

Report from the Institute for

ISSN
1067-2478

Volume 17

Number 1 and 2

PHILOSOPHY & PUBLIC POLICY

Special
Issue

Winter/Spring

1997

School of Public Affairs • University of Maryland
College Park, Maryland 20742 • 301-405-4753
<http://www.puaf.umd.edu/ippp>

THE AFFIRMATIVE ACTION DEBATE

For more than a quarter century, controversy about affirmative action has tormented American politics. It still arouses intense passions, spawns litigation, and frustrates public dialogue. Some commentators explain the fierceness of the debate by noting the conflicting interests of groups competing for a limited number of coveted jobs and educational opportunities. Others point to the symbolic importance that affirmative action has assumed for each side in the debate.

"Proponents regard the continuation of affirmative action as a litmus test of our nation's commitment to racial justice," Glenn Loury has written. "Opponents see it as an unacceptable violation of the ideal of equality of opportunity, and the principle that government should treat its citizens in a color-blind fashion." Both these ways of framing the issue, Loury suggests, are "mired in confusion." And both have at times preempted a broader discussion of strategies to address the problem of racial inequality.

A variety of rationales has been put forward to justify affirmative action programs. The single most important, writes Robert K. Fullinwider in an essay for this special *Report*, grew out of a recognition that abolishing facially discriminatory policies would leave in place a complex of long-established attitudes and informal practices that were likely to thwart rapid progress toward equal opportunity. In the years following the passage of the Civil Rights Act of 1964, this recognition gave rise to a new legal concept of discrim-

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ination, and provided a limited justification for racial preferences in hiring and admissions.

William A. Galston, in his "status report" on affirmative action, looks at how the resulting policies have affected a range of institutions, from the military to public universities. He also analyzes the judicial and political constraints that have recently been placed on preferential programs, and suggests alternative strategies for promoting equal opportunity as certain forms of affirmative action are dismantled.

Opponents of affirmative action have long argued that color-conscious selection procedures can only undermine meritocratic standards. In their essay for this issue, Judith Lichtenberg and David Luban consider the role that merit plays in modern economic life, and the role that it ought to play. Without accepting the view that judgments of merit are merely subjective, they identify imperfections in the usual processes by which institutions define and detect it. They explore the fate of the merit principle in a "winner-take-all" society. And they argue that a just society, in its allocation of posts and rewards, would make considered trade-offs between merit and other important values.

In recent years, many employers and university officials have placed the idea of diversity, rather than the moral imperative of antidiscrimination, at the center of their arguments for affirmative action. For some, achieving greater diversity is a way of enabling organizations such as police departments, colleges, and corporations to perform their missions better. For others, diversity is a good to be promoted in the service of

ideals such as community solidarity and integration. In his second essay, Robert Fullinwider examines a standard argument for diversity in higher education, and assesses its adequacy as a justification for affirmative action in admissions and faculty recruitment. David Wasserman, in his essay on diversity and stereotyping, addresses some of the more stringent objections to the pursuit of institutional diversity. Finally, Owen M. Fiss argues that the only sustainable basis for affirmative action is a commitment to dismantling the "caste structure" of American society; the diversity rationale, he writes, seems "shallow" when compared with appeals to distributive justice.

Some of the contributors to this special *Report* engage their colleagues' arguments directly, while in other cases areas of agreement or dissension are implicit. Against Owen Fiss's call for a "transcendent" commitment to social justice, one might set William Galston's reminder that some means to an acknowledged good may be "effective but nonetheless unacceptable." Robert Fullinwider's analysis of discrimination as a "de-moralized concept" converges with Judith Lichtenberg and David Luban's account of institutional racism: "the view that discrimination does not always disappear when personal bias does." Like the two papers on diversity, the essay on merit addresses important questions of stereotyping and group identity. By exploring basic issues of law, social policy, and institutional practice, this *Report*, we hope, will bring some clarity to what has often been a misguided and bitter debate.

An Affirmative Action Status Report: Evidence and Options

An ideal introduction to the affirmative action debate would supply nothing less than a crash course in the history, law, sociology, economics, and politics of the issue. My ambitions in this essay are somewhat more modest. Without masquerading as an expert, I have tried to summarize the basic facts as I understand them, put forward some illustrative case studies, and identify contentious areas of principle and policy. I also offer an inventory of options that have emerged for changing affirmative action programs. My purpose is to stimulate productive discussion by sketching a map of the terrain, not to announce and defend a particular position.

Definitions

"Affirmative action" means many different things. Among them: outreach to broaden the pool of eligible individuals to include more members of specific groups; targeted or compensatory training to upgrade the qualifications of individuals in these groups; goals and timetables to measure progress; preferences; set-asides; and actual quotas. Affirmative action programs have arisen as a result of executive orders, legislation, consent decrees stemming from government investigations, court-ordered remedies, and voluntary action by corporations and other non-public institutions.

The distinction between government-mandated and voluntary programs is important: for the most part, court decisions restricting public programs on constitutional grounds do not directly affect voluntary programs in the private sector. Some scholars

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argue that retrenchment in public programs could nonetheless lead to private-sector retreat. "Without government enforcement," writes sociologist Alan Wolfe, "some private companies may indeed drop their enthusiasm for diversity and retreat to 'birds of a feather' hiring policies." On the other hand, Wolfe notes that support for affirmative action is unexpectedly strong among leading American corporations, and he expects them to go on practicing it for the same reasons they do now: "out of pragmatism, trying to meet particular corporate objectives."

Measuring Results

Evidence on the effects of affirmative action efforts is frequently imperfect and ambiguous. For example, while programs addressing employment and government contracting have had modestly positive effects in the aggregate, their role is frequently difficult to disentangle from other antidiscrimination or opportunity-creating efforts. The Clinton administration, in its review of governmental affirmative action policies, found that active federal enforcement during the 1970s "caused government contractors to increase moderately their hiring of minority workers. According to one study, for example, the employment share of black males in contractor firms increased from 5.8 percent in 1974 to 6.7 percent in 1980. In non-contractor firms, the black male share increased more modestly, from 5.3 percent to 5.9 percent."

A significant number of the 1.3 million black government employees owe their jobs (or promotions to managerial rank) to affirmative action. Corporate affirmative programs (some voluntary, others reflecting consent decrees in response to government pressure) have opened up managerial ranks, though not yet the very top echelons, to minorities and women.

Any assessment of the expansion of employment opportunities over the past three decades must take into account, in Jerome Karabel's words, "how exclusionary many labor markets were in 1965 not only in high-status professions such as law, medicine, and academe but also in strategic working-class domains such as construction unions and police and fire depart-

ments." Karabel notes that while increased minority representation in the professions is widely recognized, "the record in certain blue-collar jobs is just as impressive. For example, between 1970 and 1990, the number of black electricians more than tripled (from 14,145 to 43,276) and the number of black police officers increased almost as rapidly (from 23,796 to 63,855)." A significant portion of these gains is attributable to affirmative action plans applicable to unions and local governments. Aggregate gains in employment and promotion for women and minorities have continued during the past decade, considered by some to have been a period of diminished attention to equity.

Effects on wages appear to have been modest. According to a benchmark report by James Smith and Finis Welch, "the racial wage gap narrowed as rapidly in the 20 years prior to 1960 (and before affirmative

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action) as during the 20 years afterward." The report argues that "slowly evolving historical forces," such as education and migration, "were the primary determinants of the long-term black economic improvement. At best, affirmative action has marginally altered black wage gains about this long-term trend."

Aggregate effects on higher education enrollments appear to have been larger. In 1955, only 4.9 percent of college students ages 18-24 were black. This figure rose to 6.5 percent during the next five years, but by 1965 had slumped back to 4.9 percent. Only in the wake of affirmative action measures in the late 1960s and early 1970s did the percentage of black college students begin to climb steadily: to 7.8 percent in 1970, 9.1 percent in 1980, and 11.3 percent in 1990. Educational gains for Hispanics have been less impressive. According to a recent report based on Census Bureau statistics, Hispanics holding bachelor's or advanced degrees rose from 5 percent of the Hispanic population in 1970 to 9 percent in 1994. (These figures exclude recent immigrants.) By contrast, blacks holding bachelor's or advanced degrees rose from 4.5 percent of the black population to 12.9 percent during the same period.

Overall, the past three decades have witnessed huge growth in the black middle class, educational attainment, incomes of black married couples relative to white married couples, and suburbanization, along with a substantial decline in overall black poverty rates. These gains are attributable to a complex of causes: national economic growth, a decline in dis-

criminatory attitudes and practices by whites, and programs—including affirmative action—targeted to African-Americans. While we can sometimes trace the quantitative impact of single causes within particular economic or educational organizations, it is far more difficult to ascertain the relative contribution of each factor to the aggregate gains of recent decades.

In conjunction with other broad economic and social trends, these positive changes have led to what Seymour Martin Lipset has characterized as “growing differentiation” within the black community. On one side, there is now a burgeoning black middle class; on the other, there are the ghetto poor, economically and

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socially isolated from the rest of society. These poor people belong primarily to two groups: single mothers and their minor children, and young men who have dropped out of both high school and the labor force.

As numerous scholars have argued, affirmative action programs have not had significant positive consequences for the bulk of the ghetto poor; nor are they likely to. The reason is straightforward: these programs work most effectively when they remove barriers to opportunity for those who possess the credentials to succeed or who are strongly motivated to acquire them within established norms and institutions.

Two Case Studies

To understand how affirmative action works in practice (and some of the reactions, positive and negative, that it evokes), it may prove useful to look briefly at two important institutions that have undergone fundamental changes during the past generation.

The U.S. Military. The armed forces were almost completely segregated until President Truman’s famous 1948 order. While the number of uniformed minorities and women rose during the next quarter century, racial tensions intensified sharply during the Vietnam era.

In response, the services implemented affirmative action plans in the 1970s. The President’s review confirmed what many observers had concluded: these plans have succeeded in expanding representation of minorities and women, especially as officers, while improving race relations, promoting integration, and enhancing overall combat readiness. The noted military sociologist Charles Moskos has characterized the Army as “the only institution in America in which whites are routinely bossed around by blacks.”

How has the military achieved these results? Many analysts have emphasized its special institutional characteristics as a highly closed, controlled, hierarchical, disciplined system with the ability to establish, and attain compliance with, organization goals. In addition, some specific features of military affirmative action efforts have contributed to their success.

- The pool of applicants accepted for military service is highly selective. A very high-ranking military officer told me that “it’s harder to get into the All-Volunteer Forces than into most colleges.” Further contributing to quality is the fact that the military has become the career of choice for many African-Americans.
- Military affirmative action plans do employ goals: promotion of minorities and women within the eligible pool is to occur in the same percentages as over-all promotions from that pool. But in many cases the goals are not linked to timetables. In addition, the goals serve as presumptions, not mandates; promotion boards that fail to meet them are deemed to have done their job correctly if they can demonstrate due diligence.
- All candidates for promotion are placed in a common pool and are subject to the same standards. Race can serve as a factor, but only when other differences are very small. As one officer put it, “Only fully qualified people are promoted, but not necessarily the best qualified. But don’t forget, we are talking micro-millimeter differences in these cases.”
- The armed forces engage in constant training, including compensatory training, before as well as after admission to the All-Volunteer Forces, to enable the highest possible percentage of individuals to meet high standards. While outreach efforts are not racially exclusive, some are “race-conscious.” New recruits who are diagnosed as having particular weak spots are given numerous opportunities to remedy them.

The University of California System. At the time of the famous Free Speech Movement in the early 1960s, the University of California System was virtually all white; this was particularly true of elite institutions such as Berkeley and UCLA. As late as 1984, whites constituted 70 percent of all students in the System. Today, that figure is 49 percent.

Since 1964, admission to the University of California has been governed by a legislatively crafted “Master Plan.” To be eligible for admission through the regular process, students must be in the top one-eighth of their high school graduating classes, take challenging courses, and do reasonably well on their SATs. From this pool, about half of each entering class is selected strictly on the basis of an “academic eligibility score”—a weighted sum of grades and SATs. Roughly 45 percent are selected from the eligible pool on the basis of additional factors such as race and ethnicity. Five percent enter

through a "special admit" category outside the normal eligible pool. Eighteen percent of African-American first-year students are in this last category; the other 82 percent are in one of the first two.

There has been a vigorous empirical debate about the academic effects of these policies. On one side, Karen Paget emphasizes that most of the students admitted to Berkeley under the Master Plan continue to be drawn from the top 12.5 percent of high school graduates. This fact, she writes, contradicts "the common but erroneous assumption that minority students have been admitted from 'below the line' or outside the eligibility pool." On the other side, there is evidence of substantial disparities in academic preparedness among students from different racial and ethnic groups. For the entering class at Berkeley in 1994, the mean grade-point averages were 3.43 for blacks, 3.65 for Hispanics, 3.86 for whites, and 3.95 for Asians. Among these same freshmen, the mean SAT scores were 994 for blacks, 1032 for Hispanics, 1256 for whites, and 1293 for Asians. (Let it be noted that the gap in average SAT scores for blacks and whites at Berkeley—262 points—is wider than the nationwide gap between the two groups.)

The picture becomes more complex when we look at

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admission and graduation rates for different categories of students. Let me turn again to statistics provided by Jerome Karabel, one of the authors and staunchest defenders of the Berkeley affirmative action program.

Under the Berkeley plan, the odds of a black or Hispanic being admitted from the eligible pool are roughly three times as high as for whites or Asians, but their chances of graduating are about one-third lower. In 1988, for example, 75 percent of black applicants, and 85 percent of Hispanic applicants, were admitted, as opposed to 28 percent of white applicants and 25 percent of Asians. After five years, graduation rates for this class were 37.5 percent for blacks, 43.5 percent for Hispanics, 71.5 percent for whites, and 67.3 percent for Asians. After six years, the graduation rates rose to 51 percent for blacks, 53 percent for Hispanics, 77 percent for whites, and 75 percent for Asians.

Critics of affirmative action often assume a direct link between the statistical disparities among average GPAs and SATs and the lower graduation rates of black and Hispanic students. Abigail Thernstrom, speaking last fall at a conference at Yale University, cited "the racial gap in cognitive skills" as the cause of

low minority retention rates, and argued that "we did these students no favor" by granting them preferences in the admissions process. In contrast, Paget cites studies showing that the reasons for lower graduation rates among minority students are "many and varied," including "personal or family financial problems." Karabel has documented black and Hispanic students' "comparative lack of financial resources" through detailed income comparisons; more recent studies, indicating striking differences in financial *assets* between whites and blacks, could be adduced as well. In Karabel's view, the fact that graduation rates for blacks and Hispanics "look significantly better after six rather than five years" lends support to economic factors as a "part" of the explanation.

However the statistics are interpreted, they cannot answer the policy question of whether the lower graduation rates for black and Hispanic students represent a reasonable trade-off against the gains in educational opportunity for large numbers of minority group members. Nor do the admissions figures answer the question of whether the costs imposed on non-minorities by the Berkeley plan are diffuse enough (see the *Wygant* case below) to pass moral muster. Clearly, however, affirmative action in the University of California System has failed to pass political muster. On July 21, 1995, by a vote of 14 to 10, the University of California's Board of Regents rejected the use of race, sex, religion, color, or national origin as factors influ-

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"The Affirmative Action Debate"
*Report from the Institute
for Philosophy and Public Policy*

**Special Issue
Winter/Spring 1997**

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encing admission. In place of these factors, the Regents were required to adopt supplemental criteria based on evidence of social disadvantage.

Public Attitudes

Popular support for the full range of current affirmative action programs has slipped significantly in recent years and is now very limited. For example, a July 1995 CNN/USA Today poll gave respondents three options on affirmative action: "basically fine the way it is"; "good in principle but needs to be reformed"; and "fundamentally flawed and needs to be eliminated." Sixty-one percent chose the reform option; 22 percent opted for elimination; only 8 percent favored the status quo.

Not surprisingly, there is a significant racial split, with only 11 percent of African-Americans in favor of outright abolition (versus 24 percent of whites). Nonetheless, only 15 percent of blacks support the status quo, and 23 percent believe that on balance affirmative action has been bad for the country. Many other recent polls point in the same direction.

Last November California voters approved Proposition 209, a measure outlawing racial preferences in the operation of public employment, education, and contracting, by 55 to 45 percent. Sixty percent of white voters—including 57 percent of white women—supported the initiative, while 74 percent of blacks and 70 percent of Latinos opposed it. A Field Poll found that even among those who voted against Proposition 209, "50 percent said they believe affirmative action should be relaxed or eliminated." At the same time, the poll found that 8 in 10 voters "recognize discrimination is still common in society today."

At least a dozen other states are considering measures similar to Proposition 209, either through legislation or ballot initiatives.

Points of Contention

Means and Ends. Among the means typically employed in affirmative action programs, enhanced outreach and targeted training enjoy widespread support, while quotas and set-asides are widely regarded as unacceptable. The ongoing debate is about preferences, goals, and timetables. One portion of this debate is empirical: do certain policies in fact work effectively to fight discrimination and promote equal opportunity? Another portion is moral: regardless of their efficacy, are the policies in question acceptable as means to the end in view?

Unless we are prepared to endorse the proposition that means are fully justified by ends, we must be prepared for the possibility that some means are effective

Beyond the Current System: Policy Proposals

- Alter current federal programs to conform with *Adarand*, *Podberesky*, and *Hopwood*. This would require the elimination of quotas, set-asides, racially exclusive programs, and programs with pure diversity rationales. A range of preference programs (the limits of which are hard to establish a priori) would probably survive this test.
- Apply the "Wygant test" across the board, by screening out programs where the burdens of racial and ethnic classifications are excessively focused on specific non-beneficiaries. This would mean, at a minimum, prohibiting race-conscious firings or reductions-in-force.
- Restrict affirmative action programs to "opportunity-enhancing assistance." Under this option, efforts such as race-conscious outreach and recruiting, compensatory education and training before and after recruitment, technical assistance, and mentoring would continue, while racial and ethnic preferences would be discontinued along with quotas and set-asides.
- Use class as either a substitute for, or supplement to, race and ethnicity. There is a spirited debate about the technical feasibility and social advantages of this course. But the intuition at its core—that class disadvantage restricts the ability of many young people to attain equal formal credentials and qualifications for employment and higher education—deserves careful consideration.
- Return to the original understanding of affirmative action as transitional rather than permanent. One version of this option would be to establish fixed phase-out or termination dates for affirmative action programs. Another version would establish time limits and mandatory public review prior to possible reauthorization of these programs.
- Distinguish between social goods that are more like opportunities (e.g., higher education) and those that are more like results (e.g., government contracts). Under this approach, the more controversial affirmative action tools such as preferences would be reserved for opportunity-goods.

- Reexamine and revise standards of merit. Social goods such as higher education and entry-level jobs are not primarily rewards for past achievement. In these areas, standards of merit should be defined relative to the capacity for high-quality future performance. It is not necessarily "preferential" treatment for universities to be open to the possibility that a young person from public housing with SATs of 1000 may have demonstrated as much potential for success as has a suburbanite with a score of 1300.
- Use the successful experience of the U.S. military as a structural model. One possibility would be to create the equivalent of the military experience for large numbers of young people through a broad-based national service program. (Before their departure from Congress, Senator Sam Nunn and Representative Dave McCurdy suggested that various economic and educational opportunities could be tied to this service—a civilian equivalent of the GI Bill.)

We might also ask: How would institutions such as UC Berkeley have to alter or augment their affirmative action programs to conform more closely to the military model? A first step would be to offer pre-acceptance preparatory academies for ambitious young people who emerge from high schools without adequate credentials for eligibility. Second, race and ethnicity could serve as factors in admission, but only within an otherwise narrow range of differences among candidates. (Recall that in the military, everyone who receives a promotion is not just qualified, but fully qualified.) Third, there would be early diagnostic testing and careful monitoring of all students for early warning signs of failure. Voluntary and (when necessary) mandatory compensatory programs would be offered to maximize every student's chances of success, strictly defined as competent performance and timely graduation.

- Get far more serious about nondiscrimination. A recent report indicates that the number of job discrimination cases and complaints has soared in the 1990s. Agencies with enforcement responsibilities have been unable to keep up; the average caseload for investigators with the Equal Employment Opportunity Commission has nearly

tripled, and the number of unresolved cases has grown by 71 percent—to a total of almost 194,000.

A fundamental objective of affirmative action programs has been to serve as counterweights to continuing discrimination. But the struggle against discrimination should also be aggressively pursued by other means. These include beefing up the EEOC and other agencies; supplementing case-by-case litigation with audit-based strategies along the lines of the Urban Institute demonstrations; and significantly increasing penalties for discrimination.

- Get far more serious about equal opportunity. The full equal opportunity agenda is tremendously challenging. It includes items such as: parenting education, child care, and Head Start; fundamental reform of public education; increased emphasis on job search and job linkage; preparatory academies; an assured system of finance for college loans and advanced technical training; strategies to promote entrepreneurship and home ownership and to assure a fair flow of capital to all individuals and communities; and broad-gauge community development efforts through empowerment zones, community-based financial institutions, and location incentives for businesses and middle-class families.

A new equal opportunity agenda might also include steps to strengthen the institutions of civil society in minority communities. For example, Paul Starr has suggested creating a new National Endowment for Black America that could "receive capital contributions for a variety of social and cultural organizations and foster both nonprofit and business entrepreneurship."

—William A. Galston

Sources: Will Marshall, "From Preferences to Empowerment: A New Bargain on Affirmative Action" (Progressive Policy Institute, 1995); *USA Today* (August 15, 1995); Paul Starr, "Rebuilding Black Institutions," *New Democrat* (May/June 1995).

but nonetheless unacceptable. Consider Justice Powell's opinion in the *Wygant* case, distinguishing between race-conscious hiring goals and race-based layoffs. "In cases involving valid hiring goals," Powell observed,

the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.

Layoffs, Powell continued, "impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive." Thus, he concluded, the "selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause."

I would draw an analogy from the world of criminal justice: it might well be the case that we could enhance arrest and conviction rates by significantly expanding the scope of warrantless searches, but our willingness to move in this direction is constrained by our commitment to individual liberty.

From transitional to permanent. The understanding at the outset was that affirmative action programs would

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be temporary and transitional, pointing toward a future in which only the relevant talents and accomplishments of individuals would be taken into account. (When the *Bakke* case was decided in 1978, most of the justices who favored affirmative action in higher education believed that it would be necessary and justified for a single generation at most.)

One element of this understanding was that the rapid expansion of the black middle class would reduce or eliminate the need for affirmative action for their children. For reasons that are poorly understood, this has not come to pass. As Glenn Loury notes, "In 1990 black high school seniors from families with annual incomes of \$70,000 or more scored an average of 854 on the SAT, compared with average scores of 855 and 879 respectively for Asian-American and white seniors whose families had incomes between \$10,000 and \$20,000 per year."

Democratic authorization. The majority of federal affirmative action programs were put in place through executive order, regulation, or the courts rather than legislative action. Many people feel that these programs were somehow imposed without their advice

and review, let alone consent. In a democracy, no course of action can be indefinitely sustained unless it rests on a solid foundation of public understanding and acceptance.

The Legal Status of Affirmative Action

Recent Supreme Court decisions (especially *Adarand v. Peña*) will have the effect of significantly reducing the scope of acceptable federal government affirmative action programs. In that case, the Court applied to federal actions the standard already binding on states and localities: programs must serve a "compelling" interest and must be "narrowly tailored." An analysis by discrimination law expert Paul Gewirtz reaches the following conclusions:

- Objectives such as enhancing "diversity" and "inclusion" or addressing general "societal discrimination" do not qualify as compelling.
- A specific showing of particular discrimination, going beyond simple statistical disparities among racial and ethnic groups, must be made.
- Even when a compelling interest is found, race-based methods may be used only after race-neutral methods are considered and found wanting, only to the extent needed to remedy the identified discrimination, only when the plaintiffs seeking a racial preference have themselves suffered from past discrimination, and only if undue burdens on non-beneficiaries (such as layoffs) are avoided.

There are, in addition, legal developments in the application of constitutional law to the states. In 1994, the Fourth U.S. Circuit Court of Appeals struck down a University of Maryland scholarship program restricted to African-American students (*Podberesky v. Kirwan*). Last year, the Fifth Circuit rejected an admissions procedure at the University of Texas Law School that divided applicants into two groups—first, blacks and Mexican-Americans, and second, all others—and then applied different admissions cut-offs to the two groups. The Court held that the law school's interest in diversity did not constitute a "compelling state interest" and that the school could not take race into account in any form in its admissions process (*Hopwood v. Texas*). The Supreme Court let both decisions stand without further review. While as a matter of law other states are not absolutely debarred from continuing race-restricted scholarships or preferential admissions policies, the scholarly consensus is that these programs are unlikely to survive all but certain legal challenge.

Ineradicable Tensions

Recent developments in constitutional law, public opinion, and the political arena have made significant changes in existing affirmative action programs all but

inevitable. This does not necessarily mean abandoning the goals of antidiscrimination and equal opportunity. A case could be made that we have asked affirmative action programs to bear too much practical and symbolic weight—that we have neglected other ways of fighting discrimination, and relied excessively on affirmative action at the expense of a broader equal opportunity agenda. (Indeed, some critics have charged that the latter represents a deliberate strategy of “equal opportunity on the cheap.”)

Still, we must acknowledge that there are permanent impediments to realizing the dream of equal opportunity—limitations not just of resources and will, but stemming also from values deeply rooted in the ethos of liberal democracy. Achieving fully equal opportunity would require equalizing all factors that affect the development of talents. As philosophers since Plato have observed, this would imply (among other things) highly intrusive and coercive government action to correct for the differential impact of such variables as family background and culture. The history of the affirmative action debate confirms that we can neither avoid nor fully erase the tension between equal opportunity and personal liberty.

—William A. Galston

Sources: Paul Sniderman and Thomas Piazza, *The Scar of Race* (Harvard University Press, 1993); Margery Austin Turner, et al., *Opportunities Denied, Opportunities Diminished: Racial Discrimination in Hiring* (Urban Institute, 1991); Alan Wolfe, “Guess Who Likes Affirmative Action?,” *The New Yorker* (Nov. 25, 1996); Christopher Edley, Jr., and George Stephanopoulos, “Affirmative Action Review: Report to the President” (1995); Jerome Karabel, “Berkeley and Beyond,” *American Prospect*, no. 12 (Winter 1993); James Smith and Finis Welch, “Closing the Gap: Forty Years of Economic Progress for Blacks,” RAND Corporation (February 1986); Steven A. Holmes, “Census Report Finds Hispanic Americans Lagging Further in College Degrees,” *New York Times* (July 27, 1995); Gerald D. Jaynes and Robin M. Williams, Jr., eds., *A Common Destiny: Blacks in American Society* (National Academy Press, 1989); William Julius Wilson, “Race-Neutral Programs and the Democratic Coalition,” *American Prospect* (Spring 1990); Seymour Martin Lipset, *American Exceptionalism: A Double-Edged Sword* (Norton, 1996); Charles Moskos, “The Army Experience,” *New Democrat* (May/June 1995); Peter Applebome, “Gains in Diversity Face Attack in California,” *New York Times* (June 4, 1995); Karen Paget, “Controversy: Affirmative Action at Berkeley,” *American Prospect*, no. 12 (Winter, 1993); Carol Ness and Annie Nakao, “Voters Back Ban on Affirmative Action by 55-45 Percent,” *San Francisco Examiner* (Nov. 6, 1996); Edward W. Lempinen, “Affirmative Action Foes Span Spectrum,” *San Francisco Chronicle* (Nov. 22, 1996); Carol Innerst, “Affirmative Action Under Siege in States,” *Washington Times* (July 26, 1995); Glenn C. Loury, “Getting Involved: An Appeal for Greater Community Participation in the Public Schools,” *Washington Post Education Review* (August 6, 1995); Paul Gewirtz, “Affirmative Action: Don’t Forget the Courts,” *Wall Street Journal* (August 2, 1995).

Civil Rights and Racial Preferences: A Legal History of Affirmative Action

Last fall, the voters of California approved the California Civil Rights Initiative, which amends the state constitution to say that public officials shall not “discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin.” Before the election, both sides in the debate over CCRI made dramatic claims about what would happen if the initiative passed. It will be a while, however, before those predictions can be tested. At the end of the year a federal court issued an injunction staying implementation of CCRI while its opponents challenge its legality. The court held that the measure may well deprive minorities and women of their constitutional rights to equal protection.

Anyone who has ever read the text of the Civil Rights Act of 1964 might be baffled at this prospect, since it says, in rather plain language, much the same thing CCRI says. For example, Titles VI and VII of the Act tell school officials and lawyers that they “shall not discriminate” against any individual on account of race or gender; and Title VII further tells employers that in order to meet their legal duty under the Act, they are not required to give “preferential treatment” to anyone in order to achieve a racial or gender balance. Indeed, the original supporters of the Act insisted that Title VII actually *prohibited* preferential treatment. But, who knows? Perhaps the Civil Rights Act is unconstitutional, too!

How, in thirty years, have we come from the Civil Rights Act to CCRI? In this essay I want to set the current affirmative action debates—typified by the controversy surrounding CCRI—in some context. I want

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to distinguish very different programs with very different rationales, all subsumed under the phrase “affirmative action.” I want to explain how programs of preference emerged out of antidiscrimination law. And I want to suggest the relevant framing of arguments about racial preferences in particular.

I. CONTEXT: EMPLOYMENT

In the Beginning

The Civil Rights Act of 1964 set American law and policy four-square against racial discrimination in workplaces, schoolrooms, and public accommodations. Along with companion legislation against discrimination in housing and voting, the Act swept aside widespread customary practices as old as the Republic itself. One year later, President Lyndon Johnson’s Executive Order 11246 threw the weight of the massive federal contracting process behind the Title VII prohibition of employment discrimination. The executive order required that every federal contractor create and abide by an affirmative action plan as a condition of receiving federal money.

What constituted the racial discrimination that the Civil Rights Act meant to prohibit? To those who supported the law, the matter was simple. Everybody knew what discrimination was, they insisted. The sign in the factory window saying “No Colored Apply” was discrimination. The high school’s refusal to put blacks on its sports teams was discrimination. The drug store’s denying blacks a seat at the lunch counter was discrimination. What could be plainer?

Soon, however, as the federal courts began to enforce the Civil Rights Act, matters became far less plain. Suppose, for example, that to comply with the law the factory took the sign out of its window but had in place a rule requiring each applicant to supply a recommendation from a current employee. Suppose that another factory abolished its explicit segregation of blacks into maintenance jobs and whites into technical jobs but had in place a rule requiring workers transferring from one job category to another to give up their accumulated seniority. These facially neutral employ-

ment practices effectively reproduced the racially exclusionary practices abolished by the law. If all a factory’s employees were white, the chance that a black applicant might be able to present the required recommendation was vanishingly small. If a factory’s black maintenance workers had to yield years of seniority to transfer to a technical job, few if any could afford to make the sacrifice. In each instance, the factory’s rules carried forward the effects of its own past discrimination.

Confronted with case after case like these, the federal courts had to decide how to conceive of practices that locked in place patterns of past exclusion, even though the practices were neutral on their face and not designed with the intent to discriminate. From early on, the courts began to construe such practices as being precluded by the Civil Rights Act in just the same way the sign in the window was precluded. In 1971, the Supreme Court, in *Griggs v. Duke Power Company*, ratified this line of interpretation, holding that a company rule disproportionately excluding blacks counted as discrimination under Title VII *whether or not the company intended such a result*, unless the company could show the practice was necessary to its doing business.

This ruling dramatically broadened the sweep of antidiscrimination law. Now all sorts of work rules and employment practices, from aptitude tests to physical requirements to educational qualifications, were up for grabs. Did black firefighters fail the fire department promotion test in greater proportions than white firefighters? Then the city had better show a demonstrable connection between scoring well on the test and good performance as a promoted firefighter. Did the high school diploma that the factory demanded as a condition of employment exclude more blacks than whites? Then the factory had better show why it needed high school graduates as janitors or laborers. The city and the factory had better show their practices to be *necessary*.

But what constituted “necessity” in such matters? What practices could a court reasonably require a firm or institution to abandon, should those practices exclude blacks disproportionately? In some instances, the answer to this question was easy, in others contentious. As with any reasonableness test, fully informed and well-meaning people could disagree about its application in a particular circumstance.

This evolution in the legal concept of discrimination grounded a further realization. Discrimination need not be the effect of this or that discrete, superficial rule or policy, which a court or government could simply require an employer to abandon. Discrimination could now be seen as built deeply into institutions. Webs of nominally innocent institutional habits and procedures could work to exclude blacks or burden them with

special disadvantages. Likewise, they could work to exclude other minorities and women, who were also covered by the Civil Rights Act and beginning to assert their claims through litigation as well. An employer's exclusion of minorities or women might not be the upshot of any single, easily detectable rule

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or practice that could be isolated and changed; it might be the effect of many different practices working together. To comply with the law, institutions needed to rethink their operations from the ground up. They needed a mechanism that could shake them out of complacency and habit. That mechanism was affirmative action.

Nonpreferential Affirmative Action

The basic idea of affirmative action was simple: motivate firms to *carry on continuous, conscious appraisal of their procedures and rules to detect and eliminate those that excluded minorities and women without appropriate justification*. The mechanism to embody this idea was the ubiquitous affirmative action plan, imposed on all federal contractors by Executive Order 11246. Make a plan, the government told firms in 1972, that includes these steps:

Step 1. Take action to make sure your selection pool is expansive.

Step 2. Given the racial composition of the expanded pool, predict the results over time of your selecting nondiscriminatorily from it. Your prediction constitutes your affirmative action "goals." They give you a benchmark against which to compare actual outcomes.

Step 3. At intervals, compare your actual selections with your "goals." If you are not meeting your goals, then reexamine your rules and procedures to see what is causing the problem.

If your selections match your "goals," the government went on to say, we are not going to look your way. But if your selections fall short of your "goals," we will come to inquire why. If the inquiry shows that your firm has made "good faith" efforts to carry out your affirmative action plan, you will suffer no penalties. After all, your requirement under the law is *not* to select the predicted number of blacks, but *to select without discrimination*. Since the predictions are often based on crude assumptions, there can be many legitimate reasons why the actual outcome wasn't the predicted outcome. But still, we will ask some hard questions: you had better have some very good answers.

This was *nonpreferential affirmative action*. Nonpreferential affirmative action was a *color-conscious, self-monitoring device to aid firms and institutions in achieving nondiscrimination*. And it was also a device enforcers of the law could use to measure compliance.

The controversy surrounding this version of affirmative action centered on the outcomes that were to be expected in the absence of discrimination. "This predictive aspect of Affirmative Action could be called any number of things," Stanley Pottinger, director of the Office of Civil Rights in the Department of Health, Education, and Welfare, observed in 1975. "They happen to be called goals." Would that they *had* been called other things! "Goals" is a misleading description, given the model of affirmative action set out above. In plain English, goals are things you *aim* at. But in a nonpreferential affirmative action plan, "goals" aren't what you aim at. What you aim at is nondiscriminatory selection. As a *byproduct* of achieving your aim (nondiscriminatory selection), you *expect* a certain number of blacks or women to be selected. If that expectation is disappointed, you are prompted to wonder why and seek an answer.

Had this conception of affirmative action prevailed as the dominant public understanding, much less controversy would have attached to it. But the model had to compete with quite different interpretations. Since institutions were required to adopt something *called* "goals," most people, whether sympathetic or unsympathetic, naturally took the word at face value and construed *goals* as *aims* incumbent on institutions. Government did not help matters here by prescribing rules that seemed to make elimination of gender and minority "underutilization" the first duty of institutions while at the same time disavowing any intent to require institutions to give preferential treatment.

Ordinary citizens could hardly be faulted for failing to see that the government meant, when it said "goals," not-goals. Nor could critics of affirmative action be greatly faulted for disbelieving the disclaimer of preferential intent. The disclaimer seemed to rest on a morally specious distinction that the Labor Department and other agencies drew between "goals" and "quotas." The government maintained that "goals" (good) are *flexible* aims whereas "quotas" (bad) are *rigid* ones. But for those critics concerned that affirmative action amounted to a policy of coerced proportional representation by race and gender, it did not matter *morally* whether mandated racial and gender preferences were rigid or flexible. Preferences were still preferences. After all, the problem with that sign in the factory window, "No Colored Apply," was not its rigidity. A more flexible sign, "No Colored Apply, More or Less," or "Almost No Colored Apply," would hardly have constituted a moral or legal improvement.

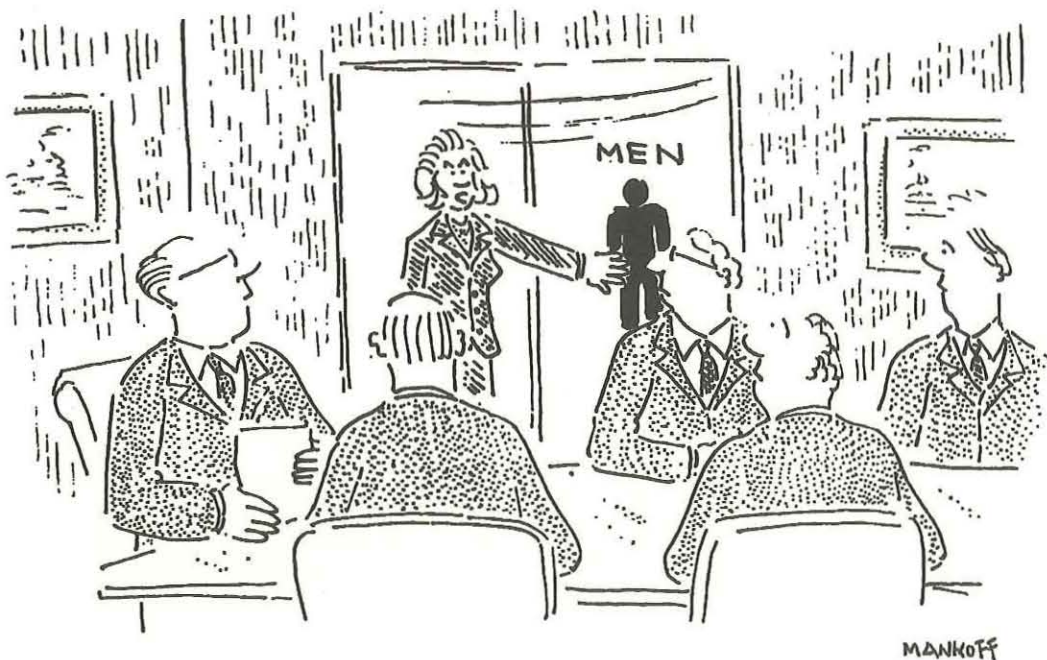
Even on the Pottinger model, affirmative action raised questions that needed forthright and persuasive answers. If government did not look closely at a contractor who was making the numbers but posed some searching and tough questions to the contractor who wasn't, wouldn't this create an incentive for contractors to make sure they were making the numbers, whatever it took? The prudent contractor, concerned about the bottom line, would hardly scruple at employing covert preferences, would he, if that was the price of legal peace? Unfortunately, the answers to these questions were frequently neither forthright nor satisfying to the critics.

Preferential Affirmative Action

The waters of controversy were further muddled by the parallel existence of genuinely *preferential affirmative action*. By the early 1970s, courts had begun ordering some employers to select by the numbers. Moreover, as the decade went along, the government used the threat of litigation to impose genuine hiring goals on several large, high-profile employers. The AT&T Corporation was a case in point. It agreed to a "Model Affirmative Action Plan" requiring it to "recruit without discrimination," but at the same time

to achieve, "within a reasonable time, an employee profile, with respect to race and gender in each major job classification, at a pace beyond that which would occur normally." The Model Plan made explicit provision for the use of racial and gender preferences. Whenever the company failed to meet its quarterly "targets" through its ordinary procedures, the Plan required that "selections be made from among any at least basically qualified candidates for promotion and hiring of the group or groups for which the target is not being met," even if there were more senior and more qualified candidates first in line.

In the AT&T case, then, the "goals" were quite undeniably *goals*. They constituted aims the company had to achieve, even by extraordinary measures if necessary. Nonetheless, the Plan offered the usual disclaimer, insisting that its "goals, intermediate targets and time frames" were "neither rigid nor inflexible quotas, but objectives to be pursued by mobilization of available company resources for a 'good faith effort.'" Once again, the effect of this rhetorical strategy was to confirm the critics' view that the whole apparatus of affirmative action was bent to the same aim. If in the AT&T case the standard disclaimer of nondiscriminatory intent was plainly disingenuous, wasn't that



"Aha! Just as I suspected!"

Drawing by Robert Mankoff.
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proof positive that the government's own disclaimers were equally mendacious?

As it was, the government had good reason for the plan it imposed on AT&T, whatever the plan's numerical components were called. Consider the especially acute problem that gender discrimination posed at AT&T. Half of the company's 700,000 employees were female, but they were all operators and secretaries. What was notable about AT&T on close inspection was how deeply the concept of "woman's job" and "man's job" was built into everything the company did. The government concluded that any approach short of force-feeding large numbers of women into "men's" occupations would founder on the profound inertial force of AT&T's inherited ways of doing things. So, with its "targets," "goals," and "objectives," the government sought to break open and destroy an entire corporate culture premised on men's and women's separate spheres.

Similar reasoning lay behind the government's strategy in other cases. For example, after nearly a decade of litigation involving the Mississippi and Alabama highway patrols, the federal courts concluded that discrimination was so deeply built into the culture and operations of the two institutions that the only effective remedy was to require them to hire one black trooper for each white trooper hired until the patrols reached a substantial, specified level of racial integration. The effective way to approach the patrols was not to change their cultures in order to get more blacks into them, but to put more blacks into them in order to change their cultures.

Reverse Discrimination

By the middle of the 1970s, employers were caught in a dilemma. If they "underutilized" blacks and women on their workforces or in particular job categories, then even their most "innocent"—i.e., facially

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neutral—practices could ground a legal charge of discrimination that might be difficult to defend against. Litigation was chancy and settling with the government meant meeting its possibly onerous terms. Look at what happened to AT&T—and to many other giants in the airlines, banking, and steel-making industries, to name a few. An employer, concerned to avoid such a fate, could tinker with this or that work

practice and still fail substantially to reduce its "underutilization," and thus fail to reduce the jeopardy of government action.

Yet if the employer embraced programs effectively assuring increased utilization of blacks and women, it faced jeopardy on another front: from reverse discrimination lawsuits. When a Kaiser Chemical Corporation plant in Louisiana decided to remedy the complete absence of blacks in its craft jobs by creating its own on-the-job training program and admitting blacks and whites to it on a one-to-one ratio until 35 percent of craft jobs were filled by blacks, the company was hauled into court by an aggrieved white worker.

In a pivotal decision in 1979, the Supreme Court upheld Kaiser's program; and the Equal Employment Opportunity Commission immediately issued rules effectively immunizing employers from reverse discrimination lawsuits where they were acting on the

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basis of an approved affirmative action plan. These developments were crucial in stabilizing affirmative action in the 1980s and 1990s among America's private employers. Firms could set about changing work practices to bring them in line with the expanded antidiscrimination mandate, and do so with a conscious eye to the numbers. They could adopt the devices best for them in remaking their total operations so as to accommodate blacks and women without fear of litigation whiplash.

By the mid-1980s, then, the basic patterns of affirmative action in employment settled into stability. All federal contractors that underutilized minorities or women had to put in place affirmative action plans containing goals and timetables. The asymmetry of enforcement pressure—threat of government scrutiny for employers who weren't making the numbers and relative immunity from reverse discrimination lawsuits for those who were—undoubtedly sometimes led to the use of racial preferences. More typically, however, the stable legal environment let institutions remake practices and alter routines that had formerly perpetuated discrimination. In special cases, as we have seen, employers used overt racial or gender preferences under court order or consent decree; but the order or decree was always limited in duration. Indeed, AT&T's Model Affirmative Action Plan expired after six years. Even so, the company voluntarily retained most of its features.

II. CONTEXT: UNIVERSITIES AND GOVERNMENT SET-ASIDES

Preferential Admissions

Out of the prohibition against racial and gender discrimination mandated by the Civil Rights Act grew—paradoxically—occasional uses of gender and racial preferences. Because discrimination was not a simple thing, courts and federal agencies sometimes concluded that short of imposing such drastic measures as preferences, institutions would continue wrongfully excluding minorities and women. In areas outside employment, however, preferences were being put in place without reference to an institution's own discrimination. Universities, for example, began adjusting their admissions policies to assure a certain percentage of minorities in undergraduate and graduate entering classes.

The medical school at the University of California at Davis instituted one of these policies, reserving 16 of its 100 entering places for minority students. Allan Bakke, a white applicant rejected by the medical school, sued. The Supreme Court's ruling in 1978 struck down the medical school's program, but the lead opinion written by Justice Louis Powell seemed to give universities permission to take race into account in their admissions process, if they were not too blatant about it. On the basis of this permission, minority preferential programs proliferated in academic institutions, ranging from informal preference-granting to formally race-normed admissions lists to specially reserved scholarships. Because this whole edifice rests on the fragile support of *Regents v. Bakke*—and because no form of affirmative action has stirred greater controversy, in California and elsewhere—it is worth looking in some detail at this quite unusual legal decision.

The medical school defended its preferential policy not as a necessary tool to remedy its own discrimination but as a useful mechanism for increasing the number of minorities in the medical profession. Such an increase, argued the school, was beneficial in a number of ways: it would supply medical practitioners to urban and rural minority populations, it would speed the integration of medicine as a whole, and it would stimulate future cohorts of minority youth to pursue medical training.

The Supreme Court split three ways in its decision. Four justices thought that the medical school's admissions policy violated the prohibitions of Title VI of the Civil Rights Act, whose language, after all, seems pretty plain. Five did not. So this five moved to a second question: given that the medical school was a public institution, did its admissions policy violate the constitutional guarantee of equal protection of the laws? Four of the five, led by Justices William Brennan and Thurgood Marshall, argued that discrimination *in*

favor of minorities ought to be judged by a permissive constitutional standard rather than the quite strict standard used to assess discrimination *against* minorities. Moreover, mindful of a decade of jurisprudence tying legitimate preferences to remedies for discrimination, they argued that the medical school was justifiably acting to remedy not its own but *societal* discrimination.

Thus, the Court stood four to four, one group of justices voting to invalidate the medical school's preferential program, the other group voting to sustain it. The odd man out was Justice Powell, whose vote tipped the decision against the medical school. He argued that all preferential programs, whether favoring or disfavoring minorities, must meet the same strict constitutional test and that the medical school's program failed that test. However, he also conjectured that less rigid university policies might meet the test. After all, academic freedom was protected by the Constitution itself, and an aspect of academic freedom was the right of academic institutions to manipulate their admissions policies to produce educationally interesting mixes of students. Universities that took race or ethnicity into account as one factor among many might be acting within constitutional limits, argued Powell. And on the basis of this singular opinion, the academy proceeded to institutionalize many sorts of preferential programs.

Since the *Bakke* decision, two jurisprudential developments have further undermined the Brennan-Marshall rationales for racial preferences in university admissions. First, the effort to expand the legal permission, "preferences to cure your own discrimination," into the broader privilege, "preferences to cure societal discrimination," has been decisively rejected by the Court. Second, the effort to install a two-tier constitutional test for racial preferences, with an undemanding standard of review for minority-favoring preferences and a very demanding standard of review for minority-disfavoring preferences, has also been decisively rejected. The Court has on several occasions in

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recent years insisted that racial classification in particular must meet the most demanding review, and that only the most compelling reasons can justify a public agency in giving racial preferences of any sort.

Already since 1994 two federal circuits have struck down university preferential policies—racially reserved scholarships at the University of Maryland

and two-track admissions at the University of Texas Law School. Although Maryland tried belatedly to show that its scholarship program *was* intended to remedy the effects of its own past discrimination, the court couldn't find any current discrimination to remedy. In the Texas case, the court rejected both the law school's claim that it needed to cure its own discrimination and its assertion that it could promote social and educational aims by using preferences. Thus, common campus practices face jeopardy not only from political initiatives like CCRI but from the courts as well.

Set-Asides

These common university practices are called "affirmative action," though they differ in their aim and operation from the employer affirmative action I described above. Indeed, they are probably what most people think of *as* affirmative action. In addition, many agencies of the federal, state, and municipal governments parcel out contracts by race and gender, reserving a certain percentage of their contracts to firms operated by minority or female entrepreneurs.

Congress's first set-aside legislation—affecting the federal government's public works contracting—arguably fell within the ambit of the antidiscrimination approach embodied in employment affirmative action. This is because the "preferences" granted through the original set-aside programs could be seen as attempts to counteract the effects of the government's own discriminatory policies. For example, the federal government maintains a public works market structured by the Davis-Bacon Act, requiring federal contractors to pay "prevailing wages" (i.e., wages pegged to prevailing union wage scales). This structuring adversely affects minority contractors by negating their main competitive advantage, the ability to offer low-wage labor; yet the Davis-Bacon Act is certainly not "necessary" to the government's doing business. By extending the *Griggs* test for employment discrimination, we could easily think of the government as a discriminator in its public works contracting, and think of its minority set-aside program as a compensation for its own discrimination, given that Congress is unwilling to scrap the Davis-Bacon Act.

Eventually, however, state and municipal governments, as well as many federal agencies, created their own set-aside policies, generally without any reference to their own discrimination. The Federal Communications Commission, for instance, set aside some broadcasting licenses for minority firms in the name of increasing "diversity" in broadcasting. In recent years, many of these set-aside programs have failed legal challenge in the courts.

Thus, many different policies may be described as "affirmative action." And many different reasons are at work in the programs that go by that name.

III. GETTING THE DEBATERS TO ENGAGE

Discrimination: What and How Much

There are so many ways that the public debate about affirmative action misfires. To start with, people often treat affirmative action as a unitary policy, rather than as a range of programs with different aims and effects. The temptation is to embrace or condemn affirmative action as a whole, by reference to certain putative rationales or putative abuses, without attending to nuances and distinctions. Even worse, critics and defenders of affirmative action are often on completely different pages, conceptually and factually, about what discrimination is.

As we have seen, the legal concept of discrimination evolved from referring to that paradigmatic sign in the factory window to encompassing all sorts of facially neutral practices that adversely excluded blacks and women and couldn't be defended as "necessary" to doing business. An institution could be found guilty of discrimination because of *effects*, not *intent*.

Many critics of affirmative action have never reconciled themselves to this definition of discrimination. In the early years of the Reagan administration, Senator Orrin Hatch pushed very strongly to overturn the effects test and make discriminatory intent an essential element of any legal standard of discrimination. The effects test was "pernicious," he claimed, "one that undermines everything that the civil rights movement has traditionally stood for—by undermining some of the most basic principles of fairness and due process." The "basic principles" Hatch had in mind require that a person intend a wrong before he be judged guilty of it.

Such a requirement does underlie some parts of the law, especially those that are "judgmental," i.e., imply a moral condemnation of the guilty. Yet the equation that Hatch supposed between legal charges of discrim-

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ination and moral condemnation is inappropriate, given the evolution of the law. The authors of the Civil Rights Act of 1964 undoubtedly thought in terms of the everyday notion then current, in which discrimination involved deliberate exclusion based on racial hostility. That everyday notion was a "moralized" concept, meaning that it implicitly condemned the acts it described. However, as it developed through court cases as a legal term of art, "discrimination" became a partly or wholly de-moralized concept in some cir-

cumstances. No longer could a finding of discrimination directly imply a morally bad character in the discriminator. Some discrimination still involved direct intention wrongfully to exclude; but most discrimination fell on different parts of the moral spectrum.

Consider what happened when institutions were told to eliminate practices that "unnecessarily" excluded blacks and women. Some of those found guilty under this standard simply failed to be very diligent about reconsidering and revising their practices. They didn't take very seriously the new legal standard. These discriminators certainly merited some moral disapprobation, just as intentional discriminators did. But an institution that took the new legal standard seriously and tried to adhere to its spirit as well as its letter still could find itself judged guilty of discrimination by a court that disagreed with the institution's assessment of necessity. Someone who acted

as conscientiously and as responsibly as we could want still risked legal liability under the law.

However, if the legal understanding has evolved in this way, ordinary understanding of discrimination generally has not. This can be seen on both sides in the affirmative action debate. Many who in the 1970s and 1980s supported affirmative action and the most extensive reach of antidiscrimination law quite freely imputed moral fault to all those found guilty of discrimination. They used the term "discrimination" as a rhetorical weapon that would have lost a good deal of its power had they acknowledged the partial demoralization of the concept. So too, critics like Senator Hatch automatically equated a legal with a moral finding, and then demanded a change in the law because they thought the moral finding too often inappropriate.

But the standard that Hatch wanted changed isn't just the holding of some unelected judges who don't



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represent the American people; it is now embedded in the Civil Rights Act of 1991, passed by Congress in its final form with bipartisan support. Those who oppose affirmative action need to take heed of this standard as they argue about how much discrimination there is and whether affirmative action in weaker or stronger forms is needed to combat it.

Even taking heed, however, won't generate much agreement about the *extent* of discrimination. For one thing, the legal concept doesn't refer to a stable set of practices or activities. The Civil Rights Act of 1991 defines "business necessity" as a practice "significantly related" to job performance or to a "significant employer objective." It takes little acumen to see that this vague idea has to be fleshed out case by case in litigation. What a decade ago didn't count as discrimination does today; and what today doesn't count as discrimination quite possibly will a decade from now. If what counts as discrimination keeps changing, we will have a hard time tracking discrimination over time. Moreover, the sum of what counts as discrimination will exhibit a quite lumpy contour, not very well captured by the gross statistical data on employment gaps, wage gaps, etc., utilized by economists. Thus, even if those on both sides of the affirmative action debate take seriously the legal concept of discrimination (in both its extension and its partly de-moralized nature), they are not likely to have eliminated their differences. At least they will be on the same page, however, able to address the threshold issue: If there remains discrimination resistant to non-aggressive measures, what do we do about it?

Winners and Losers

The original affirmative action that grew out of Title VII of the Civil Rights Act and Lyndon Johnson's executive order program was primarily a means of *changing institutions*—of overcoming and altering entrenched practices that perpetuate discrimination. Both nonpreferential and preferential affirmative action were premised on the same proposition: institutions must end discrimination. All institutions had to embrace nonpreferential affirmative action and some, for temporary periods, had to utilize preferential affirmative action. "Preferences to cure your own discrimination"—so spoke the law, as interpreted by the courts.

Yet many advocates of affirmative action took up a different rationale to defend such policies. It was perfectly fair, they argued, after generations of "affirmative action for white males," that blacks and women should get preferences in employment and elsewhere. Affirmative action preferences were a form of *compensation*, insisted some, making up for past wrongs against blacks and women. Others saw the preferences as a form of distributive justice, offsetting "white skin

privilege" or other unjust advantages that white males took into the competition for jobs, university admissions, and other social positions. If affirmative action favored blacks and women, the favoritism was *deserved*.

Such defenses invited some pointed questions. Christopher Edley, writing in his recent book, *Not All Black and White: Affirmative Action and American Values*, puts one of the standard challenges this way: "Imagine a college admissions committee trying to decide between the white daughter of an Appalachian coal miner's family and the African-American son of a successful Pittsburgh neurosurgeon. Why should the black applicant get preference over the white applicant?"

Why, indeed? If we see affirmative action as a necessary mechanism to change institutions to make them

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more racially accommodating, we will give an answer that refers to the skin color of the two applicants, *and not to their personal deservingness*. Neither the privilege of the neurosurgeon's son nor the hardship of the coal miner's daughter has any bearing. After all, putting a black into a predominantly white institution changes it in the desired direction, even if only minimally; putting in a white does not.

If, however, we see affirmative action as a scheme for compensating people or fairly redistributing advantages and disadvantages, we have to give an answer to Edley's question that refers to the personal deservingness of the winners and losers. It has to be *fair* that the white applicant loses out, fair that the black applicant wins.

So, the privileged son of the black neurosurgeon really *did* deserve the preference, argued many defenders of affirmative action in the 1970s. They insisted that every black, no matter how apparently privileged, had been harmed by racial discrimination. But how much harm, offset by what other advantages, in comparison to the overall circumstances of the white loser? These are awkward questions that were never answered satisfactorily. Nevertheless, defenders of affirmative action found it difficult to give up the proposition that the black applicant's preference was deserved.

More importantly, they couldn't tolerate the idea that the white applicant's loss was *undeserved*. To admit as much called into question affirmative action's distributive fairness. So when the white male worker or applicant complained, "Why must I bear this loss? I

am innocent of the wrongs you are trying to compensate; I am not responsible for the disadvantages you are trying to even out," the retort was, "You are not innocent." Some still insist on this point. Could we object that racial preferences burden innocent white males? No, responds one recent defender of affirmative action. White males are not innocent.

This line of argument, more prevalent in the 1970s and 1980s than now, embraces a toxic confusion. Intellectuals as different as Andrew Hacker and Alasdair MacIntyre have joined in ridiculing the protest by whites "that they bear neither responsibility nor blame for the conditions blacks face" (to use Hacker's words). While Hacker sees the protest as merely a manifestation of white racism, MacIntyre construes it as a sign of civic irresponsibility. But why does MacIntyre assume that the protest was a denial of *civic* rather than *personal* responsibility? After all, it was personal responsibility, or at least personal liability, that

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was being imputed to white males by many defenders of racial preferences. And why does Hacker assume that only a white racist would repudiate such responsibility or liability? Why shouldn't white males—and everyone else—reject it? If you think Allan Bakke is not innocent, but all you know about Allan Bakke is that he is white, and that's enough for you to know, then you must believe that guilt travels through skin color—an obnoxious notion that ought to be rejected. Even if "angry white males" are nothing more than morons and racists, some common defenses of affirmative action gave them genuine reasons to reject it.

The confused focus on individual desert and personal liability distorted defenses of affirmative action and gave its critics reason to complain. The proper focus must lie elsewhere. Our nation's system of racial segregation and exclusion that affirmative action meant to overcome was not the result of myriad individual discriminations and personal choices coalescing into one uniform effect. It was official policy, national, state, and local—policy of our people as a corporate body, executed through corporate agencies. The obligation to remedy that system and its effects is correspondingly a corporate obligation. Individuals have direct obligations to support and bear the costs of that corporate effort, but obligations *in their capacity as citizens*, not *in their capacity as white persons*. The white applicant or worker who loses out in preferential affirmative action owes no more or less *as a citizen* than any

other citizen. That the burden of affirmative action falls unevenly on him is unfortunate if unavoidable.

Has it been unavoidable? This question points to an important area of neglect in affirmative action policy. When Congress passed the Civil Rights Act in 1964, it gave little thought to how to distribute the costs of the social change it was commanding. After all, the costs did not appear significant. What could it cost the factory to take the sign out of its window, or the drug store to serve blacks at its lunch counter? But in 1972, when Congress acknowledged that discrimination was more complex than it had thought, that it was a deep and extensive effect of "systems" operating in nominally neutral ways, it did not further acknowledge that the necessary social change required to reform these "systems" would involve substantial costs, both monetary and human. There was no public debate about how these costs should be shared. As the courts and the government imposed various forms of nonpreferential and preferential affirmative action on firms and institutions, they were content to let the costs fall where they may.

The monetary costs of affirmative action plans fell upon the companies and institutions that had to implement them. Given that they were incurred by nearly all sizable firms and institutions, these costs could be passed along to consumers through higher charges for goods and services; they were a burden all of us shared, as we should have. However, the human costs—promotions and employment opportunities denied, legitimate expectations frustrated, and the like—fell upon individuals unable to transfer them to anyone else. These costs weren't large in the aggregate, but they were significant individually. They were borne by the white workers or applicants who happened to be at the wrong place at the wrong time.

This outcome may have been unavoidable; no scheme of amelioration may have been feasible. But no one tried to find out. The courts, the Congress, and the defenders of affirmative action turned a blind eye to the question of costs and their distribution. Indeed, as we have already seen, many of the defenders of affirmative action denied there were any human costs at all. When you have *undeserved* opportunities or advantages snatched away, you have no basis for complaint; you haven't suffered any real harm.

Racial Preferences: Always Impermissible?

When universities set up special scholarships for minorities or adopt preferential programs to speed the entry of women into the sciences, say, they act for perfectly worthwhile ends. When municipalities create set-aside programs in order to help support a growing stratum of minority or female business entrepreneurs, they are promoting a socially valuable goal. If we were to reach a broad consensus in favor of these goals, and

if we adopted policies that took account of the trade-offs and human costs involved in pursuing them, would that be enough to end the controversy?

Unfortunately, no. The reason is that, for many of those supporting CCRI and similar proposals, there is something *fundamentally unjust* about distributing benefits by gender and race, but especially by race. "You point to the moral evil of past racial discrimination," the critics of preferences say. "That makes the case for our side, since discriminating against whites is just as wrong as discriminating against blacks." This asserted moral symmetry is consistent with the Supreme Court's position that, as a constitutional matter, all racial classifications are equally suspect and therefore subject to the same level of scrutiny.

Yet why should this symmetry be assumed, unless the purpose and consequences of a practice have absolutely no bearing at all on its moral status? As a plain matter of our history, racial discrimination after emancipation from slavery relegated African-Americans to the economic and cultural margins of this country. It denied them protection of the law and access to the voting booth. Its aggregate *impact* on blacks was enormously destructive. And achieving that impact was among the very *purposes* of discrimination, every aspect of which was meant to remind blacks tangibly and symbolically that they were fit only for a low and subservient place in our society. By contrast, the highly circumscribed and limited preferences attaching to some parts of affirmative action imply no official judgment of contempt toward those discriminated against and are aimed at overcoming a legacy of racial division and exclusion.

It is certainly true that discriminating against whites in order to humiliate and subjugate them would be just as wrong as discriminating against blacks for the same purpose. Further, it is plausible to urge that discriminating against whites is wrong when it serves trivial rather than significant social interests. But it is not plausible to equate preferences under affirmative action with the malign and crippling discrimination under our former regimes of racial oppression. There is nothing *intrinsically* morally objectionable in using racial preferences to ameliorate and overcome the legacy of racial oppression in this country. Why not, then, treat race on a par with the countless other bases of distinction we make in law and policy?

There is a two-part answer to this question which makes CCRI more plausible. The answer is this. Race is different; but not because of something *intrinsic* to race. It is different because of *history*—our particular racial past. Race has obscenely deformed our politics and corrupted our sensibilities for our entire national history. Of course we can imagine good reasons in the abstract for using racial preferences; the real issue, however, is trusting real people and real institutions in this country properly to act on those reasons. We have

a history that should make us wary of ever letting *anybody* allocate public benefits for racial reasons. The risks of abuse are too great.

Consider a parallel case. Just as in the abstract, it seems a perfectly reasonable idea to let doctors act on the requests of terminally ill patients to speed their

*Race has obscenely deformed our politics
and corrupted our sensibilities
for our entire national history.*

deaths, in real life the picture is not so clear. We can imagine a host of subtle ways that inappropriate influences could bear on and distort the decision-making process once doctors are given such dangerous power. Perhaps we had better withhold the power.

Thus, the first part of the two-part answer says that we must not only conceive of reasons in the abstract for using (or not using) racial preferences; we must also make a historically based prudential judgment about how these reasons would play out in the real world, where they might easily be corrupted and perverted. Whereas we might be able to offer decisive, knock-down arguments for some of the abstract reasons, no such easy course is available when the issue is a summative judgment about what will happen in the future, given the evidence of our past.

The second part of the two-part answer points not to a judgment we must make but to one we have already made. The fact of the matter is that the text of the Civil Rights Act of 1964 is not hospitable to racial preferences, however many good reasons there may be for using them. Over the years, courts have squeezed out some space for preferences, but preferences always tied to furthering the purposes of the Act itself—preferences to enable an institution to cure its own discrimination. When the Act was written, Congress treated gender, religion, and other factors more flexibly, acknowledging, for example, that sex might sometimes be a legitimate qualification for a task and granting that some institutions might legitimately take religion into account in their operations. It made no such hedges in the case of race. Under the terms of the Act, employers and school officials may not bestow or withhold benefits on account of race, period.

Twice Congress has revisited the Civil Rights Act, in 1972 and 1991. Though it has amended the Act in various important ways, it has never modified the Act's blanket prohibition against the use of race in hiring or admissions. Congress could easily have revised the Act to read: "you may not discriminate against African-Americans and women, but you may discriminate against whites and males for very good reasons, such as achieving a racial and gender balance in your

institution, or promoting integration in the professions, or creating role models for young blacks and women, or offsetting societal discrimination, or distributing the benefits and burdens of life more justly, etc." But it did not.

The two-part answer, then, says in effect: it would not be unreasonable as a society to bar putatively good uses of race as well as bad; and, in fact, we have. So the various good reasons we can imagine for extending preferences by race are beside the point. Legally, they are off the table.

IV. CONCLUSION

One reason I have described the early development of affirmative action is to jar us out of the habit of *equating* affirmative action with racial and gender preferences. There is a quite distinct and important non-preferential variety of affirmative action. Most federal contractors still have to create and act on such affirmative action plans; and as the recent events at Texaco should impress upon us, the kind of self-monitoring and self-discipline demanded by such plans is very much still needed. Moreover, the failure to distinguish nonpreferential from preferential affirmative action can produce unfortunate confusion. The week after the passage of CCRI, the government in Loudon County, Va., abolished its entire affirmative action program, all of its nonpreferential elements along with anything possibly preferential, thinking it was following in the path blazed by CCRI. (Fortunately, the county government reinstated the program within weeks.)

The second reason I have described the early development of affirmative action is to show how preferential policies might arise directly out of the antidiscrimination mandate. Preferential policies do not all stand on the same ground, and it is important to be clear about this. The argument that an opponent of preferences must make against a program like that imposed on AT&T is very different from the argument he might make against a university's racially reserved scholarship program.

Any argument against AT&T-like preferences must engage the claim that an institution's discrimination can't be overcome without such a program; and engaging this claim means having an appropriate conception of discrimination. This is often the sinkhole into which all arguments about affirmative action and preferential treatment disappear, since people's conceptions of discrimination are so variable and, indeed, often so unarticulated even to themselves. The legal conception of discrimination that evolved under the Civil Rights Act of 1964 and that now stands embodied in the Civil Rights Act of 1991 ought to be the starting place of argument, even though that conception is itself full of difficulties. Getting some common ground on the idea of discrimination is vital, because not only

do preferences like those in the AT&T case purport *directly* to be antidiscrimination measures, but those employed by universities and contracting agencies may also link up *indirectly* to antidiscrimination aims. If we cannot agree on what discrimination is, we will not be able to agree on what we need to do to end it.

Finally, there are many good arguments in the abstract for using race as a tool to promote worthy social purposes. What we must decide, however, is the likelihood those reasons would actually play out well if we allowed real people and real institutions to act on them. The right answer to this challenge is far from obvious. A society might reasonably choose any number of courses, from conceding limited permission to use racial preferences to barring them altogether. Arguably, our basic law has pretty much done the last.

—Robert K. Fullinwider

Sources: The Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991 (42 U.S.C. 2000 etc.), is the basic statutory starting point for thinking about discrimination and preferences. Revised Order #4 (41 C.F.R. 60-2), issued by the Labor Department in 1972, implemented Lyndon Johnson's Executive Order 11246 requiring "affirmative action" of all federal contractors. The seminal court cases mentioned or referred to in this essay are: *Griggs v. Duke Power Company*, 401 U.S. 424 (1971); *Regents of University of California v. Bakke*, 98 S. Ct. 2733 (1978); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Podberesky v. Kirwan*, 46 F.3d 147 (1994); *Adarand v. Peña*, 115 S. Ct. 896 (1995); and *Hopwood v. Texas*, 78 F.3d 932 (1996). On "goals" and "quotas," see chapter 11, Robert K. Fullinwider, *The Reverse Discrimination Controversy* (Rowman & Littlefield, 1980); on the emergence of preferential attacks against discrimination, see Robert K. Fullinwider, "Achieving Equal Opportunity," in *The Moral Foundations of Civil Rights*, edited by Robert K. Fullinwider and Claudia Mills (Rowman & Littlefield, 1986). For recent versions of the theme "whites are not innocent," see Sharon Rush, "Understanding Affirmative Action: One Feminist's Perspective," in *An Ethical Education: Community and Morality in the Multicultural University*, edited by M.N.S. Sellers (Berg, 1994) and Thomas Ross, "The Rhetorical Tapestry of Race: White Innocence and Black Abstraction," *William and Mary Law Review*, vol. 32 (Fall 1990). The remarks by Hacker and MacIntyre can be found in Andrew Hacker, *Two Nations: Black and White, Separate, Hostile, Unequal* (Ballantine Books, 1992), p. 50, and Alasdair MacIntyre, *After Virtue* (University of Notre Dame Press, 1981), p. 205. The quotation about the neurosurgeon's son versus the coal miner's daughter comes from Christopher Edley, Jr., *Not All Black and White: Affirmative Action and American Values* (Hill & Wang, 1996), p. 138.

The Merits of Merit

How are people to be chosen for jobs and educational opportunities? Opponents of affirmative action draw a sharp contrast between two possible approaches: on the one side, employment and admissions procedures based on merit; on the other, affirmative action programs that dilute the merit principle. Either we can select the best candidate regardless of race or gender, or else we can allow group membership to influence our decision.

The ideal of "careers open to talents" dates from Napoleon's time, when it formed a centerpiece of the liberal assault on nepotism and hereditary privilege. To nineteenth-century reformers, the opposite of merit-based selection was not affirmative action for previously excluded groups; it was the awarding of posts on the basis of pedigree and connections. In one sense, today's merit principle is the reverse of the historical merit principle. During the age of aristocracy, the merit principle *was* a kind of affirmative action for previously excluded groups—the talented sons of middle-class families—whereas contemporary affirmative action is most often defended as a way for women and minorities to overcome the lack of pedigree or connections.

In another sense, however, the principle remains the same: then and now, it insists that what matters is what you know, not whom you know or what group you belong to. California Governor Pete Wilson has argued that it is a bedrock principle of American society that "individuals should be rewarded on the basis of merit." If Wilson is right, affirmative action programs are un-American and unjust, and the merit principle must reign supreme.

Critics of affirmative action like Wilson believe they know what merit is and how to find it. The defense of affirmative action, on the other side, is often understood to mean that "there is no such thing" as merit, or that merit is "socially constructed." Some critics of merit do make such claims. In so doing they tend to alienate those of us who hold the commonsense beliefs that some people really are more talented at various endeavors than others, that ability is not a purely subjective thing, and that neither talent nor differences in talent are entirely the product of culture or politics.

But these commonsense beliefs don't prove that opponents of affirmative action are right. Ability is a complex and problematic notion, and the merit principle,

which identifies ability with entitlement, is doubly complex. Because it figures so prominently both in defenses of and attacks on affirmative action, merit demands sustained and careful analysis. In what follows we pose three sorts of challenges to the meritocratic ideal:

1. *Detecting merit.* Even if we assume that there is such a thing as merit, and that we agree about what it is, the methods and procedures employed to detect merit may be flawed or biased, *even when they function properly.*

2. *Defining merit.* Disagreement exists not only about what procedures best uncover merit, but also about what *constitutes* merit for a given job or for a coveted place in the freshman class. In general, we argue, meritocrats are wedded to an overly simple and overly narrow view of what constitutes merit.

3. *Establishing merit's proper sphere of influence.* We defend two claims. First, small differences in merit often get reflected in large differences in reward, violating a principle of proportionality that ought to be part of a reasonable merit principle. Second, we argue that merit, however defined, should not be the only factor employed in allocating jobs or admissions slots.

Detecting Merit

Assume for the moment that jobs and admissions slots ought to be distributed purely on the basis of merit. Assume also that agreement exists on the criteria of merit for these jobs and places. The criteria of merit might be simple or complex; of course they will vary from job to job or from field to field. Leaving aside these details, let's call whatever it is we believe constitutes merit "*M*." *M*, we'll suppose, gets measured on the *M-scale*. And let's call that which merit *for*—the particular job or admissions slot—a "*post*." The merit principle says that posts rightfully go to the highest-*M* applicants. The question facing us, then, is how best to locate *M*.

The critique of meritocracy often begins with the observation that—leaving affirmative action programs aside—we don't in fact live in one. Coveted posts are often won not by those possessing the most *M*, but by those whose good connections have brought them to the attention of those with posts to distribute. A high school graduate whose mother works at the utility company hears about a job and has an in. The alum-

nus of Ivy College learns through friends or the alumni association of a recent graduate looking for a job and is pleased to strengthen the collegiate connection.

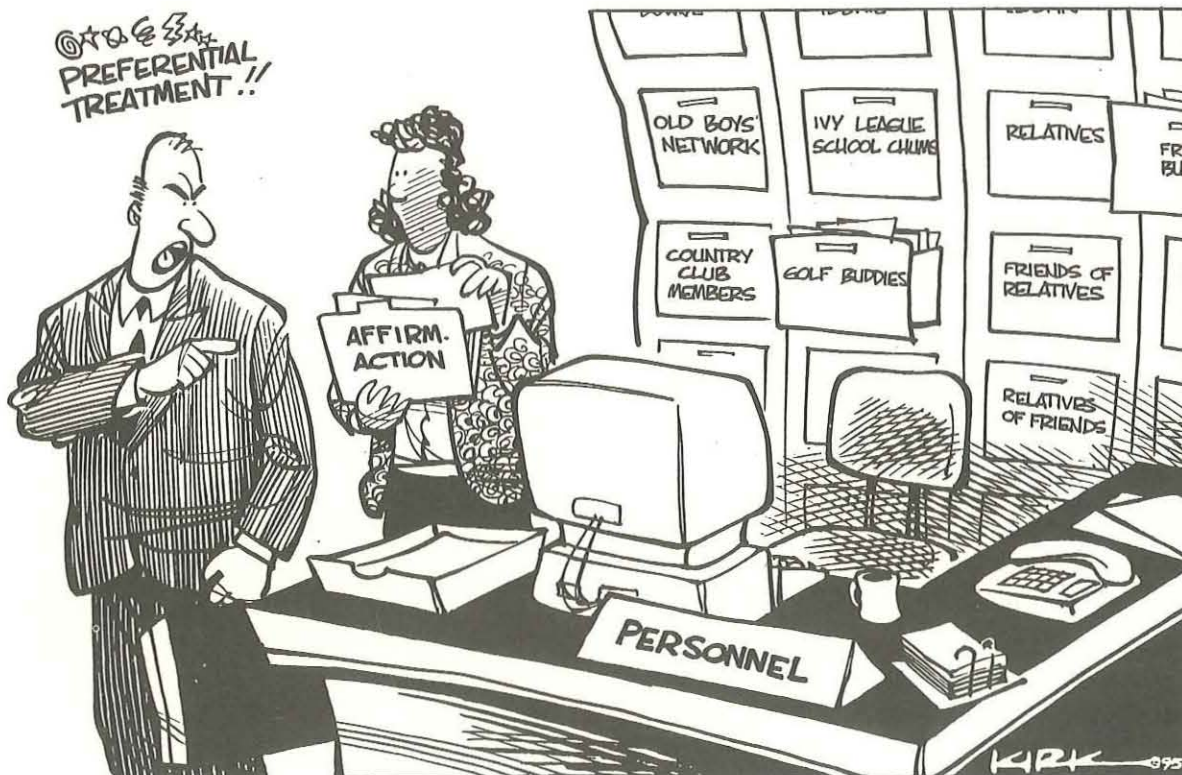
Often these processes are innocent, in the sense that it's natural, and even in many ways praiseworthy, to let someone you like know of a good job, and to help him get it if you can. Sometimes they are not. Whether innocent or not, we may think them largely inevitable; social institutions couldn't operate smoothly without personal contacts greasing the wheels. But connections and old-boy networks surely violate the principle of meritocracy—that was the original point of the career open to talents—and affirmative action programs can serve to counteract their power. In so doing, affirmative action can sometimes enhance the relationship between merit and posts, not diminish it, as critics imply.

But the role of connections in the acquisition of posts goes deeper than these remarks suggest. To see why, consider this example. The top-ranked law school in the country has no class rankings and grades its students pass-fail. Yet these students have no difficulty getting great jobs at top law firms. Why?

There's no mystery from the law firms' point of view. They know that the law school accepts only 5 percent of its applicants. The firms are willing to take the law school's word for it that these students are loaded with M. The students' applications were read by a team of talented law professors; for a firm to conduct a similar evaluation would cost tens of thousands of dollars. So the firms are willing to free ride on the law school's prior search.

We might describe the method used by the law firms in identifying attractive associates as a *rational search procedure*. It's not the search procedure that provides the most detailed and accurate information about the M of all possible candidates. But it provides very good information about M at low cost, and that makes it rational.

The important point is this: a rational search procedure will regularly select some candidates with less M than others it passes over. For the procedure will give only perfunctory glances at candidates from lesser law schools, some of whom have more M than those from top-ranked schools. That doesn't mean the procedure is irrational: from the firm's point of view, the slight



Kirk Anderson
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gain in accuracy from a more inclusive search isn't worth the added cost.

Still, we are justified in rejecting or modifying certain entirely rational procedures if we find that they have unacceptable *social* costs. If minority candidates from disadvantaged backgrounds are likely to have lesser credentials that do not always reflect lesser M, that is a reason to adopt affirmative action programs to counteract this flaw in rational search procedures.

The instruments employed to detect M may be deficient in other ways as well. The controversy surrounding standardized tests has become familiar. Some critics argue that a strong cultural bias against women and minority groups infects tests like the SAT; others think this view is nothing more than PC-think. Perhaps more significant than possible bias in the tests themselves is that higher-income students, among whom blacks and Hispanics are underrepresented, attend high schools that self-consciously teach to the SAT, and they further boost their performance with expensive test-preparation courses that raise scores while presumably leaving M untouched.

Such flaws in procedures designed to reveal M need not reflect ill will or personal prejudice towards women or minorities. Indeed, they show that the controversial term "institutional racism"—invoked to support the view that discrimination does not always disappear when personal bias does—can have a well-defined meaning.

On the other hand, some obstacles to evaluating a person's M objectively *can* be located in people's (not necessarily conscious) attitudes, rather than in procedures and institutions. For example, surveys of male managers, business students, and college professors show that, in Deborah Rhode's words, "identical resumés are rated significantly lower if the applicant is a woman rather than a man." Other studies indicate that "both male and female subjects have given lower ratings to the same artwork or scholarly articles when the artist or author is thought to be a woman."

Even if there is such a thing as M, and even if we agree about what it is, finding out who has it isn't always easy.

Defining Merit

As we have noted, the most familiar objections to the merit principle challenge the very idea of merit, arguing that there is no such thing, or that it is "socially constructed." (Rightly or wrongly, these two assertions are often taken to be equivalent.) We shall defend a more modest view. Modest or not, however, it is a view that critics of affirmative action implicitly deny.

First, M is not a single property; for practically any post, there are several ingredients that contribute to doing well in it. Second, there can be legitimate disagreement both about what the appropriate ingredi-

ents in M are and about their relative importance. It follows that comparing the M of two candidates for a post is always a matter of weighing the relative significance of different qualifications; the comparison sometimes involves disputes about whether particular qualifications are relevant at all.

Take the example of an academic job in a large state university. Such a position involves both teaching and research responsibilities; thus evidence of merit in each of these areas is relevant. There is, of course, disagreement about the relative weight each should bear, with many people arguing that teaching ability should count for more, and research for less, than it usually does in appointment decisions. But beyond this fundamental division are other points of dispute: what counts as good research (quality, quantity, subject area, degree of specialized interest or relevance); the variety of settings in which a person might or might not be a good teacher (small, medium, and large classes; introductory or advanced students; graduate students and undergraduates); collegiality, administrative ability, and general reliability. To think it is generally clear who has the most M, and that the question is only whether to hire *that* person rather than someone else who satisfies other criteria (such as "diversity") quite distinct from merit, is to be confused by a very narrow view of merit. (Our own experience suggests that many academics are confused in this way, not only favoring a highly restricted view of merit but insisting that it alone captures M objectively. These are the people who talk about how "smart" candidates are and how nothing else really matters—and who act as if they can peer into candidates' brains to see them percolating.)

An important conclusion to be drawn from this example is that merit is always a *functional* notion. Many people hold a picture of merit that is wholly individual and personal: the person with the most merit is the *smartest*, or the *fastest*, or possesses some other quality that can be defined without reference to the role these qualities play. But this picture is false. You can't decide what merit is for a university teaching position, for example, without knowing what the purposes to be served by such a position are. And that in turn requires an account of the goals and roles of a university and the services it provides. Needless to say, such questions are controversial.

Once we look at merit in this way, however, it becomes clear that some considerations opponents of affirmative action contrast with merit may be a legitimate part of it. For example, being a member of a certain group should count as a qualification or "plus factor" for a given post when members can serve as role models. The role-model argument is especially relevant to educational institutions, whose mission may include shaping students' values and aspirations. It isn't simply that a black teacher, say, can provide a

motivating example to black children. That idea was rejected by Justice Powell, in *Wygant v. Jackson Board of Education*, on the grounds that it would provide a rationale for segregation. Rather, the argument is that a black teacher plays an exemplary role not only for black children but for all children, as well as for parents and the larger community. (Likewise for the male elementary school teacher.) Moreover, contrary to the view of some critics, this argument does not rest on stereotyped judgments about the beliefs or attitudes of group members. The example of a female professor affirms possibilities of achievement and recognition, whether or not she holds what are thought to be the right political views.

There is a further argument for sometimes counting group membership as an element of merit. Affirmative action opponents frequently argue that the market will eventually eliminate discrimination. A business that discriminates against women and minorities will be at a competitive disadvantage, it is said, because it will lose capable employees to firms that don't discriminate. Over time, businesses that wish to remain competitive will be compelled to cease discriminating.

We think this argument is naive. But even if market pressures were sufficient to eliminate discrimination, the argument leads to conclusions that would dismay opponents of affirmative action. Common sense suggests that very few women want to be the *only* female employee in a business, just as very few minorities want to be the *only* minority employee. Even someone who doesn't mind anomaly and isolation will justifiably suspect that an employer with very few women or minorities in responsible positions has a glass ceiling. Having minority or female employees in responsible positions thus gives firms a competitive edge in the recruitment and retention of women and minorities. But that implies that being a woman or minority is, in and of itself, a valuable asset—a component of merit for those positions.

All of which is to say that the distinction between merit and group membership, or talent and connections, is far more dubious than proponents of the merit principle suppose.

Merit, Proportionality, and Reward

Even if we agree about what merit is, and even if we agree about how to find it, merit alone is an inadequate distributive principle, for two reasons. In this section we discuss the first, in the next the second.

Consider that associated with various posts are a range of attractions, including salary, pleasant working conditions, security, fringe benefits, enhanced future opportunities, and social status. Let's bundle all these together and call them *rewards*.

Every post requires a certain amount of M to do the job successfully; let's rank posts on the *P-scale* accord-

ing to how much M they require. Then one version of the merit principle says that the higher you are on the M-scale, the higher you deserve to be on the P-scale. Let's assume, further, that rewards can also be ranked, on the *R-scale*: higher Rs mean higher salary, status, and the like.

Now it certainly isn't true that posts ranking higher on the P-scale necessarily rank higher on the R-scale as well. Classical philology, which requires a working knowledge of at least five languages, is a lot harder than legal scholarship—it's higher on the P-scale—but law teachers do much better than philologists on the R-scale. Indeed, the *starting* salary for beginning law teachers approximately equals the maximum salary for a full professor of classics.

It probably *is* true, however, that within professions, and to some degree across professions, there is some rough correlation between the P-scale and the R-scale. The extent of this correlation will depend, in part, on how widely and unevenly dispersed the range of rewards is in a given economy. The U.S., for example, has a more polarized distribution of incomes and wealth than other industrialized countries; the rich are richer and the poor are poorer. (And according to economists Robert Frank and Philip Cook, rewards are becoming increasingly dispersed in our "winner-take-all" society.) Ben & Jerry's used to insist that its highest-paid executive would never make more than seven times what its lowest-paid worker makes. In large firms, however, the CEO often makes 300 times what the lowest-paid worker makes.

On one construal, the merit principle says that people who rank higher on the M-scale should rank higher on the P-scale. This reading of the merit principle best corresponds with the notion of careers open to talents. Should people higher on the M-scale also rank higher on the R-scale? Perhaps. But suppose one person has slightly more M than another. By the merit principle, she should end up with a job slightly higher on the P-scale. The best anthropology graduate student should get the job in the first-tier department, and the less capable should go to lower-tier departments. In a winner-take-all economy, however, the difference in rewards between two people differing slightly in M can be unjustifiably great. The slightly more talented student lands the increasingly scarce tenure-track job, where, with a moderate teaching load, she can do her research and get tenure; the only slightly less talented student moves from one temporary job to another and never has the time or security to establish her career.

The process by which small differences in merit lead to large differences in reward can be relatively simple, as in the case just described, or it can be more complex and iterated. To see the latter, recall our notion of a rational search procedure: a procedure used by an employer or a school that provides good information

about candidates cheaply by attending to easy-to-detect surrogates for quality. On this model it's rational, for example, for a professional school to rate applicants from first-tier colleges higher than those from lesser schools, even though some applicants from the latter may be better than some from the former.

Unfortunately, the use of such procedures tends over time to magnify the discrepancies between merit and success. Consider a high school senior (let's call him Gold) who barely squeaks into an Ivy League college. Perhaps he is a shade more talented than his closest competitor (let's call him Bronze); or maybe his father is an alumnus. Whatever the reason, on graduating he has a much better chance of being admitted to a top-flight law school. And this credential, in turn, bolsters his chances of obtaining a prestigious internship, and then a federal clerkship, and ultimately a successful legal career. Meanwhile, the less fortunate Bronze finds himself at a disadvantage at each of these thresholds. We see in this tale the cumulative effect of one rational search procedure after another, which amplifies a minute difference in ability into enormous differences in posts and rewards. A reward at each stage becomes a credential for the next.

It is of course possible that the difference in M between Gold and Bronze actually *increases* over time. Gold may have benefited from a superior education, better fellow students and teachers, and a more intense intellectual environment, so that even if Gold and Bronze began college with virtually indistinguishable M, they are no longer so similar. In that case, however, their story speaks to the enormous advantages conferred by prestigious and high-powered environments that are capable of producing M; and it speaks against the idea that M is some pristine quality immune to alteration. Given the opportunity to inhabit such environments, the less advantaged can also enhance their M, and therefore can deserve their excellent posts even on the most exacting use of the merit principle.

Those who care about merit ought to care about proportionality between merit and reward. Indeed, the most plausible interpretation of the merit principle says that a person should be rewarded *in accordance with or in proportion to* her merit. But in many contexts in our society, small differences in merit translate into large differences in reward. This is merit run amok, and ought to disturb anyone who genuinely cares about the merit principle.

Putting Merit in Its Place

Disproportionate rewards provide one reason to think that merit has been given too large a role in conferring benefits. The other is that merit isn't the only value or principle that plays or ought to play a part in the distribution of posts.

Plays or ought to play: the phrase may catch us up. Which is it? The defender of meritocracy seems to argue that merit is the *only* principle that *ought* to play a part, even though we know that others do in fact. Yet part of the argument for the view that merit ought not to be the only factor in such decisions is that it never has been and that no one really believes that it should be. To believe that merit alone should rule is to say that we should abolish seniority and veterans' preference in employment decisions; it is to say that we should disregard geographic diversity and preference for the children of alumni in college admissions.

Now it may well be that some of these policies ought to be abandoned. Legacy preference—the policy of elite colleges giving preference in admissions to the children of alumni—is a form of affirmative action that favors the already favored; it must serve as an embarrassment to meritocrats, who suggest that but for affirmative action the merit principle would reign, supreme and alone. But few people would deny that some weight should be given in employment or admissions decisions to seniority, veteran status, or geographic diversity. In accepting these practices, we implicitly admit that other values count besides merit.

Almost no one, then, really believes that—to put it as Barbara Bergmann has—*only* the merit principle has value and that it should never be traded off for any other consideration. The question is rather which other values or principles count, and how much. If geographic diversity is a legitimate value in college admissions, why should racial or ethnic diversity be less legitimate? Given our history, we may well think that accepting more black students will better help a college create a cosmopolitan campus environment than accepting more students from North Dakota. Merit (properly detected and properly defined) ought to count a great deal, but a pure meritocracy is a society that is difficult to imagine, and one that few of us would care to inhabit.

—Judith Lichtenberg and David Luban

Sources: Barbara Bergmann, *In Defense of Affirmative Action* (Basic Books, 1996); Robert Frank and Philip Cook, *The Winner-Take-All Society* (Free Press, 1995); Susan Sturm and Lani Guinier, "The Future of Affirmative Action: Reclaiming the Innovative Ideal," *California Law Review*, vol. 84 (1996) (for sources on the debates about standardized tests); Deborah Rhode, *Justice and Gender* (Harvard University Press, 1989) (for sources on studies of unconscious bias).

Diversity and Affirmative Action

Item: Last year, after the Board of Regents of the University of California System voted to forbid racial preferences in admissions, Charles Young, the chancellor of UCLA, remarked that "UCLA would not have achieved its current level of diversity without affirmative action." He observed that more than two-thirds of entering students in 1996 belonged to ethnic minorities, in contrast to 1980, when two-thirds of the freshmen were Caucasian. "We are a much greater university today," he concluded, "in large measure because we are more diverse."

Item: Also last year, after a federal court struck down the policy of the University of Texas Law School that reserved a portion of its entering class for blacks and Mexican-Americans, the law school petitioned the Supreme Court for review. It urged the Court to reassert the right of colleges and universities to give racial and ethnic preferences in order to promote diversity on their campuses.

Two Kinds of Diversity

The word "diversity," which echoes in every campus debate about affirmative action nowadays, joins ambiguity to ubiquity. On the one hand, the word has become simply a term of art that means the same thing as "minority and/or gender representation." When Chancellor Young spoke of UCLA's "current level of diversity," what he referred to is the two-thirds ethnic minority representation on his campus. When universities list their diversity policies, set up offices of diversity affairs, and measure their progress in achieving diversity, the word in every case is a synonym for minority/gender representation.

On the other hand, when the University of Texas Law School asked the Supreme Court to allow colleges and universities to take race and ethnicity into account in selecting students, it invoked a second sense of diversity as a justifying reason. It appealed to the idea that a university, given the kind of institution it is, needs a diverse faculty and student body. This second sense of diversity refers to the mix of viewpoints, opinions, talents, and experiences that enrich the university and facilitate its mission.

In a widely circulated report in 1996, Neil Rudenstine, president of Harvard University, justified

Harvard's commitment to diversity in this second sense by invoking John Stuart Mill, who stressed the value of bringing "human beings in contact with persons dissimilar to themselves, and with modes of thought and action unlike those with which they are

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familiar." A diverse student body, argued Rudenstine, is as much an "educational resource" as a university's faculty, library, and laboratories. Consequently, Harvard takes great pains to assure that its admissions process results in such a student body.

Elizabeth Anderson, a philosopher at the University of Michigan, makes a complementary argument. It parallels Rudenstine's, but emphasizes epistemic rather than educational considerations. "A knowledge claim gains objectivity and warrant," Anderson insists, "to the degree that it is the product of exposure to the fullest range of criticisms and perspectives. . . . Universities [should] recruit students and faculty to ensure broad representation of people from all walks of life, so that the products of inquiry are open to critical scrutiny and influence from the widest range of viewpoints, and so that the subjects and direction of inquiry are responsive to the widest range of interests." But Anderson goes further than simply commending broad representation. She maintains that

[t]he internal knowledge-promoting aims of the university call for measures to promote equality of access by all groups in society to membership in its ranks. This is an argument for affirmative action in university admissions and faculty hiring that recognizes the positive contributions that members of oppressed groups can and do make to enhancing the objectivity of research. Equality of access through affirmative action policies is not, therefore, an external political goal that threatens to compromise the quality of research. It is a means to promote the objectivity of that research.

Here we have an explicit linkage drawn between diversity of viewpoints, opinions, talents, and experiences, on the one hand, and diversity of race and gen-

der, on the other. The latter diversity, in turn, gets parsed by Anderson as "equality of access," and equality of access gets equated with affirmative action.

Is there such a tight linkage between the two kinds of diversity? Does pursuit of perspective-diversity provide the right sort of reason for pursuit of the racial/gender proportionality that preoccupies affirmative action? For all its facial plausibility, I think the way Anderson links diversity and affirmative action collapses under scrutiny. In order to see why, let's explore a bit further the educational/epistemic value of perspective-diversity. What sorts of considerations augment such diversity on campus and what are we prepared to do about them?

Valuable Perspectives

Consider, first, some of the different perspectives that may or may not be "broadly represented" in the university.

- *Age.* The way we look at the world varies considerably by age, so a broad representation of views should be sensitive to this dimension.
- *Region.* This was one of the first dimensions of "diversification" embraced at Harvard, as Rudenstine notes in his report. Though more so earlier in our history, even now people from different regions of the country possess somewhat different values and perspectives.
- *Political affiliation.* People divide deeply and sharply on matters of politics. Political views play a very important identity-defining role in individual lives. And taken together, political views profoundly affect the direction of collective life.
- *Nation.* This factor was prominent on the list of "diversities" of an earlier Harvard president. Certainly, foreigners bring to our universities customs, experiences, and viewpoints very far removed from our own.
- *Occupation.* Whether we labor with our hands or minds, with tools or concepts, on teams or individually, occupation affects our values and outlooks.
- *Urban vs. rural upbringing.* Life in big cities is very different from life on a farm or in a small town remote from large urban areas.
- *Historical experience.* People who have lived through economic collapse, war, natural disaster, mass migration, or political convulsion are marked by their experiences and often possess different values and perspectives than people who have not had such experiences.
- *Religion.* People's religious (and philosophical) views support their attitudes toward politics, education, community, justice, war, family, work, and the like. Furthermore, their religious (and philosophical) views underwrite the very meaning of their lives.

- *Military service.* The experience of being a soldier shapes people's outlooks in both predictable and unpredictable ways.
- *Special aptitudes and skills.* Being a pianist, painter, cook, chess master, competition swimmer, or sky-diver counts in your favor from the point of view of diversity, since you exemplify a particular excellence and model a particular vocation that can inform and inspire others.

There are many more items we could add to this list, but let's stop here to make a few crucial observations. First, the items are not strictly ranked in importance. Second, they are desiderata, not imperatives. Third, they admit to trade-offs. Let me explain.

Trade-offs

Take the example of age. As it turns out, two very important age groups are not represented at all in the university—the very young and the very old. There is virtually no one in the campus community under 16 or over 75. The student body, in particular, is heavily skewed toward the 18–30 range of ages. Now, these failures of representation derive from structural facts about the university: university studies demand a prior preparation unlikely to be possessed by anyone under 16; and faculty past 70 have retired and left the university. We are willing to live with these facts. Although two very important age-perspectives don't

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get represented on campus, we don't consider this failure of representation important enough to take special steps to cure it. Indeed, we even exacerbate it with some of our policies, such as encouraging early retirements among faculty and formally or informally kicking them all out the door at 70. We do this to make room for younger faculty.

This last observation points up the fact that we make trade-offs in realizing the desiderata on the list above—both internal and external trade-offs. With respect to faculty age, for example, we trade off the gains of having faculty in their 70s and early 80s for the gains of having more faculty in their 30s and early 40s. Our exclusion of very young people from higher education involves a trade-off, as well. After all, we could get 12-year-olds in the university if we wanted, but to compensate for their greater immaturity we would have to change the university in many ways, such as lowering the intellectual level of many courses. We're not willing

to do this. Moreover, we may not think that learning and research suffer all that much from the exclusion of 12-year-olds. Or 75-year-olds.

But, then, if research and education don't suffer much from these exclusions, perhaps age-perspectivity might be sacrificed in many other ways as well without degrading the overall quality of education or research. And if age-perspectivity can be sacrificed in many ways, perhaps other perspectivities can be sacrificed as well.

The "broad representation" of people and views demanded by good education and research may allow

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a lot of variation as to how the representation is composed and may even allow considerable omissions. This is certainly suggested by the way Rudenstine describes the admissions process at Harvard. What seems crucial is that each entering class be *richly diverse*, not that its diversity always reflect the *same pattern*. Thus, one year there may be more concert pianists and fewer rugby players in the class, the next year more rugby players and fewer pianists. Or perhaps both get shorted some years for more student government leaders or an unusually rich crop of Zen Buddhists. The point is, each of these mixes would be roughly as good as any other.

We find, then, that although a good student body or a good faculty will be diverse along many of the dimensions on the list above, exact mixes will vary. Nor can we expect "proportional representation" of diversities to be a useful standard. With respect to some items on the list, such a standard would be meaningless. (What would it mean to take in foreign students "proportionately"?) In other cases, we don't expect universities to undertake the efforts that would be required to attain proportional representation. We may regret that there are hardly any farm girls and farm boys among the professoriat at large, but no one proposes taking vigorous measures to alter this fact.

We do expect a university to be more concerned about some of the dimensions on the list than others, especially those—like religion and politics—most closely correlated with vital differences in value and opinion. A university probably will feel more concerned about a faculty overwhelmingly Protestant or Democratic than one overwhelmingly urban. It will regret the absence of certain minority political voices more than the absence of students from the Rocky Mountains. To make sure that certain political views

get a hearing on campus, admissions officers might even admit young socialists or anarchists in greater proportion than they occur in the general population. This suggests that the critical factor in university admissions is not demographic proportionality but, instead, what Rudenstine refers to as "critical mass." There needs to be enough of a group, he says, so that its voice gets some attention on campus, its views get taken account of. In some instances, critical mass may require overrepresentation if the group to be represented is a very small, though intellectually important, fraction of society. In other instances, critical mass will be achieved even if the group is underrepresented in relation to its numbers in the larger society. Even if only 25 percent of the students on campus are Republicans rather than 35 percent, we don't worry very much that the Republican voice won't get an adequate hearing.

Race and Gender

We haven't yet taken up the "diversities" most talked about these days: gender and race. Add them to the list. What should we say about them? Unquestionably, many of our experiences and views are deeply

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the way they treat the other
dimensions of diversity.*

affected by our race and gender. A university committed to "broadly representing" different views and experiences among its student body would take race and gender into account in its admissions process just in the same way it takes account of region, aptitudes and skills, political affiliation, religious views, and other factors. Or would it? A university concerned to foster the best environment for creating objective knowledge would take account of gender and race in choosing a faculty just in the same way it takes account of other factors. Or would it?

One thing is clear. Universities *don't* treat race and gender the way they treat the other dimensions of diversity we've been talking about. Race and gender are objects of *affirmative action* in the university, and affirmative action imposes an acute concern about *proportionality*. Affirmative action requires the university continually to ask itself, "Are women faculty being hired in proportion to their possession of the Ph.D.?" "Are African-American students being admitted in proportion to their numbers in the applicant pool?" and the like. Further, this concern about proportionality has an *imperative* quality, unlike the university's concerns about the desiderata on our initial diversity



DIVERSITY INITIATIVE

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list. The university is rightly willing to make trade-offs among those desiderata. It acknowledges a very loose fit between any particular desideratum and good education and research; consequently, it is willing to forgo some kinds of diversity for others, or for the sake of particular educational missions. The university can

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women and minorities than others.*

decide it would rather have a lot more pianists than rugby players; it can decide to emphasize getting students from foreign countries rather than from different regions in the U.S. And so on. But affirmative action seems incompatible with this sort of approach. Universities can't say: "Well, we have different priorities; we'd rather have a lot of regional diversity than racial diversity," or "We've decided to emphasize political variety over gender proportionality."

Now, this difference in the way universities treat race and gender occurs either because (i) in regard to good education and research, race and gender are different from the other dimensions of diversity; or because (ii) the way universities deal with race and

gender under affirmative action is premised upon a different ground altogether than good education and research.

Representation and Objectivity

To see what can be said in support of the first explanation, let's recall the views of Elizabeth Anderson that I set out earlier. Her argument forges a direct link between the university's educational/research purpose and affirmative action. We can reconstruct her argument as follows:

Premise 1: Objective knowledge is a product of the fullest range of perspectives. Broad representation, Anderson tells us, offsets bias. When the community of inquiry is broadly representative, individual biases are less damaging, since then no particular bias will unduly influence the community's acceptance of some theory or finding.

Premise 2: The historic absence from the academy of minorities and women has been particularly damaging to the goal of objective knowledge. Though regional or age bias, for example, may be problems, regional groups and adult age groups have not been excluded from the academy in the way that women and minorities have. Scholarship over many generations has built a huge edifice more or less oblivious to the perspectives women and minorities might bring to the table.

Premise 3: The academy, in furthering the goal of objective knowledge, ought to be especially concerned to include minorities and women. At our historical moment, it is more urgent to offset racial and gender bias than other kinds.

Conclusion: The goal of objective knowledge supports affirmative action in order to guarantee equality of access for minorities and women throughout the university.

Now, clearly, Premises 1–3 have considerable force. We cannot look back over the changes in scholarship in the last thirty years without conceding the significant changes wrought by the growth in the number of minority and women scholars. Still, we might wonder how tight the fit is between Premises 1–3 and Conclusion. Let's look at the places in this argument where dispute might arise.

First, Premises 2 and 3, which underwrite the urgency of including minorities and women in the academy, make a "lumpy" situation seem more uniformly smooth than it is. The premises, for example, don't make any distinctions among fields. Yet, some areas of study seem more affected by the inclusion of minorities and women than others. Moreover, the nature of the effects of inclusion varies.

For example, the impact of gender on writing history seems more profound than the impact of gender

on doing astronomy. The writing of history has been transformed in many ways in the last thirty years. Women historians have driven home the fact that although women have always constituted half the human race, 99 percent of written history from time immemorial has recorded the deeds and thoughts of men, not women. Furthermore, "gender" has become an important concept through which to interpret historical events. Thus, even the deeds and thoughts of

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men can be given new and interesting interpretations when set against the backdrop of "gender." Finally, the new historical research leans less heavily on "official" documentary sources and more on "unofficial" documents as well as material artifacts, bringing not only the past of women more readily into view but that of marginalized classes and groups, as well.

On the other hand, women haven't had the same impact on astronomy or the other hard sciences. Of course, women haven't gone into these sciences in the same numbers they've gone into history. But what reason is there to think that even larger numbers would affect astronomy the way their numbers have affected history? Sandra Harding, in her book *The Science Question in Feminism*, argues that modern science is deeply "anthropocentric" (male-centered), suggesting that the entrance of women throughout science would provide a welcome corrective. But all of Harding's examples of "anthropocentrism" are drawn from the biological and social sciences rather than mathematics, physics, chemistry, or astronomy. Although she rightly says we cannot rule out a priori that mathematics and all the hard sciences are gendered, she can't point to any actual problematic, concept, theory, language, or method of mathematics, physics, chemistry, or astronomy as an example of such gendering.

This same observation holds true if we focus instead on racial and ethnic minorities. My point is not that science isn't gendered or racially biased; my point is that, right now, claims about the likely impact of more women and minorities in some fields of knowledge are contentious and far from settled. My point is that objectivity of knowledge as a goal doesn't obviously dictate a decision to get women and minorities uniformly and proportionately in all fields across the board. It may guide us, rather, toward getting more women and minorities—even disproportionately more—in some fields. Or would it?

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From Perspectives to Groups

This last question arises out of a second problem about Premises 1–3, this time a problem with the move from “perspective” in Premise 1 to “group” in Premise 2. Let me stick with the example of gender and use Harding again. What Harding wants to pit against modern science is an “oppositional consciousness”—i.e., feminism (or certain feminist theories). It is not women per se that will change science, but oppositional theories. The gendered nature of science won’t be modified by adding more women scientists who already buy into the standard masculinist assumptions and research programs. Once we take this point to heart, it becomes harder to insist that the objectivity of knowledge demands we get more *women* into certain sciences, because we can’t equate *women* and *feminism*.

The same is true regarding race and ethnicity. Although it is very popular these days to talk about “group perspectives,” it is also dubious to talk this way. Women don’t share a single perspective, even on matters of gender. Blacks don’t share a single perspective, even on matters of race. When someone claims to represent a “group perspective,” that perspective is mostly a construction of the claimer (and of like-minded persons), privileging certain propositions about society, justice, and the group’s interests.

Now, this is not an objectionable or regrettable process. On the contrary, if knowledge advances through the pitting of views and outlooks against one another, the creation of oppositional perspectives is a vital activity. Moreover, these oppositional “group” perspectives are never created out of whole cloth. They will obviously reflect (and reciprocally influence) the views of many within the respective groups. But it is the *perspectives* that are crucial, given the goal of objective knowledge. Since there isn’t a tight connection between a particular “group perspective” and members of that group, the goal of objective knowledge doesn’t speak as unequivocally in favor of proportional representation of group members—the concern of affirmative action—as it does in favor of critical representation of perspectives.

The Primary Motive

Suppose, then, we were persuaded that greater inclusion of women and minorities actually wouldn’t make a real difference to astronomy. Would we, then, withdraw our support from affirmative action efforts to get more women and minorities into astronomy, including such efforts as creating special fellowships reserved especially for members of these groups?

No, because our primary motive, in the first place, isn’t to get women and minorities into the hard sciences for the sake of these sciences but for the sake of women and minorities (and their opportunities). From an affirmative action perspective, the reason we want

to lodge a critical mass of women and minorities in the hard sciences is our belief that, absent a history of exclusion, women and minorities would have flourished in these fields, and we want to change the momentum of past exclusion so that women and minorities seek and find opportunities there in the future.

This primary impulse is plain enough, I believe, if we draw the following parallel. From an affirmative action perspective, we are concerned about proportional representation of women and minorities in various academic disciplines in exactly the same way we are concerned about equality of pay for comparable women and men, or comparable minorities and whites. Concern about equality of pay has nothing to do with the objectivity of knowledge or good learning and everything to do with antidiscrimination and fairness. So, too, with the concern about representative numbers of women and minorities in various fields of study and in the university as a whole: it has to do with antidiscrimination and fairness. That is why the concern has an *imperative* quality, and why trade-offs are out of place.

The educational/epistemic argument for diversity is not wrongheaded or unpersuasive. It certainly might sometimes justify the university taking race and gender into account in selecting students and faculty (to the extent such taking into account is permitted by law). But it doesn’t justify taking race and gender into account in the way affirmative action demands they be taken into account. We can’t fully and properly justify the affirmative action concerns of universities by starting from premises that talk only about good education and objective knowledge.

—Robert K. Fullinwider

Sources: Elizabeth S. Anderson, “The Democratic University: The Role of Justice in the Production of Knowledge,” in *The Just Society*, edited by Ellen Frankel Paul, et al. (Cambridge University Press, 1995); Sandra Harding, *The Science Question in Feminism* (Cornell University Press, 1986); Neil Rudenstine, “Diversity and Learning,” Report to the Board of Overseers (January 1996), http://www.harvard.edu/presidents_office/home.html, excerpted in the *Chronicle of Higher Education* (April 19, 1996).

Diversity and Stereotyping

There are, as my colleague Robert Fullinwider has pointed out, far more compelling rationales for affirmative action than the diversity of the workplace and classroom. Diversity, however construed, does not require proportionality, often regarded as a hallmark of affirmative action policies, or even the significant representation of any particular minority group. It lacks the moral urgency of arguments for corrective justice or social reconstruction. Moreover, one can reasonably argue that diversity is not as important in some contexts as in others.

Some of its advocates readily concede the limited scope of the diversity rationale. Akhil Amar and Neal Kumar Katyal, for example, believe that diversity has greater appeal in areas like education, where there is sustained interaction among the members of a community, than in areas like subcontracting, where interaction is limited. For this very reason, they argue, a Supreme Court that has struck down minority set-asides in government contracting may yet decide to uphold affirmative action in university admissions. A modest justification may also prove to be a resilient one.

There are other reasons to endorse the diversity rationale, despite its limitations. Even if diversity does not demand proportionality or confer enforceable rights on marginalized groups, it may increase opportunity and access in settings where even small gains in representation would constitute significant progress. Moreover, it appears to be a less divisive rationale than corrective justice or social reconstruction, especially where it emphasizes the benefits of greater minority participation to the larger society.

Acting on Generalizations

There is, however, another objection to the diversity rationale that would deny it even such a modest role. Critics argue that the very benefits it offers are predicated on objectionable forms of stereotyping.

It is readily apparent that most familiar uses of the diversity rationale involve generalizations from race, gender, or ethnicity. An urban police force wants to hire more black and Hispanic officers because it thinks that they are likely to have far better rapport with the disaffected and wary youth of those neighborhoods than their white counterparts. A corporation recruits women and minorities for its sales force on the

assumption that they will generally be better than their white counterparts at pitching its products to female and minority customers, and that these customers are more likely to give their business to salespeople of their own race or gender. An urban school system wants more black and Hispanic teachers because it thinks they will generally be better than their white counterparts at spotting talent in, and motivating, alienated black and Hispanic students, as well as relating to parents and the broader community.

In each of these examples, the diversity rationale appeals to generalizations about the strength and influence of group loyalties, or about the degree of fellow-feeling and understanding between group

Diversity appears to be a less divisive rationale than corrective justice or social reconstruction.

members. Some of the generalizations concern the response of community members or clients to a diverse force of teachers or police officers or salespeople; others concern the likely attributes of the teachers, police officers, and salespeople themselves.

Such generalizations are not, of course, intended as universals. But even where they are carefully qualified, and exceptions duly noted, critics of the diversity rationale often find them troubling. In particular, they object to the use of race or gender as a proxy for skills, attitudes, and behavioral dispositions.

Certainly one can imagine instances where such use would be unacceptable. Suppose an organization hires more blacks in order to get a more athletic workforce. In that case, the underlying generalization is offensive, associated with a long history of invidious discrimination, and unnecessary, since the employer can test all applicants for the desired skills rather than relying on race as a proxy.

In the more familiar examples above, however, the underlying generalizations are less offensive, as well as less dispensable. Certain attitudes and behavioral dispositions, like rapport with a wary or alienated population, are difficult to test for, and their associa-

tion with race and ethnicity does not have the invidious character of generalizations about talents. Still, generalizations about attitude and behavior, or so I will argue, can have significant moral and social costs. In contrast, generalizations about experience may be less troubling. I will explore these two kinds of generalizations as they apply to the pursuit of racial diversity in higher education—the venue which, according to Amar and Katyal, is the most hospitable to any diversity rationale.

The Campus Mix

Consider a standard argument for diversity among students and faculty. Advocates claim that it is important for colleges and universities to increase the representation of blacks on the ground that they are likely to have attitudes, experiences, and values which it is desirable to include in the campus mix. Although those attitudes, experiences, and values are neither unique to blacks nor shared by all blacks, blacks are, by virtue of their upbringing and treatment, more likely than other people (specifically white males) to possess them.

Again, there are two grounds for opposing such generalizations. First, critics argue that the generalizations are dubious or unreliable. This complaint has some

sting to it, since advocates of diversity are often eager to point out the implausible or poorly established claims embedded in other people's generalizations. Weighing the value of diversity against other considerations that enter into admissions decisions, Amar and Katyal note that "SAT scores and grades are at best a crude proxy for a student's potential to teach other students." But then, race or gender is also a proxy for that potential. *How* crude a proxy depends, as we will see, on what minority students are expected to teach their classmates.

The critics' second complaint is that racial generalizations are inherently objectionable, and that in endorsing them, proponents of the diversity rationale are guilty of a fatal inconsistency. Abigail Thernstrom makes the complaint in these terms:

Affirmative action proponents seem to want Americans to indulge in racial stereotyping for some purposes (the drawing of district lines, the classification of applicants into victim and nonvictim groups for purposes of admission to institutions of higher education, etc.), but violently object when they view such stereotyping as a danger in other contexts [such as news coverage reporting the race of crime perpetrators or suspects]. . . . One is tempted to ask, which way do you want it, folks? Is a high degree of race consciousness beneficial or pernicious?



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As it is framed, Thernstrom's challenge might seem easy to meet. A high degree of "race consciousness" is pernicious when it hurts the members of stigmatized groups; it is more defensible when it helps them. A negative generalization about the violent or criminal behavior of young black men is objectionable in part because the burdens of its overbreadth fall so clearly on

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the innocent, law-abiding members of a vulnerable and disadvantaged community. It is true that the overbreadth of positive generalizations—for example, that black college applicants have shown perseverance and resilience in the face of pervasive bias—will confer a competitive disadvantage on non-minority applicants who do not enjoy a similar presumption. But this might reasonably be regarded as a less egregious injustice.

Such a response to Thernstrom, however, overlooks the less obvious burdens that even the most favorable racial generalizations may impose on blacks themselves. Some critics of the diversity rationale contend that generalizations regarding race, however positive, harm their subjects by perpetuating one of the most oppressive features of their stigmatization: to be seen primarily as representatives of a group rather than as individuals.

A Burden of Expectations

Jim Chen, for example, argues that generalizations about the experience or perspective of minority candidates for faculty positions function as ideological straitjackets. "Under affirmative action," Chen writes, "the mind of the minority professor becomes *res universitatis*, something belonging not only to the academic community that she has voluntarily chosen, but also to an external, race-based community to which she has been ascribed. Her mind is no longer her own, having been conscripted in large measure for service to both of these communities." Of course, any successful candidate, minority or not, may be measured against the expectations under which she was chosen. But the burden of such expectations is greater for minority candidates, since the contribution they are expected to make to diversity is understood not with reference to their individual talents or interests, but rather to their membership in a particular group.

Chen may be justified in claiming that the diversity commonly sought by universities pressures those hired under its rubric to adopt minority views, pursue minority research, and engage in minority advocacy.

The standard terms used by proponents of diversity, such as "viewpoint" and "perspective," are ambiguous, covering, on the one hand, the experiences an individual has had and the culture she has absorbed; on the other, the positions and opinions she has adopted or is likely to adopt, and the interests and commitments she has acquired or is likely to acquire. The latter understanding of "viewpoint" or "perspective" diversity, which emphasizes belief and behavior, may well be the one that informs most academic and corporate policies. And it is easy to see why such expectations would be terribly constricting.

It may be, however, that valuable kinds of diversity can be pursued with less offensive generalizations. I want to suggest that generalizations concerning background and experience are less constricting and oppressive than those about behavior or attitude. The case for diversity becomes less problematic when it focuses on what a candidate has experienced rather than on what she has done or is likely to do.

Experience and Background

In an academic setting, diversity does not require us to favor minority candidates because they are likely to express acceptably unorthodox views, or to engage in approved forms of activism. Rather, the preference for minority candidates is based on an expectation that they will bring to the community important types of experience to which most of its members have very little exposure. These types of experience may include the candidate's firsthand encounters with certain social facts, such as poverty or exclusion, and her knowledge of a culture which exposed her to a broad

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range of such experiences and gave her a variety of ways of understanding and coping with them. A preference for diversity in life experience and culture would favor candidates not only from "Title VII minorities," but also from insular Appalachian and Amish communities, as well as Islamic and formerly Communist countries. It would overlap with a preference for geographical diversity to the extent that geography shaped the candidates' upbringing and experience.

The pursuit of this sort of diversity is not premised on the expectations about opinions, interests, and commitments which Chen finds so objectionable. Far from relying on the "direct equat[ion of] race with belief and behavior" denounced by Justice O'Connor in *Metro*

Broadcasting, it may well challenge any such equation. Part of the educational value in such diversity comes precisely from seeing the complexity and indeterminacy of the relationship between experience and culture, on one hand, and beliefs and commitments, on the other.

Of course, the extent to which race or ethnicity is associated with distinctive experiences and culture will depend on how much commonality there is to the life experiences and culture of group members, and this will obviously vary with time and place—Jews in late 20th-century America, for example, undoubtedly share far fewer significant experiences than did Jews in 17th-century Poland. There is certainly room for disagreement about the commonalities in the experiences

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of African-Americans, women, and other underrepresented groups. Conservatives and optimists, for example, tend to think that the end of legal segregation and the increase in economic opportunity has created a black middle class that has much more in common with its white counterpart than it does with the poorer blacks left behind in the inner city. Many middle-class blacks, like Ellis Cose in *The Rage of a Privileged Class*, would argue that race continues to be a dominant and pervasive factor in their lives.

People may disagree about not only the extent but also the value of the experiences and culture shared by members of a particular group. Army brats may well share a lot of experience associated with transience and dislocation, but we may not feel that it is critical to include people with such experiences in our academic community. In contrast, we may regard an academic community as impoverished if it does not include people who have experienced certain kinds of exclusion or stigmatization. This kind of diversity may be especially valuable in a community whose members have largely led sheltered, privileged lives, lives that may incline them to moral complacency.

A pair of epistemological assumptions lies behind a preference for diversity of this kind. The first is that the actual experience of exclusion and stigmatization (mediated by the culture of the excluded and stigmatized group) yields knowledge and insight of a kind rarely obtainable by other means. The second assumption is that sustained personal interaction—rather than, say, reading books or watching movies—offers the best chance to convey something of this knowledge and insight, however imperfectly, to others. If the

first assumption were false, the community would not need firsthand accounts of exclusion and stigmatization; if the second were false, it could get them from books.

Although the first assumption seems plausible, it is still an empirical generalization with notable exceptions. As Claudia Mills points out, individuals who are not members of minority groups can sometimes achieve, through their own powers of empathy and imagination, a vicarious understanding of the experience of group members. The second assumption is also plausible, but it may seem a peculiar one for a university to make. University education is premised on the effectiveness of books and other comparatively impersonal, non-interactive forms of communication in giving students insight into things they will never directly experience. While a university can also recognize the educational benefits of sustained personal interaction, its commitment to those benefits may be suspect. It is belied not only by the official tolerance of self-segregated dorms and classes, as Amar and Katyal point out, but also by an increasing and uncritical reliance on less personal (and social) educational media, like the Internet.

Burdens and Opportunities

Whatever criticism we may raise against the generalizations that sponsor the pursuit of experiential diversity, it seems clear that they do not straitjacket minority candidates as severely as generalizations about beliefs, opinions, and commitments. They do not involve treating individuals as members of groups from

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which, in David Bromwich's words, "all one's relevant supposed interests and opinions can be projected." Nonetheless, they may still have psychological and moral costs.

In the first place, being valued for one's group-specific experiences can be awkward or demeaning. It is something of an insult to have a host or friend turn to you and ask how you feel about some recent event as a black, a Jew, or a woman. This may be true even if the query assumes not that blacks, Jews, or women have a single view of that event, but merely that your reaction to it will be *influenced* by your being black, Jewish or female. The second assumption, I would argue, is less offensive than the first. But the distinction between them is hard to maintain, especially if you are the only

black, Jew, or woman in a dorm, class or department. A minority of one is more likely to be treated as a representative or spokesperson for her group.

Second, even if minority students are recruited in sufficient numbers to discourage their typecasting, the pursuit of experiential diversity appears to assign them an educational responsibility not shared by other students. While they might ideally see this more as an opportunity than a burden—a chance to make their classmates less insular and complacent—such an educational process can be quite irksome: Minority students may feel that they are expected to remedy the ignorance, or gratify the curiosity, of people who ought to know better. In practice, the commitment to diversity may degenerate into an interest in the exotic. Moreover, those minority students who have led lives of inclusion and privilege may resent the expectation, however innocent, that they have unusual tribulations to share.

Finally, there is a danger that educational institutions—buffeted by competing pressures from federal regulators, alumni, and their own faculty and students—will be neither willing nor able to limit their recruitment, admissions, and hiring policies to the experiential generalizations I have tried to defend. Given the difficulties in distinguishing acceptable from unacceptable generalizations, there is reason to fear that the dis-

tinctions will be obscured in practice, if they are ever made. And even if conscientious administrators attempt to maintain them, these distinctions may well be ignored or rejected by the people who are affected by university admissions policies, from the minority students and faculty selected under them to the university community at large. If diversity will inevitably be seen as a rationale that supports the recruitment of minority candidates as representatives of, or advocates for, their groups, or as a smoke screen for other controversial agendas, its advertised benefit as a less divisive rationale for affirmative action may prove illusory.

—David Wasserman

Sources: Akhil Reed Amar and Neal Kumar Katyal, "Bakke's Fate," *UCLA Law Review*, vol. 43 (1996) Abigail Thernstrom, "Voting Rights: Another Affirmative Action Mess," *UCLA Law Review*, vol. 43 (1996); Jim Chen, "Diversity as Damnation," *UCLA Law Review*, vol. 43 (1996); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990); Ellis Cose, *The Rage of a Privileged Class* (HarperCollins, 1993); Claudia Mills, "Multiculturalism and Cultural Authenticity," *Report from the Institute for Philosophy and Public Policy*, vol. 14, no. 1/2 (Winter/Spring 1994); David Bromwich, *Politics by Other Means* (Yale University Press, 1992); Patricia Elam Ruff, "Private School, Private Pain," *Washington Post* (February 23, 1997).



Don Wright

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Affirmative Action as a Strategy of Justice

The problem that affirmative action seeks to remedy is a structural one. For its first hundred years, this country embraced a slave system defined in racial terms; for its next hundred, the country's caste structure was maintained by a strict system of segregation known as Jim Crow.

In 1954, a clarion call went out from, of all places, the Supreme Court and we began the long, painful process of structural reform. Many institutions and agencies participated in that process, fashioning and implementing a wide variety of remedies. Having its roots in the late 1960s, affirmative action emerged as one such strategy.

At first, affirmative action contemplated a certain measure of color consciousness in the recruitment process. Blacks were specifically invited to apply for positions that traditionally had been reserved for

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whites. They were told that the doors were now open. Soon, however, the strategy took on a different and sharper meaning, that of preferential treatment. In the process of allocating scarce opportunities, blacks were to be given a "plus" in the evaluation of their candidates in the hope that it would enable them to obtain a larger portion of these prized positions.

Many justifications have been offered for this plus. Some see affirmative action as a way of diversifying life in the public square, of creating a broad variety of viewpoints in, for example, the institutions of higher learning. Under this view, affirmative action is necessary to remedy the deleterious effects of segregation that are felt by whites as well as blacks: a certain cultural isolation or insularity. Others see affirmative action as an exercise of compensatory justice. It is an effort to rectify the wrongs of the past by giving blacks an additional advantage—the plus—in the allocative process. I find both these justifications wanting.

The diversity rationale seems shallow, for it lacks the normative pull necessary to justify the costs inevitably

entailed in a system of preferential treatment. The rationale has little appeal once we move outside the university context, for example, to the realm of production workers or guardrail contractors. Even in the university context, diversity seems an incomplete justification. Standing alone, the rationale lacks a standard or basis for choosing what kinds of diversity we should favor, why, for example, we should give a plus to blacks but not to members of religious minorities.

The compensatory justice rationale has the normative pull so lacking with diversity, but falters because of the lack of identity between the victims of the wrong and the recipients of the preferential treatment, and between the perpetrators of the wrong and those who bear the cost of the remedy. The rationale also leaves unexplained why a plus in the allocative process, and thus an increase in the share of the prized positions of society, is the appropriate compensation for the wrongs of the past.

These two defenses of affirmative action—diversity and compensatory justice—emerged in the fierce struggles of the 1970s and are standard today, but I see them as simply rationalizations created to appeal to the broadest constituency. They proved to be easy targets for the *Hopwood* court. I sharply disagree with the conclusion of that court, however, because I think of affirmative action in other terms. In my opinion, affirmative action should be seen as a means that seeks to eradicate caste structure by altering the social standing

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of our country's most subordinated group. By giving members of that subordinated group a greater share of the prized positions of society, we improve the relative position of that group and, in so doing, make a small but determined contribution to eliminating the caste structure. The social ordering of racial groups is altered.

The structural justification, like the compensation theory, constitutes a theory of justice. In a caste system,

not only are socially groups hierarchically ordered, but membership in a group is determined on the basis of ascriptive criteria and one's presence in the subordinated group places a ceiling on his or her opportunities and life chances. The imperative for eradicating such a social structure may be an expression of a community's self-understanding and aversion to the kind of society that is divided and ordered by caste. Alternatively, the imperative for reform may be based

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on individualistic concerns; eliminating caste may be seen as an essential precondition for the self-actualization of the individuals who form the subordinated group.

Like the theory of compensatory justice, the structural rationale builds on history, only it does so in a different way. In the compensatory theory, history counts as a normative reason, whereas in the hands of the structuralist, history is solely factual. Slavery and Jim Crow are not the reasons for the remedy, but instead provide the particular causal dynamic that produced the social structure that needs to be remedied. Affirmative action is concerned with the present, with eliminating any form of caste that exists in the here and now. It seeks to remedy not wrongs of the past, but the intolerable situation that this country finds itself in today. As such, the strategy would extend not just to blacks, but to any group currently subordinated in society. For example, immigrants who only recently arrived in this country and did not suffer past wrongs at the hands of American society would be eligible for affirmative action if, in the strategy's absence, such immigrants would constitute a subordinated group.

Although I believe that affirmative action should be seen as a strategy of justice, though more a means of

distributive, rather than corrective, justice, I acknowledge that this strategy undeniably works its own wrongs. For blacks who obtain the prized positions, a doubt is created in the minds of some, including the prizewinners themselves, as to whether they would be where they are without preferences. For rejected white applicants, there is the frustration of desire, of not being able to attend particular schools or to obtain specific jobs. In addition, these applicants suffer a hurt that blacks know all too well—the hurt that comes from being judged unfavorably on a criterion unrelated to individual merit and over which they have no control.

These grievances are indeed genuine; they are wrongs never to be forgotten and never to be trivialized. We should not conclude, however, that by identifying or locating these wrongs, we have provided a sufficient reason to enjoin or dismiss a remedial program with purposes as transcendent as those of affirmative action. In an imperfect world, a great transformation cannot be achieved without pain and sacrifice, without even a measure of injustice. Surely, this must be the great lesson of the Civil War.

Asking for such sacrifices is an extraordinary, but appropriate, request, provided that two conditions are satisfied. One is that the cause involved is so noble and so worthy as to justify the individual suffering that it inflicts. The other is that there is no other way. To support affirmative action despite its harms we must believe, as Justice Blackmun once put it, that we cannot mitigate or eradicate caste without this system of preferences—that, ultimately, we cannot get beyond racism without taking race into account.

—Owen M. Fiss

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In spite of recent improvements in the economy, both experts and ordinary citizens have become increasingly troubled about what they see as a decline in the strength of our social fabric and in the quality of our civil and civic life. Many kinds of political participation, including voting in presidential elections, have declined over the past three decades. During that same period, the American people's confidence in the political system has declined even more sharply. We are significantly less inclined to trust one another as fellow citizens than we were a generation ago. While scholars debate methods and evidence, it is clear that many Americans believe that neighborhoods and community organizations are weaker than they once were and than they should be. And most Americans—some surveys indicate nearly 80 percent—believe we are in a period of pervasive moral decline, marked by weaker families, higher crime and social disorder, declining civility, and powerful cultural forces, such as television, movies, and popular music, that make it harder to raise our children and build a decent society.

The National Commission on Civic Renewal will seek to address these ills by gathering and assessing information and advice from a wide range of voices; by studying and highlighting promising civic organizations and initiatives around the country; and by offering specific recommendations for improving our civil and civic life. In addition to publishing a final report at the end of this year, the Commission will issue an interim series of working papers by an interdisciplinary group of scholars. The first set of papers will be available by May 1.

The Commission has been funded through a generous grant from the Public Policy Program of the Pew Charitable Trusts. Its ongoing activities are housed at the Institute for Philosophy and Public Policy. For general information about the Commission or its working paper series, please write to the address below or consult our Web site:

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