Affirmative Action & the Obligations of American Citizenship

Robert Justin Lipkin

Available at: https://works.bepress.com/robert_lipkin/61/
Since Justice Powell first penned the *Bakke* decision in 1973, Americans have been embroiled in a battle over affirmative action. Essentially, the problem is whether using race-conscious considerations is compatible with our constitutional and intuitive conceptions of equality. The problem is derived from the centuries old practice of American apartheid. A history which includes slavery, Jim Crow segregation, and the entrenched vestiges of racism, which endured even after the formal structures of slavery and segregation were banished from American society. Affirmative action is a remedial approach to the effects of over four hundred years of racial oppression and injustice. The lingering effects of racial oppression will not

---

1 Distinguished Professor of Law, Widener University School of Law; J.D. UCLA School of Law; Ph.D. and M.A, Princeton University; B.A., Brooklyn College.
3 Charles M. Blow, *Welcome to the 'Club,'* N.Y. TIMES, July 25, 2009, at A28, available at http://www.nytimes.com/2009/07/25/opinion/25blow.html. This vestigial racism consists of conscious and unconscious reactions to Blacks even when these reactions do not include overt discrimination. It also includes more complex circumstances where racial attitudes might be operative in causing an unfortunate outcome. Consider the arrest of Harvard Professor, Henry Louis Gates, Jr., by Cambridge police. The facts are difficult to discern, but both sides probably agree on this account. Upon returning from China, Professor Gates discovered that the door to his home was jammed. He and his driver attempted to “break in to the house.” It was reported to the Cambridge police who arrived questioning Professor Gates’ conduct. Although the facts are uncertain, it seems that after showing the police identification, Professor Gates asked Sgt. Crowley for his identification. Both parties overreacted, and ultimately the police arrested Professor Gates for disorderly conduct. The nation was split virtually across racial lines — Whites supporting the police and Blacks supporting Professor Gates — although there was some crossover. I certainly do not know the true story in this case, but it might be worthwhile to speculate whether Whites supporting Sgt. Crowley would maintain their support if Crowley was Black and Gates was White. See Abby Goodnough, *Harvard Professor Jailed; Officer is Accused of Bias,* N.Y. TIMES, July 20, 2009, http://www.nytimes.com/2009/07/21/us/21gates.html?_r=1&scp=1&sq=arrest%20of%20Henry%20Louis%20Gates%20Jr.&st=cse.
vanish on their own therefore something needs to be done. Someone must sacrifice to achieve a level playing field for Blacks and Whites. However, the question remains: Who should be expected to sacrifice to remedy the racial disparity and injustice that still exists in American institutions and in the greater American community?

Merely eliminating the seeds of racial injustice and oppression will only, at best, ensure that no new discrimination becomes systemic. This solution is insufficient and merely future regarding: If it works at all, it is designed to eliminate only the most oppressive forms of apartheid. It does little to right the wrongs of past oppressive racial injustice. Nor does it extricate the effects of this oppression from continuing as systemic elements in American society. Since the treatment of generations of minorities inevitably affects their descendants, the majority of contemporary Blacks are tainted and limited by the treatment of their ancestors.

It takes little imagination to realize that children of slaves will not be on a level playing field with Whites nor will the grandchildren and great-grandchildren of slaves have the same opportunities. Although precise causal correlations between centuries of racial oppression and their effects on any particular racial minority are unavailable the negative effects on competition in American society are obvious. As President Lyndon Johnson remarked, you can’t remove the shackles from someone, put him at the starting line and ask
him to run a race against those who were never shackled and say “compete.” “Competition” under these circumstances is simply the ratification of a racial status quo relegating slaves and descendants of slaves to permanent second-class status as citizens. Something more is required.

The resolution to this problem requires eliminating the entrenched vestiges of racism. The deprivation of opportunities to slaves and victims of segregation restricted the potential development of these individuals in all areas of American life. History is replete with self-educated Blacks but the typical experiences of most Blacks were as slaves and victims of segregation. If one’s parents, immediate family, and racial community are deprived of education the task is daunting. Especially in comparison to the efforts of Whites, whose educational opportunities were far greater. Many Blacks were raised in an environment where the attractive examples of social mobility were beyond their reach. The “role-model” effect is essential for the oppressed to begin to unshackle their chains. A person remains shackled if the effect of oppression restricts the range of opportunities for their children.


5 The Life of Frederick Douglass National Historic Site, http://www.nps.gov/archive/frdo/fdlife.htm. Frederick Douglass was born into slavery 1818 on the Eastern Shore of Maryland. During the course of his life he escaped from slavery, became a newspaper publisher, and became renowned as a voice for the abolition of slavery which he came to pass during his lifetime. During Douglass’ life, he also served as president of the Freedmen’s National Bank, U.S. Marshal for the District of Columbia, and diplomatic posts in Haiti and the Dominican Republic.

6 As President John F. Kennedy said, in admittedly different circumstances, in his Civil Rights Speech on June 11, 1963:

One hundred years of delay have passed since President Lincoln freed the slaves, yet their heirs, their grandsons, are not fully free from the bonds of injustice. They are not yet freed from the bonds of injustice. They are not freed from social and economic oppression. And this Nation, for all its hopes and all its boasts, will not be fully free until all its citizens are free .... We face, therefore, a moral crisis as a country and a people . . . [A] great change is at hand, and our task, our obligation, is to make that revolution, that change, peaceful and constructive for all. Those
Witnessing the tenure of a Black president makes it easier for a young Black boy or girl to see the presidency as something they might possibly reach. That is one very important reason why the election of Barack Hussein Obama, as President of the United States, is likely to have an enormous “role-model” effect on young Black children. Although, not every Black child will attain the presidency, his or her conceptual scheme or vocational imagination, which permits them to strive for the presidency, is made richer and exposes them to a plethora of other positive roles along the way. In short, oppressing one group by restricting its members’ inalienable right to become all that they might be, makes them unable to provide the environment for their children to rise above their parents’ oppression.

The problem of inter-generational racial oppression

We can characterize the problem of eliminating the entrenched vestiges of racism as the problem of inter-generational racial oppression. This occurs even when slavery and de jure racial discrimination have been banished. Impoverishing the potential of one generation inevitably continues impoverishing future generations until something is done to break the causal chain. The problem is that whatever is done to dismantle inter-generational racial oppression has a price. Someone has to pay for it. We must first look toward our republican democracy to see if it dictates which institution, group, or individual should bear the price of eliminating American apartheid. Assuming these vestiges will not magically disappear on their own, the question of who should bear the cost and nature of that remedy becomes essential if our goal is to achieve racial justice.

Racial Preferences

who do nothing are inviting shame .... Those who act boldly are recognizing right as well as reality.

Affirmative action is one of the remedies for inter-generational racial oppression since it provides some race conscious preferences in admissions to colleges and universities and in job hiring. If one believes that inter-generational racial oppression inevitably handicaps those individuals born after the elimination of these American evils, then a natural reaction - whether constitutional political, or moral - is to fashion a remedy to reduce the force of this handicap. This is known as “leveling the playing field”. If a parent wrongly favored one child over another, and finally comes to his senses that both children should be treated equally, eliminating the favoritism without something more will not level the playing field. Some compensatory treatment of the disfavored child is necessary to achieve that equality. This is, in part, a zero-sum game. To now favor the traditionally disfavored child means sacrifice on the part of the favored child. Can this be justified?

Two problems are inextricably interwoven into the fabric of this question. First, does the idea of affirmative action comport with the United States Constitution’s guarantee of equal protection? And second, even if it is constitutional, does it make sense?

The Constitutional Obstacle

The constitutional controversy over affirmative action has followed a tortuous journey through ideologically divided courts. From the beginning, courts have warily viewed racial preferences. Currently, the Court reviews race-conscious legislation under the most severe standard of judicial review. This standard, called strict scrutiny, is the most difficult standard for
the Government to overcome, if it can be overcome at all. In order for a race-based law to pass strict scrutiny, the government must prove to the Court the law has a compelling purpose and is narrowly tailored or necessary to achieve that purpose. This means that the government presumes that every American has a right against racial discrimination. If that right is to be overcome the Government must have a special purpose, which though typically undefined, is viewed as strong enough to override someone else’s right not to be discriminated against.

Judicial conservatives opposed to affirmative action make a compelling purpose difficult to find. In their view, an anti-racial-discrimination right trumps other considerations, even some sort of compensatory strategy for overcoming centuries of racial injustice. Because rights are individualized constructs, one person’s right to anti-racial-discrimination cannot give way to the importance of leveling the field between groups of Blacks and Whites who themselves were innocent of discriminating against minorities. Each American has this right not to be discriminated against on racial grounds. The only exception to this right is when discrimination is designed to remedy an institution’s own past discrimination. After all, discrimination is discrimination and violates the Equal Protection Clause against using racial classifications in legislation absent an extraordinary justification.

One group of judicial conservatives generally opposed to affirmative action—Former Chief Justice Rehnquist, current Chief Justice Roberts, Justices Scalia, Thomas, and Alito—oppose race-conscious laws unless designed to remedy identifiable racial discrimination. For example, if a particular police department has a history of not promoting minorities, a race-conscious law or court order to conduct promotions in a race-conscious manner may be permissible. Adherents of this group believe that only past, identifiable, racial discrimination

---

8. Id.
can possibly serve as a compelling interest relevant to overcoming strict scrutiny. The second group of judicial conservatives, most notably Justices Kennedy and O'Connor, are not categorically opposed to narrowly tailored diversity as a compelling interest that may overcome strict scrutiny in the appropriate case. Indeed, former Justice O'Connor embraced diversity as a compelling interest in law school admissions where race was used as one of several factors to individually evaluate a candidate’s qualifications for admission. If not for Justice O’Connor’s decision in this case, it is likely that racial-preferences may have been totally banned from constitutional legitimacy.

By contrast, it seems that Justices Souter, Ginsburg, and Breyer endorse an anti-racial-discrimination right. They believe that preferential treatment, so long as it is not based on considerations of racial superiority, does not constitute invidious discrimination against anyone. Such discrimination is the essential element in American apartheid. Slavery and segregation were based on the anthropological view that Africans were inferior to Whites, morally and intellectually. Even though Africans were human beings, racists never conceded

---

12 Id. at 720-22, 734-35 (2007).
13 Grutter, 539 U.S. at 334-35.
14 It is not easy to discover a rationale for determining when a purpose is compelling. In the context of affirmative action, compensating for generalized discrimination does not count as a compelling interest, but diversity does. What principle explains this? If we directly compensated for generalized discrimination, the diversity issue would take care of itself. Presumably, generalized discrimination is too amorphous. It does not tie perpetrators to victims. It violates one of the fundamental precepts of the American legal system: individualized guilt and individualized compensation. However, whenever there exists a systemic social evil as fundamental and deeply embedded in social practice as racial injustice, what benefit is there in sticking to this principle of individualism? We know that discrimination affects most, if not all Blacks with varying degrees of stigma oppression. Why not confront the source itself?
that Africans were as fully human as Whites.\textsuperscript{17} Animus toward Africans represents a world-view in which equal treatment of Whites and Blacks is not morally required because Blacks are simply not equal to Whites. Unequal treatment does not violate the first principle of equability: Treat similarly situated persons in the same manner. Those favoring affirmative action embrace benign discrimination and reject invidious discrimination while those opposing affirmative action reject both.

Invidious racial discrimination should be distinguished from benign discrimination. The latter is designed to achieve important social purposes and in no way denigrates Whites by giving race-conscious preferences to Blacks. In this view, discrimination against Blacks because they are not fully human, invidious discrimination, is radically different from discrimination in favor of Blacks, benign discrimination. And therefore, in some innocuous sense discrimination against Whites in university admissions or hiring to bring about desirable social policy furthers that social purpose. As Oliver Wendall Holmes once put it, even a dog knows the difference between being stumbled upon and being kicked.\textsuperscript{18}

The present state of constitutional law pertaining to affirmative action is uncertain. In Grutter,\textsuperscript{19} the Court held that race could be used as one of several factors in law school admissions. After the resignation of Justice O’Connor, the Court rejected the idea of race as a factor to maintain integrated schools in Seattle and Louisville.\textsuperscript{20} In these cases, the Chief Justice opined that “the best way to stop discriminating on the basis of race is to stop discriminating on the basis of race.”\textsuperscript{21} This assertion has a catchy rhetorical appeal but it is not at all clear if it is very helpful or informative. The reason is simple: To stop “discriminating on the basis of race”

\begin{footnotesize}
\begin{enumerate}
\item See id. (two of the most illustrious Americans at one time or another shared this view: Thomas Jefferson and Abraham Lincoln and of course many much less illustrious Americans. The inferiority of Africans has been ingrained in American culture and politics).
\item O. W. HOLMES, JR., THE COMMON LAW 3 (Boston: Little, Brown, and Company 1881).
\item See Grutter, 539 U.S. 326 (2003).
\item Id.
\end{enumerate}
\end{footnotesize}
leaves untouched the effects of past discrimination. It tells us nothing about how to remedy the persisting institutional racism.

**Racial Justice Beyond the Constitution: Is it Possible?**

This is the problem. If the Constitution forecloses race-conscious laws, what can the government do to achieve a racially just society? More generally, how will Blacks and other minorities have the requisite opportunities to achieve social and material equality? This is the question that the affirmative action opponents fail to address directly. It seems morally imperative that victims should not be required to remedy their own victimhood.

One harsh answer to these questions is that the Court should only be concerned with the constitutional issues surrounding affirmative action. The Constitution must be interpreted correctly, even when correct constitutional interpretations have negative social consequences. The Court’s role is to interpret the Constitution, not to fix societal ills. As a general proposition, this reply is correct. The Court is not empowered to survey societal wrongs and fashion solutions. After all, the Court is not a legislature. Yet, it is nonetheless puzzling why the Court is foreclosed from fashioning constitutional remedies to problems that if it did not cause, at least exacerbated by judicial decisions. The Constitution has caused, in part, the evils of both slavery and segregation. Not facing slavery at the Constitutional Convention may be regarded as the first constitutional evil responsible for American apartheid. Others were to follow. However, the Civil War Amendments formally banned slavery and racial segregation. Does this not absolve the Constitution’s complicity in racial injustice?

Since the end of Reconstruction, the *Civil Rights Cases*, and the *Plessy v. Ferguson* decision, the Court has permitted state laws to virtually re-enslav[e] Blacks. By introducing the State Action Doctrine, the Court immunized the states from any repercussions when private citizens are permitted to treat Blacks as second-class citizens. Further, *Plessy’s* “separate but equal” holding fortified the foundation of two societies - one White and the other Black. While it is true that *Brown v. the Board of Education* overturned, at least in educational contexts,
segregation and subsequent per curiam decisions overturned many of the Jim Crow laws, the racial die had already been cast. At the time of Brown, we were already deeply committed to racial apartheid. Laws were struck down that did nothing to mitigate the deeply entrenched effects of pre-Brown racial injustice. What responsibility does the Court have to remedy its own role in that injustice? To insist upon none is the reason this answer is harsh and unsatisfying.

Another remedy to American apartheid is simply let nature, or more precisely the free market, take its course. The only way for minorities to equalize their position in society is through hard work, assuming responsibility for their own futures, and getting over the victimization culture that impedes racial equality. In other words, they should pick themselves up by their bootstraps.

In theory this approach has merit. The problem in giving preferences based on race to some means denying others benefits that may in a conventional sense deserve these benefits more. In this way, individuals who were not responsible for American apartheid are deprived of benefits in order to remedy ills perpetuated by others. Minorities directly affected by slavery and segregation, as well as those who perpetuated the discrimination, are no longer in the picture. Does this not place the responsibility of achieving racial justice on innocent people for the benefit of individuals who were never formally victims?

This approach is subtly flawed. Aside from the problem of inter-generational racial oppression, racial apartheid privileged Whites for hundreds of years. It is highly unlikely that descendants of Whites would be in their societal positions today without also being members of a class benefiting from the existence of a second-class citizenry. Contrary to former presidential

---


23 This statement refers to the argument that educational institutions should only use a student’s standardized test scores and grades as part of their admission procedure; thus not prohibiting qualified individuals from certain opportunities.
candidate Pat Buchanan’s view[^24] - that White males built American society and fought and died in wars defending the nation - slaves made enormous contributions to American culture for the benefit of everyone.[^25] Without the oppression of Blacks and the fruit of this oppression, Whites would not be in the privileged position they occupy today. America’s economic prowess may never have reached the height it did without a class of employees who were not paid or paid a wage no other group would have tolerated. Hence, a contemporary White person, not responsible for oppression of Blacks, nonetheless benefited greatly from this oppression. Is it unjust to ask such an individual to sacrifice some benefits to rectify a racial imbalance?

If America is to achieve racial equality, some one or some group must pay for it. According to the free market approach, Blacks must pay by working hard and over the course of years and generations achieve positions in society that they would have achieved earlier absent American apartheid. Just how many generations will be needed to buckle down in this manner is difficult to predict. But one thing we can say for sure is that Blacks will need to work much harder at reaching their potential than Whites do. There is something troubling about a


White men were 100% of the people that wrote the Constitution, 100% of the people that signed the Declaration of Independence, 100% of the people who died at Gettysburg and Vicksburg, probably close to 100% of the people who died at Normandy. This has been a country built basically by White folks, who were 90% of the nation in 1960 when I was growing up and the other 10% were African-Americans who had been discriminated against.

[^25]: Not only does Mr. Buchanan fail to explore why only White men wrote the Constitution and signed the Declaration of Independence, but he gets his facts wrong about Blacks’ role in building the nation and fighting American wars. Mr. Buchanan’s statements illustrate how Blacks’ contributions can be hidden from our public consciousness. Mr. Buchanan had a good education at Georgetown and presumably has been exposed to many interlocutors on the role racial minorities played in creating America. Yet, it has not penetrated his rabid views on affirmative action and the role of White working males. This is but one of several informal ways Blacks fail to receive their appropriate recognition, and also forms the basis of a new subtle form of racism that needs to be identified and extricated.
system which permits one group to oppress another and then insists that the remedy for this oppression requires the victims to make things right.

The free market approach places a double burden or double cost on Blacks. The first burden or cost was of course the original evil, slavery, and then subsequently segregation. Blacks were victimized and as a result were not allowed to naturally develop their own potential, as were Whites. To say now that governmental action is precluded, for the most part, from systematically eliminating the effects of this oppression due to some ideological commitment to constitutionalism places a second burden or cost on Blacks. According to this approach, Blacks should sacrifice in order to erase the effects of their own victimization. The free market approach implies, though not in these words, that the victims of slavery and segregation should pay twice for racial injustice: First, by being victims; and second, by waiting for the market to take its course in remedying their victimization. What sacrifice or price should Whites, even innocent Whites, pay to remedy the effects of American apartheid? Or should Whites, the perpetrators of slavery and segregation bear no responsibility for achieving racial justice at all? Such a conclusion cannot be consistent with any reasonable conception of racial justice.

The Obligations of American Citizenship in a Republican Democracy

The question of who should bear the cost of achieving racial justice cannot be answered by an appeal to intuitive judgments about justice. Like other intuitive conflicts, our intuitions develop, to a large extent, on the racial group of which we are members and the particular interests we have as members of these groups. Those in favor of affirmative action see the need for race-conscious laws both in terms of compensatory justice and for the sake of diversity in American society. Those opposed to affirmative action are right to point out the natural disappointment in not being admitted to one’s preferred university. Especially when others less qualified, according to standardized factors of grades and exams, are admitted. Such disappointment will quickly turn to resentment unless there is some legitimate reason for bearing the loss.
Is there any justification why innocent Whites should be prepared to sacrifice for the racial ills of our community? I propose tying this issue directly to the obligations of American citizenship. For this to work, we must ask the following question: What obligations or responsibilities do American citizens, or citizens of any democracy have, in remedying the consequences of the community’s past wrongs?

One possible answer is the theory of republican democracy. In our republican democracy, self-rule involves identifying with other citizens as personifying the general community. We are not merely a group of individuals related only by laws and other formal relationships. Citizens have interests in one another; when one individual is wronged the community is wronged. Just as each member in a family will be called upon at some time to sacrifice for another member, in a greater community every individual is required to sacrifice important interests.

In this manner, the community’s rights and wrongs become each individual’s rights and wrongs. Just as every member of a baseball team is responsible for the team’s victories and defeats, an individual committed to the community acknowledges responsibility for the community’s misdeeds. This includes even those misdeeds which occurred before the birth of those those individuals who are called upon to make the sacrifice and those which occurred even before her ancestors arrived on American shores. This deep identification with community is acknowledged by all citizens when speaking about the community’s morals, strengths and triumphs. It prepares the conscientious democrat to support remedies of racial injustice, even when

---

26 By “republican democracy” I mean a system of self-rule in which majoritarian decisions are filtered through mechanisms such as representation, separation of powers, federalism, and judicial review. These filters constrain transient majoritarian passions, and in doing so provide the foundation of a community. This differs from a pure majoritarian democracy where the only constraining influence is majority rule.
these remedies might conflict with his or individual interests. One can say that this is just the point of being a member of a republican democratic community: We no longer think of ourselves as detached, alienated, complete individuals. Instead, we think or ourselves as integral members of the community who can be called upon to remedy the community’s wrongs. This despite the fact that we ourselves may have not had any direct involvement in perpetrating those wrongs.27

Re-conceiving the affirmative action controversy in this manner allows us to determine what type of democracy exists in America. If the Court frustrates the majority’s decision to compensate for past wrongs, it binds us to a form of democracy that fosters radical individualism and alienation. The majority should be able to act as democrats committed to the community, to devise such solutions as diversity in education, which as an additional positive effect produces educational benefits for everyone. If prevented from doing so, American democracy is less able to deal with the inevitable racial and ethnic conflicts we face in the twenty-first century.

27 This is, to be sure, a controversial conception of democracy. Those committed to individualist conceptions of democracy might insist that they owe no one anything unless they voluntary choose to do so through contract, they cause some direct harm or inflict injury on some victim. I cannot here show why individualistic democracy is impoverished. My goal instead is to show an alternative conception, namely, communitarian democracy, where the relationship between citizens is more intimate. I concede that today, American democracy is afflicted with a vulgar individualistic democracy where empathy, respect, and concern for others in some quarters is virtually absent. Twenty-four hour cable television is as good as any place to witness the brutality of “democratic” debate. It doesn’t matter what one says, whether one’s words are true, false, or indifferent just as long in some sense one wins the argument.
Consider the Supreme Court nomination hearings of Judge Sonia Sotomayor. She was in her own words, an “affirmative action baby.” Her objective scores might not have been as strong as a White male, but her experience as a Latina helps her see the world more completely than a White male. In that regard, Sotomayor brings a perspective to her educational institutions and to the practice of law that might very well be absent. According to conventional factors, the White male may have outscored Ms. Sotomayor at Princeton or Yale. Participation in an affirmative action program involves accepting the possibility that he may lose out to someone who, according to conventional standards, is less qualified. This sacrifice helps to right the wrongs of the greater community. Further he encourages the enrichment of the community with a perspective not represented by courts due to the community's wrongs of rejecting admittance to racial and ethnic minorities in a host of American institutions and practices. The sacrifice on the part of the White male reveals his character as someone committed to the community's interests first, and his own second. He exemplifies the ideal of the republican democrat.

This illustrates that American society is replete with the language of rights and the language of responsibilities. Unfortunately, the language of rights almost always prevails. Our current wars over affirmative action highlight the language of rights and suppress the language of responsibilities. My proposal is to resurrect the language of responsibilities to provide a greater understand of the affirmative action controversy.

We can construct a new framework for evaluating affirmative action. We should add to our discussion of affirmative action not only individual rights, but also individual responsibilities. A purely rights based culture is characterized “by its starkness and simplicity, its prodigality with rights labels, its legalistic character, its exaggerated absoluteness, its hypo-

---


individualism, its insularity, and its silence with respect to personal, civic and collective responsibilities.”

Perhaps more importantly, “the language of rights is the language of no compromise.”

The right not to be discriminated against on racial grounds overlooks the distinction between invidious and benign discrimination. And as such, prevents the realization that when racial discrimination is benign, a compromise may be possible. Barring quotas and automatic racial balancing, the language of responsibility may persuade some Whites that an obligation of American citizenship is the willingness to assume the responsibility of sacrificing personal interests in order to right the community’s most egregious wrongs.

One might feel that this argument is utopian in the extreme. They may ask themselves: “Why should I sacrifice benefits that I have earned in order to rectify the ills perpetrated and benefit people that I have never known?” or “Why should the burden fall upon my shoulders?” The answer is this sacrifice benefits the American community. It rectifies the ills of the American community, not the ills of individual wrongdoers. Having personally benefited from a system of racial apartheid at the expense of people I have never known, I should be prepared to sacrifice so that the community stands on firm moral ground. Someone has to pay the price of extricating racial injustice. It does not makes sense to require the victims to pay

---


31 Id. at 9.

32 The term “utopian” is ordinarily used in a pejorative sense, namely, if some proposal is utopian it means it is unrealistic and shouldn’t be taken seriously. See Dictionary.com, “Utopian” Definition, http://dictionary.reference.com/browse/utopian (last visited Sept. 24, 2009).

33 Consider Gordon Woods’ conception of the framers:

The vision of the revolutionary leaders is breathtaking. As hard-headed and practical as they were, they knew that by becoming republican they were expressing nothing less than a utopian hope for a new moral and social order led by enlightened and virtuous men. Their soaring dreams and eventual disappointments make them the most extraordinary generation of political leaders in American history.

twice, once for the initial evil and then again to rectify the evil. A shared responsibility between the descendants of both the victims and the wrongdoers reveals the commitment to communitarian republican democracy.

No longer should we argue that affirmative action rests only on non-minority’s rights but also on his or her responsibilities owed to a trans-temporal community. We should see the affirmative action controversy as part of a cultural effort to define the obligations of democratic citizenship in a community where historical wrongs need a remedy. We need to focus on the question: Which of America's past injustices should we now take responsibility to remedy? In this view, no one has the right to affirmative action. Rather affirmative action is the majority's constitutional prerogative, through the use of the legislative process and a means of taking responsibility for the community's past wrong doing. This has the surprising added benefit of bringing American citizen into a more intimate community with one another as well.

---

34 Responsibilities that we have as citizens, not as individual wrongdoers, but as beneficiaries of a community that needs to be redesigned in terms of evolving moral ideals.