GETTING BEYOND RACIAL PREFERENCES: THE CLASS-BASED COMPROMISE

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If you ask Americans whether it is time to get beyond racial preferences, the vast majority will say yes.[1] If you ask, instead, the question posed to Panel III of the conference, *The Rehnquist Court and the American Dilemma*,—"Is it time to get beyond race?"—the answer may be more ambivalent. The two questions are quite different, and the merging of them has caused a great deal of confusion in the legal and political battles over affirmative action.[2] It may very well be time to "get beyond racial preferences," even though we cannot "get beyond race" entirely. It may be significantly more difficult to "get beyond race" because this might encompass three very different things.

First, taken literally, the notion might be that humans interacting with one another would come to a point where they place on skin color the same significance they place on eye color. This seems an unlikely development. Even if there was widespread interracial marriage, as Professor Frank Wu advocated in Panel II, we know that humans are acutely attuned to the most minute differences in skin tone and shade. In short, if "getting beyond race" means actually getting beyond consciousness of race, the goal is hopelessly naive and

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1. *See generally* PAUL SNIDERMAN & THOMAS PIAZZA, THE SCAR OF RACE (1993) (exploring new politics of race in 1980s and 1990s through analysis of results of public opinion surveys); Richard Morin & Sharon Warden, *Americans Vent Anger at Affirmative Action*, WASH. POST, Mar. 24, 1995, at A1 (reporting results of ABC News Poll finding Americans oppose racial preferences by margin of 75% to 24%).

2. The scope of this Essay is limited to affirmative action in education, employment, and contracting. It does not discuss the quite different question of affirmative action in the voting rights context.

fantastical, a point which advocates of racial preference are quick to emphasize.

On a second level, "getting beyond race" might mean getting beyond official governmental recognition of race. Social critic Michael Lind argues in *The Next American Nation*[3] that the government should cease to recognize racial categories. According to Lind, "[t]he color—blind liberals were right, in the early 1960s, to favor the complete elimination of government racial labels."[4]

There is an element of this thinking as well in those who advocate adopting a "multiracial" category in the government's collection of data. In order to get beyond official race categories, however, one must be willing to assume we are truly beyond the need for tough enforcement of existing antidiscriminatory statutes. In fact, at least two widely supported mechanisms of civil rights enforcement *require* consciousness of race.

First, the Civil Rights Act of 1991,[5] which codifies the Supreme Court's unanimous decision in *Griggs v. Duke Power Co.*,[6] requires the collection of racial data. The Act, overwhelmingly supported in Congress, steers a sensible course between requiring racial preference on the one hand, and placing the entire burden of proving discrimination on victims on the other hand. Under the Act, when an employment practice produces a statistical racial imbalance, or "disparate impact," in the workplace, employers bear the burden of defending the practice with reference to a race-neutral justification of "business necessity."[7] Abolish racial categories, and the Act becomes unenforceable. Likewise, old-style affirmative action guidelines, which require employers to cast a wider net to garner a diverse applicant pool (without providing preferences in decisionmaking), require race to be a definable category. This practice is widely supported, backed by conservatives and liberals alike.

Instead, the real controversy over "getting beyond race" is on a third level; that is, are we ready to "get beyond racial preferences?" Have we reached a point in our history where we are done repaying the debt of slavery and segregation? Are we ready to be color—blind in our distribution of benefits and burdens?

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3. MICHAEL LIND, THE NEXT AMERICAN NATION (1995).

4. *Id.* at 305.

5. Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 2 U.S.C. and 42 U.S.C.(1994)).

6. 401 U.S. 424 (1971). *Griggs* held that the Civil Rights Act of 1964 prohibited employers from instituting employment procedures unrelated to job performance yet which operated to disqualify substantially more blacks than whites. *Id.* at 436.

7. 42 U.S.C. § 2000e-2(k)(1) (1994).

Publicly, both sides of the mainstream affirmative action debate profess to want color—blindness in the end; there is disagreement, however, over the means to achieving that agreed upon goal.[8] For example, even Professor Lani Guinier, President Clinton's controversial nominee to be Assistant Attorney General for Civil Rights, proclaimed that Martin Luther King's dream of an eventually color—blind society "is my dream too."[9] She and other proponents of preference, such as Professor Angela Davis, argue that we are still not ready. In her Conference keynote address, Davis argued that conservatives have misrepresented King's call to judge people not "by the color of the skin but by the content of their character."[10] Davis notes that conservatives fail to mention that King was describing an aspiration, that he "looked forward" to the day of color—blindness. Others argue that the best way to become color—blind is to eliminate racial preferences now.[11]

The debate is typified by the celebrated written exchange between Justice Harry Blackmun and Professor William Van Alstyne. In *Regents of University of California v. Bakke*,[12] Justice Blackmun argued that "[i]n order to get beyond racism we must first take account of race."[13] To fail to remedy some 300 years of oppression would be patently unfair, he argued,[14] and today's advocates say thirty years of racial preference has hardly done the job. To Justice Blackmun's argument, Professor Van Alstyne replied that "one gets beyond racism by getting beyond it now: by a complete, resolute, and credible commitment *never* to tolerate in one's own life—or in the life or practices of one's government—the differential treatment of other

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8. In academic circles, by contrast, long-run color—blindness is not an agreed upon goal. *See generally* Richard Delgado & Jean Stefancic, *Critical Race Theory: An Annotated Bibliography*, 79 VA. L. REV. 461 (1993) (listing major works documenting development of "critical race theory"); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (exploring roots of "critical race theory").

9. LANI GUINIER, TYRANNY OF THE MAJORITY 191 (1994).

10. MARTIN LUTHER KING, JR., I HAVE A DREAM: WRITINGS AND SPEECHES THAT CHANGED THE WORLD 104 (James M. Washington ed., 1992).

11. *See* James Richardson, *UC Kills Affirmative Action*, S.F. BEE, July 21, 1995, at A1 (quoting California Governor Wilson as saying "diversity can be achieved naturally," in support of University of California Board of Regents' vote to abolish racial and gender based affirmative action); Sonya Ross, *Dole Wants End to All Federal Affirmative Action Programs*, PHOENIX GAZETTE, July 28, 1995, at A14 (describing Sen. Dole's proposed Equal Opportunity Act of 1995 that would eliminate federal affirmative action programs and would be what he describes as "a starting point" for new color—blind age).

12. 438 U.S. 265 (1978).

13. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part and dissenting in part). Justice Blackmun's words track McGeorge Bundy's earlier articulation. *See* McGeorge Bundy, *The Issue Before the Court: Who Gets Ahead in America?*, ATLANTIC MONTHLY, Nov. 1977, at 41, 54 ("To get past racism, we must here take account of race.").

14. *Bakke*, 438 U.S. at 407.

human beings by race."[15] Van Alstyne argued that race-conscious means contradict the color—blind ends, thus racial preferences inevitably encourage people to think in racial terms.

The paradox of affirmative action is that there is some plausibility to both arguments. To leave the legacy of past discrimination unremedied is to risk freezing the unjust status quo. Alternatively, to use racial preferences as a remedy puts the means in direct tension with the color—blind end. One possible answer to this conundrum is to provide race-neutral preferences to the disadvantaged; that is, preferences by class, not race.[16]

Providing preferences to disadvantaged people generally is at once color—blind and cognizant of our nation's history. As a result of slavery and segregation, blacks remain disproportionately poor and would disproportionately benefit from a class-based preference to the extent that the economic legacy of the past remains. The means themselves, however, would be color—blind, thereby obviating the legitimate argument of many whites that there is not a scientific causal link between past discrimination against a group and the provision of a preference to individual members of that group some time later.

King himself argued that race-blind programs for the poor are an appropriate response to the legacy of slavery and segregation. King clearly saw the need for compensation. "[I]t is obvious," he wrote, "that if a man is entered at the starting line in a race three hundred years after another man, the first would have to perform some impossible feat in order to catch up with his fellow runner."[17] King proposed as a remedy a Bill of Rights for the Disadvantaged.[18] The fact that poor whites would benefit, and wealthy blacks would not, was of little concern to him. "While Negroes form the vast majority of America's disadvantaged," he wrote, "there are millions of white poor who would also benefit from such a bill."[19]

Even those wedded to racial preferences on the merits need to explore the class preference alternative as a matter of legal and political necessity. The courts in recent years have come down much closer to Van Alstyne than to Blackmun. For example, in *City of*

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15. William Van Alstyne, *Rites of Passage: Race, the Supreme Court and the Constitution*, 46 U. CHI. L. REV. 775, 809 (1979) (emphasis in original).

16. For a further description of the mechanics of this proposal, see RICHARD KAHLENBERG, THE REMEDY: CLASS, RACE, AND AFFIRMATIVE ACTION (forthcoming May 1996); Richard Kahlenberg, *Class, Not Race*, NEW REPUBLIC, Apr. 3, 1995, at 21, 21-27.

17. MARTIN LUTHER KING, WHY WE CAN'T WAIT 134 (1964).

18. *Id.* at 137.

19. *Id.* at 138.

Richmond v. J.A. Croson Co.[20] and *Adarand Constructors, Inc. v. Pena*,[21] the Supreme Court applied strict scrutiny to state and federal affirmative action programs.[22] While President Clinton likes to emphasize that seven of nine Justices in *Adarand* said affirmative action is sometimes appropriate, instances of racial classifications surviving strict scrutiny are extremely rare.[23] By contrast, class preferences are constitutionally unassailable. Because the left lost the great effort to get "class" categorized as suspect under Equal Protection jurisprudence,[24] there is no double-edged sword with which conservatives can strike down benefits for the poor. Politically, the fate of racial preferences has always been fragile, saved only by a bipartisan consensus among moderate elites. The days of dodging bullets, however, may be over, as the question is now being posed directly to the electorate. In November 1996, the California Civil Rights Initiative (CCRI) is slated to ask voters to evaluate the simple proposition that the state should not discriminate against, or grant preferences in favor of, individuals on the basis of race, gender, or national origin.[25] Polls show that passage is likely.[26]

Even where preference programs are more insulated from popular opinion, progressives need to be concerned about the larger political impact of supporting racial preference programs. King saw the

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20. 488 U.S. 469 (1989).

21. 115 S. Ct. 2097 (1995).

22. Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2113 (1995) (remanding with instructions to use strict scrutiny in evaluating federal affirmative action plan); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (striking down city's plan requiring 30% of construction contracts to be awarded to minority businesses).

23. For a rare exception to the rule that strict scrutiny is fatal to racial classifications, see Jacobs v. Barr, 959 F.2d 313, 318 (D.C. Cir. 1992) (concluding that reparation payments made to Japanese Americans interned during World War II survive both intermediate and strict scrutiny), *cert. denied*, 506 U.S. 831 (1992). Most affirmative action programs fail to meet the narrow tailoring of this program. *See Croson*, 488 U.S. at 508 (explaining that 30% quota was not sufficiently related to number of minority contractors in Richmond and appeared to be chosen "arbitrarily"); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 283 (1986) (holding that racially preferential layoff plan was not sufficiently narrowly tailored because less intrusive means, such as hiring goals, were available).

24. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 148 (1980) ("The retreat from the once glittering crusade to extend special constitutional protection to the poor has turned into a rout.").

25. The text reads, in part: "Neither the State of California nor any of its political subdivisions or agents shall use race, sex, color, ethnicity, or national origin as a criterion for either discrimination against, or granting preferential treatment to, any individual or group in the operation of the state's system of public employment, public education, or public contracting." Mona Charen, *Lack of Funds Threatens California Civil Rights Initiative*, FRESNO BEE, Nov. 2, 1995, at B7; *see also* Cynthia Craft, *Senator Assails Santa Cruz Chancellor over Angela Davis Honor*, L.A. TIMES, July 21, 1995, at B5; Cathleen Decker, *Backers of Affirmative Action Face a Tough Task Politics*, L.A. TIMES, Aug. 7, 1995, at A3.

26. Charen, *supra* note 25, at B7 (citing Field poll that found 65% approval for initiative in early September 1995).

divisive potential of racial preferences, and wrote, "Nothing would hold back the forces of progress in American life more effectively than a schism between the Negro and organized labor."[27] To some conservatives, the advent of racial preferences was desirable precisely because of their divisive potential. It is true, as Dean Jamin Raskin argued, that Richard Nixon backed racial preferences in part because they were modest and nonthreatening to the Establishment.[28] A part of Nixon's reasoning, however, was much more devious. According to former Nixon aide John Ehrlichman, Nixon imposed racial preferences on the Philadelphia construction industry in part to punish labor and to break up the old New Deal coalition of labor and civil rights groups.[29] Once preferences were on the table, and were gradually embraced by Democrats, Nixon denounced the very quota plan he had enacted, helping to spur massive white working-class flight to the Republican Party.[30] Likewise, Professor Frank Wu is wrong to blame the California Civil Rights Initiative for pitting Asians against blacks; it is the underlying policies of preference that by their very nature divide.[31] Adding women to the mix of preference beneficiaries would seem to help those who back preferences politically, but in fact, women oppose gender preferences at almost the same rate as men.[32]

In response to the political and legal assaults on affirmative action, proponents of preference programs have developed two new sets of arguments to supplement the old compensatory justification. First, race preferences are necessary to prevent *ongoing* racial discrimination; and, second, that preferences are necessary to promote *diversity*. Both rationales contain problems of their own.

There can be no doubt that racial discrimination remains a continuing tragedy in our society. At the Conference keynote address, Professor Angela Davis spoke of cab drivers routinely bypassing black passengers, and in Panel III, Professor Katheryn Russell pointed to the racial hoax phenomenon, in which white criminals like Susan Smith try to blame their crimes on innocent

27. KING, *supra* note 17, at 142.

28. *See* Conference, *Race, Law and Justice: The Rehnquist Court and the American Dilemma*, 45 AM. U. L. REV. 567 (1996).

29. JOHN EHRLICHMAN, WITNESS TO POWER 218 (1982).

30. *Id.* at 241.

31. Indeed, Asian Americans oppose racial preference at an even greater rate than do whites. *See* PETER BROWN, MINORITY PARTY 286-87 (1991) (citing 1988 Field Poll finding higher opposition to affirmative action among Asian Americans than among whites in California).

32. *See* Morin & Warden, *supra* note 1, at A1 (finding 69% of women oppose preferences for women compared with 76% of men).

blacks.[33] The continued existence of racism, however, does not and cannot justify broad-based racial preference schemes.[34] The remedy for cab drivers who discriminate is to suspend their licenses, not to apply racial preferences in the hiring of new taxi drivers. The remedy for racial hoaxes, as Professor Russell argued, may be an enhanced penalty, not a preference for African-American applicants to Berkeley.

Broad-based racial preferences were never meant as a way of preventing future discrimination; they were meant as a remedy for past discrimination, whose present day legacy cannot be addressed by prospective antidiscriminatory statutes. The Civil Rights Acts of 1964[35] and 1991[36] are necessary bulwarks against contemporary racism;[37] racial preferences are almost always an inappropriate response. We can get beyond racial preference without getting entirely beyond race, and those proponents of preferences who wish to blur this distinction only confuse matters.

The second, new noncompensatory argument advanced suggests that racial preferences are necessary to create a desirable racial diversity in universities and other settings. In the panel discussion, Professor Burt Wechsler argued that "no blacks" would be admitted to some leading universities without racial preference.[38] Mr. Phil Nash said universities should consider race in admissions, because universities employ all sorts of nonacademic considerations, such as, preferences for legacies and oboe players.[39]

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33. Michael Quintanilla, *Divided We Stand*, L.A. TIMES, Apr. 28, 1995, at E1 (describing rush to blame innocent minority or ethnic groups or individuals for crimes against whites).

34. By contrast, the racial discrimination of a particular employer can justify narrowly tailored remedies to proven discrimination. *See* United States v. Paradise, 480 U.S. 149, 185 (1987) (upholding district court's racial hiring quota enacted in response to pervasive, systemic, and obstinate discrimination by Alabama Department of Public Safety).

35. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000(a)-(e) (1994)) (enforcing right to vote, ordering desegregation of public facilities and education, and establishing Commission on Equal Employment Opportunity to enforce prohibition against employment discrimination).

36. Pub. L. No. 102-166, 105 Stat. 1071 (codified in scattered sections of 2 U.S.C. and 42 U.S.C.) (providing stronger remedies and additional protections for victims of intentional and unintentional discrimination in workplace).

37. An increasing number of conservatives have actually called for a repeal of civil rights protections in the private sector. *See, e.g.*, DINESH D'SOUZA, THE END OF RACISM 544 (1995) (advocating repeal of 1964 Civil Rights Act); RICHARD EPSTEIN, FORBIDDEN GROUNDS 413-21 (1992) (arguing that dominance of freedom of contract and voluntary market transactions should prevail in private employment situations). Roger Pilon of the CATO Institute also advocated this position on the first panel. *See* Conference, *supra* note 28, at Part I; *see also* Roger Pilon, *Discrimination, Affirmative Action, and Freedom: Sorting Out the Issues*, 45 AM. U. L. REV. 775 (1996). These arguments are quite shortsighted for the reasons outlined in the first panel by Brenda Wright. *See* Conference, *supra* note 28, at Part I.

38. Conference, *supra* note 28, at Part IV.

39. Conference, *supra* note 28, at Part IV.

Professor Wechsler's claim is an obvious overstatement. While it is clearly true that without racial preference, the number of African-American students at elite universities will decline, some will be admitted without preference and many more will be admitted with a race-neutral preference for students from low-income families. More still will be admitted if a definition of "class" is adopted that accurately reflects the aggregate difference between black poverty and white poverty. Such a definition therefore must consider concentrations of poverty, wealth measurements, and family structure.[40]

Mr. Nash's analogy between racial preferences, alumni preferences, and preferences for oboe-players is also flawed. Alumni preferences, like racial preferences, are genetically determined, having nothing to do with the individual effort or character of the applicant, and should be abolished. It is a sign of the decline of the moral authority of the civil rights movement when one of its arguments for racial preferences is that they are no worse than alumni preferences. Moreover, it is truly bizarre to equate skin color with ability to play an oboe (or to play football). One's talent as a musician or athlete is honed through hard work and individual effort. Race is an accident of birth which is utterly immutable. That the two categories can be so casually lumped together is a sign of the ease with which we have become accustomed to thinking in racial terms.

American society is not likely to be in a position to "get beyond" race any time soon. Race conscious, but nonpreferential, civil rights statutes are necessary to address contemporary discrimination. It is time to get beyond racial preferences, however, and all their toxic side effects. Class-based affirmative action addresses the legacy of discrimination in a way that is more sustainable, legally and politically. In addition, the class-based program would free us to move on to Martin Luther King's more ambitious agenda of creating genuine equal opportunity for disadvantaged Americans across race and gender lines.

40. *See generally* Richard D. Kahlenberg, *Equal Opportunity Critics*, NEW REPUBLIC, July 17, 1995, at 20, 21 (arguing that sophisticated definition of "disadvantage" will yield greater representation of minorities in universities than straight income-based definition).