credentials to the prospective employer. They gave the white student and the black student identical scripts of what to say to the employer. In other words, these students were testers. The only different variable was race. The statistics are disconcerting as to what they found, but not surprising. Whites received interviews 22% more often than blacks did. Whites received job offers 41% more than blacks. The wages whites were offered were 17% higher than the wages offered to blacks who received job offers. Whites were told of additional job opportunities 48% of the time. This isn't a study from the 1950s. It's not a study from

1890s or the 1860s. It's a study from the 1990s. Other statistics, of course, point to the same phenomena.

A survey was done of the Fortune 1000 Industrial Companies and the Fortune 500, to measure the number of their senior managers who were of racial minority groups or women. Again the statistics are disconcerting, but not surprising. It was found that 96% of the senior managers in these companies were men. It was found that 97% of the senior managers were white, 0.6%, that is less than 1% were African-American; 0.3% were Asian and 0.4% were Latino.

Another study was done. It found that an African-American man with a professional degree on average earns 70% of what a white man with the same degree earns. An African-American women earns on average 60% of what a white man with the same degree will earn. I could spend the rest of this hour presenting the statistics. But I think they show what all of us know: race and sex discrimination are a continuing, tragic part of this society.

There is a second myth in the discussion of affirmative action: that affirmative action programs are widespread and unchecked. The myth is that quotas are rampant, and unqualified people are thus hired for jobs, given contracts, admitted to schools. To me this is the most destructive myth of all and it is a myth because it's absolutely false. The reality is that affirmative action is very much limited. If nothing else, it's limited by the United States Supreme Court's decisions. The United States Supreme Court has made it clear that affirmative action will be allowed only if the government can prove that the program is necessary to achieve a compelling government interest.

The first Supreme Court case to deal with affirmative action was *Bakke v. California Board of Regents* in 1978. *Bakke* involved the University of California at Davis Medical School, which set aside 16 slots in its entering class of 100 for minority students. Five justices on the court, without a majority opinion, held that the set aside was impermissible. Five justices, again without a majority opinion, indicated that it would be permissible for state universities to use race as one factor among many admissions criteria to enhance diversity in

the classroom. *Bakke*, the first decision on affirmative action, made it clear that quotas were generally impermissible. The Supreme Court since has made that even more apparent.

In 1989, in *J.A. Crowson v. City of Richmond*, the Supreme Court for the first time articulated the level of scrutiny to be used in evaluating government affirmative action programs. The Supreme Court said that affirmative action programs should have to meet the same constitutional test as invidious racial discrimination. In other words, affirmative action programs are allowed only if they are necessary to achieve a compelling government interest.

In 1990, in *Metro Broadcasting v. FCC*, the Supreme Court indicated that a federal affirmative action plan would need only to meet intermediate scrutiny; that is, it would have only to be substantially related to an important government purpose. But this was overruled just last June in *Adarand Constructors v. Peña*. In *Adarand* the Supreme Court said that racial discrimination, whether it's against whites or against racial minorities, must meet the same test: strict scrutiny. It has to be necessary to achieve a compelling government purpose.

Here's what this means. First it means that quotas are virtually non-existent in the State of California or elsewhere. The Supreme Court has made it absolutely clear that quotas won't be allowed. Those who oppose affirmative action want to talk about quotas. But it's a non-existent target because quotas just aren't there.

Second, it means that affirmative action programs exist only where they're necessary to achieve a compelling interest. I don't think it can be said enough that affirmative action programs have to meet the same constitutional test as discrimination against racial minorities. And third it says to me that the affirmative action programs that meet this test should be there. If it can be shown that there's a compelling need for affirmative action and that there's no other way to achieve the goal, then that's exactly the kind of program that should remain.

There's no indication that unqualified individuals are hired as a result of affirmative action. Quite the contrary, in the State of California everyone who seeks State employment must pass exactly the same test. No points are added to the scores for racial minorities or women. Points are added only to veteran's scores. Unqualified students are not admitted to any state college or university. Only those who meet the standards for qualification are accepted. And thus it is a myth to see affirmative action as widespread, to see affirmative action as unchecked, to see quotas that mean unqualified individuals are accepted.

There is a third myth of affirmative action that I want to talk about: that the Constitution requires that the government be color blind or gender blind. Those who oppose affirmative action cloak themselves in the noble rhetoric of colorblindness, or gender blindness, and certainly that's a desirable ultimate goal that someday might be reached. But there's nothing in the Constitution that requires that the government always, under all circumstances, be color blind or gender blind. The text of the constitution doesn't require this. The relevant language of the Fourteenth Amendment simply says: "No state shall deny any person equal protection of the laws."

Long ago Aristotle said that equality means treating likes alike and unalikes unlike in proportion to their sameness or difference. If blacks and whites are alike, then equality requires that the government treat them alike and certainly we would all agree in most respects blacks and whites are alike. If men and women are alike then equality requires that they be treated alike, and in most regards, of course they're alike. But if there are differences between whites and blacks because of the long legacy of discrimination, if there are differences between men and women because of the history of sex discrimination, then to treat these groups alike when they're unlike, is inequality. In other words, the Constitution at time requires that the government be color conscious and gender conscious.

Several simple examples are illustrative. Imagine that a city through a community playhouse is doing a story of Martin Luther King's life. Would anyone doubt that the city can hire an African-American to play Martin Luther King? This easy

example shows that the government, at times, can take race into account. Imagine the government is setting a program to test for sickle-cell anemia, or to test for Tay-Sachs disease or for other diseases that have a prevalence within a particular racial or ethnic group. It seems clear that there could be testing in the African-American community for sickle-cell trait or in the Jewish population for Tay-Sachs disease.

To bring it again to the topic of affirmative action, certainly race and gender can be taken into account by the government in fashioning remedies. If there's a school system that's long had race discrimination, then race can be taken into account in assigning pupils to achieve desegregation. The government doesn't have to be color blind there. If there's a history of employment discrimination, remedying that discrimination again requires that race be taken into account.

Even the United States Supreme Court, conservative as it is, recognizes this. *Paradise v. United States* in 1986 is a key case. A federal district court found that the Alabama State Police had engaged in intentional discrimination in hiring and promotions. The federal district court ordered a remedy where half of the positions would be set aside for African-Americans, until the effects of the discrimination were eradicated. The United States Supreme Court approved this. The Supreme Court said there was clear proof of past discrimination and thus the overtly race-conscious remedy was permissible. The point of these examples is that it's an erroneous statement to say that the government must always be race or gender blind.

If these are the myths of affirmative action, what are the realities? The first is that eliminating affirmative action will decrease the diversity in colleges and universities. Those who oppose affirmative action want to talk about it as if it's entirely concerned with reparations for past discrimination. That is certainly one of the goals of affirmative action, but it's not the only objective. Another crucial goal of affirmative action is increasing diversity in areas where diversity is essential. One of those places is in the classroom. I have been a law professor for 16 years now. I've taught constitutional law to almost all white classes and I've taught constitutional law to classes with a substantial number of minority students. I will tell you that

the discussion in those classrooms is markedly different.

When a class discusses topics like race discrimination or how the police treat people or affirmative action, there are simply different views expressed when there are a significant number of minority students. This shouldn't be a surprise. Race matters enormously in the way we experience society — in the way we're treated. Gender matters enormously in the way we experience society — in the way we're treated. Therefore, common sense tells us that different racial groups, that different genders, will bring different experiences and perspectives to the classroom.

The sad reality is that because of the history of discrimination, if admissions to colleges and universities are entirely color blind we will decrease their diversity. The statistics again are revealing. For example, the elimination of affirmative action in the University of California system, as a result of the Board of Regent's decision, will decrease the number of Latino students from 18% to about 6%. Eliminating affirmative action in the University of California will decrease the number of African-American students there from 7% to 2%. I believe the decrease will even be greater than that because sociologists tell us that when the numbers get that small more members of that group will choose to go elsewhere where there's a critical mass. And so it's unlikely that there will even be 2% African-American students in the UC system once affirmative action is abolished, as African-American students choose to go elsewhere where there's more of a group for them to be a part of. There are similar statistics with regard to the California State system, as to the effects if admissions had to be color blind.

Those who oppose affirmative action say that they'll substitute class-based affirmative action for the current program. There are many problems with this. How is social class to be defined? Also class-based affirmative action doesn't really achieve the goal of diversity. A key purpose of affirmative action based on race and gender is that people of different races and different genders will bring different experiences to the classroom. Regardless of social class, blacks and whites experience society differently in many ways.

A simple example: I'm the first, the only child, in my family ever to go to college. I come from what is called a working-class family. I bring things to the classroom as a student and now as a teacher that those who come from professional families don't. But a black student brings something different than what I bring, even if the black student comes from a professional family. That student brings the experience of being an African-American in this culture.

Besides all that, it's clear that class-based affirmative action won't achieve the results of race-based affirmative action. A study was done by the University of California and it found that relying solely on class-based affirmative action would mean less than a third as many Latino students and less than a quarter as many African-American students as are now on campus under current programs.

With regard to diversity I have focused just on higher education, but that's not the only place where diversity is essential. Again, think of a simple example. Imagine that you're the chief of a police department in a large racially diverse city. Shouldn't you assign police officers in part to make sure that there are African-American officers in an African-American community, that there are Latino officers in a Latino community, and that there are Asian officers in a predominately Asian community. That doesn't mean that all of the officers need to be of that racial group. But isn't it essential that race be taken into account? If taking race into account became a violation of law, this simple social need couldn't be met.

There is a second major reality to eliminating affirmative action: programs that are essential to remedy past discrimination would be eliminated. I began by talking about how discrimination is a reality of the American past and the American present. Thus, there need to be programs to deal with it. Eliminating affirmative action would abolish these programs.

Let me focus on three categories of programs — the three categories mentioned in the proposed California Civil Rights Initiative: public contracting, public employment and public education. With regard to public contracting, California like every state has a dismal record of dealing with minority-owned

businesses. Look at Los Angeles County in 1994, just a little over a year ago. It was found that of every dollar that the county spent on contracting, 95 cents of it went to a white-owned business. It was found that 4 cents on the dollar went to a Latino-owned in business and less than one cent on the dollar went to a black-owned business. It was found that only 2 cents on the dollar went to a business owned by women.

The statistics nationally are in accord with the California numbers. Nationally, women own 37% of the businesses in the country, but they get less than 2% of the public contracts. This was recognized in the 1970s. It was seen that at that time only one percent of the state's public contracts went to minority owned businesses. So the governor at the time decided to articulate goals for contracting with minority owned businesses. The governor was that noted liberal, Ronald Reagan.

It's important to recognize that the goals here are not a quota. There's no set aside. All businesses can compete for all of the contracts. The goal is that 15% of the government contracts should go to minority owned businesses. That's much less than the percentage of minorities in the state. But, minorities could someday get more than 15% and they can get less than 15% if the goal's not met. There are no sanctions imposed to not meeting the goals: it's not a quota.

Nonetheless, the goals have been dramatically effective. In 1989, before the current set of goals were articulated, only about 3% of the Department of General Services' contracts were with minority owned businesses. Because of the goals and timetables, these numbers have gone up dramatically. Now, statewide about 12% of all of the contracts are with minority owned businesses. It's still less than the 15% goal, showing that the goal isn't a quota, but it has gone up dramatically in a relatively short period of time because the goals and the targets are on the books.

If all affirmative action is eliminated, these goals will go by the wayside. There will be no reason for any state or local agency to try to make sure that it's reaching out to minority owned and women owned businesses. The progress, limited though it is, will be undone.

Consider a second area: employment in the state. Again, statistics show that historically, minority groups have been under-employed relative to their numbers in the state. As I said, at the outset, in 1975, less than 10% of the state's employees were African-American. So what the state has done again is set up goals and targets. And once more, the goals and targets have been effective. Today, about 30% of the state's employees are from racial minority groups. This doesn't mean that the legacy of discrimination is completely undone. Minorities tend to be overrepresented in lower paying jobs and underrepresented in higher paying jobs. But the goals and targets have had an effect and abolishing all affirmative action would eliminate this progress as well.

With regard to education, I've already presented those numbers. The California Board of Regents has already eliminated affirmative action for the UC system. CCRI would do the same thing for the local community colleges and the state college system.

But those aren't the only effects of eliminating affirmative action. There are many other kinds of affirmative action programs in education that the opponents of affirmative action don't want to talk about. Here are some examples: Many high schools and colleges now have special programs to encourage girls to take advanced science and math classes. All statistics show that girls are tremendously underrepresented in higher science and math classes. Society desperately needs more talented people in these fields. We're traditionally cutting ourselves out of an enormous pool by the underrepresentation of girls and women. And so, many high schools in state colleges and universities have set up enrichment and outreach programs to girls and women. If CCRI is adopted, these programs will be eliminated.

Many colleges and universities have set up enrichment programs to prepare minority youth for college and university education. These programs are phenomenally successful. One, run by the State of California statewide, has particularly impressive statistics. A study found that only 7% of the African-American students were college-ready prior to the program. The study found that after the program was implemented, 51%

of the African-American students were college-ready. It found that only 7.5% of the Latino students were college-ready by their definition prior to their enrollment in the program and that 46% were college-ready after the program.

Because of the long legacy of discrimination, this kind of enrichment is essential. It's essential because there continue to be major inequalities with regard to school funding along racial lines. Today, as we speak, 20% less is spent on average on the black child's elementary and secondary schooling compared to the white child. As a result of this, if that black child is to be treated equally, there has to be something to overcome the past discrimination. That's what the enrichment programs are all about. If CCRI is adopted, these too will be eliminated.

There is a third and final reality that I want to talk about: eliminating affirmative action will increase discrimination. Those who oppose affirmative action want to draw a rigid, bright line distinction between, on the hand, affirmative action and on the other, discrimination. They say they want to outlaw race and gender discrimination, but they want to outlaw affirmative action too. In reality, there is no such rigid or bright line distinction. The reality is if you eliminate affirmative action, you're going to license discrimination.

One example is from the area of employment or voting law. In order to remedy discrimination, it's necessary to look at discriminatory impact. If discriminatory purpose must be proven in order to show a violation, relatively little will be done about the problem of discrimination. It's simply too difficult to prove discriminatory purpose. At this point in our history most legislators aren't going to openly express a discriminatory purpose for a law. Legislative history isn't going to state a discriminatory purpose for the law. That's why under federal employment discrimination law, Title VII, it's possible to prevail by proving discriminatory impact. The Supreme Court has long recognized, as Congress has, that that's the only way to root out employment discrimination.

In 1980, in *City of Mobile vs. Bolden*, the Supreme Court said discriminatory impact did not establish a Constitutional violation with regard to voting. Congress effectively overruled

that decision in 1982 with the Voting Rights Act amendments that said proof of discriminatory impact with regard to voting was sufficient to violate federal law. These laws clearly say racially discriminatory impact, gender-discriminatory impact is impermissible.

The only way for the government to avoid discriminatory impact is to look to race, to look to gender. How can the government know whether employment practices have a discriminatory impact except to consider the effect on racial minority groups and on women. How can the government know whether or not a voting scheme will have a discriminatory impact but to look to the effect on racial groups? So the law now requires that discriminatory impact be considered. If discriminatory impact is considered, then the government cannot be race or gender blind. If all affirmative action is abolished, if we force the government truly to be race and gender blind, then how can discriminatory impact any longer be sufficient to prove a violation? Aren't we on a path that inevitably must lead to this weakening of discrimination laws?

A second example comes from the California Civil Rights Initiative itself: Clause C. Clause C says nothing in this section shall prevent gender from being used if it's reasonably necessary to a bona fide qualification with regard to public employment, education or contracting. Notice that this provision says that the government may use gender as a basis for discrimination, if it's reasonably necessary in employment, education, and contracting.

Current employment discrimination law does say that the government or private employers can use gender if it's reasonably necessary for a bona fide occupational qualification. But no law, state or federal, has ever said that the government can discriminate based on gender if it's reasonably necessary to a bona fide qualification in contracting or education. This would open the door to new discrimination. It wouldn't simply prohibit affirmative action.

Moreover, Clause C likely would have the effect of weakening the protection against gender discrimination under the California Constitution. In 1971, the California Supreme Court

said strict scrutiny should be used for gender discrimination when challenged under the California Constitution. Under the United States Constitution, intermediate scrutiny is used for gender discrimination. But California, since 1971, has been much more progressive than that.

The proposed California Civil Rights Initiative is an amendment to the California Constitution. It would say gender discrimination is allowed if it's reasonably necessary to a bona fide qualification. The reasonably necessary language is far closer to rational basis review than it is to strict scrutiny. And as you know, under rational basis review, any reason is good enough and it doesn't have to be a good one. I don't think that this provision in CCRI is coincidental or accidental. I think that inevitably, if we eliminate affirmative action, we're going to be increasing discrimination as well.

I, too, hope that there will be a point in our society's history where all of society can be race-blind and gender-blind in education, in contracting and employment. I'm even naive enough to hope it'll be in my children's, or at least my grandchildren's, lifetimes. But I know as I speak to you today in 1996, if ever there will be a point when society can truly be race-blind and gender-blind, today at times society must be race-conscious and gender-conscious. Race and gender matter and we can't pretend they don't.