**Justice Sees in Color**

By Scot Dressler

Introduction

 "If I see a Black pilot, I'm gonna be like 'boy, I hope he is qualified.” These are – perhaps surprisingly – not the words of a segregationist salivating for the racially exclusivist days of a bygone era. Rather, they are the words of one 30-year-old Charlie Kirk, founder, and president of the non-profit conservative advocacy group Turning Point USA, spoken on his radio show earlier this year. Kirk, to exculpate himself, would go on to clarify that this statement was not genuinely reflective of his views on race, insisting that it was “not who I am, that's not what I believe.” Rather, Kirk was expressing the view that Diversity, Equity and Inclusion (DEI) programs in the airline industry aimed at hiring candidates from demographic groups which have historically faced hiring discrimination – namely people of color and women – would generally dilute the quality of hirees (Lynch). Apparently, he is not alone in this sentiment. Elon Musk, the billionaire chief executive of Tesla and owner of the social media platform X (formerly known as Twitter), has publicly argued that DEI efforts are lowering the standards of hiring for medical practitioners, and by extension, endangering the lives of patients (Milmo). Notably, neither individual cited data to support their claims. These statements are not unique but are rather part of a general uptick in a certain line of conservative thought which has called the efficacy, ethics, and legality of DEI programs into question. Though certain conservatives have long opposed the inclusion of race as a factor in hiring and education admissions, this uptick has arisen in the aftermath of last year’s *Students for Fair Admissions v. President and Fellows of Harvard College*, in which the Supreme Court determined that Harvard University’s race-based admissions system was unconstitutional (*Students for Fair Admissions*). These concerns likely also have a basis in the general moral panic abounding in conservative circles around so-called *critical race theory*, which has resulted in widespread book banning and challenges to curricula referencing the history of racism and racial discrimination in the U.S. in schools around the country based on their allegedly discriminating against white students. The following pages will demystify and protect DEI programs from these undue points of attack, present a brief argument in favor of the constitutionality of DEI programs and race-conscious hiring and admissions practices, as well as provide a general ethical grounding for the necessity of developing race-conscious policy in workplaces and higher education institutions as a means of developing a more just society.

Recognizing Racial Disparities

 To begin with, it is beneficial to first establish the fact that racial discrimination in workplaces and higher education institutions is a lived reality and can be substantiated with data. According to data collected by the consulting firm McKinsey, American institutions of higher education are fundamentally non-representative of the American population, with Black, Hispanic, and Native American students consistently being underrepresented as both undergraduate students and members of faculty at institutions of higher education. Moreover, students from these populations typically have worse academic performances as measured by rates of graduation (Ellsworth et al.). Less than 8 percent of higher education institutions in 2022 had equitable student representation whilst also ensuring that students of underrepresented demographics graduate at similar rates to the general U.S. student population (Ellsworth et al.). Core to these data is not only that this profound lack of parity exists and is reflective of broader systemic challenges, but that progress on the front of improving representation of underrepresented racial and ethnic groups in higher education institutions has greatly faltered within the last ten years. From 2013 to 2020, ostensibly no progress was made with regard to Black and Native American students (Ellsworth et al.). Meta-analysis of data collected across various field experiments in hiring indicates that racial discrimination against Black and Latino people is an active reality in the labor force as well, and that rates of discrimination in hiring in the last two decades have changed very little, if at all (Quillian et al. 1) White applicants are consistently more likely to receive call backs than their Black and Latino counterparts, despite sharing the exact same qualifications (Quillian et al. 2). And despite the general conception of American society as moving away from racial discrimination in hiring, the rates of racial hiring discrimination against Black job applicants experienced ostensibly no change, and rates of racial hiring discrimination against Latino job applicants decreased only marginally between 1989 and 2015 (Quillian et al. 2).

 At this point, two key conclusions can be made – first, that institutions of higher education are in fact not representative of the American public along racial and ethnic lines, and second, that institutions of higher education and the job market in general are failing at increasing rates of representation for underrepresented racial and ethnic demographics. The question of DEI programs and race-conscious admissions and hiring systems then is not to increase the number of non-white students and employees as a means of meeting an arbitrary quota at the expense of considering job qualifications, but rather of fostering environments of work and learning that are conducive to an equitable distribution of resources capable of addressing systemic barriers placed in the way of certain racial and ethnic demographics, and ensuring that individuals from underrepresented groups are recognized as valid applicants when they possess the necessary qualifications.

Diversity, Equity, and Inclusion Programs Understood

 Now that the fundamental problem of underrepresentation and hiring discrimination directed at racial minority groups has been recognized, it is beneficial to briefly explore what the general purpose of DEI programs is to dispossess them of the accusations that they inherently represent a kind of radical ideological bent.

 Diversity, equity, and inclusion programs are highly diverse, relying on varying methodology and aiming towards differing outcomes. Douglas Yueng, in his brief overview of DEI programs for the US Department of the Air Force on behalf of the RAND Corporation, observes that while some programs simply aim to bring workplaces into compliance with government opportunity requirements and generally foster non-hostile, inclusive environments, others function more educationally, aiming to teach workers the skills necessary to understand and value diversity of perspective and recognize personal biases as a means of ensuring workplace efficiency and serendipity. These programs are recognized at an organizational level to be crucial for the assurance of long-term sustainability (Yueng 43). Yueng identifies conflicting data, which generally indicates that DEI training helps workers develop skills beneficial to fostering a more diverse working environment but fails to develop long-lasting attitudinal changes (Yueng 44). Setting the topic of general effectiveness aside, it may be inferred from this that DEI is by no means radical, its justification being firmly entrenched in liberal, business-oriented thought. Yueng draws upon data to characterize the adoption of DEI efforts as beneficial for workplace efficiency and cohesion – a means to greater economic output and a tool for lessening the threat of inter-employee disunity that would jeopardize as much. It ought to come as no surprise that much of the cited data on economic inequality along racial lines came from McKinsey, one of the nation’s foremost corporate consulting firms. DEI is not by any stretch of the imagination a tool for upending the social order. On the contrary, it is a tool intended to alleviate the internal struggles within the capitalist organizational model to strengthen it. This is hardly the second coming of Marx.

Restricting and Uplifting: How the Constitution Sees Race

 To address the argument against the constitutionality of DEI and race-conscious admissions programs, it is beneficial to first draw a distinction between two general categories of policy targeting or surrounding the issue of race. I will refer to these types as *restricting* and *uplifting* racial policies respectively. Restricting racial policies are those adopted by governments and private institutions which intend to restrict certain racial groups in their political participation or in their general ability to live equitably in society. Uplifting racial policies are conversely those systemic and institutionalized practices aimed at drawing in individuals of underrepresented or discriminated against racial categories into the full scope of societal participation, either by specifically targeting those groups with programs tailored towards their uplift, or by deconstructing systems of power within a society that perpetuate restricting racial policy. Uplifting racial policies ostensibly always emerge responsively to address the descendent effects of past restriction. The Constitution has for the entirety of its history been interpreted to validate both subtypes.

A core supposition of those who oppose the constitutionality of certain DEI and affirmative action programs is that the Constitution is effectively color blind, refusing to recognize race in any facet. This notion is deeply ignorant of the historical contexts and motivating factors behind the inception of the Constitution and its subsequent amendments. To begin with, the Constitution has from its very inception explicitly recognized race and ethnic identity as categories within its jurisdiction. Article I, Section 2, Clause 3 originally explicitly named “Indians” as a group who would not count towards the allotment of Representatives in the House of Representatives due to their being untaxed. Though this may seem a relatively mundane inclusion, it is crucial in that it is a direct recognition of a specific ethnic category within the Constitution. Furthermore, this very same section would create what is known as the three-fifths compromise, which concluded that enslaved people would be recognized as only three-fifths of a free person for the purposes of proportional representation in Congress and taxation. Though the text does not denote a specific racial group, the system of chattel slavery in the United States was obviously highly racialized, with Africans being the near universal target for this heinous system. To include a clause specifically intended to address complications arising out of a racialized system of chattel slavery is indubitably to recognize race, though it is perhaps tacit. We may consider this the employment of the Constitution for racially restrictive purposes. The three-fifths compromise was ultimately overturned by the addition of the Thirteenth and Fourteenth Amendments, which themselves compose an employment of the Constitution that is racially uplifting. The Thirteenth Amendment abolished the system of racialized chattel slavery, and the Fourteenth guaranteed equal protection under the law for all U.S. citizens, an attempt to draw former slaves under constitutional protection. Again, though the racial categories are not explicitly stated in these amendments, they arise in response to injustices enforced in a racialized context and acknowledge the possibility of rights of citizenship to be denied to people on the basis of their skin color or ethnic background when they would otherwise be entitled to them– i.e. black, formerly enslaved people. These amendments are not simply indirectly linked to the subject of race – they arise specifically to correct past prejudices in violation of the general constitutional mandate targeted at people of specific racial and ethnic categories.

More recently, the Roberts Supreme Court interestingly also rejected this premise of constitutional color-blindness, with its ruling against Harvard’s affirmative action program in *Students for Fair Admissions v. President and Fellows of Harvard College*. Though the Court’s majority effectively placed the constitutionality of affirmative action efforts in check, it nonetheless affirmed the precedent established in *Brown v. Board of Education* that there do exist contexts in which racial identity can be targeted so long as it serves a compelling public interest, leaving the general legality of policies of racial uplift off the chopping block (*Students for Fair Admissions*). The question then becomes whether racial disparities in academic and economic opportunity are matters of compelling public interest. To establish this, a broader view of the United States judicial system will be taken, and I will assess what it means practically for justice to truly be established.

A More Perfect Union

 Setting aside the specific, racialized contexts of the Constitution itself, it is relevant to draw this debate around DEI and race-conscious admissions into a broader ethical discourse which ties the American political and judicial systems towards a more ideal vision of justice. If citizens take the preamble to the Constitution at its word when it sets the establishment of justice as one of its own primary functions, then it is necessary to analyze public policy not merely in reference to its technically abiding or not by the text of the Constitution, but also by whether a given policy adheres to the more hazily defined constitutional drive towards the establishment of a general societal justice. The late, paramount political philosopher of the previous century, John Rawls, provided a particularly salient discursive framework for conceiving of justice within the liberal democratic setting.

 Rawlsian thought posits that policies of racial uplift are necessary mechanisms for the correction of past injustice as a means of making a society more fundamentally just. Rawls developed what he termed ideal theory, which constitutes theory pertaining to what makes a just society truly just. Understanding what characteristics make a society just allows observers to more effectively determine when a society is truly unjust (Nagel 82). According to ideal theory, the just society is broadly constructed along three central principles: that all people be guaranteed the same personal liberties and political rights, that all people possess equal opportunity to pursue personal social and economic advantages, and that those who are the most socially and economically disadvantaged be made as well off as possible by systemic means (Nagel 82). If we adopt the ideal theory framework, we can clearly conclude based on the data briefly outlined in a previous section that presently, American society does not practically offer all citizens equality of opportunity; non-white individuals are disproportionately restricted from equal participation in the hiring market and are less likely to possess the baseline resources necessary to achieve academic success. We are therefore now placed in a profoundly non-ideal context. A counterpart of ideal theory is non-ideal theory, a narrower body of thought attempting to describe what ought to be done when observers find themselves within a society and political culture that is in one way or another unjust (Nagel 82). Civil disobedience and conscientious objection to military service are two specific forms of what we may call non-ideal praxis referenced by Rawls (Nagel 82). Though Rawls did not ultimately elaborate on affirmative action in writing, he did insist on the importance of upholding the constitutionality of affirmative action programs, as later articulated by his student, philosopher Thomas Nagel (Nagel 84). As Nagel puts it, so long as affirmative action programs exist for the purposes of de-stratifying society along racial lines by providing access to education and by extension the personal social and economic advantages which education ultimately enables to groups which have historically been boxed out of said opportunities, then they are just mechanisms of rectifying the existing non-ideal state of society (Nagel 84). At the very least, we must recognize that some systematic response to racial disparities is necessary – it is impossible to conceive of a scenario in which racial disparities can be addressed absent an explicit, head-on approach. If a policy which refuses to view race altogether is adopted, there is no way by which the lack of racial parity can in its totality be addressed. This is the fertile ground where what I have earlier defined as policies of racial uplift can take form. This encompasses affirmative action efforts and DEI initiatives which intentionally target race as a means of amending past injustice – they are necessary steps in amending non-idealities of American society.

 I argue that the United States – and in fact ostensibly all liberal democracies – exist in a state of perpetual shifting, in which the sum of all juridical, political, and social systems are slowly reconstructing themselves as a means of eliminating *non-ideality*. In American political parlance, we may conceive of this as the formation of a more perfect union. That phrase – coined in the preamble to the Constitution – expresses the role of justice in the republic as one of advancement; justice is established to draw the Union into the fullness of its liberal mandate. But the establishment of justice is not a phenomenon which happens all at once, but rather occurs in procession, as new socio-political paradigms expose pervasive injustices. For justice to be established under the Constitution, the law must be responsive to the revelation of non-ideality, which requires that the systems of juridical power in the United States buck this quasi-legal norm which dictates that the law rooted in the Constitution cannot recognize race, and uphold the constitutional integrity of diversity, equity, and inclusion efforts, as well as race-conscious admissions and hiring practices.

Conclusion

The Constitution affirmatively declares that the establishment of justice is intended to have a transformative effect, reforming the United States into a more perfect union. This establishment requires that injustice – or non-idealities – be ferreted out continually as a means of ensuring the common welfare of all Americans. Recognizing the racial disparities which exist in academic and employment contexts, it becomes necessary for policies of racial uplift to be implemented, targeting historically and actively disadvantaged ethnic and racial groups for consideration on this basis. These policies must be protected by the judiciary, recognizing both that they are necessary steps towards the advancement of justice, and that the Constitution has historically recognized race, both for restricting and uplifting purposes. The American public and the interpreters of the law must steer themselves away from the false vision of the Constitution which asserts that it must in all contexts see no race and recognize that the Constitution sees in color.

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