Reaffirming Merit in Affirmative Action

Margaret Y. K. Woo

The word "affirmative" in "affirmative action" was not happenstance. Hobart Taylor, Jr., the young black lawyer who drafted Executive Order 10925, the document that originated affirmative action, carefully chose the words "affirmative action" to give "a sense of positiveness" to performance under that order.¹ And yet, since the implementation of Executive Order 10925, opponents have argued that affirmative action is "negative" action, inconsistent with meritocracy, because it lets in "unqualified" people purely on the basis of race and gender. In the battle around affirmative action, the liberal response that affirmative action serves social justice by remedying past and present discrimination appears to be losing.

What is necessary then to counter the anti–affirmative action argument is to unpack the assumptions behind merit to reaffirm that affirmative action in education is selection on the merits. Not only must we remind ourselves of the justice mission behind affirmative action, but we must also take the lead in educating the public that affirmative action is "positive" action. Specifically, in the education context, we need to recognize the limitations of the present narrow definition of merit, largely based on grades and standardized testing. The challenge is to reclaim merit for affirmative action.

An Affirmative Action Profile

As someone who has given years of service on admissions committees, I would like to begin with a profile of an applicant I considered to be an ideal affirmative action candidate. Opponents of affirmative action typically offer examples of challengers to affirmative action—worthy and sympathetic white applicants who, according to their argument, would have been admitted had places not been set aside for less-well-credentialed minorities. The other stories—the faces and the histories of those who benefited under affirmative action—remain hidden under the negative images surrounding the words "unqualified" and "low LSAT scores."

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My example is an applicant with an LSAT score placing him only in the 53rd percentile, and an undergraduate GPA of 2.88. Under the ordinary review process, he would have been rejected. But a closer look revealed that this was a Latino with a compelling life story. He had come to the United States with other members of his family as an undocumented person knowing no English. Although he achieved a high school diploma, it was impossible to obtain copies of his records so that he could go to college. Despite pressing economic need and a demanding work schedule, he studied English and qualified for a general equivalency diploma. Still working part time, he entered the local community college at age twenty-five. Throughout his time in college, he volunteered to counsel high school dropouts in a GED training course.

The above profile makes an important point about affirmative action: that selection through affirmative action is selection on the merits. Despite his low scores, this is an applicant I would admit under affirmative action because he has demonstrated tremendous merit in his life story—motivation, maturity, and perseverance. In fact I have admitted applicants with profiles like this. They have completed law school, some with faltering starts, and many have moved on to prestigious fellowships and successful careers in major law firms. Elimination of affirmative action would mean denying such meritorious applicants a chance, and yet that is exactly what opponents of affirmative action are urging.

Recent Backlash Against Affirmative Action

Opposition to affirmative action has been gathering momentum and recently has achieved its greatest force in a series of backlash efforts, including California’s Proposition 209, a narrowly passed 1996 referendum to end affirmative action. \(^2\) Similar referenda have been proposed in more than half the states, although California remains the only state to have passed one.

And the tide also seems to be turning against affirmative action in the courts. Affirmative action was initially established through an executive order based on the idea that the executive and the judiciary would be more likely to “get it right” than the legislative branch, with its process of public debate and compromise. \(^3\) Yet three recent court decisions on affirmative action in education suggest that judicial support may be waning. In Hopwood v. Texas, \(^4\) the Fifth Circuit ruled against race-based preferences in law school admission. In Podberesky v. Kirwan, \(^5\) the Fourth Circuit struck down merit-based scholarship

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2. Proposition 209 provides: “The state shall not discriminate against or grant preferential treatment to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.” Cal. Const. art. I, § 31(a).

3. Lemann, supra note 1, at 54.


programs limited to minority students. And in Taxman v. Board of Education, the Third Circuit ruled against race-based preferences in firing teachers.  

The central argument against affirmative action is that it is a “quota system” that confers automatic preferences on women and racial or ethnic minorities regardless of their qualifications. According to this line of argument, affirmative action means having to choose an unqualified person to meet rigid quotas, and therefore affirmative action compromises merit and lowers standards.

**The Traditional Defense of Affirmative Action**

In response, the proponents of affirmative action have pointed to its original “remedial” justification. Race and gender disparities and discrimination still exist, they say, and without affirmative action doors will remain closed for racial minorities and women. The goal is distributive justice: the “visible presence and success of minority professionals can help secure compensatory or distributive justice for other members of their racial and ethnic groups.” They further argue that affirmative action benefits *everyone* because it ensures diversity: particularly in the educational context, people with different experiences and perspectives can all learn from each other.

All this has failed to persuade opponents of affirmative action, partly because it seems to make the group more important than the individual. “Equality,” in American thinking, has to do with individuals, and so does “merit”: one should be rewarded because of one’s own actions or achievements, not because of an affiliation. By the same token, courts have resisted the remedial justification for affirmative action except for those institutions that have been the subject of specific judicial or legislative findings of discrimination. In sum, both the public and the courts have resisted broad-based group remedies, because redistribution on the basis of a collective wrong seems to be inconsistent with the individualism that underlies American society.

Class-based affirmative action—the idea of giving consideration to the economically disadvantaged—is a recently suggested alternative to race-based affirmative action. Elsewhere in this issue Deborah Malamud explains at length why it is not a satisfactory substitute. Here I will say only that class-based affirmative action may run into the same cultural and social resistance as that facing race-based affirmative action. Absent any “remedial” justification, the core justification for class-based affirmative action is simply an argument for redistribution. As we have seen in the recent backlash against welfare, the American public is not embracing redistribution on either class or race grounds.

**Attacking Modern Meritocracy**

In addition to the diversity and social justice arguments, then, we need more ammunition in support of affirmative action, whether based on race or class. We need to argue the individual merits of the beneficiaries of affirma-

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tive action programs, and we need to attack the present concept of “merit” head on.

I am not challenging the normative assumption that merit can be a legitimate system for distribution of rewards such as jobs and education. To the extent that merit is the “functional capacity to perform,” it can be an efficient system for distributing opportunities because it maximizes our human resources. But since the foes of affirmative action have essentially framed the debate as merit versus race, we need to reclaim “merit” so that we can change the dialog and engage in a real debate rather than talking past each other. What I am challenging here, in part, is the way merit has been subsumed and redefined by convenient “predictors” of merit, and how the present “predictors” have worked unfairly against minorities and other disadvantaged people.

Indeed, the history of affirmative action can be seen as a struggle over the fairness of the modern meritocracy. Supporters of the meritocracy maintain that it is individual achievement that matters, and merit “does not refer to inherited characteristics such as race or gender.” They also believe, in varying degrees, in the reliability of numerical indicia of merit. I would posit, on the other hand, that while “inherited characteristics of race and gender” may not be determinative of individual worth, “race and gender” can be a starting point to assess a person’s history and development, which must be taken into account in any measurement of individual merit. Numerical indicia do not tell us much about the character and worth of persons who must face and overcome societal obstacles such as racial or gender discrimination.

Our “numerical education-based meritocracy” has two flaws. First, not every child born in America has access to good schools or has parents who emphasize and support the child’s education. The historical emphasis on educational attainment may be especially detrimental to some racial minorities. In a landmark study of educational spending in a number of major American communities, Jonathan Kozol concluded that spending for white children’s education far exceeds spending for nonwhites. For example, in 1989 Chicago with its large minority population spent approximately $5,265 per student, while the mainly white surrounding suburbs spent as much as $9,300.

Second, basing “merit” on numbers is problematic in many ways. While high test scores and earlier grades are relatively successful in predicting good academic performance in school, low numbers do not necessarily forecast poor academic or professional performance in the long run. As others have pointed out, standardized tests can be culturally biased in their substance and

10. I take the phrase from Lemann, supra note 1, at 43.
methodologically biased in favoring good test takers. Further, standardized tests are incomplete. While they measure a certain level of training, they do not measure progress or potential. In my view, someone who starts from behind and makes significant progress has demonstrated enormous talent and—hence—merit. Such progress can be more revealing of intelligence and ability than the "numerical education-based" measurements of present achievement alone.

A Different View of Merit

For me, then, merit means more than statistics. In particular, merit can be perseverance in facing and overcoming obstacles. Discrimination on the basis of race is a societal obstacle for anyone subjected to it, and overcoming such an obstacle is evidence of inherent potential, character, and progress—in short, of individual merit.  

Under this view of merit, then, present-day race-based affirmative action is merit-based because it takes into account societal obstacles that might otherwise skew objective criteria of individual merit. And if lower-scoring minority applicants can be recognized as "meritorious" in this way, then the later uses of diversity to fill a class with representative groups may not be so objectionable. At that point, admissions officers are filling the class with diverse and "meritorious" applicants of different racial groups, in much the same way as they choose among qualified applicants on the basis of geography. Diversity preferences for racial minorities can no longer be attacked as letting in "unqualified" people.

A "merit" selection based on overcoming obstacles can be seen not only as a principled basis for existing race-based affirmative action criteria; it can also serve as a distinct race-neutral selection category to support affirmative action for other groups facing social discrimination on such grounds as gender, class, sexual orientation, or physical disability. And there are multiple benefits in using this category. For one, the category of overcoming obstacles eliminates the division between race and nonrace identities. In recent years, group-based identities have been a powerful source of strength for those within the group but have also contributed to division between groups. The problem, as Martha Minow has so cogently pointed out, is that "in identity politics, I am for others, but only those like myself."  

12. One can argue that there is no such thing as "merit" in the abstract. Merit must be understood in context of the purposes an institution may define and pursue. Ronald Dworkin, A Matter of Principle 299–300 (Cambridge, Mass., 1985). In other words, what counts as merit in an applicant depends on what qualities the particular institution deems relevant to its own character and its social purposes. For a school like mine with a public interest mission, a student demonstrating special background in public interest work could have an added measure of merit. Other schools have other emphases.

13. This is consistent with the consideration schools already give to personal tragedies faced by individual applicants. My position is simply that societal obstacles (such as race discrimination) can and should also be taken into account, and that affirmative action should appropriately address recognized patterns of disadvantage based simply on membership in a particular group.

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Second, as an umbrella category overcoming obstacles can obviously be more inclusive than race-based affirmative action by bringing in others who have also historically suffered under group-based stigmas, such as gender, class, disability, and sexual orientation. For an educational institution truly devoted to the ideals of diversity, the category of overcoming obstacles seems a more intellectually coherent way of ensuring diversity. Certainly, one of the attacks against race-based affirmative action that has proved most difficult to counter is the argument that it promotes a hierarchy of diversity values with the race value on top.

Third, by requiring an assessment and articulation of a person’s experience of overcoming obstacles, the category avoids the problem of essentialism. Critics of identity politics have accurately pointed out the problems of essentializing a complex person to one trait—be it gender, race, or class—as determinative of that person’s viewpoint and interest. A focus on overcoming obstacles appropriately recognizes the individual within the group.

Fourth, such a focus helps us to recognize the “intersectionality” of multiple identities: we can acknowledge the multiple difficulties faced by a poor immigrant Latina, without requiring her to self-categorize and to limit herself to consideration as “poor” or “female” or “Latina.” The overcoming-obstacles category, if correctly formulated, can more clearly assess her triple disabilities and her inherent worth and motivation in overcoming such obstacles.

Fifth, thinking about overcoming obstacles can help in recognizing possible coalitions and alliances between racial groups. Asian-Americans have been touted as the model minority who have succeeded academically without the assistance of affirmative action. Asian-American legal scholars have argued against the accuracy of this portrayal, and against this use of Asian-Americans as a means of undermining race-based affirmative action. With the emphasis on overcoming obstacles, no one group can arguably be the “model” minority wedge between racial groups.

Finally, and perhaps most important, that emphasis can help us to focus more acutely on the underlying social conditions of oppression. The word “obstacles” continues to remind us of the harm society has done to individuals, particularly in the form of group-based discrimination. If we are required to consider group-based harm in our admissions process, we as a society may be more sensitized to the discrimination that still exists and all the negative ramifications that may entail.

In sum, a broader recognition of merit (beyond grades and statistics) can include race as a part of a person’s social and cultural history and a starting point to discuss an individual applicant. This broadened merit may also support an umbrella category of diversity—people who have faced and overcome group-based discrimination. Admission will depend on the applicant’s individual merit, demonstrated by the efforts exerted to overcome these obstacles.

15 For a good analysis of the complex position of Asian Pacific Americans in the affirmative action debate, see Gabriel Chin et al., Beyond Self-Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action (on file with author).
Objections to an Overcoming-Obstacles Model

Of course, there may be counterarguments. Isn’t “overcoming obstacles” just a proxy for racial preferences? Or (conversely) doesn’t this approach decrease the representation of racial minorities? And how can this model be practically implemented?

As to the first argument—that overcoming obstacles is simply a proxy for race—the response is that there is a real difference. The merit of the applicant is not simply a matter of biology. Rather, merit is the recognition of what the applicant has done to overcome the obstacle of race (or gender or class as a demonstration of maturity, perseverance, and progress. This is consistent with the traditional American focus on individual effort, rather than on group rewards.

And we should remember what Bakke still stands for.16 In the education context, Bakke says that race can be a plus to be considered with other factors. School admissions policy may use a matrix that includes race, but may not treat race separately and weight it disproportionately. As the Law School Admission Council has pointed out, there is a legal distinction between reliance on race as an admission determinant (which is legally perilous) and the use of factors, such as overcoming disadvantage, that may correlate closely with race.17 Undeniably, one may question whether it is legally permissible to consider factors closely correlating to race. But if we are to preserve diversity in this era of changing attitudes on affirmative action and renewed judicial attention, we must explore alternative approaches that test the boundaries of what the courts will allow.

As to the second argument—that the overcoming-obstacles approach will dilute racial representation—the answer is that it may. After all, no alternative approach is likely to bring in as much racial diversity as race-based affirmative action. But my approach will operate to preserve diversity in education, and it will maintain race as one—though not the only—consideration.

Ultimately, one can argue that racial representation need not be diluted. As I noted earlier, admissions personnel still have to keep in mind the picture of the class as a whole. They may try to fill a class with people of different races much as they try to fill a class with residents from different parts of the country. But at that point they will be selecting from all “qualified” candidates already viewed as admissible: now diversity is an administrative consideration, not a threshold criterion subject to legal challenge.

Indeed, if one of the goals of affirmative action programs is to take a second look at applicants with risky numbers and select those whose merit is not captured by numerical indicia, then an overcoming-obstacles standard would be useful. It would force each of us to understand what the impact of different factors may be on a student’s potential. What is it really like to learn English as a second language? To be the first in the family to go to college? To grow up in

17. Preserving Affirmative Action Programs in the Late 90’s (June 1996).
poverty? The priority among the various factors would depend on the profile of the particular applicant pool: what qualities are needed to ensure a truly diverse and representative class?

Finally, the last challenge may be a practical one—that is, how to implement affirmative action under this broader definition of merit. What does it mean to incorporate “overcoming obstacles” into the admissions process?

One suggestion may be that schools need to develop an alternative valuation system beyond numerical indicia. While I am not advocating the rejection of standardized tests such as the LSAT, I am suggesting that we need to accord other factors equal weight. In so doing, we also offer the world an alternative method of valuation to the numerical ranking of _U.S. News and World Report_ (which, rather cynically, ranks schools according to the average LSAT of the entering class). Perhaps there may be an indexing system which will integrate an applicant’s other qualifications (other individual merits) with test scores.

The indexing system may take into account an applicant’s self-identification with a certain disadvantaged group. This self-identification will give rise to a presumption for a second look. Additionally, it could also require an essay outlining specifically the applicant’s experience in facing and overcoming societal obstacles.

One may question how the admissions process can ensure accuracy in these personal accounts of “overcoming obstacles”? How can the process prevent exaggeration or even fabrication of personal experiences? Indeed, there may be no guarantee against fabrication of accounts of “overcoming obstacles,” just as there is no guarantee against fabrication in any personal essay required in every application process. The job of an admissions officer is to screen essays carefully for consistency and veracity. If the possibility for fabrication is greater because the applicant now has a clue as to what to fabricate, the process can check itself by requesting additional letters from those who have personal knowledge of the particular experiences described.

Clearly, then, integrating the “overcoming obstacles” criterion into the admissions process requires more work and more resources. Applying an overcoming-obstacles standard requires giving hundreds of applications a close read. And this must be done without a separate minority admissions subcommittee, since after _Hopwood_ separate admissions committees for affirmative action will surely be scrutinized. According to the district court in _Hopwood_, “the constitutional infirmity of the [University of Texas] law school admissions procedure . . . [lies in] fail[ing] to afford each individual applicant a comparison with the entire pool of applicants, not just those of the applicant’s own race.”

Under _Hopwood_, then, files of minority applicants collected for review and recommendation by a separate person or committee must at some point be reviewed and acted upon through a process common to all applicants.

18. 861 F. Supp. 551, 579 (W.D. Tex. 1994). Indeed, the _Hopwood_ plaintiffs have not complained about the new affirmative action program instituted after this decision. The new affirmative action program does not use separate committees or differential numerical admissions requirements, and uses race or ethnicity only as one factor in making admissions decisions.
But the workload may not be impossible. Each admissions director I have contacted has concluded that reading every file, even when the number of files is 6,000, is not only necessary but possible. Admissions officers are already doing just that. As Leigh Taylor, dean of the Southwestern University School of Law and chairman of the Law School Admission Council, has put it, admissions officers normally consider “life experience, community service, motivation, character, demonstrated leadership ability, and educational disadvantages overcome.” What I am proposing is affirming the considerations already taking place, by including the overcoming of racial disadvantage as a factor which deserves recognition as merit.

And there are some options that might alleviate the workload, including perhaps the use of several subcommittees, each with an affirmative action representative, or an appeals committee to look at disputed applicants. The point to emphasize, however, is that for affirmative action to continue, schools will have to devote more resources—more time and manpower—to admissions work. Some may question whether this is sensible in a time of declining applications. But responsible educators should always be thoughtful about whom they train and why they train. Declining applications, at most, may meaning admitting fewer applicants rather than applying a less thorough review in the admissions process.

What do the latest anti-affirmative action developments mean for educators? For one, educators need to reassess the goals of education and the goals of affirmative action—both nationally and, more specifically, in our particular institutions. This means that we must cast off the false distinction between affirmative action and merit, and point out that selection through affirmative action is selection on the merits. Certainly, one way of appreciating the individual merits of minority applicants is to understand the progress and potential demonstrated by their overcoming the obstacles of discrimination. I am not so much arguing for a reconceptualization of the admissions process, but more generally for a “shifting of the paradigm,” so to speak, in understanding that affirmative action is selection on the merits.

We also need to think more carefully about the goals of our particular institutions in the scheme of legal education and other law schools. It is important, not only for affirmative action but also in response to declining applications, to target those who are most suited to our particular schools. As Wallace D. Loh has said, in a time of declining resources, a school must make “disciplined choices about what a school does best.” What constitutes a meritorious applicant may be defined in part by the focus of particular schools.

Second, educators need to make the admissions process consistent with more clearly defined goals of affirmative action and education. We need to


move away from rigid numerical criteria and think more deeply about the profile of our student body. One practical suggestion may be to develop a "diversity" committee that meets with the law school administration to set goals for the profile of incoming classes and later assesses and makes recommendations for change. Of course, the task will not be easy. How does one assess goals without quantifiable data? Does assessment mean quantification, which in turn means quotas? Does assessment mean quantification and the loss of discretion?

We also have to recognize that admissions work reaches beyond admissions. Remember that affirmative action means "positive" action. This means the admissions office should broaden its tasks to include other steps such as recruitment and outreach programs directed at students who would otherwise not be admitted. Admissions is not simply the committee reading applications. Rather, the admissions process begins earlier. An affiliation program with colleges that serve large numbers of disadvantaged and minority students could increase the applicant pool. Schools may also want to accelerate alumni efforts to encourage admittees to attend.

Not only does the admissions process begin earlier under affirmative action, it also ends later. We can no longer ignore the relationship between admissions and other issues, such as retention and recruitment. Today, more than ever, we need to make minorities feel welcome in our institutions.

Ultimately, the message may be that a school truly committed to affirmative action will have to put in more time and resources to implement any affirmative action program. Once the program is in place, educators will need to speak out to increase public understanding of affirmative action—again, nationally and within our own institutions to create a better environment for inclusion.