

Unprintable Characters

a collection of letters sent to

**the Editors of the Atlanta Journal
and other newspapers**

concerning the topic of

Affirmative Action

which the editors chose not to print.

Date: Saturday, June 16, 1996
From: JimmySchmd@aol.com
Subj: Letter to the Editor
To: journal@ajc.com(***The Atlanta Journal***)

Editors:

In the issue of the ***Atlanta Journal/Atlanta Constitution*** of the 15th instant, Dick Williams writes favorably of Terry Eastland's book, ***Ending Affirmative Action: The Case for Colorblind Justice***. Mr. Eastland's book is a good example of the distortions of history, misunderstandings of our Constitution, half truths, quotes out of context, racial prejudices and other factors necessary for an individual to maintain a position opposed to affirmative action.

Mr. Eastland, in his book, refers favorably to Justice John Marshall Harlan's famous dissent in the case ***Plessy v. Ferguson***. Mr. Eastland states that Justice Harlan argued "that government should not have the authority to engage in racial regulation of any kind." Mr. Eastland uses Justice Harlan's now famous statement "Our constitution (sic) is color-blind, and neither knows nor tolerates classes among citizens." Mr. Eastland then builds a case that affirmative action violates this "color-blind" basis of our Constitution. Mr. Eastland is mistaken. Affirmative action respects Justice Harlan's "color-blind" Constitution. Mr. Eastland misunderstands Justice Harlan's dissent in ***Plessy***. Mr. Eastland's misunderstandings of Justice Harlan's dissent are repeated when Mr. Eastland discusses the Constitutional issues raised by affirmative action.

Plessy v. Ferguson was the Supreme Court case decided in 1896 which upheld the 'separate but equal' doctrine. It was this doctrine that formed the Constitutional justification for the set of racial laws known as Jim Crow. The case arose as a result of a Louisiana law which required equal but separate accommodations aboard passenger trains for the black and white races. Justice Harlan was the only Supreme Court Justice to dissent in the ***Plessy*** case.

Justice Harlan made it very clear in his dissent that he opposed Louisiana's law because it was "conceived in hostility to, and enacted for the purpose of humiliating, citizens of the United States of a particular race." Justice Harlan acknowledged that the white race was the dominant race in wealth and in power. This dominance, Justice Harlan noted, did not give the white race a superior position with regard to the rights protected by the Constitution. The Constitution, according to Justice Harlan, recognizes "no superior, dominant, ruling class of

citizens. There is no cast here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved."

Justice Harlan found the Louisiana law contrary to our Constitution not because it recognized the social, political, and cultural reality of race but because the action of the Louisiana legislature proceeded, according to Justice Harlan, "on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?" Justice Harlan's "color-blind" Constitution is "color-blind" precisely because it recognizes "every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race" and because it does not sanction laws which would allow individuals of one race to degrade and put into an inferior position individuals of another race notwithstanding any inequalities in the actual social, political, and economic positions of these individuals.

Regarding affirmative action the issue is whether these programs conform to or violate Justice Harlan's "color-blind" Constitution. To find out, I have formulated the following questions that are based on the reasons Justice Harlan used in finding that the Louisiana law violated the principles of the "color-blind" Constitution. The words in quotation marks are the words used by Justice Harlan in his *Plessy* dissent.

Are affirmative action programs "conceived in hostility to" the white race?

Are affirmative action programs "enacted for the purpose of humiliating" the white race?

Are the effects of an affirmative action program such that it "practically, puts the brand of servitude and degradation upon" whites?

Do affirmative action programs proceed on the belief that white "citizens are so inferior and degraded that they cannot be allowed" in our schools of medicine and law?

Do affirmative action programs violate any "right that inheres in civil freedom" and deny "the equality before the law of all citizens of the

United States without regard to race?"

The answers to these questions are no.

Affirmative action, therefore, conforms to the principle of the "color-blind" Constitution and does not violate the rights of whites. Mr. Eastland, Mr. Williams, and the other opponents of affirmative action are seriously mistaken when they insist otherwise.

Mr. Eastland does not recognize the importance Justice Harlan places on what is today called invidious discrimination. His inability to recognize and acknowledge this important concept leads him to the serious mistakes that he makes with regard to affirmative action.

Those who support affirmative action have asked the opponents of affirmative action to provide an explanation of how affirmative action violates the rights of whites. The opponents of affirmative action have had 30 years to state their case that affirmative action violates the principle of the "color-blind" Constitution and violates the rights of the white citizens of the United States. The supporters of affirmative action have asked that this explanation use sound Constitutional reasoning such as that used by Justice Harlan in his dissent in *Plessy*. After thirty years, the supporters of affirmative action are still waiting for the opponents of affirmative action to provide that explanation. I believe that the reason that we are still waiting is because such an explanation can not be made.

Jim Schmidt

Date: Saturday, November 2, 1996 10:02:33 AM
From: JimmySchmd@aol.com
Subj: Letter to the Editor
To: journal@ajc.com(***The Atlanta Journal***)

Dear Editors:

In your issue of the 1st instant, a letter writer criticizes some of the opponents of the California Civil Rights Initiative for behavior which “makes it impossible to have civil discourse about a substantive issue.” In asserting that affirmative action is discrimination the letter writer engages in precisely the activity which he accuses the supporters of affirmative action of practicing.

For the last thirty years the opponents of affirmative action have failed to answer the following substantive question: Why should we be of the opinion that affirmative action is illegal racial discrimination?

We have available several documents that are central to our history of trying to understand what racial discrimination is and which provide us with a way of making that determination. Three of those documents are: Justice Harlan’s minority opinion in *Plessy v. Ferguson*, the majority opinion of *Brown v. Board of Education of Topeka*, and Martin Luther Kings book *Why We Can’t Wait***. These documents were central to the civil discourse of the past that helped us to come to the understanding that certain laws and practices constituted racial discrimination.**

Using the methods of civil discourse developed in those documents the supporters of affirmative action have shown why we believe that affirmative action does not constitute racial discrimination. The opponents of affirmative action have never provided a substantive counter argument. There is no known substantive defense of the position that affirmative action is racial discrimination.

If the letter writer wishes to engage in “civil discourse about a substantive issue” perhaps he could begin by providing an explanation of why we should consider affirmative action as racial discrimination using the above examples of civil discourse developed for discussing this issue to guide him in this effort.

Jim Schmidt

Date: Sunday, November 10, 1996 9:45:28 AM
From: JimmySchmd@aol.com
Subj: Letter to the editor
To: journal@ajc.com(***The Atlanta Journal***)

Dear Editors:

The editorial board of the Atlanta Journal indicates that it holds to the position that affirmative action is racial discrimination. The editorial board is mistaken.

We know what racial discrimination is. We have a long and painful history of discovering how certain of our laws and practices were based on racial prejudice and served to promote the notion that blacks “are so inferior and degraded that they cannot be allowed” to mix with whites. I am in this instance borrowing the words of Justice Harlan in his famous dissent in the *Plessy* case.

None of the editors on your editorial board has shown, using what we know about the subject, that affirmative action constitutes racial discrimination. As a white male, I would be very interested in seeing such a showing. In the 20 to 30 years that affirmative action programs have been in place I have not experienced the sense of inferiority and degradation that racial discrimination should impose.

In the absence of such a showing, one must conclude that the position of your editorial board on the issue of affirmative action rests on a falsehood and is, therefore, mistaken.

Jim Schmidt

Date: Saturday, November 8, 1997
From: JimmySchmd@aol.com
Subj: Letter to the editor
To: jrnledit@ajc.com(***The Atlanta Journal***)

Dear Editors:

In his column of November 6, 1997, Richard Mathews accuses some participants in the debate over affirmative action of dishonesty. His accusation is misplaced.

Many supporters of affirmative action would not oppose programs like the one suggested by Mr. Mathews. Those supporters would disagree with Mr. Mathews' claim that affirmative action is unconstitutional.

The 1954 Supreme Court decision in ***Brown*** properly declared the racial classifications used by the Board of Education of Topeka, Kansas, to be unconstitutional because those classifications were used to denote "the inferiority of the negro group," and they generated "a feeling of inferiority as to their (blacks) status in the community."

The editors of the ***Atlanta Journal*** at the time rejected those constitutional principles. This rejection was understandable since those editors supported the Jim Crow system that ***Brown*** declared illegal. Those editors supported the efforts, made as a result of ***Brown***, to implement "color-blind" laws and programs that they hoped would peacefully preserve the Jim Crow system.

When Mr. Mathews makes the claim that the racial classifications used in affirmative action programs are unconstitutional, he shows us that he, like the ***Journal*** editors of forty years ago, rejects the constitutional principles used by the Supreme Court in ***Brown***. The ***Journal*** editors of forty years ago were honest about their reasons for rejecting those constitutional principles.

If Mr. Mathews wishes to introduce some honesty into the debate on affirmative action, he should begin by explaining why he rejects the sound constitutional principles, affirmed in ***Brown***, that inform us that the racial classifications used in affirmative action do not violate the rights of any individual and are therefore constitutional and just.

Sincerely,

Jim Schmidt

Date: Tuesday, November 18, 1997 9:49:25 PM
From: JimmySchmd@aol.com
Subj: Letter to the Editor
To: jrnledit@ajc.com(*The Atlanta Journal*)

The Editors:

There have been two times that I know of that I have been denied a job because I am a white male and the employer was implementing an affirmative action program. In both cases, I felt burdened by society's attempts to deal effectively with our racial problems. The questions to ask are, was this burden placed on me done in a way that violated my rights to be treated as an equal? Was this burden placed on me in a way that differed from any of the other burdens placed on me and on my fellow citizens? The answer to these questions is no.

Jeff Dickerson, in his column of November 18, refers to the University of Texas Law School's use of "admissions criteria other than grades, such as geography." In order to meet a quota of 74 % of admissions being residents of Texas, the UT Law School requires that the grades and test scores of non-residents be substantially higher than that of the residents of Texas. Those non-residents who are discriminated against by this social program and denied admission to UT Law School even though their grades and test scores are substantially higher than many of the residents admitted, have not had their rights violated nor have they been unjustly treated by the law school.

Likewise, when Texas implemented its affirmative action program to counter today's effects of racial prejudice, by using the same method it used to benefit residents, those not favored by the affirmative action program had not had their rights violated nor had they been unjustly treated.

Why do those who oppose affirmative action think that the discrimination that uses racial categories in affirmative action is distinguishable, with regard to our rights and privileges, from the discrimination and resulting disadvantages caused by a wide range of government actions none of which has ever been thought wrong or unjust solely because of the disadvantage that those actions cause?

Jim Schmidt

Date: Sunday, November 23, 1997 1:10:06 PM
From: jimmyschmd@earthlink.net
Subj: Letter to the Editors of the New York Times
To: letters@nytimes.com(***The New York Times***)

To the Editor:

In her column of November 22, Abigail Thernstrom complains that supporters of affirmative action have not listened to the opposition “with the respect to which they are entitled.” However, the supporters have listened to the opposition and we have given them the respect that they are entitled.

In their book, ***America in Black and White***, Stephan and Abigail Thernstrom note the following about Justice William Brennan’s opinion in the ***Bakke*** case. Justice Brennan’s “opinion dismissed the classic liberal insistence that ‘[o]ur Constitution is color-blind’ as an interpretation that had ‘never been adopted by this Court as the proper meaning of the Equal Protection Clause.’...Brennan’s view, however, was clearly that Justice John Marshal Harlan (dissenting in ***Plessy*** in 1896) had been wrong...” The Thernstrom’s are mistaken about the meaning of both Justice Harlan’s ***Plessy*** opinion and Justice Brennan’s comment.

Justice Brennan, in the statement referred to by the Thernstrom’s, is not rejecting Justice Harlan’s ***Plessy*** opinion. Rather, he is rejecting the meaning “summed up by the shorthand phrase ‘[o]ur Constitution is color-blind.’”

Notwithstanding the meaning of the “shorthand phrase” much favored by the Thernstrom’s, Justice Harlan’s ***Plessy*** opinion does not make the argument that our Constitution does not permit the use of racial classifications such as those used in affirmative action programs. Rather, Justice Harlan makes the argument that when racial classifications are used, the determination, as to whether or not these classifications violate the rights of those individuals not favored by the government actions based on those classifications, must be color-blind.

Like the majority opinion in ***Plessy***, the opponents of affirmative action reject the application of Madisonian principles to the issues of race. In the imprudent zeal of their animosity to affirmative action, the Thernstroms, the supporters of Proposition 209, and other opponents of affirmative action, have placed in jeopardy those protections for our rights and liberties that our Constitution provides.

In *Plessy*, Justice Harlan pointed out the dangers when these Madisonian principles are rejected. The issue for Justice Harlan was not just race. When Justice Harlan wrote, “Further, if this statute of Louisiana is consistent with the personal liberty of citizens, why may not the state require the separation in railroad coaches of native and naturalized citizens of the United States, or of Protestants and Roman Catholics?” he was pointing out that no individual’s rights would be safe once these Madisonian principles are rejected.

If Ms. Thernstrom wishes for the beginning of a “true dialogue,” she could start by explaining why she rejects Justice Harlan’s advice to apply Madisonian principles to the issue of race.

Jim Schmidt

Date: Saturday, December 1, 1997 8:33:56 PM
From: jimmyschmd@aol.com
Subj: Letter to the Editor
To: letter.editor@edit.wsj.com(***The Wall Street Journal***)

To the Editors:

In his column of December 1, 1997, Terry Eastland wrote that “the Constitution requires” that “strict scrutiny” be the test used to judge the affirmative action program of the city of Houston. Our Constitution makes no such requirement. Mr. Eastland is seriously mistaken to insist that it does.

The root of Mr. Eastland’s mistaken view of our Constitution may be found in his book “**Ending Affirmative Action: The Case for Colorblind Justice.**” On pages 27-8 of that book, Mr. Eastland shows that he misunderstands the argument that Justice John Marshall Harlan made in the minority opinion for ***Plessy v Ferguson***. Mr. Eastland writes that Justice Harlan argued “that government should not have the authority to engage in racial regulation of any kind.” Justice Harlan did not make that argument. Since Mr. Eastland misunderstands the argument Justice Harlan made, his opposition to affirmative action depends not on the color-blind Constitution of Justice Harlan, but on the color sensitive Constitution of the majority opinion in ***Plessy***.

In ***Plessy***, the majority opinion rejected the claim that the Louisiana railroad car law that required the separation of individuals by race “stamps the colored race with a badge of inferiority.” The majority used a hypothetical example to justify this conclusion. What if, the majority asked, a government dominated by blacks enacted “a law in precisely similar terms,” would this law “relegate the white race to an inferior position?” Their answer was no.

Since turnabout would not be unfair play, the majority concluded that the Louisiana law did not violate the provisions of the Fourteenth Amendment. For the majority, the race of the individual burdened by the law was the deciding factor. If the law would be fair for whites, then the law must be fair for blacks.

Justice Harlan disagreed with this method of determining whether or not the racial classifications of the Louisiana law violated the civil rights protected by our Constitution. Justice Harlan proposed an alternative to the color sensitive method of the majority. Instead of

looking at the race of the individuals involved, Justice Harlan looked at the reasons for the law. Thus, he offered a color blind method for determining the constitutionality of the racial classifications used by our public authorities.

Justice Harlan asked whether or not the racial classifications used in the law “in fact proceed on the ground that the colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?” In so doing, he used color blind principles to determine the constitutionality of the law. He did not look at the race of the citizens. He asked only if the racial classification degraded and placed in an inferior position those individuals affected by the law.

Likewise, if we are to judge Houston’s affirmative action programs using Justice Harlan’s color blind principles, we would ask: Does the affirmative action program proceed on the ground that the white citizens are so inferior and degraded that they cannot be awarded city contracts?

When Justice Scalia looked at the the racial classifications used in the affirmative action program of Richmond, Virginia, compared them to the racial classifications used in the past to discriminate against blacks, and then wrote in *Croson*, “turnabout is not fair play,” he was affirming the color sensitive Constitution of the majority in *Plessy* and rejecting Justice Harlan’s color-blind Constitution. Mr. Eastland’s writings, likewise, affirm the color sensitive Constitution of the majority in *Plessy* and reject Justice Harlan’s color-blind Constitution.

Jim Schmidt

Date: Monday, February 2, 1998 8:32:13 PM
From: jimmyschmd@aol.com
Subj: Letter to the Journal Editorial Page Editor
To: cynthia@ajc.com, jwooten@ajc.com, mezzard@ajc.com,
rmatthews@ajc.com (*The Atlanta Journal*)

Dear Mr. Wooten:

I am writing to you in response to your editorial column of February 1, 1998.

In this column you list two requirements that a fair remedy to the “conundrum” of affirmative action should contain. I grant to you that both of these requirements seem reasonable and fair.

Who could argue with requiring that our public authorities “be open and above-board” about programs such as affirmative action? I will not argue to the contrary. Likewise, who could deny that “no permanent preference” should “be granted on the basis of something individuals can’t change for themselves or their children.” There is no argument on these points forthcoming from this supporter of affirmative action.

However, you must understand that many, including myself, who support affirmative action, view such proposals from any opponent of affirmative action with a great deal of skepticism regarding the stated intention of being “fair to minorities and whites.”

I will be the first to admit that the affirmative action programs of the last 20 years, as practiced by our colleges and universities, could not pass a “front-page test.” This situation, however, is not one that any responsible supporter of affirmative action is happy with. Nor is this situation a result of affirmative action or the wishes of its supporters. Rather, the inability of affirmative action programs to pass a “front-page test” is due to the concessions forced on those programs by the opponents of affirmative action.

Since 1977, it has been the law of the land, that the affirmative action programs of the nation’s colleges and universities may not use explicit racial classifications. Instead, all affirmative action programs must aim at diversity in the student body. (See Justice Powell’s opinion in *Bakke*.)

At the time, many supporters of affirmative action opposed the decision in *Bakke* that required colleges and universities to pursue their goals of

increasing the enrollment of blacks by methods that do not explicitly take race into account. At that time, we labeled those requirements as hypocrisy. If those who determine and administer the admissions standards, however they may be expressed, understand that one of their goals is to increase the number of blacks in the school, then they will use race as a criterion in making judgments on who to admit. The diversity requirements, imposed, incorrectly, I might add, by an opponent of affirmative action, forced every affirmative action program at our colleges and universities to be placed in a position that they could not pass the “front-page test.”

Thus, when an opponent of affirmative action now offers a “fair remedy” that includes a requirement such as the “front-page test,” it seems a reasonable and prudent response to view such a proposal with a great deal of skepticism.

A reasonable person must also view the second requirement mentioned in your column with an equal, if not greater, amount of skepticism. Supporters of affirmative action have had a difficult time understanding the position of opponents of affirmative action on the issue of preferences granted to individuals based on “something individuals can’t change for themselves or their children.” The case of Allan Bakke is, again, instructive.

Before he applied to the University of California at Davis Medical School, Allan Bakke was refused admission to two medical schools not because of his race but because of his age. Those medical schools thought that a student entering medical school at the age of thirty-three, the age Bakke was when he applied, was likely to make less of a contribution to medical care over his career than someone entering at the age of twenty-one. No amount of work on the part of Mr. Bakke would ever lower his age and thus improve his chances of obtaining admission to those schools in subsequent years. No rights of Mr. Bakke’s were violated by those decisions yet those decisions were clearly based on a characteristic that an individual “can’t change for themselves.”

In 1789, James Madison, the Father of our Constitution, indicated that our Constitutional system would not be able to survive if blacks and whites were allowed to live together. In a memorandum on the issues of freeing the slaves, Madison wrote “that a complete incorporation of” blacks into white society “is rendered impossible by the prejudices of the Whites, prejudices which proceeding principally from the difference of colour must be considered as permanent and insuperable.”

The opponents of affirmative action today, like Madison in 1789, insist

that the color of a person's skin presents divisions so peculiar, "permanent and insuperable," that our normal Constitutional methods of resolving the disputes that arise from our racial differences will not work. Normal Constitutional methods inform us that the preference for younger students did not violate Allan Bakke's rights. However, according to the opponents of affirmative action, these Constitutional methods can not to be used when determining whether or not a program to increase the enrollment of blacks in medical school and thus the number of black doctors in society, violates Allen Bakke's rights. Race, the opponents say, is so peculiar and involves individual characteristics so "permanent and insuperable," all classifications based on it are wrong.

Andrew Kull, in his influential book, "[The Color-Blind Constitution](#)," writes, "The contention that racial classifications are so peculiarly invidious as to require a per se constitutional proscription remains the core of the argument for" the opponents of affirmative action.

I believe that the opponents of affirmative action are wrong. Racial differences are not peculiar, not permanent, and not insuperable.

I fear, however, that you might have been right when you wrote, "Bosnian peace is less of a conundrum."

Jim Schmidt