Affirmative Action’s Labor Roots

Affirmative action was a hard-won victory by left-labor activists. It must be defended.

by Touré F. Reed

The new issue of *Jacobin*, “Up From Liberalism,” will be out February 4. Check out our preview and subscribe today.
Justice Antonin Scalia got deservedly slammed when, in a line of questioning in *Fisher v. Texas*, he voiced doubts about the intelligence of African Americans, suggesting that blacks would generally be better served by attending less competitive universities. Scalia’s Charles Murray–esque reflections on the capabilities of black people are outrageous, but the fact that the US Supreme Court has chosen to hear *Fisher v. Texas* in the first place is far more alarming.

In 2008, Abigail Fisher — who hails from Sugarland, an upscale Houston suburb — filed a lawsuit alleging she had been denied admission to University of Texas–Austin because of race conscious admissions policies.

As many others have noted, Fisher was not denied admission to UT-Austin because of affirmative action.

UT-Austin automatically admits the top 10 percent of the state’s high school graduates, irrespective of race, ethnicity, sex, religion, or sexual orientation. Fisher had solid high school grades and SATs but was not among this select group, which accounts for 92 percent of UT-Austin’s in-state admissions.

Applicants for the remaining 8 percent of slots are assessed on the basis of two scores — the combination of grades and standardized test scores and a personal achievement index, which includes consideration of an applicant’s race, socioeconomic background, unique accomplishments, leadership skills, etc.

Race could certainly be taken into consideration in this second tier category, but it’s hard to imagine how Fisher — who went on to graduate from LSU — was a victim of “reverse discrimination.” UT-Austin offered provisional admission to 42 white and just 5 black or Latino students with lower grades and test scores than Fisher’s, and 168 black and Latino students with grades as good or better than Fisher’s were also denied admission. Moreover, Fisher also declined the standard offer to transfer to UT-Austin her sophomore year on completion of a year at a UT branch campus with a 3.2 GPA or better.
But given the political composition of the court, it is likely that Chief Justice Roberts and the other conservative justices — hoping that Justice Kennedy will swing their way — plan to deliver a crippling blow to affirmative action in college admissions when the high court rules on *Fisher v. Texas* later in 2016.

Likewise, since Edward Blum’s Project on Fair Representation — the conservative nonprofit that has financed Fisher’s lawsuit — is committed to fighting so-called race-based policies in voting, education, and employment, we can expect the hits on affirmative action to keep coming in the aftermath of *Fisher*.

**Racial Justice and the Public Good**

Affirmative action has been the source of controversy for about as long as it has existed, but its positive impact is undeniable. The anti-discrimination and recruitment policies that fall under the umbrella of “affirmative action” have opened up opportunities for women and racial minorities in fields that had been largely closed off to them by either formal or informal barriers.

Affirmative action policies have also contributed to making the workplace fairer for everyone since fear of contract forfeiture and litigation has compelled even non-union employers to establish formal guidelines for hiring, promoting, and firing employees. Moreover, white men actually account for the bulk of those filing age discrimination lawsuits.

Simply put, a Supreme Court ruling that affirmative action is unconstitutional would constitute a blow to democracy itself.

Still, those who seek to defend affirmative action — and I am among such people — would be wise to situate it in a broader historical frame than recent controversies and consider the labor origins of anti-discrimination measures.
Black labor activists played an important role in the enactment of anti-discrimination legislation during the modern civil rights movement. African-American labor and civil rights activist A. Philip Randolph and the Brotherhood of Sleeping Car Porters successfully used the threat of a march on Washington in the 1940s to pressure President Franklin D. Roosevelt to issue Executive Order 8802, barring discriminatory employment practices among defense contractors and federal agencies during World War II.

Randolph, Bayard Rustin, and the Negro American Labor Council, would go on to organize the 1963 March on Washington, which played a role in the passage of the Civil Rights Act of 1964. And while Randolph and Rustin argued that fair employment practices legislation alone was incapable of redressing disparities in employment and income — which, by the 1960s, owed more to deindustrialization than racial discrimination — Title VII of the 1964 Civil Rights Act established the legal framework for affirmative action.

Some will dismiss the important role played by black left-labor activists in both the genesis of the civil rights movement and the enactment of anti-discrimination legislation as a kind of historical artifact — facts about a past rooted in politics that are no longer relevant.

Such criticisms are not without merit, though they bring us to the real point. The neoliberal political orthodoxies of today — namely the evisceration of the welfare state and the related predilection for market-based and even voluntarist solutions to political economic problems ranging from racial inequality to environmental calamity — are fundamentally at odds with the social-democratic politics that made affirmative action possible.
Between the 1940s and the 1960s American politics tilted toward social democracy — a leaning that shaped the cultural and legal parameters essential to the enactment of anti-discrimination legislation. Whatever the institutional affiliations of African-American activists of yesteryear, the legal foundation for anti-discrimination legislation proceeded from the view that the federal government had the authority to intervene not just in affairs of the states but also in the practices and policies of private entities (businesses, universities, etc.), provided the existence of an overriding public interest.

With respect to employment, this principle was established not in defense of racial equality, but the right to collective bargaining.

Prior to the 1935 Wagner Act, “freedom of contract” limited the government’s authority to regulate the employer-employee relationship. The Great Depression, however, led the drafters of the Wagner Act — Senator Robert Wagner and his assistant Leon Keyserling — to argue that the right to collective bargaining was essential to redressing the problem of under-consumption that had caused the protracted economic downturn.

Many progressives also argued that unions would check managerial caprice by allowing workers to negotiate for contracts that established formal employment guidelines — for things such as hiring, firing, promotions, and raises — which would confer stability and dignity to the workplace via democratic process. From the second New Deal through World War II, the overwhelming majority of Americans were united with the executive, the courts, and the majority of legislators in the view that unions served a “public good.”

As can be said of any institution in America, many unions — particularly in the building trades — were guilty of discrimination. But unions — particularly industrial unions — were also among the civil rights movement’s strongest allies.
In fact, unions and churches accounted for nearly equal shares of the financial contributions to the 1963 March on Washington for Jobs and Freedom. More to the point — in cases such as *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen* (1944) and *James v. Marinship* (1944) — the courts chipped away at union discrimination, denying NLRB coverage to unions guilty of racial discrimination.

This punishment of racist unions rested on the New Deal’s more expansive definition of “state actors” which transformed entities that were once deemed private — and thus beyond the scope of the Fourteenth Amendment — into quasi-public institutions subject to federal regulation.

While the expanded purview of state actors along with a more liberal application of the Constitution’s Commerce Clause were initially designed to grant the federal government greater authority to regulate economic affairs, these two big government frameworks would pay dividends for civil rights — Jim Crow unionism, southern Democrats’ “white primary,” and restrictive covenants would all be struck down by the courts before 1950 — and they would help lay the foundation for affirmative action.

The case for affirmative action — like unionization before it — proceeded from the view that anti-discrimination policy was in the public interest. Though the history of federal workplace anti-discrimination initiatives dates back to the New Deal, President Kennedy’s 1961 Executive Order 10925 — which authorized the federal government to cancel contracts with vendors who failed to take “affirmative action” to redress employment disparities — is generally understood as the start of the modern era of anti-discrimination policy.

The Kennedy and later the Johnson administrations argued that workplace discrimination was a drag on the national economy, viewing racism as an irrational encumbrance on productivity. The Kennedy administration’s case for a fair employment practices bill — what would eventually become Title VII of the Civil Rights Act of 1964 — thus centered on the Commerce Clause, placing workplace discrimination in the purview of the federal government.
Those who imagine that market-oriented programs offer the best route to racial equality today should recall that opponents of Title VII, like Republican senator Barry Goldwater, argued that fair employment practices legislation violated “freedom of contract.”

But while anti-discrimination legislation necessarily infringed on an employer’s right to hire, fire, promote, or demote whomever they wished, the Wagner Act had already abridged this right — as proponents of anti-discrimination law understood at the time — thus establishing a precedent for affirmative action.

In fact, the phrase “affirmative action” first appeared in a Wagner Act provision that directed judges to impose financial penalties on employers who discriminated against union organizers.

The eventual implementation of affirmative action in the workplace likewise drew on precedent stemming from the Wagner Act. As study after study has shown, few if any employers use quotas — which are not mandated by Title VII. Instead, employers hoping to avoid costly lawsuits established offices of equal employment to ensure compliance with anti-discrimination law.

These new equal employment offices were modeled on the labor relations departments union and non-union firms established in the wake of the Wagner Act. Moreover, many of the policies implemented by equal employment offices to ensure fair employment practices — including in-house grievance procedures, formal job descriptions, published guidelines for promotion and termination, salary classifications, and open bidding — were already in use by labor relations departments partly because unions had demanded them.

The Wagner Act and the labor movement it helped spawn are perhaps the clearest expression of the social-democratic impulses informing the old New Deal Democratic coalition. As such, the links between the right to collective bargaining and anti-discrimination legislation draw attention to the historic importance of social democracy to so-called civil rights issues.
Indeed, it’s hard to imagine on what basis black civil rights leaders — who lobbied on behalf of a group that accounted for just 10 percent of the nation’s population — would have demanded a fair employment practices act in the 1960s, if the Wagner Act had not already established a precedent, in the name of the public good, for abridging the right to freedom of contract.

Simply put, the civil rights movement’s victories required an interventionist state — as was understood by all of the principal players, on both sides, at the time. And while the New Deal had significant limitations, its efforts to enhance the purchasing power of working people — centered on fostering a more stable form of capitalism — established a framework for a rights discourse that would prove indispensable to African-American civil rights.

Social Democracy and Racial Equality

It is no coincidence then that the attacks on affirmative action and collective bargaining have intensified over the past few decades, a period that has witnessed the retreat from a more social-democratic state and the rise of neoliberalism. For free-market ideologues, anti-discrimination legislation and unionization both muck up the rational function of the market and disrupt capitalist class power.

To be sure, corporate America — which was responsible for devising workplace affirmative action strategies to begin with — has been one of affirmative action’s most powerful allies for the better part of the last three decades. But the fact that the corporate defense of affirmative action centers on diversity poses its own problems.

The diversity defense — itself the product of Board of Regents of University of California v. Bakke and the Reagan administration’s efforts to gut anti-discrimination programs with the assistance of then Equal Employment Opportunity Commission director Clarence Thomas — has come to reify race and gender alike, insofar as it presumes that each member of an identity group possesses a unique cultural perspective.
In conflating culture with race, “diversity” inadvertently plays into the hands of racists, like Justice Scalia, who view presumed hardwired group differences not as cause for celebration, but as justification for exclusion and even continued exploitation — as was the intent of race from the start.

Diversity likewise conforms to a human capital model of labor relations that displaces the view that government has a compelling public interest to ensure equity, which was the original basis of affirmative action and, of course, the Wagner Act.

Since the human capital defense of affirmative action is wed to a market utopianism that views the social safety net as an encumbrance on business, this and other such narrow defenses of affirmative action centered on the unique cultural attributes of identity groups not only fails to address the material needs of most black people — who have long been overrepresented among workers in manufacturing, the service sector, and the public sector — but it also helps to fuel resentment among working-class whites, contributing to the rise of racial demagogues like Donald Trump.

If the history of the modern civil rights movement has any lessons for us today, then one is that those who imagine a world in which black and brown people might achieve racial equality in the absence of a social-democratic politics “want crops without ploughing the ground; they want rain without thunder and lightning; they want the ocean without the awful roar of its many waters.”

Though far from the most radical option on offer, affirmative action was the product of a social-democratic vision and is best defended by a politics that presumes the proper role of government is to foster economic stability and security for its citizens.
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