

Affirmative Action and Fairness

I began by talking about four white men: David Duke, Brian Weber, William Bradford Reynolds, and George Bush.

David Duke has been much in the news of late. A former Klansman, a former leader of a white supremacist party, a purveyor of neo-Nazi literature, and now a representative in the state legislature, Duke took 40 percent of the vote in the 1990 senatorial primary in Louisiana—40 percent of the vote, 60 percent of the white vote. The main theme of his campaign: the injustice of affirmative action, the need for civil rights for whites. He tapped into something deep. He touched a nerve.

It is federal courts who for twenty years have created or sustained the various parts of affirmative action, including the occasional use of quotas. Why have they done this?

Brian Weber is also from Louisiana. In the 1970s he worked at a Kaiser Company chemical plant. That plant, like industry in general in the South, had a segregated work force. All of its black employees were relegated to a handful of unskilled jobs. There were none in the high-paying craft occupations. Moreover, given the company's rules and practices, little was likely to change. Kaiser hired craft workers by going outside the plant, using a regional labor market in which almost all workers trained in the crafts were white. The chemical workers' union and the company agreed to a plan to change things: the company would henceforth train its own craft workers instead of hiring from the outside, and it set up an on-the-job training program, admitting plant workers into the program from two lists—a white list and a black list. For every white worker admitted, one black worker would be admitted—until 30 percent of the craft workers at the plant were black. An explicit racial criterion. A quota.

In Brian Weber's eyes, this was unjustified reverse discrimination. He brought suit in federal court, and in 1979 the Supreme Court found in favor of the company.

There is a real irony in Weber's lawsuit. Weber himself was an unskilled worker at the plant. Had the company maintained its practice of going to outside markets for craft workers, Brian Weber would never

have risen very far within the plant. The new program meant that he now had a chance to advance himself; he only had to wait his turn. No matter. The racial preferences in the program touched a nerve. They weren't tolerable. They had to go.

Nor, for George Bush, is the mere threat of preferences in favor of blacks or women acceptable. In October 1990 he vetoed the new Civil Rights Act, which would have clarified certain standards of proof in civil rights lawsuits. His objection was that these standards of proof made it hard for firms to defend themselves against charges of discrimination. Consequently, some firms might be tempted to avoid discrimination charges by using quotas—giving racial or gender preferences to make sure their work forces had the right racial or gender profile. This possibility was enough to cause the president to reject the bill.

Why Quotas Are Anathema

What is it, though, that makes a program like Kaiser's intolerable? What makes the mere risk of preferences unacceptable? Why is the Q-word anathema? That question brings me to the last man I'll talk about, William Bradford Reynolds. Reynolds headed the Office of Civil Rights in the Department of Justice during the Reagan Administration, and was that administration's leading spokesman on affirmative action and against quotas.

The debate about preferential treatment, he said, is between those (like himself) who believe in *equality of opportunity* and those who believe in *equality of results*. Those who *oppose* preferential treatment believe in individual rights and a colorblind, genderblind society. Those who *support* quotas believe in group rights and dividing up social benefits by race and gender. That's the way Reynolds put it.

Putting the matter this way is politically effective for opponents of affirmative action. Individual rights, equality of opportunity, success through effort and merit, reward because of what you do, not who you are—these values are as American as apple pie. Opposing preferential treatment isn't opposing racial and gender justice; it's just opposing an alien philosophy, an un-American ideology.

There may well be people who support preferential treatment because they believe in equality of results

This article is adapted from a talk given to undergraduates at Ithaca College and Rider College, as part of debates on affirmative action in which the author was assigned the role of advocate.

for its own sake, because they believe in group rights, or because they want a society shaped around color and gender. But the federal judges of this country are certainly not among those people, and it is federal courts who for twenty years have created or sustained the various parts of affirmative action, including the occasional use of quotas and preferences. Why have they done this? By their own account, to *prevent* discrimination and *secure* equality of opportunity.

Reynolds says that using racial and sexual preferences to end discrimination is nonsense; the way to end discrimination is not to discriminate in reverse but simply to *stop discriminating*. Exactly—if we can. If we can stop discriminating. That's the rub. And that's the problem courts ran into.

Can't We Just Stop Discriminating?

It takes more than good will and good intentions not to discriminate. It takes capability as well, and that may be hard to come by. To see what I'm talking about, let's look back at a company like Kaiser after the Civil Rights Act of 1964 outlawed discrimination in employment. The company may have employed no blacks at all. The sign in the window said: "No blacks apply." Now, how does the company comply with the law and stop discriminating? It takes the sign out of the window and says, "If blacks apply and meet all requirements, we will hire them." And suppose it is sincere. Is that enough?

Look at how other aspects of company policy may work. Suppose the company only advertises its jobs by word of mouth. It posts job openings on the bulletin board and lets the grapevine do the rest. Then few blacks will ever hear of openings since all the workers

are white—a fact reflecting, of course, the company's past discrimination. A company policy not itself designed to keep blacks out nevertheless does exactly that. Or suppose that the company requires each applicant to provide a letter of recommendation from some current or former employee. All the current and former employees are white, so this policy, too, is going to exclude blacks. Taking the sign out of the window changes nothing at all.

This is what courts encountered when they began adjudicating civil rights cases in the 1960s. Because the system of discrimination had been so thorough and in place for so long, it was like the child's spinning top, which keeps on spinning even after you take your hand away. Ordinary business practices let a firm's prior discrimination keep reproducing itself—and that reproduction, whether intended or not, is *itself* discrimination. So concluded a unanimous Supreme Court in the landmark 1971 case *Griggs v. Duke Power Company*. In order to comply with the law, businesses must look at all parts of their operations—job classifications, work rules, seniority systems, physical organization, recruitment and retention policies, everything—and revise, where possible, those elements that reproduce past discrimination. That's the core idea of affirmative action, as it was born in the early 1970s from the experience of courts trying to assure non-discrimination and equal opportunity, and as extended through federal rules to all recipients of government contracts and funds.

Make a plan (these rules say) that establishes a system for monitoring your workplace and operations; that changes procedures and operations where you see they may have discriminatory impact; and that predicts



what your work force would look like were you successfully nondiscriminating, so you will have some measure of the success or failure of your efforts.

Those are the basic elements of affirmative action. They are surely reasonable. Even William Bradford Reynolds accepted most of this. Why is there ever a need for more? Why is there ever a need actually to impose racial or gender quotas? Or to risk their being adopted by firms?

It took federal law that mandated tearing up the sidewalks at nearly every intersection in this country to jar us into realizing that many of the problems people in wheelchairs faced lay in the fact that we had made a world that excluded them.

Because sometimes it takes strong measures for us to see how to do what it is needed to secure the reality of equal opportunity, not just its form. If we've built a whole world around discrimination, then many of the ways the world discriminates may not be visible to us even when we go looking. We may not be able to see all the ways our business practices exclude women and blacks from the workplace or detract from their performance there until the workplace is actually changed by having women and blacks in it. And one quick way of changing the composition of the workplace is through quotas.

Courts have sometimes—not often—resorted to quotas when they were convinced that an institution was simply not capable of identifying and changing all the features of its practices that discriminate. Often the quotas have been imposed on companies or municipal agencies whose own histories showed them completely unwilling to make anything but token changes. But sometimes they've been imposed where the sheer inertial weight of company culture and organization convinced the court that the company would never be able to find "qualified" minorities or women, no matter how hard it tried. The culture itself had to be changed by putting minorities and women in the roles from which they had been excluded.

Here is where the real issue lies. It is about the nature and sweep of discrimination. Do we think discrimination is a relatively *shallow* or a very *deep* phenomenon? Do we think discrimination is *transparent* or *opaque*? The answer need not be a flat yes or no. Perhaps in some places discrimination is shallow, in some places deep; in some circumstances transparent, in others opaque. If discrimination is shallow and transparent, then modest affirmative action should be enough to cure it: we look for, find, and eliminate practices that are

reproducing the effects of past discrimination. But if discrimination is deep and opaque, then we may not be able to find it even when we look, and more robust forms of affirmative action may be necessary. We may need rather sharp assistance to *see* the way our practices work to exclude and oppress. We may need to be shocked or shaken out of our old habits, to have our consciousness raised.

This, I think, is the heart of the controversy about affirmative action. The difference is not that some people want equal opportunity and some want equality of results, that some believe in individual rights and some believe in group entitlements. The difference is that some think discrimination is always transparent and shallow while others think it is—sometimes, at least, in some sectors or institutions—deep, enduring, and opaque.

The Land of the Giants

To drive home this point about the opacity of discrimination and how it can subvert good will and good intentions, I ask you to go through some experiments with me. Start with a simple fantasy. Imagine we were suddenly all transported to the land of the Giants. They would be puzzled and wonder what in the world to make of us; and in short order they would probably conclude that, though we were like them in many ways, still we were quite incapable, incompetent, *inferior* creatures—for although we have our charming side, we really can't manage to do well even the simplest tasks in Giant Land. We just don't measure up. Perhaps it's just our nature to be helpless, the Giants conclude. We must have been some unfortunate quirk in God's creation.

But we would know that the problem does not lie in us, it lies in the fact that everything in Giant Land is built to the scale of Giants. That world is built for Giants and of course we don't do well in that world—but give us back the world built for us and see what we can do! We can even outperform Giants!

What's my point? It's that the Giants see *their* world as *the* world. They just naturally measure us against it, so they see the problem to be in *us*.

This is just fantasy, you say, and besides, the Giants wouldn't have been so dense. If you think not, then turn to a second example—a real one.

Twenty-five years ago, we tended to think that people in wheelchairs couldn't do much. It was a shame they were in wheelchairs—it wasn't their fault—but it meant that they were incapable of doing what most of the rest of us did. They were very limited in their mobility, thus not qualified for most jobs. And so they were excluded. Left out. Omitted.

Why did we think that? Not because we disliked people in wheelchairs. It was because, when they had trouble performing operations we do easily, we naturally attributed the trouble to *them*—to *their* condition—because we just took the world as it was for granted. And how was that world? It was a world of *curbs*. Curbs everywhere.

Now, curbs are not supplied by nature. The world of curbs was made—made by and for us, the walking, running, jumping types. It took federal law that mandated tearing up the sidewalks at nearly every intersection in this country to jar us into realizing that many of the problems people in wheelchairs faced lay not in them but in the fact that *we* had *made* a world that excluded them, and then, like the Giants, had assumed *that* world was *the* world.

Unavoidable Unfairness

The world of Giants—the world of curbs—the world of whites and men: imagine, if you will, a world built over a long time by and for men, by and for whites. In that world there would be a thousand and one impediments to women and blacks working effectively and successfully. That world and its institutions would be suffused through and through with inhospitality to blacks and women—just as Giant Land was inhospitable to us little people, and Curb World was inhospitable to wheelchair people. Imagine that world—or do we have to imagine it? That's the world we still live in, isn't it?

Isn't it plausible that strong measures may be needed to change it? Are those strong measures, if they in-

volve racial or gender preferences, unfair to white men? Of course they are. Well, doesn't that settle the matter? It would if we could always be fair without sometimes being unfair. Does that sound puzzling?

Think a moment. What are our options? Consider the civil rights bill George Bush vetoed, and threatens to veto again. If we set high burdens of proof on businesses, some of them may resort to quotas—and that's unfair discrimination. But if we don't set high standards, some businesses won't make the necessary effort to change practices that still hinder blacks and women—and *that's* unfair discrimination. Sometimes we may be faced *only* with the choice of risking unfairness in one direction or risking it in another. Sometimes we may have no choice except to impose one unfairness or allow another to persist. Then what do we do?

President Bush vetoed the civil rights bill because it created the risk of quotas. Does he believe, then, that vetoing it creates no risks that some blacks and women will continue to be discriminated against, or is the unspoken premise this: that the risk of victimization is tolerable if the victims are not white men?

—Robert K. Fullinwider

Protecting Children, Born and Unborn

If the courts speak for the American people, then the American people must be deeply ambivalent about children. Granted, some of the ambivalence might stem from metaphysical uncertainty. After all, when courts are expected to rule on everything from actual children, to the potential children that are fetuses, to the potentially potential children that are spermatozoa or unfertilized eggs, it's natural to flounder. But even with regard to a single metaphysical category, such as potential children, we seem to be inconsistent. And so, one suspects, the inconsistency comes less from metaphysical floundering than from moral conflict—from a conflict of values that reflects, among other things, the mixed feelings and incompatible beliefs we have about children.

Take, for example, the recent Supreme Court decision in *Automobile Workers v. Johnson Controls*. Johnson Controls, a battery manufacturer, had barred all women except those with medical proof of infertility from jobs that exposed them to high levels of lead. The stated reason for the ban was benign: the company wanted to protect the future children of its employees.

The UAW filed suit, claiming sex discrimination under Title VII of the Civil Rights Act, and the Supreme Court ruled in favor of the union. "The bias in Johnson Controls' policy is obvious," said Justice Blackmun, delivering the opinion of the Court. "Fertile men, but not fertile women, are given a choice as to whether

