

An Open Response to Prof. Erwin Chemerinsky

August 6, 2017

Dear Prof. Chemerinsky:

I am writing in response to your op-ed, “Don’t use Asian Americans to justify anti-affirmative action politics,” published by Washington Post on 8/3/2017. “Use”?? As first-generation Asian Americans, many of my friends and I are deeply offended by your politically motivated article that shows zero ounce of scholarship but is fraught with factual deficiency and logical flaws.

I really hate to use such strong words, because you just became the new dean of my alma mater, Berkeley Law. I still want to congratulate you—you deserve it, as there are only so many T-14 deanships. When I received from Boalt the news that you were being interviewed for the job, I joked with others: “Should I feel excited or not. He is a terrific con law scholar, but so liberal. I probably would vote for him because Boalt only chooses liberal deans anyway.” Yet, it was the last thing in my mind that I would be disappointed so quickly, and so profoundly that now I have to write something so emotionally charged.

I will rebut your article in a point-by-point fashion shortly, but want to first explain why I am so disturbed. I also want to tell you that, agitated and motivated by your article, my Asian American friends and I will launch new campaigns to support Mr. Ed Blum and his “white” and “conservative” anti-(race-based)-affirmative action mission.

The central thesis of your article is that white conservative opponents of affirmative action, represented by Mr. Blum, or perhaps the whole Sessions DOJ, want to “use” and “deploy” us Asian Americans as some tools in their anti-affirmative action campaign. Your assertion is beyond being condescending, ignorant, and ridiculous. It is hypocritically discriminating at its worst.

No, we are neither fancy napkins to be easily “used” nor cheap weapons to be readily “deployed.” Today Asian Americans are among the best educated ethnical groups with the highest incomes in America, but you elite liberals still need to “suspect that Asian Americans will see through this clumsy and cynical attempt to deploy them in service of dismantling affirmative action,” as if we are so dumb that we are clueless about who we are or what we are doing.

You have lived in California for almost the last decade. But the sheer ignorance in your article does not suggest you knew what happened in the last four years in California as to Asian/Chinese Americans on the AA issue. Having been involved at every single turn, I will chronicle some major events here:

- In mid-February, 2014, Chinese Americans in California learned of a pending state constitutional amendment bill, SCA-5, that would repeal Prop. 209 (1996)’s ban on race-

based AA in California. We immediately realized that this bill would harm us badly. The bill had already passed in the Senate and must be stopped in the Assembly.

- Within a month, we across the whole California worked nonstop in trying to stop this bill, all as political newbies. Thousands of people joined the movement. In the Bay Area, we founded Silicon Valley Chinese Association (SVCA) to lead the effort. On March 17, 2014, California democrats shelved SCA-5, obviously because of our efforts. This was an amazing achievement given that California democrats had super majority in both houses while we had zero political experience/connection before. All of our volunteers worked very hard and contributed tremendously. It was largely a grassroots movement with just a little help from California republicans, but without any outside “white conservative” help. We knew neither Mr. Blum nor his Supreme Court litigations then. We did not even know what AEI was. And all these happened within just one month. Personally, I built [a website](#), launched [a snail mail campaign](#) lobbying [all 80 members of the California Assembly](#), and wrote to California legislature leaders [an open letter](#) summarizing the movement. [Here is a nice video documenting our collective efforts](#).
- Being keenly aware of the AA issue, SVCA campaigned very hard in the 2014 election for Catharine Baker (who happens to be a Boalt alum and bravely objected to race-based AA on PBS in the fall of 1997 as a Boalt 1L) and helped elect her into the first republican state legislator in the whole northern California in eight years. [Here is a nice video on the story](#).
- In early 2015, SVCA heard of Mr. Ed Blum’s Supreme Court litigation efforts, and immediately wanted to partner with his organization. [SVCA reached out to Mr. Blum](#) and [invited him to visit Silicon Valley for a forum](#) discussing race-based AA and his Supreme Court cases. The forum event was [fully video-recorded](#). Shortly thereafter, SVCA launched a national campaign and helped Mr. Blum’s organization, Students For Fair Admissions (SFFA), recruit many thousands of new members and raise money. To this day, the majority of SFFA’s 20,000+ members have been those recruited by SVCA.
- In November 2015, SVCA learned that Governor Jerry Brown had vetoed a bill, AB 176, that contained a covert agenda for race-based AA. SVCA reached out to Assemblywoman Catharine Baker to discuss the bill, and issued [a statement condemning it](#).
- In 2016, SVCA learned that a new bill, AB 1726, which was essentially identical to AB 176, had been re-introduced. SVCA organized numerous lobbying efforts, including [a well-publicized protest in front of the California legislature](#), and ultimately defeated AB 1726 with respect to its race-based AA agenda. Afterwards, Daily Journal invited me to [publish with them an op-ed on AB 1726](#).

As you can see, we are nobody’s “convenient tool.” And we are just a single local group in Silicon Valley, while there are many similar Asian American advocacy groups across the nation. In fact, SVCA is just one of 64 Asian American groups that joined an administrative complaint

filed with both the DOJ and the DOE in 2015 against Ivy schools for their race-based AA practices. The administrative cases were initiated completely within the Asian American groups, and not driven by any outside “white conservative” influence.

Now, as promised, here come my point-by-point rebuttals to your article.

- “Yet affirmative action opponents are trying hard to argue that they are concerned about more than just white people.”

What is wrong with this? Besides a conspiracy theory, are you arguing those opponents should be concerned about just white people? I am surprised that you have quickly deployed a double standard to drop political correctness.

- “Anti-affirmative action activist Edward Blum has specifically attempted to recruit Asian American plaintiffs, using ads with photographs of Asian American students to do so. (A Blum-backed lawsuit against Harvard University currently features a highly qualified Asian American plaintiff...)”

Are you serious? Again, what is wrong with this? It is law school 101 that to build a strong case, you want to choose the best (strongest) plaintiff whenever you can. In any case, when Mr. Blum did this, we had defeated SCA-5 in California and made headlines for a long time, so don’t you see this was something just natural?

- “The argument that affirmative action harms Asian American people is simply inaccurate.”

What did you mean by “simply inaccurate”? And what would be “accurate”? Many other fellow Asian Americans and I can testify that affirmative action does harm us—isn’t that enough? Or, you meant affirmative action does not harm us *enough*?

“And worse, the argument is strategic rather than motivated by real concern for the well-being of Asian Americans.”

This is purely a conspiracy theory without any evidence.

- “Legal precedent, extensive research and experience support the idea that affirmative action has benefits for all students, including Asian American students. The Supreme Court has accepted since 1978, and reaffirmed just last year, that race-conscious admissions policies comply with the Constitution when they promote diversity and include a holistic evaluation of all students. Research supports this view, finding that diverse learning environments improve learning, increase interracial understanding and better prepare students for careers in a diverse society.”

First and foremost, “legal precedent,” by itself, cannot “support the idea that affirmative action has benefits for all students, including Asian American students.” A legal precedent is nothing but an opinion or ruling from a court; it may contain some reasoning or arguments, but it cannot

serve as evidence. Besides, I am unaware of any 9-0 Supreme Court case on affirmative action—nothing was undisputed.

Further, “has benefits”—even putting your “for all students, including Asian American students” assertion aside—does not mean “has no costs/harms.” Have you performed any cost/benefit analysis? You cited some research results arguably in your favor, but did you cite any research results *not* in your favor? There are many of them. I understand your article is advocacy, not research, but your total lack of balance of views simply made your advocacy pathetically weak.

- “As professional educators, we can attest firsthand to the benefits of affirmative action.”

So your firsthand attestation only applies to benefits, but not costs/harms at all? Quite amazing. It has been well publicized that [AA had made Justice Thomas miserable](#), not only during his years at Yale Law, but also during his job interviews.

- “Diverse classrooms promote discussions that would not occur in racially homogeneous learning environments.”

Wait, are you suggesting that we live in a binary world, and without affirmative action, we would *necessarily* have no diverse classrooms but only racially homogenous learning environments? Really? Logically, the only way this can happen is, without affirmative action, none of those needy minority students is capable of getting admitted on merits. I have no idea why you had such a condescending idea.

- “Moreover, affirmative action programs benefit Asian American students in specific and concrete ways. Historically, such programs were critical in making public higher education available to Asian Americans in the 1960s and 1970s, before which Asian Americans had suffered exclusion and de jure segregation in public education like other people of color. So Asian Americans are already the beneficiaries of affirmative action in education, both firsthand and as the children of people who benefited firsthand and who consequently had improved professional opportunities and greater economic security.”

This is perhaps the most interesting point in your whole article, so I will take it seriously.

This [link](#) nicely summarizes the history of AA. When President Kennedy coined the term in his Executive Order 10925 on March 6, 1961, his message and intent were clearly against racial discrimination towards minorities (“take **affirmative action** to ensure that applicants are employed, and employees are treated during employment, **without regard to their race**, creed, color, or national origin.”). At that time in history, African Americans, for example, were racially discriminated against in many situations, including in college admission processes. Like it or not, over the past decades this “prevention-of-racial-discrimination” has evolved into “doing-racial-favors”—under the same name of AA—towards the very same minorities (except, Asian American minorities, in at least the case of college admission) contemplated by President Kennedy.

So, from then to now, there was mathematically a turning point in time. Before that point, AA was to prevent discrimination against some minorities. After that point, AA was to give preferential treatments towards those minorities. Today, nobody challenges the virtue of the former—it is only the latter that is in controversy.

But you did not elaborate on “benefit Asian American students in specific and concrete ways.” Did you mean Asian American students got the benefits of “prevention-of-racial-discrimination,” or “doing-racial-favors,” or both? Regardless, let me tell you the truth, on half of my own ethnicity (Chinese Americans) or perhaps some other Asian ethnicities (such as Indian Americans, Korean Americans, to name a few) with whom we share some key values:

We only need “prevention-of-racial-discrimination,” *but not* “doing-racial-favors.” It is deeply rooted in our culture that we believe in education and hardworking like religious zealots. Then and now, even the poorest Chinese immigrant parents want to invest all their savings into their children’s education, which they believe will bring a bright future to those children. A fair chance without being discriminated against is all that we need—nothing more.

As a new Chinese immigrant, I don’t really know whether the generations before me had received the benefits of “doing-racial-favors.” I cannot speak for them. But I can speak for our culture—no, we did not really need such a *windfall*, if there was one. We did not need it then, and we do not need it now. And any windfall in the past does not justify that we must stay indebted forever.

- “Affirmative policies continue to benefit Asian American students and communities today. While not every Asian American subgroup remains underrepresented, many are for at least some schools, including Vietnamese, Thai, Lao, Burmese, Filipino, Hmong, Native Hawaiian and Pacific Islander students. Race-conscious admissions policies give school officials the latitude to take into account the unique experiences of these individuals.”

This is a naked footnote to why the California legislature has tried a series of legislation that would divide API (Asians & Pacific Islanders)—and API only—into many racial groups for the purpose of collecting college admission data:

- AB 1088 (Mike Eng and Ted Lieu, 2011, adding additional API racial groups for governmental data collection, but language related to public education was deleted after its first draft; passed)
- AB 176 (Rob Bonta, 2015, containing language related to public education; passed and vetoed by Governor Jerry Brown) ([see our statement here](#))
- AB 1726 (Rob Bonta, 2016, essentially identically to AB 176 of 2015; passed after deletion of language related to public education) ([see my op-ed here](#))

Essentially, legislation like AB 1726 would divide and identify API groups into two camps: one that has been over-represented in college education and one that has been under-represented.

Equipped with such data, SCA-5 supporters will be able to argue that not all API groups support Prop. 209—those under-represented API groups actually oppose it as they covertly want to obtain racially preferential treatments. Your assertion above has explained precisely what such legislation is truly about.

- “Given the many ways that affirmative action benefits Asian American students and their communities, we should see conservative solicitude for Asian Americans ‘harmed’ by affirmative action as strategic rather than genuine.”

No, you have not given any good example of “the many ways.” You only listed a few Asian ethnicities that might benefit from a continuing race-based AA practice, but conveniently ignored what would happen to the other Asian ethnicities, only because you knew the latter would be harmed by affirmative action.

- “Conservative opponents of affirmative action have not, generally speaking, taken an interest in other issues that affect Asian American welfare in unique ways, ranging from employment discrimination to health care to immigration.”

While your accusation here is highly disputable, it is in any case a straw man argument since we are only in a debate on public policies for college admission.

- “So why the conservative concern when it comes to affirmative action? The answer is that Asian Americans provide a convenient tool for opponents of affirmative action. By framing opposition to affirmative action as concern for Asian Americans, opponents of affirmative action can protect the existing racial hierarchy — with white people at the top — while disguising their efforts as race-neutral rather than racially motivated.”

This fancy conspiracy theory is an outright insult on our intelligence. “A convenient tool”?? In *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* (2007), Chief Justice Roberts concludes his opinion eloquently: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” But you think we do not have any independent thinking, and we do not even know it when AA harms us *in fact*?

- “We suspect that Asian Americans will see through this clumsy and cynical attempt to deploy them in service of dismantling affirmative action.”

So you still have a little confidence in our intelligence, as you still “suspect that [we] will see through this clumsy and cynical attempt to deploy [us]”? Actually, we prefer being “deployed” over being discriminated against.

- “And at least for the time being, the Supreme Court has been clear that affirmative action policies are constitutional.”

This is really interesting—“for the time being.” It sounds like, as a noted constitutional law scholar, you are not very confident that *Grutter* can actually survive a new Court after Justice Kennedy’s (expected) upcoming retirement? And you know better than anyone that, but for

Justice Kennedy's inexplicable reversal of himself, *Fisher II* probably would have overturned *Grutter*, right?

- “But if anything, anti-affirmative action efforts demonstrate the need for racial diversity. One way to improve upon the shallow racial understanding of affirmative action opponents is to ensure diverse educational environments that promote clear thinking and honest conversation about racial issues.”

The empty logic and circular reasoning here are beyond my intelligence. Honestly, I don't know what you are talking about.

It is quite hard to believe that I just wrote such a long open letter with this much emotion to the new dean of my own law school. I still greatly admire you both as a scholar and as a teacher (although the only class I ever took from you was a BarBri class of constitutional law). I wish you had not co-authored the article. I really do.

Last but not least, as mentioned earlier, thanks to your article, SVCA will launch new campaigns to support Mr. Blum and SFFA. The goal is to recruit at least 10,000 new members and raise money for SFFA.

Sincerely,

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