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TUESDAY, SEP 3, 2013 08:25 AM PDT

# Randall Kennedy: In praise of affirmative action

Affirmative action helped me attend Yale Law and teach at Harvard. I do not feel belittled by this

RANDALL KENNEDY

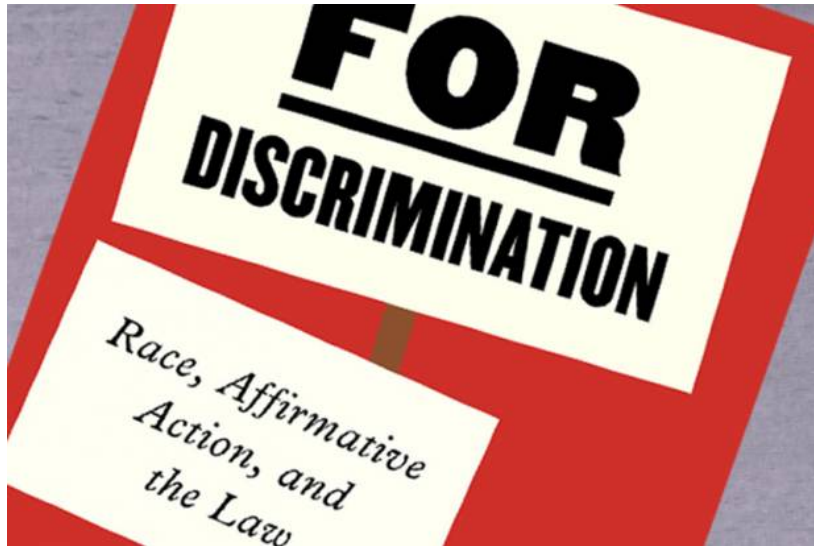
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Excerpted from *For Discrimination*

I can clearly recall watching the Jerry Lewis version of the film "The Nutty Professor" from a balcony set aside for African Americans in a theater in Columbia, South Carolina, in the summer of 1963. Ironically, as a nine-year-old, I perceived that Jim Crow arrangement as favoring blacks; it was far easier for us to throw candy down on the whites

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## BOOK OF THE WEEK



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my aunt lived, the choice to close rather than desegregate public parks, and ordinances requiring racially separate bathrooms (especially memorable for me were the signs differentiating “white ladies” from “black women”).

I was born in Columbia in 1954, the year the Supreme Court invalidated racial segregation in public schools. I visited frequently but did not live there. Fleeing racism like many millions of other Southern black refugees, my parents raised me and my siblings in Washington, D.C. My father once told me he feared that if he remained in the Deep South, he would kill or be killed in a racial altercation. He was a postal clerk who attended a couple of years of college at two black institutions: Dillard University, in New Orleans, and Southern University, in Baton Rouge. My mother was a schoolteacher who earned an undergraduate degree from South Carolina State College, an institution created for Negroes in order to “protect” the state’s white university. When she sought a higher degree, she learned that that sort of study was unavailable to her in her home state. To fulfill what they perceived as their obligation under “separate but equal,” state authorities subsidized her tuition so that my mother could study “abroad” at some institution that would accept blacks. That is how she wound up as a student at New York University, where she earned a master’s degree.

Throughout the late 1950s and early 1960s, I enjoyed a happy childhood in a loving household. By moving north, my family did not wholly escape racism; anti-black attitudes and practices were (and are) a national phenomenon. But what we encountered in D.C. paled in comparison with what my extended family faced in South Carolina; one of my cousins was at the civil rights protest at South Carolina State College in which three undergraduates were murdered by state police in an episode of racially motivated violence that, while the subject of a fine book, has never received the attention it warranted.

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In my house, discussion about the civil rights movement was constant. From my parents I learned to revere well-known heroes and heroines—Martin Luther King, Jr.; Rosa Parks; Fannie Lou Hamer—as well as lesser-known figures like James Hinton, Modjeska Simkins, and Matthew Perry. Subsequently, I have come to appreciate with ever-deepening gratitude the benefits they pried open and that I have enjoyed as a matter of course. For one thing, I have had the privilege of attending an extraordinary array of schools that became accessible to more than a negligible number of black students only after the late 1960s: St. Albans School for Boys (1968–73), Princeton University (1973–77), and Yale Law School (1979–82). An affirmative action ethos played a role in my admittance and flourishing at each of these selective, expensive, and powerful institutions. This ethos consists of a desire to make amends for past injustices, a commitment to counter present but hidden prejudices, a wish to forestall social disruption, and an intuition that racial integration will enrich institutions from which marginalized groups have largely been absent.

Of course, I encountered invidious racial discrimination in these schools periodically, but, luckily for me, the balance of my encounters along the race line were positive. I have often been shown special attention in competitive settings in which my blackness was

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LUKE BRINKER

solicitude of William Bowen, who was then the president of the university, and Neil Rudenstine, the university provost (and later the president of Harvard). Their generosity was due, in part, to the mysterious alchemy of friendship. It was also due to their self-conscious, systematic efforts to lend special aid to promising scholars of color in America and indeed around the world. Throughout their distinguished careers, Bowen and Rudenstine have been highly effective practitioners of the affirmative action ethos.

When I was a senior in college, considering law school, I attended a gathering that featured the Yale Law School dean of admissions. He distributed a document that included a chart noting the range of Law School Admission Test (LSAT) scores of the students in the most recent entering class. I had just received my LSAT results. My score was disappointing—low enough that it did not even appear on the chart. I waited until the dean had fielded all of the other students' questions before I bashfully approached him and asked whether, given my score, I should still apply. He asked what sort of grades I had earned. When I told him that I had an A-minus average, he urged me to proceed. I won admission to Yale, Harvard, and every other school to which I applied. I had the profile of a hard worker, and I also had a halo over me, having just won a Rhodes Scholarship. In other words, without affirmative action I would surely have gained admission to a fine law school. But in its absence, and in the face of that spectacularly mediocre LSAT score, would I have gained admission to Yale and Harvard? Maybe not.

I attended Yale Law School (YLS) in the aftermath of Regents of the University of California v. Bakke (1978). In that landmark ruling, the Supreme Court invalidated a particular affirmative action program but upheld affirmative action in university admissions in general, if structured in a certain way and pursued for the sake of “diversity.” At YLS, virtually all black students supported affirmative action. Doing so was seen as a sacred communal obligation. A memorable dinnertime discussion with black peers in my first year involved the question of what to do when Bakke became the subject of inquiry in class. One upper-classman (who has subsequently distinguished himself in government service and business) argued passionately that the case allowed for only one defensible outcome: he maintained that we ought not allow Bakke to be debated, because our presence at the school should not be subject to debate. He recommended that we walk out of class if opposition to affirmative action was voiced. I recall thinking at the time that that advice was silly. How else were we—aspiring lawyers—to master the arguments and counterarguments regarding affirmative action other than by engaging antagonists? But I also remember biting my tongue; as a newcomer, I thought it prudent to be quiet until I got a better sense of my surroundings.

Affirmative action figured, too, in another episode that remains vivid for me decades later. In my second year, in the introductory course on taxation, a black student was the first person called on. There were only two or three other black students in that class, and I made it a point to speak with them afterwards. I wanted to know whether they had felt as anxious as I had when our black classmate was called upon and whether they had felt as relieved as I had when she displayed mastery of the relevant material. They told me that they, too, had felt personally implicated by her performance and that they, too, had cheered silently when she answered commendably, putting “the race” in a good light. The perception of linked fate and that feeling of being always on the spot as a representative of the race, at least in mixed company, are features of African American life that predate affirmative action and arise outside of its presence. They are accentuated, however, in settings in which affirmative action is salient.

In law school, I earned the respect of professors and served on the editorial board of The Yale Law Journal. My most instructive and inspiring experience during law school was working at the National Association for the Advancement of Colored People (NAACP) Legal Defense and Educational Fund (LDF). There I had the good fortune of meeting an array of wonderful attorneys, including Jack Greenberg, who offered me a position at LDF. I would have accepted the offer but for the intervention of James Vorenberg, dean of Harvard Law School. He called me near the end of my final year at Yale to ask whether I had considered a career in legal academia. I told him that I had not but that I was open to thinking about it. Dean Vorenberg invited me to Harvard to talk with him, and I did so on several occasions during the postgraduate years when I served as a law clerk for Judge J.



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This recruitment was highly unusual. Rarely does Harvard seek to persuade someone to apply for a faculty position. Dean Vorenberg and his colleagues did so in my case because influential professors at Yale had touted me, because I had written essays that appeared in a number of national publications, and because of the prestige in academic circles of the judges for whom I was clerking. They also took extra steps to recruit me because they wanted to add some color to a faculty that, in the mid-1980s, included only one African American and no Latinos, Native Americans, or Asian Americans. During the two years before my arrival, in 1984, the campus had been beset by highly publicized protests in which a substantial number of students and a small number of faculty members accused the law school administration of discriminating against minority academics of color or failing to reach out sufficiently to recruit them.

Affirmative action played a role not only in eliciting my candidacy; it played a role, too, in the ultimate determination to make me an offer. Was I “qualified”? Sure, I was. Indeed, I was highly qualified. But so, too, were still stronger candidates, probably all of whom were white. Top law schools search not merely for those who are highly qualified; they search for the most outstanding among the best qualified. I doubt that I measured up to that standard. To obtain an offer, I needed and received a boost from affirmative action. A race-sensitive desire to assist a promising black scholar, along with my own hard-earned skills and credentials, helped me gain admission to a faculty that otherwise would probably have been outside my reach.

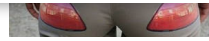
Affirmative action has also buoyed my professional career. In 1998, I was inducted into the American Academy of Arts and Sciences and the American Philosophical Society, two of the country’s most prestigious honorific academic societies. By that point I had built a record of which I could justly be proud, including articles in leading law reviews and an award-winning book. Still, racial considerations explain in part why I was honored ahead of others, senior to me, who had deeper, more distinguished records than mine. Having snubbed outstanding black scholars in previous eras, the American Academy and similar organizations are using blacks like me to make amends and to serve other functions.

I do not feel belittled by this. Nor am I wracked by angst or guilt or self-doubt. I applaud the effort to rectify wrongs and extend and deepen desegregation in every aspect of American life.

There will be those, I suspect, who will put a mental asterisk next to my name upon learning that my race (almost certainly) counted as a plus in the process of selecting me for induction into these organizations. If they do, then they should also insist upon putting a mental asterisk next to the name of any white person who prevailed in any competition from which racial minorities were excluded. The distinguished historian Eric Foner highlights this point nicely, noting that when he graduated from Columbia College at Columbia University in 1963, his class was all male and virtually all white. “Most of us,” he writes, “were young men of ability, yet had we been forced to compete for admission with women and racial minorities, fewer than half of us would have been at Columbia.” Still, he observes, “none of us . . . suffered debilitating self-doubt because we were the beneficiaries of affirmative action—that is, favored treatment on the basis of our race and gender.”

Many Americans misconceive achievement, attributing it entirely to individual effort and talent. In reality, though, achievement stems from many sources: individual effort, to be sure, but also luck (the good fortune to have a healthy body and mind) and social support (family, schools, parks, libraries, laboratories). In assessing my own record, I try to maintain equanimity, knowing that on account of race I have sometimes been penalized and sometimes been preferred. I do my best and hope that my work meets high standards. I realize, though, that judgment is social, contingent, and subject to forces beyond my control.

Does my status as a beneficiary of affirmative action oblige me to support it? Absolutely not. Mere benefit from a policy imposes no obligation to favor or defend it. Warren Buffett should not be precluded from condemning an unwise tax provision that favors the wealthy simply because he was assisted by it. If a policy is wrong, one should speak out



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personally—though I have. I support it because, on balance, it is conducive to the public good. It is a continuation and intensification of an egalitarian and democratic impulse in American race relations that has been gathering momentum, albeit fitfully and with dramatic reversals, since at least the Civil War. Racial affirmative action partially redresses debilitating social wrongs. Racial minorities, and blacks in particular, have long suffered from racist mistreatment at the hands of the federal government, state governments, local governments, and private parties. This oppression has produced a cycle of self-perpetuating problems that will not resolve themselves without interventions that go beyond prospective prohibitions on intentional racial mistreatment. Past wrongs have diminished the educational, financial, and other resources that marginalized groups can call upon, and have thus disadvantaged them in competition with whites. Hence, it is not enough simply to end racist mistreatment. Reasonable efforts to rectify the negative legacy of past wrongs are also morally required.

Compensatory justice is not the only strong basis for racial affirmative action. It can also be defended as an adjunct to antidiscrimination measures, countering hard-to-identify racial biases that continue to impede racial minorities. Antidiscrimination norms are notoriously underenforced, given the difficulty of discerning violations, loopholes in the law, and the expense of litigation. Working as a discrimination-blocking prophylactic, affirmative action indirectly counteracts misconduct that would otherwise be left unhindered.

Affirmative action also usefully integrates marginalized groups. While compensatory affirmative action works on behalf of groups that have suffered historical mistreatment, integrationist affirmative action can work on behalf of any group that is wrongly alienated from the main currents of American life, no matter what the cause of its isolation or estrangement. Resuscitating aims and sentiments that animated key sectors of the civil rights movement, integrative racial affirmative action, in the words of Professor Elizabeth Anderson, “helps people learn to cooperate across racial lines, breaks down racial stigmatization, interracial discomfort, and habits of segregation, makes decision makers more aware of and accountable for the impact of their decisions on all racial groups, and invigorates democratic exchange in civil society.”

Affirmative action can also serve a pedagogical function, by facilitating the creation of environments in which, aided by racial diversity, enriched learning and wiser decision making ensue. Close observers of various types of organizations—universities, firms, juries, etc.—maintain that diversity often enhances their overall performance. The diversity rationale is a relative newcomer among justifications for affirmative action. It did not attain prominence until the Bakke decision and has been viewed with skepticism ever since, even among strong proponents of affirmative action. I used to disdain the diversity rationale, and I continue to think that some of the claims made on its behalf are excessive. Still, there is something true and powerful in the message that concerted efforts to include marginalized groups in society’s key forums are not only abstractly virtuous but concretely productive, not only good for beneficiaries but good for the institutions to which they contribute.

Like all policies, affirmative action entails costs. It risks instilling excessive race-mindedness, stoking resentments, and diverting attention from those whose needs are even greater than those typically benefited by positive discrimination. Affirmative action also creates, or at least exacerbates, stigmatic harms, calling into question the ability, or even the capacity, of putative beneficiaries. In these pages I will say much about these costs, which are substantial. I maintain, though, that the net benefits generated by affirmative action justify its continued existence.

I also argue that affirmative action, in its typical design and implementation, is in accord with the federal Constitution. There is nothing in the Constitution’s text, in the intentions of its framers, or in the logic of its mission that should be seen as precluding racial affirmative action. The Supreme Court has cast a heavy pall over affirmative action because it runs afoul of what it claims is a mandate of constitutional color blindness. The Court is wrong. The Constitution does not compel color blindness and should not be seen as harboring an aspiration for color blindness. The Fourteenth Amendment directs states

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Constitutional color blindness threatens policies that are assisting to create a multiracial polity in which previously oppressed peoples participate as productive, equal actors in every sphere of American life. Constitutional color blindness is thus a destructive jurisprudence. The Constitution should be construed as prohibiting only invidious racial discrimination, by which I mean conduct undertaken for racial considerations not merely despite hurtful consequences but because of its hurtfulness. Other sorts of racial distinctions, including racial affirmative action, should be regulated by regular majoritarian politics.

While controversy over affirmative action arises in a variety of settings, including employment, housing, electoral districting, and the selection of jurors, the struggle over higher education is the context on which I concentrate. I do so mainly because, as Professor Glenn C. Loury observes, "elite education is the primary site in American life where access to influence and power is rationed." The intense interest in the affirmative action controversy at the top public and private colleges and universities, where seats are scarce and competition savage, stems from their positions as key gateways to opportunity, socialization, and certification. Selective institutions of higher education are far-reaching training grounds for the power elite.\* That largely explains why the struggles at these sites have given rise to the most significant judicial rulings, the most influential writings in the affirmative action literature, and the most important of the electoral campaigns against so-called reverse discrimination.

Affirmative action's foreseeable future is likely to mirror its present confusing condition. Consider, for example, that many proponents of color blindness support so-called race-neutral affirmative action programs that use nonracial criteria such as income or class rank with the expectation that doing so will yield larger numbers of successful racial minority candidates. Many such programs are race-conscious right beneath the patina of their apparently raceless packaging. Some color-blind constitutionalists attack such programs, charging that they are illicitly race-sensitive even if, textually, they are silent as to race. That attack, though, will fail to resonate anytime soon. The affirmative action ethos has become deeply rooted. The social forces that created it, combined with changes it has wrought, have made racial homogeneity unacceptable in most key public forums. Even many conservatives who decry affirmative action accord enhanced value, because of race, to like-minded people of color who integrate their ranks, such as Clarence Thomas, Thomas Sowell, Condoleezza Rice, Herman Cain, Susana Martinez, Michelle Malkin, Marco Rubio, Allen West, Tim Scott, Ben Carson, and Shelby Steele. The diffusion of the sentiments that have generated affirmative action will prevent its extinction, though it will probably be increasingly constrained. For now, affirmative action is like an injured bear: too strong to succumb to its wounds but too hurt to attain full vitality.

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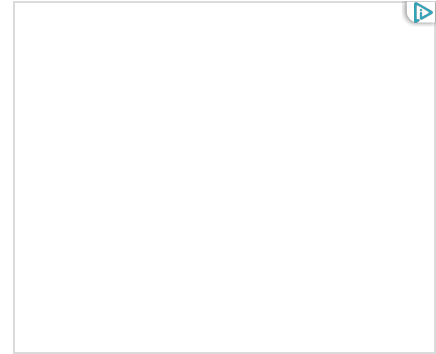
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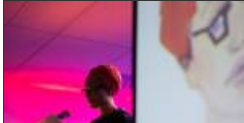
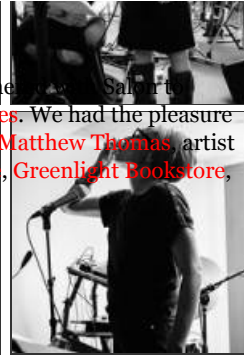
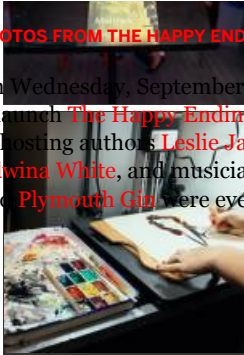
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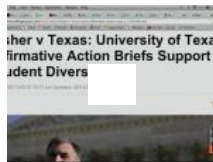


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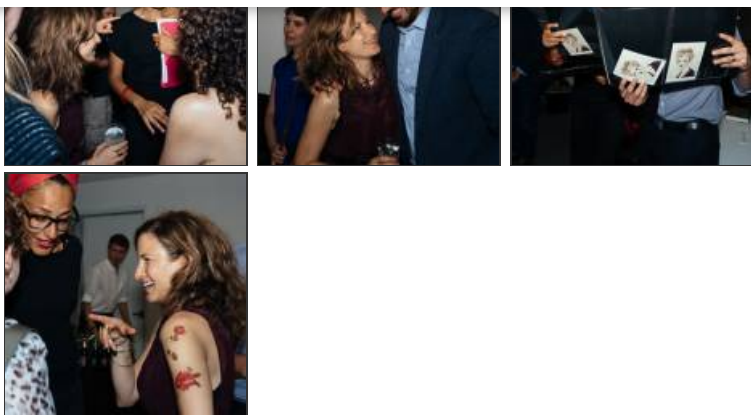


A New Affirmative Action



A Brief History Of Affirmative Action





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**danielmunro1988** @danielmunro1988 from Twitter

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**@JamilSmith @Salon** affirmative action will always be needed. It's a biological fact that white people are superior to all other races

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**@JamilSmith** what? who said that? It is time to get over black and white, we are all same color underneath the skin.

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**\_bigchee** @\_bigchee from Twitter

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**@Bettejenny @JamilSmith** what is that supposed to mean? Ignore the obvious? If there's an APB out for us, what's underneath is described?

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**AlisonSpalding2** @AlisonSpalding2 from Twitter

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**@JamilSmith** Shaming is an old trick, disgusting. Fascists used it a lot, unfortunately it can be effective.

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Sep 4, 2013

his victimhood.

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**Old Poor Richard**

Sep 3, 2013

*I do not feel belittled by this*

It made the kid whose slot you took by way of affirmative action feel racially discriminated against, though. Little bit of satisfaction from 'getting even' with the white/Asian 'privilege'?

[Like](#) [Reply](#)

**sister h**

Sep 7, 2013

@Old Poor Richard

Affirmative action doesn't take away anyone's "slot." Nobody has a slot reserved for them, except maybe legacy admissions.

The kid who feels like "their slot" was taken away is suffering from deep feelings of entitlement.

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**Gerry Q**

Sep 3, 2013

How about in athletic competitions?

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**Old Poor Richard**

Sep 3, 2013

@**Gerry Q** Time to make fatties a protected class and reserve some percentage of sports scholarships for obese weaklings instead of giving them all to tall, fit, strong (mostly black) people.

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**Michael Morrison**

Sep 3, 2013

It's very odd that the author would cite the malleability of the 14th amendment as support for Affirmative Action.

If I recall correctly, that same wrong-headed interpretation also gave us "Separate but Equal."

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**K**

Sep 3, 2013

Affirmative action is a permanent policy and institution in the Western World -- it cannot be stopped because the quickly changing demography of the US (and the West) gives a growing population of voters who benefit from AA, and so anyone opposing it forgo these votes. (The white Left and beneficiaries of AA compose a political majority in the US -- this also means that the Left will dominate the courts, one house of Congress, and the Presidency as long as the US is organized as it is now).

Ending the practice of AA is similar to expect that people on welfare will actually vote against a policy of having welfare. It won't happen.

So it is permanent. It is also a policy voted in by whites in countries that were overwhelmingly white, and so those whites have set in motion a set of permanent policies that will be used to discriminate against their children and grand children, and in fact, against all their descendants, indefinitely. But hey, at

3Like Reply

**Frank Knarf**

Sep 3, 2013

Kennedy too quickly waves away the potential negatives without providing substantive arguments. The "mismatch" controversy is not mentioned, and the issue of Asian admissions penalties is ignored. Kennedy here is relating an anecdote about his own experiences, but the context today is not that of the 1960s. To repeat a cliché, should the Obama children receive preferences over the children of Chinese immigrant food service workers?

3Like Reply

**Ellemm**

Sep 3, 2013

**@Frank Knarf** The Obama children are already entitled to certain preferences that have nothing to do with race: They can attend their parents' Ivy League universities as legacy admissions. Somehow when we talk about privilege we never discuss the fact that preferences often have nothing to do with qualifications and everything to do with connections.

Surely we are not going to pretend that before this Affirmative Action stuff that every school admission and job was granted on the basis of merit. People have never had any trouble hiring and even promoting people they are comfortable with, regardless of qualification. We can try to rewrite history but we can all see this. If we want to move toward a society that is merit-based, even the privileged class will have to examine some of its own special perks.

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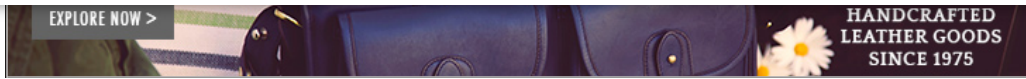
**jugstopper**

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In b4 racist comments from right-wing-nuts.

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