

Third Thursday Briefing

The crucial issues on the public agenda involve more than the choice between alternative policies. They involve disagreements over the very terms in which problems are formulated. As a stimulus to thoughtful debate on public policy choices, the Center for Philosophy and Public Policy and the School of Public Affairs at the University of Maryland cosponsor a series of monthly Third Thursday Briefings on topics of current concern. These briefings, held on Capitol Hill from February to June, bring together academic theorists and policymakers to discuss the ethical or conceptual foundations as well as the policy implications of central policy decisions. From time to time, QQ will feature highlights from these briefings.

Two Cheers for Quotas—And a Resounding Boo

The February Third Thursday Briefing took as its topic "Two Cheers for Quotas: The Moral Basis of Affirmative Action." Robert K. Fullinwider, Associate Director of the Center for Philosophy and Public Policy, argued against an inviolable right to equal opportunity that would rule out programs of preferential affirmative action. He concluded that affirmative action should be judged primarily in terms of its progress toward furthering urgent social goals. "Quotas and preferences are not invariably ruled out by a principle of equal opportunity: they must stand or fall on their success or failure at producing desirable results at acceptable costs. Quotas can force speedy integration of blacks and women into roles, positions, and occupations from which they have been previously excluded, and they can do this sometimes at acceptable levels of cost. Thus, sometimes they are fully justified."

In what follows, Charles Cooper, Special Assistant to the Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, delivers his response.

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In *Brown v. Board of Education* the Supreme Court ended the 58-year reign of the shameful "separate but equal" doctrine, acknowledging with eloquent simplicity the primacy of the constitutional right at issue: "At stake," said a unanimous Court, "is the personal interest of the plaintiffs in admission to public schools . . . on a nondiscriminatory basis." *Brown* spurred a judicial and legislative quest to condemn racial discrimination, both public and private, in virtually every aspect of American life. Until recently, courts since *Brown* have consistently denounced distinctions based on race as being, in Chief Justice Stone's words, "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Congress has likewise made clear its abhorrence of racial discrimination,

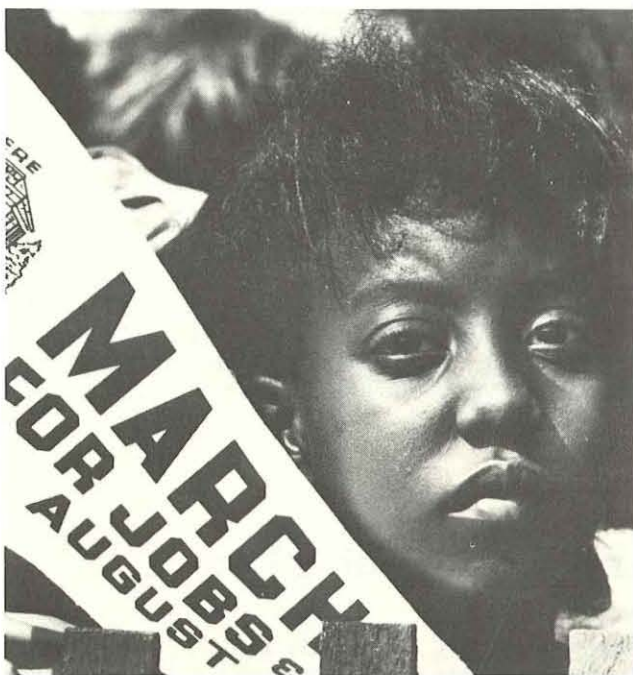
enacting the Civil Rights Acts of 1957, 1960 and 1964, the Voting Rights Act of 1965, and the Civil Rights Act of 1968, to name just a few of the milestones in this area. I submit that these judicial and legislative pronouncements express a national consensus that racial discrimination is wrong—morally repugnant—and ought not to be tolerated in any form.

Professor Fullinwider, however, argues that distinctions based on race—indeed, racial quotas—are not ruled out on moral principle. I think this argument retreats from the high ground staked out, at long last, by the Supreme Court in the *Brown* case. I think that distinctions based on race, including racial quotas, are ruled out on grounds of moral principle and that the contrary argument put here today is flawed in that it fails correctly to identify the moral principle with which racial quotas are irreconcilably inconsistent.

It is true that selection of a less qualified applicant because of race or gender violates a right belonging to the better qualified applicant. The right violated, however, is not, as Professor Fullinwider suggests, the right to be selected on the basis of merit. As he observes, there is no such right. Rather, the right violated by racial preferences is the right not to be rejected on the basis of race.

When I say that there is no right to be selected on the basis of merit, I mean that there is no law—constitutional or statutory—prohibiting an employer from selecting a less qualified candidate over a better qualified candidate. This is not to say, of course, that there is no principle commending merit selection. Clearly there is. An important element of the American ethos is an expectation that hard work will be followed by success and reward—that we can better ourselves by making ourselves better.

Professor Fullinwider argues that the merit selection principle is defeated by veterans' preferences as surely as it is by racial preferences, and that few people find veterans' preferences morally offensive. True. And the



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"I woke up this morning with my mind set on freedom"

merit selection principle is also sometimes thwarted by the idiosyncrasies of the particular employer, or by a simple mistake in assessing the qualifications of individual candidates. When the merit selection principle is defeated, it is unfortunate, wrong, and unfair, but it is not a denial of rights.

There is, however, a personal right not to be rejected or otherwise discriminated against on the basis of race. And this right suggests a strong moral principle: namely, that it is always wrong—indeed, it is odious—to distinguish among persons on the basis of race. That the nondiscrimination principle and the merit selection principle are both defeated by employment and admissions quotas is coincidental. The two principles are not coextensive; the nondiscrimination principle is vastly broader as is demonstrated by the host of constitutional and statutory prohibitions on types of racial discrimination having nothing whatever to do with individual industry and ability.

For example, the Fifteenth Amendment prohibits denying the right to vote on account of race, but not because such a denial would violate the merit selection principle. Unlike the areas of employment and admission to educational opportunities, participation in the democratic process is not regulated through a competition of qualifications. Indeed, as previously noted, the principle at stake, and vindicated, in *Brown* was admission of children to public schools on a racially nondiscriminatory basis. Individual qualifications and merit were wholly beside the point in that case.

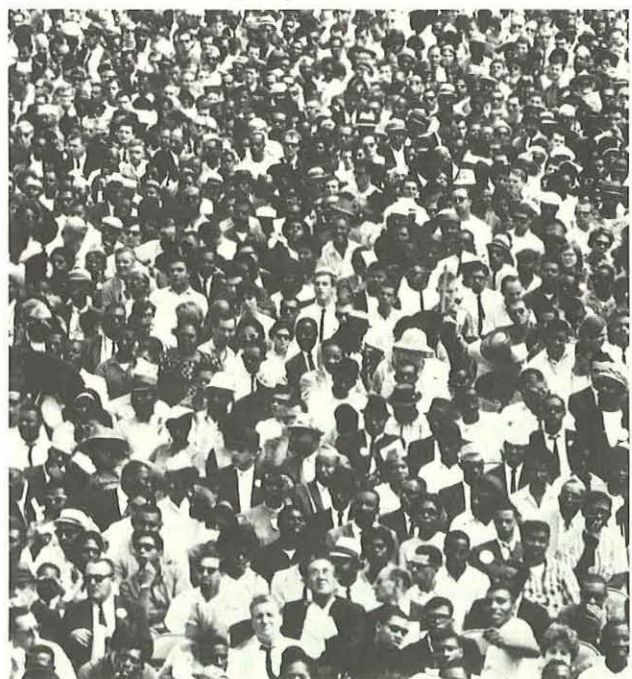
It is true that racial quotas in employment violate the principle of merit selection, and in a nation in which men and women rightfully expect success to flow from

talent and hard work, this is something we should rarely do. But racial quotas also violate a larger principle—the principle of non-discrimination—and in a nation dedicated to racial equality, this is something we should never do. For to do so is to deny the moral imperative underlying our national commitment to racial justice.

Professor Fullinwider's defense of quotas urges us to train our sights not on the trees, but on the forest. He argues that the objectionable aspect of preferences, their unfairness to individuals, is overcome if they serve some societal goal of major national importance. The goal suggested in defense of preference schemes is "speeding up integration," which will in turn dispel stereotypical perceptions and "prime the pump" for further upward and lateral progress by disadvantaged minorities.

Saying that integration is America's goal in the area of race relations is on the order of saying that acquisition of a trophy is the goal of the teams in the Superbowl. It confuses the goal with its reward. Obviously, the goal of the contestants in the Superbowl is to win, and a trophy is their reward. Similarly, our national goal in the matter of race is to make it irrelevant. Almost twenty years ago, Dr. Martin Luther King dreamed aloud of a nation in which his children would "not be judged by the color of their skin, but by the content of their character." This is, I submit, the nation's goal, and integration will reward achievement of that goal. So too will follow the subsidiary rewards such as the explosion of stereotypical perceptions and accelerated upward and lateral progress of minorities. But we must not allow our impatience to reap the rewards of realizing the goal of the non-discrimination principle to lead us to deny and to sacrifice the principle itself.

March on Washington for Jobs and Freedom, 1963



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