

Two Views of Affirmative Action

For two decades now, the principles and practices of affirmative action have been hotly contested in every branch and at every level of government. In what follows, Wm. Bradford Reynolds, Assistant Attorney General for Civil Rights in the U.S. Department of Justice, and Richard Wasserstrom, Professor of Philosophy at the University of California at Santa Cruz, present opposing views on how far and on what basis programs of preferential treatment

for blacks, women, and ethnic minorities can be justified. Their debate is drawn from papers they presented at a conference on "The Moral Foundations of Civil Rights Policy," held at the University of Maryland on October 18-20, 1984, sponsored by the Center for Philosophy and Public Policy. The full text of their papers is available as a Center working paper. (For information on ordering, see page 15.)

I.

Two predominant competing values drive the debate on affirmative action in our society today: the value of equal opportunity and the value of equal results. Typically — to the understandable confusion of almost everyone — "affirmative action" is the term used to refer to both of these contrasting values. There is, however, a world of difference between "affirmative action" as a measure for ensuring equality of opportunity and "affirmative action" as a tool for achieving equality of results.

In the former instance, affirmative steps are taken so that all individuals (whatever their race, color, sex, or national origin) will be given the chance to compete with all others on equal terms; each is to be given his or her place at the starting line without advantage or disadvantage. In the latter, the promise of affirmative action is that those who participate will arrive at the finish line in pre-arranged places — places allocated by race or sex.

Unfortunately the promise of equal results is a false one. We can never assure equal results in a world in which individuals differ greatly in motivation and ability; nor is such a promise either morally or constitutionally acceptable. This was, in fact, well understood at the time that the concept of "affirmative action" was first introduced as a remedial technique in the civil rights arena. In its original formulation, that concept embraced only non-preferential affirmative efforts, in the nature of training programs and enhanced recruitment activities, aimed at opening wide the doors of opportunity to all Americans who cared to enter. No one was to be afforded a preference, or special treatment, because of group membership; rather, all were to be treated equally as individuals based on personal ability and worth.

This administration's commitment is to this "original and undefiled meaning" — as Morris Abram, Vice Chairman of the Civil Rights Commission, calls it — of "affirmative action." Where unlawful discrimination exists, we

see that it is brought to an abrupt and uncompromising halt; we ensure that every identifiable victim of the wrongdoing receives "make whole" relief; and we require affirmative steps such as training programs and enhanced recruitment efforts to force open the doors of opportunity that have too long remained closed to far too many.

The criticism, of course, is that we do not go far enough. The remedial use of goals and timetables, quotas, or other such numerical devices to achieve a particular balance in the work force has been accepted by the lower federal courts as an available instrument of relief, and it is argued that such an approach should not be abandoned.

Our first response is a strictly legal one; it rests on the Supreme Court's recent decision in *Firefighters Local Union v. Stotts*. At issue in *Stotts* was a district court injunction ordering that certain white firefighters with greater seniority be laid off before blacks with less seniority in order to preserve a certain percentage of black representation in the fire department's work force. The Supreme Court held that this order was improper because "there was no finding that any of the blacks protected from layoff had been a victim of discrimination." It ruled that federal courts are without *any* authority under Title VII of the Civil Rights Act to order a remedy that goes beyond enjoining the unlawful conduct and awarding "make whole" relief for actual victims of the discrimination. Quotas are by definition victim-blind: they embrace without distinction nonvictims as well as victims of unlawful discrimination and accord preferential treatment to both. Accordingly, whether such formulas are employed for hiring, promotion, layoffs, or otherwise, they must fail under any reading of the statute's remedial provision.

There are equally strong policy reasons for coming to this conclusion. The remedial use of preferences has been justified by the courts primarily on the theory that they

are necessary to cure "the effects of past discrimination" and thus, in the words of Justice Blackmun, to "get beyond racism." This reasoning is twice flawed.

First, it is premised on the proposition that any racial imbalance in the employer's work force is explainable only as a lingering effect of past racial discrimination. Yet equating "underrepresentation" of certain groups with discrimination against those groups ignores the fact that occupation selection in a free society is determined by a host of factors, principally individual interest, industry, and ability. It simply is not the case that applicants for any

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given job come proportionally qualified by race, gender, and ethnic origin in accordance with U.S. population statistics. Nor do the career interests of individuals break down proportionally among racial or gender groups.

Second, and more important, there is nothing *remedial* — let alone *equitable* — about a court order that *requires* the hiring, promotion, or retention of a person who has not suffered discrimination solely because that person is a member of the same racial or gender group as other persons who were victimized by the discriminatory employment practices. The rights protected under Title VII belong to individuals, not to groups, as was affirmed in *Stotts*. As indicated, remedying a violation of Title VII requires that the individual victimized by the unlawful discrimination be restored to his or her "rightful place." It should go without saying that a person who is *not* victimized by the employer's discriminatory practices has no claim to a "rightful place" in the employer's work force. According preferential treatment to nonvictims in no way remedies the injury suffered by the actual victims.

Moreover, racial quotas and other forms of preferential treatment unjustifiably infringe on the legitimate employment interests and expectations of third parties, such as

incumbent employees, who are free of any involvement in the employer's wrongdoing. To be sure, awarding retroactive seniority and other forms of "rightful place" relief to individual victims of discrimination has some of these same consequences. However, legitimate claims of identifiable victims warrant the imposition of a remedy that places some burden on those innocent employees whose "places" in the work force are the product of unlawful discrimination. Restoring the victim of discrimination to the position he or she would have otherwise occupied merely requires incumbent employees to surrender some of the largesse discriminatorily conferred upon them. *But* an incumbent employee should not be called upon as well to sacrifice or otherwise compromise legitimate employment interests in order to accommodate persons *never wronged* by the employer's unlawful conduct.

Proponents of class-based preferences note that the effort to identify and make whole all victims of the employer's discriminatory practices will never be 100 percent successful. While no one can dispute this unfortunate point, race- and gender-conscious preferences simply do not answer this problem. The injury suffered by a discriminatee who cannot be located is in no way ameliorated by conferring preferential treatment on other, randomly selected members of his or her race or sex.

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Proponents of judicially imposed numerical preferences also argue that these are necessary to ensure that the employer does not return to his or her discriminatory ways. But far from *preventing* future discrimination, imposition of such remedial devices *guarantees* future discrimination. Only the color or gender of the ox being gored is changed.

The inescapable consequence of *Stotts* is to move government at the federal, state, and local levels

The Origins of Affirmative Action

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such *affirmative action* as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate."

— Section 706(g), Title VII,
Civil Rights Act of 1964

"The contractor will not discriminate [and] . . . will take *affirmative action* to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin."

— Section 212, Executive Order 11246, 1965,
as amended by Executive Order 11375, 1968

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noticeably closer to the overriding objective of providing all citizens with a truly equal opportunity to compete on merit for the benefits that our society has to offer. The use of race or sex in an effort to restructure society along lines that better represent someone's preconceived notions of how our limited educational and economic resources should be allocated among the many groups in our pluralistic society necessarily forecloses opportunities to those having the misfortune — solely by reason of gender or skin color — to be members of a group whose allotment has already been filled. Those so denied, such as the more senior white Memphis firefighters laid off to achieve a

more perfect racial balance in the fire department, are discriminated against every bit as much as the black Memphis firefighters originally excluded from employment. In our zeal to eradicate discrimination from society, we must be ever vigilant not to allow considerations of race or sex to intrude upon the decisional processes of government. The simple fact remains that, in the words of Judge Rehnquist, wherever it occurs, and however explained, "no discrimination based on race [or sex] is benign. . . . no action disadvantaging a person because of color [or gender] is affirmative."

— Wm. Bradford Reynolds

II.

I take programs of preferential treatment to be ones that make relevant the race or sex of individuals in the sense that the fact that an applicant for admission, a job, or a promotion is nonwhite or female constitutes a relevant, although not a decisive, reason for preferring such an applicant over one who is white or male. Here I will consider only programs concerned with racial preferences, but I take what I have to say to be applicable to comparable programs where members of other ethnic or minority groups, or women, are concerned.

The positive case for such programs begins with the following claim, namely, that we are still living in a society in which a person's race is a socially significant and important category. To be black is to be at a disadvantage in terms of most of the measures of success or satisfaction — be they economic, vocational, political, or social. If this claim about the existing social reality of race is correct, then two further claims seem plausible. The first is that there is in place what can correctly be described as a system of racial oppression. It is one both in virtue of the systemic nature of the unequal and maldistributed array of social benefits, opportunities, and burdens, and in virtue of the way things are linked together so as to constitute an interlocking, mutually reinforcing system of social benefits, burdens, ideology, and the like, which, when tied to race as they are, make it a system of racial disadvantage and oppression. Second, even if the intentions and motivations of those occupying positions of relative power and opportunity are wholly benign and proper, it is likely that the system will perpetuate itself unless blacks come to occupy substantially more positions of power and authority within the major social institutions.

The case for programs of preferential treatment can thus be seen to rest upon the claim that they do succeed in introducing more blacks into these kinds of vocations, careers, and institutional positions than would have otherwise been present. The programs have worked and do work to produce, for example, black judges, lawyers, and business executives where few if any existed before. And changes of this sort in the racial composition of these institutions have mutually reinforcing consequences that play an important role in dismantling the existing system of racial disadvantage.

The main ground of principled opposition to such programs has to do with the charge that they are themselves substantially unjust. The first argument commonly raised against these programs is this: if it was wrong to take race into account when blacks were the objects of racial policies of exclusion, then it is wrong to take race into account when the objects of the policies differ only in their race. Intellectual consistency requires that what was a good reason then be a good reason now.

The right way to answer this objection is, I think, to agree that the practices of racial exclusion that were an integral part of the fabric of our culture, and which are still to some degree a part of it, were and are pernicious. Yet, one can grant this and also believe that the kinds of racial preferences and quotas that are a part of contemporary preferential treatment programs are commendable and right. There is no inconsistency involved in holding both views. A fundamental feature of programs that discriminated against blacks was that these programs were a part of a larger social universe in which power, authority, and goods were concentrated in the hands of white individuals. The complex system of racial oppression and superiority that was constituted by these institutions and the ideology that accompanied them severely and unjustifiably restricted the autonomy and happiness of members of the less favored category.

Whatever may be wrong with today's programs of preferential treatment, the evil, if any, is simply not the same. Blacks do not constitute the dominant social group. Programs that give a preference to blacks do not add to an already comparatively overabundant supply of resources and opportunities at the disposal of members of the dominant racial group in the way in which exclusionary practices of the past added to the already overabundant supply of resources and opportunities at the disposal of whites.

A related objection that fares no better has to do with the identification of what exactly was wrong with the system of racial discrimination in the South, or with what is wrong with any system of racial discrimination. One very common way to think about the essential wrongness of racial discrimination is to see it as consisting in the use of an irrelevant characteristic, namely race, to allocate social benefits and burdens.