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To discuss so-called "affirmative action" usefully, it is essential that we be clear as to what we are talking about. We are talking about racial preferences, the practice of racial discrimination; apart from that, there is no controversy and nothing to debate. "Affirmative action" has become simply a deceptive label for racial preferences. The central question presented, therefore, is whether government and government supported institutions should grant preference to some individuals, and thereby necessarily disfavor others, on the basis of race.[1] For the ordinary American citizen, the answer could not be more clear. Such discrimination plainly violates the basic American ideal that all persons are equal before the law and must be treated as individuals, not as members of racial groups. The 1954 *Brown v. Board of Education*[2] decision was understood to make this ideal a matter of constitutional principle. Acting on that understanding, Congress enacted the 1964 Civil Rights Act to make it national statutory law.[3]

It is sufficient ground for opposition to racial preference programs, at least in higher education, that nothing should be done by public institutions that cannot be done openly. The whole point of all racial preference programs is to evade and camouflage the fact that the groups preferred by the programs cannot otherwise compete with

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1. *See generally*, Lino A. Graglia, *Racial Preferences in Admission to Institutions of Higher Education, in* THE IMPERILED ACADEMY 127 (Howard Dickman ed. 1993).

2. Brown v. Board of Educ., 347 U.S. 489 (1954).

3. 42 U.S.C. §§ 1971, 2000a-h (1970), 78 Stat. 241 (1964).

others for admission to selective institutions of higher education on the basis of the standard criteria for academic achievement or ability. It is necessary, therefore, that misdirection and concealment characterize every aspect of such programs. For example, racial preference programs in admission to institutions of higher education were initially put forward as programs for the "culturally or educationally deprived," though they were, and are, based only on race.[4] It was, and sometimes still is, said that the ordinary admission criteria applied to whites are "culturally biased" against blacks and members of some other (but, strangely, not all) minority racial groups, even though it is known that the criteria do not underpredict—they typically overpredict—the academic performance of the racially preferred.[5]

The argument most frequently heard today for racial preference in higher education is simply that without it, blacks, the primary intended beneficiaries, would be "underrepresented" or, more typically, "grossly underrepresented" in such institutions.[6] The fallacies of this argument are many. First, it is not really an argument at all, but merely an assertion of the tautology that more blacks should be admitted to institutions of higher education in order that there be more blacks in such institutions.[7] It does not offer a reason why an additional black entrant should be considered more desirable than an additional equally or even better qualified white entrant. Second, the argument assumes, contrary to the principle of political equality, that racial groups rather than individuals are the relevant entities.[8]

Third, the argument fails because institutions of higher education

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4. *See* Lino A. Graglia, *Special Admission of the "Culturally Deprived" to Law School*, 119 U. PA. L. REV. 351 (1970).

5. *See* ROBERT KLITGAARD, CHOOSING ELITES 103 (1985); ABILITY TESTING: USE, CONSEQUENCES, AND CONTROVERSIES 73 (Alexandra K. Wigdor & Wendell R. Garner, eds., 1985).

6. *See* Lino A. Graglia, *"Affirmative Action," Past Present and Future*, 22 OHIO N.U. L. REV. 1207, 1212-13 (1996) (citing Thomas J. Ginger, *Affirmative Action: Answer for Law Schools*, 28 HOW. L.J. 701, 704 (1984) ("[W]ithout remedial admissions programs, the number of minority students in law schools would be insignificant.")).

7. *See id.* at 1212.

8. *See id.*

are not, in any event, meant to be representative institutions.[9] It never happens in the world, and there is no reason to expect, that members of all racial or ethnic groups will appear proportionately in different occupations or activities.[10] Finally, blacks are not in fact "underrepresented," but rather "overrepresented"—that is, their numbers are disproportionately high—in institutions of higher education once IQ scores are taken into account.[11] In general, more than half of the students in the bottom ten percent of a school's IQ range will be black.[12]

The most common substantive argument for "affirmative action" in higher education, as in other areas, is that it provides a "remedy" for disadvantages resulting from past racial discrimination.[13] The argument is obviously fallacious in that it is not possible to remedy an injury to "A" caused by "B" by giving a benefit to "C" at the expense of "D." Further, if remedying disadvantage were the concern, disadvantage, not race, would be the criterion. Race cannot be used as a proxy for disadvantage because not all blacks, and not only blacks, have suffered disadvantage.[14] Indeed, blacks who apply to institutions of higher education are typically among the most advantaged. The real plight of the "underclass" creates sympathy and support for racial preferences, but very few members of that class, unfortunately, apply for admission to selective colleges and universities.[15]

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9. *See id.*

10. *See* THOMAS SOWELL, PREFERENTIAL POLICIES: AN INTENTIONAL PERSPECTIVE (1990).

11. *See* RICHARD J. HERNSTEIN & CHARLES MURRAY, THE BELL CURVE 319–20 (1994).

12. *See id.* at 472.

13. *See* Arval A. Morris, *New Light on Racial Affirmative Action*, 20 U.C. DAVIS L. REV. 219, 223 (1987) ("[A]ll affirmative action is remedial, looking backwards and presupposing a prior wrong."); K.G. Jan Pillai, *Affirmative Action: In Search of a National Policy*, 2 TEMP. POL. & CIV. RTS. L. REV. 1, 7 (1992) ("[O]nly blacks (and American Indians) have a constitutionally cognizable claim for remedial preferences to compensate for past racial discrimination and its lingering effects."); Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 HOW. L.J. 1, 11 (1995) ("the disadvantages that individual members of racial minority groups have suffered as a result of . . . past discrimination should be neutralized through the implementation of make-whole remedies.").

14. *See* Carol R. Goforth, *'What Is She?' How Race Matters and Why It Should*, 46 DEPAUL L. REV. 1, 96 (1996).

15. *See* Glenn Lowry, *The Moral Quandary of the Black Community*, 79 THE PUBLIC INTEREST, Spring 1980, at 20; Richard Epstein, *Affirmative Action in Law Schools: The Uneasy*

Racial discrimination in higher education does not typically stop with admission, but extends to the grant, often automatic, of financial benefits. At the University of Texas Law School, for example, the specially admitted children of well-off black professionals—judges, lawyers, doctors, businessmen—were automatically awarded unneeded financial aid that better qualified white students in real need were denied. My colleagues frequently point out to me that, as a believer in free markets, I am in no position to object to this. The blacks are simply selling what the school thinks it needs, black faces, and in a market economy, you must expect to pay for your needs.

As the remedy rationale for racial preferences has become more obviously untenable, its proponents have increasingly relied on the argument that it provides a needed educational "diversity." Selection of students by race, however, provides "diversity" in nothing but race. The typical black applicant to an institution of higher education comes from a middle or upper middle class background not readily distinguishable from that of the typical white applicant. If diversity of views or experience were the objective, one would expect to see a preference for foreign students or members of minority religions, which is not the case.

The irrelevance of the remedy and diversity arguments to "affirmative action" in higher education is shown by the fact that no black has ever been denied preferential admission to the University of Texas Law School, for example, on the ground that he was not economically or culturally advantaged (or, indeed, that he was exceptionally advantaged). In addition, no black applicant has ever been denied preferential admission because his background and views seemed indistinguishable from those of the average white. It was only necessary, and it was entirely sufficient, that he be black.

Racial preferences necessarily lead to the formation of organizations on racial lines in order to fight for and defend against preferences. We now have black caucuses and Hispanic caucuses in state and national legislatures, the *raison d'être* of which is to fight for even more preference for their racial group. There are no white caucuses, which means that discrimination against whites is

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Truce, 2 KAN J.L. & PUB. POL'Y 40 (1992).

politically costless. It is not costless, however, in the hostilities engendered.

The many arguments once offered for racially preferential admission to institutions of higher education—biased tests, remedy, diversity, role models, etc.—have more recently come down to a single one: "We can't have" (*i.e.*, it is not politically feasible to have) "an all-white institution." America is in no danger of its selective institutions of higher education becoming all white. Asian Americans, comprising less than four percent of the population, now account for twenty-four percent of the student bodies at Harvard and Columbia, and over thirty-five percent at Berkeley and other schools of the University of California. We seem generally to have no difficulty in accepting gross racial and ethnic disproportions in educational institutions and elsewhere. For example, Jews make up about forty percent of many law faculties, Asians dominate Ph.D.'s in math and science, and blacks make up two-thirds of the players in professional football and four-fifths in basketball.

Putting all questions of principle aside, however, racial preferences must be opposed on the purely practical ground that the size of the preferences typically involved is so large that their use cannot operate to increase racial equality or respect. For example, in 1988, the difference between the combined SAT score of the average white and the average black admitted to the University of California at Berkeley was 288 points, and the gap between blacks and Asians was even larger.[16] At the graduate and professional school level the problem is, if anything, even more intractable. According to a recent article in *American Lawyer*, for example, of all law school applicants in 1996–97, only 103 blacks and 224 Hispanics had a college grade-point average (GPA) of 3.25 or better and a Law School Admission Test (LSAT) score at or above the 83.5 percentile.[17] Only sixteen blacks and forty-five Hispanics had a GPA of 3.50 or better and an LSAT score at or above the 92.3 percentile. Those are good scores, but not nearly good enough for admission to the most selective (roughly top ten) law schools. The average applicant admitted to the

16. *See* HERNSTEIN & MURRAY, *supra* note 11, at 452.
17. *See* AMERICAN LAWYER, Nov. 1997, at 4.

University of California at Berkeley Law School (Boalt Hall), for example, had a GPA of 3.74 and an LSAT score at the 97.7 percentile.

The virtual nonexistence of blacks at the level of academic achievement required for admission to highly selective schools means that their admission in substantial numbers requires that the ordinary admission criteria be not merely bent or relaxed, but virtually ignored. Blacks must be admitted with credentials indicating a level of preparation and achievement that means that most of them will be far from competitive with the fully qualified admitees. The unavoidable result is humiliation, frustration, and a resentful realization that they have been misled, not done a favor, by university officials who had assured them they could compete. Protests against "racism" naturally come to be seen as a more productive activity than academic endeavor. Frustration necessarily leads to demands that the conditions of competition be changed. Black, ethnic, and "multicultural" studies will have to be added to the curriculum, and grading standards will have to be changed. As it would be self-defeating to permit open discussions of racial preference, "hate-speech" codes will have to be adopted, "political correctness" enforced, and "sensitivity training" programs instituted.

Because opposition and, indeed, all discussion of racial preferences must be suppressed, their use is inconsistent with academic freedom and a university atmosphere of open inquiry. Indeed, it is only the employment of tactics of intimidation, successfully silencing opposition, that has allowed discrimination against whites to persist and expand. It is not too much to say that racial preferences, and, therefore, the admission of substantially underqualified students, are the source of virtually every major problem of education policy plaguing the American campus today.

Law schools, the leading proponents and practitioners of racial preferences, can easily be cavalier about standards since, after all, what real harm can an incompetent lawyer do? But as Bob Zelnick has pointed out in his recent book *Backfire*,[18] the effects of racial

18. BOB ZELNICK, BACKFIRE (1996).

preferences are more serious in the medical profession.[19] On the 1988 National Board exams for doctors, he notes, pass rates were eighty-eight percent for whites, eighty-four for Asians, sixty-six for Hispanics, and forty-nine for blacks.[20] Admission to medical school is, of course, highly competitive, but "affirmative action"

> routinely denies admission to more qualified whites and Asians and provides admission to less qualified blacks and Hispanics. The evidence is overwhelming that this gap carries over into performance in medical school and on the qualifying exam to become a doctor. As early as 1976, Professor Bernard Davis of Harvard Medical School chronicled the erosion of standards after Harvard decided to reserve twenty percent of each medical school class for minorities. First, required science courses were dropped when it became clear minorities fared poorly in them. Next, a pass-fail grading system replaced traditional letter grades. Then, simply passing the national medical boards was determined to be adequate. When minorities failed their boards in disproportionate numbers, they were given five opportunities to pass, and when this proved insufficient, the provision was waived altogether.
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> The conclusion is inescapable: because of racial preferences, this country is producing doctors who are substantially less qualified than those who would be starting the practice of medicine if racial preferences were abandoned. The same society that keeps potentially useful drugs off the market until they are tested for a near-eternity, that bans carcinogens that must be consumed by the gallon to produce harm—*this society consciously and deliberately graduates doctors who are less qualified to treat the sick than would be the case if admissions to medical school were based purely on ability and not on race.*[21]

Surely the most socially destructive effect of racial preferences, however, will prove to be that preferences will be taken to establish

19. *See id.* at 152.
20. *See id.*
21. *Id.* at 151-52 (emphasis in original).

what may come to be known as a general "Black Exemption." If blacks cannot be expected to meet the requirements applicable to others in admission to institutions of higher education, why should they be expected to meet other requirements? The essential message of preferences is that blacks are just "too different" from others to be expected to comply with the rules and standards applicable to others. Unfortunately, a general understanding and acceptance of this message is not consistent with the maintenance of a viable multiracial society.