

Reply to Affirmative Action

Jonathan K. Stubbs wishes to ignite a spirited discussion of affirmative action, but his October 2008 *Virginia Lawyer* essay did not even make a prima facie case for affirmative action, let alone a compelling argument for it. He spends three-quarters of his essay chronicling the history of slavery and discrimination against African Americans and women. Those are facts we all know, or should know, but they do not answer the question of what, if anything, should be done in light of that history.

Stubbs first asks, "What is affirmative action?" but fails to answer the question. He says that affirmative action "entails policies designed to ensure that each person has the resources available to achieve his or her maximum potential." That sentence contains words but no concrete meaning. Stubbs then says the "deck is stacked" against the economically disadvantaged, and he bemoans the unfairness of an inner-city student with 1100 Student Achievement Tests losing out to a suburban student with 1200 SATs. One would thus infer that Stubbs's view of affirmative action is some sort of undefined help for African Americans, women, and poor people.

Then, just when we thought that being poor qualified one for affirmative action (along with race and gender), Stubbs ends this section of his essay stating only that "race and gender" must be considered in remedying discrimination. What happened to the poor folks? Then, just when we thought that affirmative action is some sort of undefined help for African Americans and women, Stubbs concludes his essay by referring to "affirmative action based on race, gender, or national origin." *National origin*? Where did that come from? And what happened to the poor folks? Stubbs's essay contains a total of zero facts relating to discrimination against people based on national origin, yet with a stroke of a pen he would advantage enormous numbers of people over others based on where they were born. (Stubbs not surprisingly neglects to tell us which national origins

are to be favored, and how, and which are to be disfavored).

Clearly, one cannot begin a serious (let alone spirited) discussion of affirmative action until we know what that term means. When millions of people are casually included and excluded in the course of a four-page essay, it is a sign that that the term "affirmative action" cries out for more precise definition.

Stubbs makes the astounding assertion that America has "tens of millions of semiliterate, technologically unskilled workers and entrepreneurs." I don't believe that for one second. He has forty-nine footnotes, and the absence of a footnote for that whopper rings loud. Indeed, the presence of the word "entrepreneurs" in the sentence makes it positively nonsensical. Tens of millions of semiliterate, technologically unskilled *entrepreneurs*? This is not serious writing.

Stubbs's methodology is also wanting. When Stubbs tries to explain how affirmative action (whatever it means) would work, he suggests that disparity in SAT scores between urban and rural students — for example — merits deeper inquiry into the students' living circumstances to see who did the most with available resources. Yet how, exactly, will such a subjective and labor-intensive inquiry be accomplished? Most importantly, what standards will govern the inquiry? Will an inner-city student get X points for having skin of color A, Y points for being of gender B, and Z points for being poor? Will the children of rich, suburban Asian parents be triply punished for their unfortunate concatenation of parentage, prosperity, and domicile? And suppose a student is of mixed parentage, will she lose extra-credit points owing to having one parent of a disfavored race? A spirited discussion of affirmative action will surely arise when troublesome questions like these are meaningfully addressed.

Finally, and dizzily, Stubbs ends his piece by rhetorically pronouncing that "we can seriously consider discontinuing affirmative action" when "the President of the United States has a permanent suntan (Stubbs's regrettable

phrase, which should have been edited) ... and when the overwhelming majority of Americans genuinely believe that having such a leader is not a big deal." By the time this letter is published that time will have come.

Robert A. Dybing
Richmond

Professor Stubbs's Response:

I am indebted to Robert A. Dybing for his thoughtful response to my essay. In reply to some of the main points that his letter raised, I offer the following comments.

Mr. Dybing's Claims

Basically, Mr. Dybing's letter claims that my essay fails to adequately define affirmative action and lacks facts supporting the need for affirmative action. For example, Mr. Dybing contends that insufficient evidence exists to support the argument that millions of Americans are semiliterate and technologically unskilled. Finally, he takes issue with national origin as a basis for affirmative action.

Revisiting Affirmative Action

My essay defines affirmative action as having several interrelated dimensions: (a) policies necessary so that each person can reach his or her maximum potential; (b) fair evaluation of each person's potential; and (c) availability of societal goods in a more representative fashion. This definition of affirmative action has both procedural and substantive components. From a procedural standpoint, we need national policies that foster the goal of maximizing each person's potential. Substantively, the policies need material and human resources to make them work.

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Magazine Should Focus on Diversity of Ideas

Here's an idea for a future diversity story: Does the election of a black lawyer, who is married to another black lawyer, as president of the United States mean we can finally move beyond judging "diversity" in the legal profession simply by reference to skin color or gender? (As to the latter, more than 50 percent of the graduates of Virginia's law schools are female, and have been for more than ten years.)

For example, how about focusing on diversity of ideas and opinions — a far more Jeffersonian proposition than counting one as "diverse" merely by accident of birth? Month after month I receive *Virginia Lawyer*, full of articles written from, and promoting, a decidedly politically correct/left point of view, even though I suspect the overall membership of the Virginia State Bar is less liberal than the magazine's editorial preferences. It sure would be nice to broaden the scope of what is considered to be diverse beyond biology to other areas, such as thought, opinion, and ideas.

Brian S. Chilton
Mathews County

Joined the Cause

I was born in Virginia. I am a proud University of Richmond Spider and a graduate of the University of Virginia School of Law.

I have been in Florida in the law business since. I am still a member of the Virginia State Bar because my roots in my native state still run deep. I was so proud of your October issue of *Virginia Lawyer* and its report of the diversity initiatives. My thanks to VSB President Capsalis and all in the Virginia State Bar who are working on this. I have joined in the cause and really believe that our better angels await.

Roy C. Young
Tallahassee, Florida

Compliment and a Suggestion

Great Issue of *Virginia Lawyer*!

Also, I read the Executive Director's Message in the October issue of the magazine, and I have a suggestion to Karen Gould for a budget reduction. When I served on committees, I would get reimbursed for my mileage. Why not cut that out and have the people take off the mileage as a charitable deduction? I do that for other boards.

John M. Levy
Williamsburg

Karen A. Gould replies

Thanks for your compliment on Virginia Lawyer, as well as for your suggestion on how to cut costs. I don't think we can impose such a budget restriction on our volunteers, but they are welcome not to put in for mileage reimbursement. Last year, we spent \$120,000 on mileage reimbursement to our volunteers.

Congratulations on Diversity Issue

I write to congratulate *Virginia Lawyer*, and in particular Assistant Editor Dawn Chase, on the October issue devoted to the Diversity Initiative, and recalling the efforts of Oliver Hill, Spottswood Robinson, and other great Virginians in overcoming Massive Resistance by resort to the courts. This issue is a valuable contribution to our history, and the bar should take measures to insure that it finds its way into every high school library as well as the public libraries throughout the commonwealth. Perhaps the Virginia Law Foundation can be called upon to support the further printing and distribution of this landmark issue.

Robert C. Nusbaum
Norfolk

Diversity Issue Praised

Kudos on the October 2008 issue regarding the Diversity Initiative, especially the work done by Assistant Editor Dawn Chase. There were so many interesting articles from so many different perspectives. It was an issue to be deservedly proud of.

Vincent Cardella
Falls Church

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National policies such as what? One goal could be that every child in America will have a seat in a world-class school beginning in kindergarten. If as a nation we prioritized educating each American child to reach maximum potential instead of allowing resources to be determined by a fluke of history (who one's parents are, and on which side of town one is born), much of the conversation about affirmative action would be moot.

We don't live in that world. Our national priorities lie elsewhere. Accordingly, to decide who is qualified to attend a premier state university, for example, it is necessary to evaluate potential based on flexible criteria. Students across Virginia and America come from such a wide range of educational backgrounds that a mechanical one-size-fits-all approach — such as admission based primarily on test scores — simply benefits those who have the resources to prepare for the tests. Not every student has several thousand dollars to sink into Scholastic Aptitude Test courses, individual tutorials, preparatory manuals, and other test preparation resources.

Regarding how to evaluate potential, fortunately, the U.S. Supreme Court (in Justice Lewis F. Powell Jr.'s *Bakke*¹ opinion and

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Justice Sandra Day O'Connor's *Grutter v. Bollinger*² opinion) has given guidance that emphasizes a flexible, individualized, good-faith effort to evaluate each applicant's potential.³ Writing for the *Grutter* Court, Justice O'Connor said:

When using race as a "plus" factor in university admissions, a university's admissions program must remain flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application. The importance of this individualized consideration in the context of a race-conscious admissions program is paramount.⁴

An individualized admission process can include limited reliance on relatively neutral testing processes (a student's grade point average in an academic setting, for instance) and some more subjective evaluations such as written essays, letters of reference, and the student's individual life challenges and experiences (being the first child in a family to attend an undergraduate institution, for example).⁵

My honored colleague asks how many points are to be awarded for each personal attribute that an applicant has—for instance skin color, gender, or economic poverty. In *Gratz v. Bollinger*,⁶ the Supreme Court rejected a university admission program "which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race."⁷ Chief Justice William H. Rehnquist stated that such a program was not "narrowly tailored"⁸ and failed to provide "individualized consideration."⁹ The mechanical point system approach suggested by Mr. Dybing fails to adequately consider the specific potential of each individual. A holistic assessment is required. For instance, more reliance on objective criteria such as academic performance (reflected in grades, academic awards, and school projects) can help establish basic competence. Once the

qualification threshold is reached, then consider other aspects of the application, including (a) what seems to be the likelihood of this individual successfully completing her studies, and (b) what the individual adds to enrich the learning experience of others.

Finally, affirmative action entails a more representative distribution of societal goods (jobs, housing, credit, educational resources) than currently exists because the current distribution has more to do with material wealth, gender, and skin color than merit. The unrepresentative nature of our nation's economic, political, judicial, and educational leadership is no more an accident than is a turtle sitting on a fence post. (If you find such a situation, you know that the turtle had some help.) That is the message of the essay's thumbnail history.

Stupidity and genius respect no color, religious, class, gender, or political boundaries. Human potential (such as math, musical, athletic, or literary intelligence) is randomly dispersed among the human population. So are human limitations. When a person is conceived, race, gender, economic class, and nation of birth have little to do with potential. It's what happens later that causes confusion.

Reference Concerns

Mr. Dybing asserts that he does not believe that tens of millions of Americans are semiliterate. I invite your attention to the U.S. Department of Education 2003 National Assessment of Adult Literacy¹⁰ (National Literacy Assessment). This states that 12 percent of the estimated 222.4 million adult Americans¹¹ who live in households or prisons lack "basic document literacy" skills, defined as the skill to decipher a simple written document.¹² Practically, that means approximately 26.5 million adult Americans would find it virtually impossible to read a commonly used type of chart and understand it.¹³

In addition, the National Literacy Assessment concludes that 14 percent of American adults have "below basic prose literacy skills."¹⁴ These roughly thirty million American adults would be unable to understand a short physician's instruction sheet telling them which liq-

uids they should not drink before a medical procedure.¹⁵

Finally, the National Literacy Assessment estimates that 22 percent of adult Americans have "below basic" quantitative literacy skills.¹⁶ That means nearly fifty million adults find the challenge of doing simple addition for a bank statement nearly insurmountable.¹⁷

The National Literacy Assessment supports the argument that tens of millions of Americans have "below basic" literacy skills. A large number of semiliterate, technologically unskilled Americans work for others or themselves, or are unemployed. Many of them cannot read simple documents or add. The essay refers to them as "unskilled workers and entrepreneurs." (Some folks with little formal education are self-employed on farms and in other small businesses.)

Race and National Origin Discrimination

Finally, my learned colleague criticizes the essay because it states that affirmative action should include discrimination based on national origin. The Supreme Court has repeatedly held that the Constitution protects individuals from discrimination based on national origin in large part because national origin has historically served as a proxy for race. Two recent Supreme Court cases illustrate the point. In *St. Francis College v. Al-Khazraji*,¹⁸ the United States Supreme Court ruled that a citizen of the United States who had been born in Iraq could maintain a suit alleging racial discrimination under the Civil Rights Act of 1866 (42 U.S.C. § 1981).¹⁹ The Court noted that the Congressional debates leading to the passage of Section 1981 were "replete with references to the Scandinavian races ... as well as the Chinese ... Latin Spanish ... and Anglo-Saxon races ... Jews ... Mexican ... blacks ... and Mongolians were similarly categorized."²⁰

In a remarkable footnote (perhaps anticipating the findings of the Human Genome Project?), the *St. Francis College* court stated that

There is a common popular understanding that there are three major human races —Caucasoid, Mongoloid, and Negroid. Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary and of little use in understanding the variability of human beings ... These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part socio-political, rather than biological, in nature.²¹

In these circumstances, the Court held that:

Based on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid, whether or not it would be classified as racial in terms of modern scientific theory.²²

Likewise in *Rice v. Cayetano*²³ a case involving an Hawaiian state agency established to administer funds and programs benefitting native Hawaiians, the Supreme Court stated, "Ancestry can be a proxy for race. It is that proxy here."²⁴ The *Rice* Court ruled that Hawaii's statutory scheme violated the Constitution's Fifteenth Amendment's guarantee of equal voting rights.²⁵ *Rice* and *St. Francis College* exemplify an impressive line of Supreme Court cases in which the Court has recognized that race and nationality have been used interchangeably. (Earlier examples of the Court's recognition of the interchangeable use of race and nationality include *Ozawa v. United States*,²⁶ and *U.S. v. Thind*²⁷).

Given the Supreme Court's precedents, my colleague's concerns about national origin discrimination are not well grounded.

Conclusion

I appreciate Mr. Dybing's spirited response to the essay. Hopefully our dialogue will push discussion in a constructive direction: what to do about tens of millions of Americans —adults and children— who cannot now or in the foreseeable future give their best gifts to this country, much less to humankind. As we begin under a new national administration, a very important start would be for the next president to make a major infrastructure investment in America's children by presenting a budget with sufficient resources so that each American child will be able to attend a world class school. Implementing such a commitment would go a long way to putting an end to the need for affirmative action. The commitment of such resources would also reduce the likelihood that America will lose its ability to lead globally because of substandard domestic educational institutions. A national budget reflecting a commitment to a first rate education as an American birthright would pay handsome dividends (in the form of new schools, teachers, and expanded curriculum) now and in the future. Such a budget would also signal the extent to which the new administration is serious about positive change.

Endnotes:

- 1 *Regents of Univ. of California v. Bakke*, 438 U.S. 265, at 311-24 (1978).
- 2 539 U.S. 306 (2003).
- 3 *Id.* at 311-44.
- 4 *Id.* at 336-7.
- 5 *Id.* at 338.
- 6 539 U.S. 244 (2003).
- 7 *Id.* at 270.
- 8 *Id.*
- 9 *Id.* at 271.
- 10 National Center for Education Statistics, United States Department of Education, *National Assessment of Adult Literacy: A first Look at the Literacy of America's Adults in the 21st Century* (2003). Available at <http://nces.ed.gov/NAAL/PDF/2006470.pdf> (last visited November 1, 2008). See also, National Center for Education Statistics, United States Department of Education, *Key Concepts and Features of the 2003 National Assessment of Adult Literacy* (2005) (elaborating, among other

things, on the research methodology of the 2003 National Assessment). Available at http://dese.mo.gov/divcareered/AEL/AEL_KeyConcepts.pdf (last visited November 3, 2008).

- 11 *Id.* at 18.
- 12 *Id.* at 4, (Figure 2).
- 13 *Id.* 4-24.
- 14 *Id.* at 4, (Figure 2).
- 15 *Id.* at 3 (Table 1).
- 16 *Id.* at 4 (Figure 2).
- 17 *Id.* at 3 (Table 1).
- 18 481 U.S. 604 (1987).
- 19 *Id.* at 609 § 1981 states:

All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

- 20 *Id.* at 612.
- 21 *Id.* at 610, n. 4.
- 22 *Id.* at 613, emphasis added. The Supreme Court agreed with the Court of Appeals that "§ 1981, 'at a minimum,' reaches discrimination against an individual 'because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of homo sapiens.' It is clear from our holding, however, that distinctive physiognomy is not essential to qualify for § 1981 protection." *Id.*
- 23 528 U.S. 495 (2000).
- 24 *Id.* at 515.
- 25 *Id.* at 512-524.
- 26 260 U.S. 178 (1922). The *Ozawa* Court upheld the denial of the citizenship application of "a person of the Japanese race born in Japan" because the framers of the original Immigration Statute of 1790 intended to "confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny to all who could not be so classified." *Id.* at 195.
- 27 261 U.S. 204 (1923). *Thind* rejected the claim of a Hindu from India that he was a white person under the relevant immigration statutes because "the words 'free white persons' are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word 'Caucasian' only as that word is popu-

larly understood. . . . It is a matter of familiar observation and knowledge that the physical group characteristics of the Hindus render them readily distinguishable from the various groups of persons in this country commonly recognized as white.” *Id.* at 214-15.