

# No Substitute for the Real Thing

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As the debate over affirmative action continues with unprecedented intensity, increasing attention is being given to something called “class based” or “race neutral” affirmative action as a possible alternative to measures based on race or gender.

Though basing preferences on economic disadvantage rather than race was first suggested by Justice William O. Douglas in *DeFunis v. Odegaard*, 416 U.S. 312 (1974), until recently conservative jurists and commentators have been the principal proponents of such programs. For example, following on Justice Antonin Scalia’s approving comments on race-neutral remedial measures aimed at the disadvantaged in his concurring opinion in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), William Bradford Reynolds and Bruce Fein outlined on these pages (See “A Kinder, Gentler Affirmative Action,” *Legal Times*, Feb. 13, 1989) a proposal for enhancing the ability of small and disadvantaged businesses to compete for public contracts.

Now, however, class-based affirmative action is gaining broader support. President Bill Clinton has suggested that the idea has at least some appeal to him. Class-based affirmative action is being much discussed in *The New Republic*, and in a long cover story, Richard Kahlenberg, who is writing a book on class-based affirmative action, recently provided an expansive articulation of the concept.

Of course, like race- and gender-based affirmative action, class-based affirmative action can mean different things to different people. Certainly, some part of the enthusiasm for class-based affirmative action rests simply on the notion that there exists some social utility in improving the status of the most disadvantaged, even if it is accomplished merely by redistributing opportunities rather than expanding them.

## Recognizing Innate Talents

Yet, as intimated in remarks by President Clinton and as more elaborately explained in Kahlenberg’s article, class-based affirmative action is not intended to favor the economically disadvantaged simply because they are economically disadvantaged. Rather, the currently articulated goal of class-based affirmative action is to ensure that the innate talents of the disadvantaged are recognized despite the obstacles such individuals face in

developing and demonstrating those talents. For example, it is assumed that a particular score on the SAT by an economically and otherwise disadvantaged person actually reflects more potential talent than the same or somewhat higher scores by persons from more advantaged backgrounds.

Despite the plausibility of that assumption, it is not clear whether that is how things actually will work. Statistically, persons from a disadvantaged group achieving a particular score on a standardized test or other measure of skill or achievement on average underperform persons from a more advantaged group achieving the same score. Roughly speaking, this statistical phenomenon – called “regression toward the mean” – means that a person from a lower-scoring group who gets a score higher than that group’s average on a particular day is more likely than a person from a higher-scoring group to have achieved that score simply because he was having a “good day”.

To the extent that the assumption is valid, however, it ought to be – and no doubt from time to time has been – an essential element in identifying the best-qualified candidate. But there is no point now in denominating reliance on the assumption as a form of “affirmative action.”

The apparent reason that some *do* choose to characterize programs crediting the assumption as “affirmative action” is the belief that class-based affirmative action may in some manner serve as a substitute for race-based affirmative action since class-based affirmative action will disproportionately benefit blacks and other minorities. But the casual reliance on the correlation of disadvantage with race ignores the reality of how class-based affirmative action is likely to operate in some of the situations where many deem affirmative action to be crucial.

## Elite (White) Universities

One of the greater concerns to persons almost ready to abandon affirmative action entirely is the recognition that without race-conscious admissions programs, blacks are not often going to make up much more than 1 percent or 2 percent of the student bodies at elite universities and professional schools, as documented by Robert Klitgaard in *Choosing Elites* more than a decade ago. This is not too surprising an outcome when one recognizes that even modest average differences in academic achievement translate into enormous differences in meeting the

demanding standards for competitive admission to such institutions. Nevertheless, to most citizens – and to most white students at those institutions – the nearly complete absence of black students is an immensely disturbing prospect.

There is little reason to believe that class-based affirmative action, however vigorously pursued, will materially affect those numbers. To put the matter in perspective, imagine setting aside 100 of 1,000 places in an entering class for class-based affirmative action. It is reasonable to expect that blacks will secure a higher proportion of those 100 slots than the, say, 1 percent or 2 percent they would secure of the first 900 on the basis of standard criteria. But there is little reason to expect that they will comprise a substantial proportion of those last 100 slots. There simply are an awful lot of non-black people who are disadvantaged in a country where non-blacks make up 71 percent of the poor. And on average, poor non-black children have higher test scores than poor black children, which means – as any statistician will confirm – that blacks will not make up a large proportion of the poor children with the very highest test scores. So it should be no surprise if blacks still fill only a small portion of places reserved for the disadvantaged. And the end result is unlikely to differ greatly from that which would obtain without a program for the disadvantaged.

Proponents of class-based affirmative action have joined in the recurring calls for doing away with preferential treatment of children of alumni and geographical preferences, which historically have tended to advantage whites. Such preferences may or may not be good ideas. But for generations they have been causing the favoring of some groups that are entirely, or almost entirely, white over other groups that also are entirely, or almost entirely, white – and if they are done away with, the slots now available for open competition still will be filled almost entirely by whites.

Universities may do away with those programs if they wish, but they are ill-advised to do so if they believe that such action has anything to do with materially enhancing admissions opportunities for minorities.

## Identifying Potential Merit

Proponents of class-based affirmative action envision that it would reach beyond education to public contracting and entry-level employment, as well. But in the case of public contracting, the notion of class based affirmative action as a means for identifying potential merit breaks down entirely. In contrast to the educational selection process, public contracting is not concerned with identifying potential merit, but with identifying who will perform the required services most efficiently. Whatever the plausibility of the assumption that a 650 SAT score from a person from a disadvantaged background shows more potential merit than a 675 from a person with a more advantaged background, there is no similar plausibility in

the notion that the bidder with the weaker proposal actually will provide the services more efficiently because his or her business is disadvantaged.

In any event, while programs favoring disadvantaged businesses on the basis of truly race-neutral criteria will cause the share of contracting dollars allocated under such programs that go to minority businesses to be higher than the small or minuscule share of contracting dollars going to such businesses in the absence of race-based set-asides, there is little reason to believe that the minority share will be much higher. Minority set-asides may never have been a good idea. But class-based set-asides are unlikely to be a realistic substitute.

In the case of employment, the assumption that a demonstrated level of achievement reflects greater potential in an individual from a disadvantaged background, again, has at least theoretical plausibility, and surely employers will from time to time act on the assumption, albeit in light of all the available information on a particular applicant. But, particularly with regard to entry-level positions that seriously disadvantaged persons are seeking, the evidence indicates that employers are readier to regard a disadvantaged background as an indicator of negative traits than positive ones.

For this and other reasons, it is hard to imagine the widespread implementation of programs systematically crediting an applicant's disadvantaged background as a means of enhancing the estimate of the applicant's potential worth as an employee. And if such programs are implemented, recent immigrants are likely to benefit more than the native-born black Americans with whom those immigrants often will be competing, if only because employers may regard immigration itself as an indication of initiative.

It may be that the time of race-based affirmative action has passed-and some will argue that it was not a very good idea to begin with. But if race-based affirmative action is now to be thoughtfully abandoned in whole or in part, it ought not to be because of some untested and unlikely notion that class-based affirmative action is a meaningful alternative.

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*Editor's note:* For further discussion of class-based affirmative action, please join James Scanlan on Lexis Counsel Connect. Go to the Discuss menu, select National and International Topical Law Forums, and choose Civil Rights.