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# Remarks of Juan F. Perea

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Like my colleagues, Richard Delgado[1] and Frank Wu,[2] I think affirmative action is the wrong debate to have because it focuses our attention on the wrong questions. As a way of illustrating this point, I have tried to cull out of *Brown*[3] and *Grutter*[4] some very basic, plain-English questions that the cases seem to have answered. For me, this is helpful in understanding why we are asking the wrong questions with respect to affirmative action.

It seems to me that *Brown* answered the question, "Can we keep them out of our schools by law?"—"we," of course, being the white majority, and "they" being persons of color.[5] The *Brown* Court answered no.

Now consider affirmative action and the question changes somewhat. The question generally seems to become something like "Despite their lesser qualifications,[6] how many of them shall we let into our colleges, universities, and workplaces?" If I translate the terms of strict scrutiny into plain English, I come up with two questions. First, "How compelling is it for us to let them into our institutions?" The narrow tailoring component

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1 Richard Delgado is currently a Professor of Law and Derrick A. Bell Fellow at the University of Pittsburgh School of Law. He is a prominent figure in the Critical Race Theory movement and the author of numerous books and articles on the subject. *See e.g.*, Richard Delgado, *Affirmative Action as a Majoritarian Device: Or, Do You Really Want To Be a Role Model?*, 89 MICH. L. REV. 1222 (1991).

2 Frank Wu is a Professor of Law at Howard University School of Law and is also an adjunct Professor at Columbia University. He is the author of YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE (2002).

3 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

4 Grutter v. Bollinger, 123 S. Ct. 2325 (2003).

5 Subsequent references to "we" or "us" and "them" or "their" are used similarly. "We" generally refers to the white Majority or white decision makers, and "them," "they" and "their" generally refer to persons of color, blacks and Latinos in particular.

6 While I do not accept the validity of measures that produce disproportionate numbers of "lesser qualified" blacks and Latinos, nor the validity of many measures of so-called "merit," I recognize the value judgments that are made on the basis of such measures.

can be worded as follows: "How minimally intrusive on the expectations and interests of white students is it?"[7]

These are the wrong questions to ask because they pose questions of fundamental fairness and justice as issues fit for majoritarian discretion and decision.[8] There is a kind of majoritarian *noblesse oblige* in the questions as I formulated them and as the Court answers them. The Court has phrased affirmative action, an issue of fairness and remedy, in the language of majoritarian utility rather than in the language of justice.

The Court will decide what constitutes utility—today it is diversity—and for how long diversity will remain useful. The Court's conception of utility will also define the duration of affirmative action. Remarkably, Justice O'Connor offered her gratuitous prognostication that affirmative action should not be necessary after twenty-five years.[9] To anyone with a sense of history and a sense of the amount of racism yet to be remedied in America, Justice O'Connor's statement is incomprehensible.

The Court's current approach to affirmative action is wrong precisely because the Court inquires only with regard to majoritarian utility, costs and benefits. These are the wrong questions because they discourage and avoid historical inquiry into the scope of racial injustice. The Court's reasoning promotes denial of our history of racism. The Court makes our history of racial injustice seem irrelevant and increasingly remote in time and in public consciousness. The Court's reasoning avoids consideration of an adequate remedy for our country's long and continuing history of race-based denial of educational opportunities to blacks and Latinos.[10] The Court's rhetoric encourages a debate focusing on educational benefits, or the lack thereof, rather than a debate focused on the resolution of issues of racial injustice and fairness.

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[7] *Cf.* United Steelworkers v. Weber, 443 U.S. 193 (1979) (considering whether an affirmative action plan unnecessarily trammels the interests of non-minority employees).

[8] *See Delgado, supra* note 1, at 1225.

[9] *See Grutter,* 123 S. Ct. at 2347.

[10] For one article describing the scope of educational segregation and discrimination against Latinos, see Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos,* 117 HARV. L. REV. 1420 (2004).

Instead of endless, repetitive debates about affirmative action—which will now become heated debates about the educational value or not of diversity—we should ask a different set of questions. We should ask: "What can we do to produce an adequate remedy for a long history of racial discrimination in education?" "What is a fair distribution of educational resources and professional opportunities among all our people?" "How do we best accomplish such a fair distribution?"

For the record, I support affirmative action. I support anything that leads to a fairer distribution of educational opportunities. From my perspective, however, the diversity rationale upon which the Court relies is weak. I would like to mention a few of its weaknesses, especially those implicated by the questions that I have just posed. As many speakers have already stated, affirmative action is not nearly enough.

The diversity rationale is ultimately a utilitarian rationale for a project that should instead be founded on principles of justice as a remedy for past and present discrimination. The utility of educational benefits is measured from a majoritarian point of view. The majority could, of course, easily decide that the benefits are no longer worth it, despite the fact that a remedy is still necessary.[11] As I described earlier, a rationale of diversity and educational benefits encourages the wrong debate. We are focusing too much attention on whether there are educational benefits, rather than on the demands of justice. Instead of noticing the massive injustices surrounding us, we are encouraged to consider only "How much of this affirmative action are we willing to allow and justify?"

Part of the instrumental value of diversity for majoritarian purposes is that it legitimizes elite majoritarian institutions and their exclusionary admissions standards: the Court expressed something like this when it wrote that "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[12] Therefore, diversity is posited as valuable because it legitimizes elite, white-controlled institutions like universities, major industries, and the military.

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[11] *See Delgado*, *supra* note 1, at 1223–24.

[12] *Grutter*, 123 S. Ct. at 2341.

From my perspective, the far better rationale is to understand that persons of color are entitled, by right, to a fair share of all the valuable opportunities our society has to offer.