Affirmative Action: The Perpetuation of Racism

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A Senior Thesis submitted in partial fulfillment
of the requirements for graduation
in the Honors Program
Liberty University
Spring 2010

Acceptance of Senior Honors Thesis

This Senior Honors Thesis is accepted in partial fulfillment of the requirements for graduation from the Honors Program of Liberty University.

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Abstract

While there are rational people with good intensions on both sides of this debate, affirmative action in employment may perpetuate the very racism it seeks to remedy. This thesis will begin by giving a brief historic perspective of affirmative action, analyze several of the key arguments supporting and opposing the policy, and conclude by summarizing the key areas of conflict on which the debate centers. The topic will be limited to affirmative action as it exists today in employment and promotion practices.

Affirmative Action: The Perpetuation of Racism

"I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character," proclaimed King (Meyer, 2004, p. 497). The historic presentation by Martin Luther King, Jr. on August 28, 1963, marked a shift in American thought, culture, and civil rights. The civil rights movement of the 1960s precipitated a host of changes that have been both far reaching and controversial, one of which is the policy of affirmative action.

Affirmative action is those collective set of policies and practices by educational institutions, employers, and government actors that attempt to correct past grievances by actively benefiting minorities and women in regards to education and employment (Holzer & Neumark, 2006). A broad range of policies fall within the term *affirmative action*. The most passive is the practice of specifically recruiting protected classes, while the most aggressive is establishing firm quotas and hiring rates (Holzer & Neumark, 2000). Affirmative action requires proactive steps to correct imbalances in the workforce rather than merely prohibiting discriminatory actions against protected classes (Holzer & Neumark, 2000). These policies are almost universally considered to be the most controversial race-based practice in American society (Holzer & Neumark, 2006), (Burns & Schapper, 2008), and (Mangum, 2008). The debate over affirmative action is a heated one due to its potentially divisive and racial nature, the long American history of horrific racial abuse, and the significant material impact of the policy on the whole of society. The debate centers on the concepts of justice, equality, past grievances, the status of

institutional barriers, rule of law, and a host of abstract considerations that must be analyzed in order to reach an informed judgment that respects the rights of all parties.

This thesis will examine the historical framework of the debate, the positions of the arguments, and the critical issues of the debate from which the different opinions are formed. This analysis will hold the presupposition that equality, the definition of which is admittedly also hotly contested, is the chief goal of those engaged in the discussion. The scope of this thesis is limited to affirmative action as it relates today to employment and promotion practices.

A Historical Framework

A proper analysis of affirmative action necessitates an understanding of the historical context from which it arose. The origins of the American ideals of equal opportunity and colorblindness trace their origins as far back as the signing of the U.S. Constitution in 1788 (Meyer, 2004). The advance of these ideals from the origin of America until the first use of affirmative action by President Kennedy in 1961 was marked by painstakingly slow and often regressive progress. The time period predating the modern civil rights movement represents a dark and inexpugnable blot on American history. Slavery, Jim Crow laws, and society-wide segregation have left an indelible mark upon today's society. The recognition of these historical offenses naturally leads to the question that affirmative action attempts to answer, that of choosing the best policies to correct and overcome the historical offenses against minorities and women. It should be acknowledged that minorities and women were oppressed and limited in their educational, political, and employment opportunities for much of the history of the

United States, and it has only been for a small fraction of the time that equal opportunity was even considered a goal. Whites for a long period of time claimed special privileges on the basis of race (Fish, 2000). For an even longer period of time, women were denied the same opportunities that were afforded to men. It is because of this long history of abuse and the tangible impact of affirmative action that opinions are so deeply held and the controversy so divisive.

The Origin of the Modern Civil Rights Movement

The beginning of the Modern Civil Rights era, initiated by the Supreme Court's decision in *Brown v. Board of Education* (1954), the subsequent Executive Order 10,925 by President Kennedy, the Civil Rights Act of 1964, and the rise of civil rights leaders such as King, marked a revolutionary shift that has transformed society. Society-wide prejudices, open discrimination, and racial strife have seemingly been replaced, to a large degree, by a society that seeks to redress wrongs and provide all individuals a fair chance to take advantage of opportunity. The fact that affirmative action is a policy and topic of debate serves to illustrate the seeming progression and transformation of modern thought toward one of inclusion and equality.

The initial focus on equal opportunity. The civil rights movement, in its initial stages, endeavored to achieve the goal of racial equality (Meyer, 2004). As expressed by President Kennedy's assertion that "race has no part in American life or law," the civil rights movement began not with the goal of racial preferences but with the object of attaining equality and equal rights and moving beyond race (Meyer, 2004, p. 483). Kennedy's Executive Order 10,925 required government contract holders to "take

affirmative action to ensure that applicants are employed, and employees are treated during employment without regard to their race, creed, color, or national origin" (Meyer, 2004, p. 439). This first use of affirmative action in employment required government contractors to encourage underrepresented classes to apply, but still mandated that the actual selection was made without regard to color (Sowell, 1984). Thus, under Executive Order 10,925, employers could both "encourage previously excluded groups to apply" and treat applicants and employees without regard to race, creed, color, or national origin (Sowell, 1984, p. 39).

The Civil Rights Act of 1964 continued the focus on equal opportunity and disregard of the group membership of the job applicants. Senator Hubert Humphrey, who guided the bill through the Senate, "assured his colleagues that it 'does not require an employer to achieve any kind of racial balance in his work force by giving preferential treatment to any individual or group,'" and he explained that subsection 703(j) of Title VII of the Act existed to express explicitly that point (Sowell, 1984, p. 39). Subsection 703(j) states:

> Nothing contained in this subchapter shall be interpreted to require any employer… to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer…in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area. (US EEOC, Title VII, para 44)

The later subsection 706(g) does not declare that an employer will be held liable for societal patterns reflected in its workforce, but only for "intentional discrimination" (Sowell, 1984, p. 40). Thus, Title VII made it clear that employers would be held responsible for ensuring equal opportunity but did not require affirmative action as it is often implemented today in the forms of quotas and explicit racial preferences. This distinction is that of disparate treatment versus that of disparate impact. As can be seen from Senator Hubert Humphrey's description and subsections 703(j) and 706(g), the Act sought to prevent the former, not the latter.

The transition to equal results as the means of reaching equal opportunity. The goal of equal opportunity in the civil rights movement was gradually replaced with the goal of racial "preferability" (Meyer, 2004, p. 471). At its most basic level, the shift was from the ideal of colorblindness and the pursuit of equal opportunity to explicit color consciousness and results as the means of achieving equal opportunity. The movement, despite its initial motivations, became one fueled by "a socialistic hunger for preferential treatment" (Meyer, 2004, p. 473). Great strides were taken during the 1960s toward racial equality, but the educational and employment disparities were far from eliminated (Reynolds, 1992). According to Holzer and Neumark (2000), there persists a race gap in wages of 15-20 % and a roughly ten percent disparity when human capital controls are taken into account. Likewise, Holzer and Neumark find an even greater wage gap between men and women. They point out that the degree to which the wage gaps are reflective of discrimination instead of other characteristics is uncertain. Holzer and Neumark conclude that, although a large portion of wage gaps are accounted for because

of differing levels of educational attainment and cognitive skills, employer discrimination does contribute to the race and sex wage gaps.

In seeking a "quick fix," policy makers allowed the "concept of racial neutrality" to give way to "a concept of racial balance" (Reynolds, 1992, p. 42). Preferences were seen as a necessary evil to correct the results of past discrimination (Reynolds, 1992). "In order to get beyond racism, we must first take account of race" was the way Justice Blackmun stated the concept in his concurring opinion in *Regents of the University of California v. Bakke* (1978, p. 407).

This transition in focus from equal opportunity to group balance was led by judicial decisions and federal administrative agency decisions (Sowell, 1984). The landmark case *United Steel Workers v. Weber* (1979) was determined by the Supreme Court's decision to reject "a literal interpretation" of Title VII in favor of the "spirit" of the act (1979, p. 201). Upon President Johnson's inauguration, he became an ardent advocate of the viewpoint of affirmative action as a system of racial preferences, and his influence helped shape affirmative action as a means to redress historic grievances against African-Americans. Equality in results, rather than opportunity, became an explicit goal (Johnson, 1965).

President Johnson's administration oversaw the creation of the Office of Federal Contract Compliance in the Department of Labor. Departing from the original concepts of Title VII, this new agency issued guidelines on placement goals and timetables, while still stopping short of quotas (Sowell, 1984). However, in 1971, guidelines explicitly referring to "'results-oriented procedures'" were issued that made it clear that affirmative action had been "decisively transformed into a numerical concept, whether called 'goals'

or 'quotas'" (Sowell, 1984, p. 41). The 1971 case *Griggs vs. Duke Power* was the first to recognize disparate impact as a standard for discrimination (*Griggs v. Duke Power,* 1971). The transition from colorblind focus on equal opportunity to a preoccupation with equal results was complete.

The Current Trends and Debates

The recent case *Ricci v. Destefano* (2009), the New Haven, Connecticut firefighter's case, is representative of the current trends and debates regarding affirmative action and racial preferences. In the case, the question before the court was whether an objective test for promotion that had an adverse impact on certain protected classes could be disregarded merely because of the adverse impact (*Ricci v. Destefano,* 2009). The Supreme Court narrowly ruled in a 5-4 decision that the disparate impact that would result from the neutral test results did not justify the invalidation of the test results (*Ricci v. Destafano, 2009*). This case illustrates the current debate that is before the nation demonstrates that the issue is still quite relevant and hotly contested.

The Argument for Affirmative Action in Employment

The trend toward affirmative action as a system of racial preferences originated with two key philosophical justifications (Meyer, 2004). First, the idea of racial preferences was based upon the idea that they are necessary to reverse and correct the historic discrimination to which minorities have been subjected. This position holds that mere equality under the law is insufficient.

The second philosophical basis for affirmative action as a system of racial preference was the idea that it was a necessity in order to integrate more fully into society those who, for so long, had been excluded (Meyer, 2004). This justification held that this race-based affirmative action was the means by which all of American society could be benefited by the assimilation of formerly oppressed races (Meyer, 2004).

The view of affirmative action as a means of allowing minorities and women to catch up and have a fair chance in the employment and economic race, has become predominate in affirmative action's application and interpretation. The concept of a level playing field is one that frames much of today's discussion of affirmative action. Essentially, most parties agree that a level playing field is desirable, but the points of contention arise when determining what a level playing field actually is and what the best way is to get there.

Modern proponents of preferential-based affirmative action typically hold to five basic tenets that all require close examination (Holzer & Neumark, 2006). These five points support affirmative action based on arguments concerning the status quo, the end goal, and the best methods of achieving the end goal. The first contention that barriers continue to exist for protected classes deals with the status quo. The second issue clarifies the goal of affirmative action. This is essentially a temporary focus on results as a means of achieving equal opportunity. The last three arguments serve to support affirmative action as a proper method to progress from the present reality to the desired future state.

Contention that Protected Classes Face Continued Opportunity Barriers

A consistent contention of affirmative action supporters is that barriers exist and will continue to exist for minorities and women (Meyer, 2004). This idea of institutionalized racism is foundational to the conclusion that affirmative action is necessary to achieve equality (Himma, 2002). This idea "views life as a race in which [w]hites were given a head start…rather than…the start of a new race with colorblind anti-discrimination laws in place to prevent a false start" (Meyer, 2004, p. 488). Indeed, supporters of affirmative action hold that society has maintained systematic barriers to achievement in employment and education that have consistently held back protected classes in the race of life (Holzer & Neumark, 2006). If significant race-based and sex-based impediments did not exist, there would be no basis for affirmative action, and supporters are passionate in the assertion that discrimination thrives in modern day America (Burns & Schapper, 2007). As Burns and Schapper (2002) explain, "affirmative action '[begins] from the implied premise that there is an injustice or an inequality which is at the heart of the matter'" (p. 370). The assumption behind affirmative action is that the centuries of discrimination have left an enduring impact that put protected classes at a disadvantage, regardless of whether they are equal under the law. Additionally, the group-wide disadvantages are considered to be substantial enough as to present significant impediment to the advancement of protected classes as a group. As stated by President Johnson in his 1965 Howard University commencement address:

> Freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the

> leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates. (Katznelson, 2006, p. 541)

Supporters of affirmative action believe that the playing field is still powerfully tilted in the favor of white males and that racial preferences are small concessions when compared with the societal advantages afforded to dominant groups (Reyna, 2005). Proponents of this view hold that group-based disadvantages persist to the extent that differing treatment based on group membership is justified. This idea that barriers continue to exist is the first premise of racial preferences.

Equal Outcomes Are the Means of Achieving Equal Opportunity

An equally important distinction made by affirmative action proponents, in regard to equality, is that of equality of opportunity versus equity of results (Holzer & Neumark, 2006). As pointed out by Holzer (2000), it is difficult to separate the enforcement of equal opportunity from numerical yardsticks, such as those provided by disparate impact. Based on the first assumption that significant institutional barriers exist, outcomes are deemed to be the best method of actually reaching the ideal of equal opportunity. It is assumed that equal opportunity, as a reality, will not occur or will not occur in a timely fashion without this intermediate goal of results. As asserted about by President Johnson, opening the gates of opportunity is not enough; rather, groups that have been the object of

historical discrimination must be given the ability to walk through the gates of opportunity (Katznelson, 2006): "According to President Johnson, the federal government was obligated not only to guarantee every citizen's right to equality but to ensure the actual equality of all citizens" (Meyer, 2004, p. 487). This view of equality incorporated the concept of a collectivist nation in which individuals are equal in regards to outcomes in addition to opportunity (Meyer, 2004).

This equality of results is seen as a necessary step in achieving equality of opportunity. This view holds that equal opportunity cannot in fact exist while significant disparities in outcomes persist. Proponents of affirmative action see such redistribution of results as necessary because the historical exclusion of certain groups of people has led to the universal point of view established by the dominant group (white males), and redistribution of outcomes is necessary to achieve the ultimate goal of a color-blind society (Burns & Schapper, 2007). Advocates of racial preferences would argue that equality under the law is not justice, and that, even if there is equality under the law, protected classes still remain at a disadvantage. This disadvantage, it is argued, can only be overcome by racial preferences that give advantages to protected classes to balance out the disadvantages inherited at birth: "The legitimizing rationale is to correct an unfair disadvantage" (Himma, 2002, p. 410). The theory of disparate impact is the manifestation of this reasoning. Disparate impact is "when members of a protected class are substantially underrepresented as a result of employment decisions that work to their disadvantage" (Mathis & Jackson, 2008, p. 100). Disparate impact theory holds "that when an action has a disproportionate *effect* on some group, it can be challenged as illegal discrimination" no matter what the intent (Clegg, 2000, p. 79).

This portion of the debate goes to the very heart of the idea of justice. There are two opposite views of justice. The first view is that every individual should have the same rights and protections under the law, regardless of color or sex. This position sees colorblindness and legal equality as the end and final goal. The second view of justice is that the workforce should roughly mirror society in the representation of protected classes. That is, even if legal equality and colorblindness were achieved, if disparities exist between the number of protected class members and the number in the workforce, then injustice will still exist. Although this view, like the first, sees equal opportunity as the legitimizing rationale, it is only a secondary goal, the very achievement of which is determined by results. This view assumes that an imbalance in representation is, in fact, an injustice. This paradigm of views regarding the very definition of justice is central to this discussion.

Affirmative Action Benefits Society as a Whole through Diversity and Integration

Advocates of affirmative action maintain that the diversity that results from preferential treatment benefits not only those minorities it directly affects but also society as a whole through the integration of a talent base with a broad range of experiences and viewpoints. It is held that the effectiveness of the economic sector and greater societal good is enhanced by the redistribution of opportunity and the broadening of businesses' skill base (Meyer, 2004). Dworkin argues that "'in certain circumstances a policy which puts many individuals at a disadvantage is nevertheless justified because it makes the community as a whole better off'" (Wagner, 1990, p. 84). Taylor (1996) frames the consideration in terms of the importance of individual merit contrasted with the general

good of society. As explained by Meyer (2004): "[a]ffirmative action, by redistributing opportunity…enhances the greater societal good by increasing the effectiveness of the economic sector'" (p. 500). This argument is the first offered in support of affirmative action as an effective means to achieve the goal of equality. This argument also supports the justification for outcomes as a goal of affirmative action rather than mere opportunity. Like the general argument, this specific point sees the racial discrimination of affirmative action as justified because of the overall societal good that results from the policy.

Affirmative Action Gives Weight to Minority Status at the Expense of Merit

Proponents of racial preferences argue that affirmative action does not result in the transfer of opportunity from qualified whites to unqualified minorities; rather they argue that it merely gives preference to minorities in cases where both minorities and whites are qualified. Taylor (1996) argues that merit should be seen in terms of thresholds. That is, any differences in ability above the minimum required can be disregarded and are irrelevant. Although this is the theoretical reasoning, the practice of racial preferences has given rise to the belief held by some proponents of affirmative action that merit is not an acceptable standard by which to allocate the limited number of employment opportunities available. Burns and Schapper (2007) expose the underlying socialistic ideas behind racial preferences when they state: "merit is a social construct" (p. 375). Burns and Schapper further reveal one of the core socialist precepts of racial preferences when they decry the selfish capitalist ideals of private property:

> In our unequal world, moral inhibitions against the illegitimate expropriation of wealth ("theft") take precedence over moral imperatives for need-based transfers

> of wealth ("charity")…Moreover…[the] redistribution of wealth is insisted to be a private and voluntary matter through charity and generosity. (p. 375)

Burns and Schapper (2007) go on to suggest that it is this idea of the importance of private property over the forced distribution of wealth that has led to the current system, whereby those in power control the means by which merit is measured, and subsequently, maintain power for themselves. Burns and Schapper (2007) finally question the use of merit itself as a determining factor in the allocation of scarce resources and opportunity itself:

> However, the real irony is that 'meritocracies' have never actually been built on the meretricious qualities that are so fiercely protected…Excellence or competence have never been the only defining factors and have never been applied impartially for "it was not always the best who were hired". (p. 377)

This view that merit is neither an accurate nor a fair way to assess individual competencies serves to reinforce affirmative action's central focus on equality of results rather than equality of opportunity. Assuredly, not all proponents of affirmative action will openly go so far as Burns and Schapper in revealing the policy's socialistic base, but whether explicitly admitted or not, the idea of redistribution for benign purposes underlies racial preferences. Berry (2008) suggests that "malleable notions of qualification [and] merit" are simply means of "perpetuating racial inequality" (p. 237). This does not indicate that merit is entirely disregarded under the policy; rather, increased significance is given to group membership at the expense of merit. The importance given to minority status is justified because it is necessary for achieving greater outcome

equality and because the means of determining merit are considered unfair and biased against certain protected classes.

Correcting Historical Discrimination Is both Equitable and Moral

The final justification for affirmative action is that it is the only moral choice in the face of historic discrimination. Those who argue in favor of racial preferences do so with the firm belief, based on the above premises, that such affirmative actions are both the fairest way to achieve equality and the only ethical option when presented with the past wrongs committed against African-Americans and other minority groups. Burns and Schapper (2007) strongly advocate that the redistribution of opportunities through affirmative action is the ethical choice. Holzer and Neumark (2006) point out that advocates of affirmative action see the policy as essential if opportunities are to be distributed equally. Taylor (1996) argues that those who hold the position of gatekeepers have the obligation to take actions that will result in equality of outcomes. Hajdin (2002) sets forth the argument that prohibiting discrimination and requiring affirmative action are morally justified for the very same reason. Hajdin postulates that a prohibition against discrimination will serve to reduce the level of discrimination against certain classes, but that increasing discrimination in the favor of those classes will achieve the same goal faster. This view assumes a moral imperative to achieve a balance of outcomes. Himma (2002) concludes that "race- and sex-based preferences are morally permissible because [they are] reasonable calculated to negate an unfair competitive disadvantage proximately related to institutional racism and sexism" (p. 408). This consideration of affirmative action contains a moral dimension much more than a pure

economic one. If discrimination against minority groups continues and such discrimination is wrong, then, proponents argue, favorable discrimination is necessary to provide a balance that would otherwise remain impossible. Even if discrimination no longer occurs, it is argued that the institutional disadvantages that persist will effectively prevent equality in both opportunity and impact. These important moral considerations prove to be, even in America's capitalistic society, preeminent in the determination of the appropriateness of affirmative action.

The Arguments against Preferences in Employment

As stated by Supreme Court Chief Justice John Roberts in the case *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race" (p. 748). This summarizes the basic view of those who oppose racial preferences. Opponents of affirmative action in employment believe that continuing to discriminate on the basis of race perpetuates the problem. Those arguing in opposition to racial preferences in employment employ the use of five general premises upon which the argument rests. These premises roughly correlate with the countering views to those expressed in favor of affirmative action.

The Present Role of Discrimination Is Negligible in Hiring Considerations

One of the stances of opponents of affirmative action is that institutional racial discrimination has been largely rendered void. This is an important consideration, because "if discrimination is no longer a problem, there is no need for affirmative action to address it" (Kravitz, 2008, p. 177). Some scholars and others argue that, despite the

election of an African-American to the highest position in the land, the Presidency of the United States, discrimination still thrives (Burns & Schapper, 2008). However, McWhorter (2000) contends that racism is a minor factor almost everywhere in America.

McWhorter (2000) argues that never in history has there been such equal opportunity as that which exists now in America and that to complain about oppression today because of scattered inconveniences trivializes the sacrifices of those who faced true oppression. Sowell (1984) questions the assumption that statistical disparities in representation signal and imply discrimination and the assumption that such disparities would not exist in the absence of discrimination. Sowell (1984) goes on to argue that it would be economically infeasible for widespread discrimination to exist: "From an economic point of view, to say that any group is systematically underpaid or systematically denied as much credit as they deserve is the same as saying that an opportunity for unusually high profit exists for anyone who will hire them or lend to them" (p. 113). Thus, while disparities, such as the previously referenced wage gap in representation do exist, opponents of racial preferences contend that the cause is not continued institutional racism.

Equal Opportunity for All Takes Precedence over Equal Distribution

One of the most important points of contention of opponents of racial preferences is the determination of the meaning of equality. Newton (1973), speaking of equality before the law, says "rule of law is the name and pattern of…justice; its equality stands against the inequalities of wealth, talent, etc.—otherwise obtaining among is participants" (p. 308). For opponents of affirmative action, equality before the law is what constitutes

justice. As Supreme Court Justice Clarence Thomas stated in his dissenting opinion in *Adarand Constructors, Inc. v. Pena*:

> Individuals who have been wronged by unlawful racial discrimination should be made whole[,] but under our Constitution there can be no such thing as either a creditor or a debtor race…To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced slavery, race privilege[,] and race hatred. In the eyes of government, we are just one race here. It is American. (1995, p. 239)

Newton argues that when employers favor protected classes, the same injustice is committed against the ideas of equality that define citizenship and that by destroying justice, the very ideal becomes meaningless. There is a broad distinction between equal opportunity and equal results, and opponents of affirmative action believe that the law only protects equal opportunity.

The manifestation of equality of results in the theory of disparate impact demonstrates this crucial difference. Rather than reducing racial discrimination, the doctrine of disparate impact requires deliberate discrimination (Clegg, 2000). While intentions may be pure and just, opponents of the policy hold that the disparate impact employment doctrine is the root of most of the worst abuses of civil rights laws (Clegg, 2000). Disparate impact is the chief source used for evidence of discrimination in many employment cases (Holzer & Neumark, 2006). It is this policy that exemplifies the real points of disagreement. According to Clegg (2002), "the disparate-impact idea is not found in the original Civil Rights Act of 1964; indeed, it is clear from the act's text and

history that this approach was not what Congress had in mind" (p. 80). Title VII of the Civil Rights Act of 1964 was not originally meant to be the panacea for achievement inequalities, and it cannot ensure that all citizens finish the race equally. Opponents of the policy believe that the goal is a level playing field for all, regardless of race or gender. While advocates of the policy also argue for a level playing field, the difference arises in the definition of a level playing field. One view is that a fair race means equal opportunity, without consideration of race or sex. The opposing view believes a fair race is dependent upon equal outcomes. Both perspectives believe in fairness, but fairness is defined in drastically different way. The theory of disparate impact forces employers to create equal outcomes, without regard for equal opportunity. As stated by Justice Thomas in *Adarand Constructors, Inc. v. Pena*:

> Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law…There can be no doubt that the paternalism that appears to lie at the heart of [affirmative action] is at war with the principle of inherent equality that underlies that infuses our Constitution. (1995, p. 240)

For this reason, opponents of group-based discrimination believe that disparate-impact theory is inherently without merit (Clegg, 2002). Thus, an understanding of the meaning of fairness and equality is essential to determine whether opportunity or outcomes is the proper goal. The answer to this one question will shape the entire analysis of affirmative action and true equality.

Preferential Treatment Results in the Selection of Less-qualified Individuals

Opponents of racial preferences argue that when group status is heavily considered at the expense of merit, less-qualified individuals will be given preferences and hired in lieu of more-qualified individuals who are denied preferential treatment. If King's dream that his children be judged by their character rather than the color of their skin is to become a reality, weight should be given to Meyer's (2004) contention that merit alone, rather than race or sex, should be the standard by which individuals are judged in regard to job specifications. Far from pursuing color-blindness, the intent of affirmative action and disparate impact theory is to institutionalize race-consciousness (Clegg, 2000).

Justice William Douglas' dissenting opinion in *DeFunis v. Odegaard* (1974) reveals what opponents of affirmative action see as a danger. Douglas argued that "consideration of race as a measure of an applicant's qualification normally introduces a capricious and irrelevant factor working an invidious discrimination," and that "there is no constitutional right for any race to be preferred" (*DeFunis v. Odegaard,* 1974, p. 333). Critics of affirmative action argue that giving preeminence to race rather than merit by legalizing racial preferences increases the likelihood that less-qualified individuals will be selected at the expense of more qualified individuals and increase racism in employment decisions. As Holzer and Neumark (2000) explain: "employers concerned with a possible disparate impact discrimination claim will seek to ensure that women and minorities are adequately represented among their hires" (p. 4).

Preferential Treatment Stigmatizes Recipients and Fosters Underachievement

In consideration of the ethical position of affirmative action, opponents of the policy hold that racial preferences actually harm those they were intended to help: "To accept a policy of racial preference is to accept the inevitability of racial separation and abandon hope for an integrated society" (Meyer, 2004, p. 502). Meyer (2004) argues that to judge individuals on race rather than merit alone "lends credit to the erroneous generalization that on a level playing field, whites would beat African Americans every time, and that society must therefore tilt the field so as to put whites at a disadvantage" (p. 503). Such a perspective not only is unfair to those not helped by affirmative action, it also is "morally damaging" to everyone affected (Meyer, 2004, p. 503). Opponents of racial preferences argue that the cause of inequalities in employment representation is not solely workplace discrimination, as affirmative action proponents might attempt to frame the issue. Rather, there are many factors that contribute to the earnings gap and the underrepresentation of protected classes, including education, motivation, priorities, work ethic, and the "victim mentality" mindset itself (Hall, 1991, para. 25). Clearly, certain individuals from all groups, not just protected classes, have a victim mentality. However, McWhorter (2000) refers to victimology as "a racewide preoccupation with an ever-receding victimhood, which generally entails exaggerating it, [and] gives failure, lack of effort, and criminality a tacit stamp of approval" (p. 43). This illustrates that a victim mentality is not held exclusively by protected classes, but blaming achievement gaps on group membership can potentially increase this negative mindset. This protraction of the victim mentality fosters underachievement and the misguided idea that racial preferences are a necessity for members of protected classes to compete in the race.

Meyer (2004) offers an alternative solution to modern racism:

> Racism is flourishing because we are awash in socialistic controls…It is… foolish to suggest that we can escape the evils of racism by implementing socialistic initiatives that merely guarantee African Americans that the only factor by which they will ever be judged is the color of their skin. The only way to eradicate societal racism with any degree of effectiveness is to leave the matter to the free market... (p. 500)

This argument by opponents of affirmative action refers to the means of achieving the goal of fairness and a level playing field. Regardless of which definition of fairness is most appropriate, downplaying the achievements of protected classes and perpetuating the notion that protected classes could not compete without such policies is a questionable method to achieve equality. Clegg (2000) succinctly sums up the problem with racial preferences with the statement:

> The mindset that sees the world in minority-versus-white terms is bad for race relations generally, of course, but the biggest losers are minorities. When standards must be lowered and quotas imposed because of "them," resentment and stereotypes flourish, and progress toward genuine racial equality comes to a halt. (p. 89)

Affirmative Action Contradictions the Principles upon Which it is Based

This final contention of opponents of affirmative action may be the strongest one. This argument begins with a consideration of why justice and equality matter at all: "In a political context, 'equality' is specified as 'equal rights'---equal access to the public

realm, public goods and offices, equal treatment under the law" (Newton, 1973, p. 309). This initial idea of equal treatment under the law forms the foundation for the concept of injustice. Without knowing what justice is, it is impossible to understand injustice. Newton (1973) gives a terse summary of the most important problem with affirmative action with the statement:

> The practice of reverse discrimination undermines the foundation of the very ideal in whose name it is advocated; it destroys justice, law equality, and citizenship itself, and replaces them with power struggles and popularity contests. (p. 312)

This is one of the most fundamental flaws of affirmative action. There is no legislative means to make up fairly for lack of privilege. Some individuals and groups will always benefit at the expense of others. There is a fatal flaw that runs through any form of racial preferences that surpasses equal opportunity. This is the direct contradiction between the foundation for the policy and the method of the policy's implementation. If equal opportunity is no longer considered the goal, then there is no foundation upon which to base affirmative action. At the point at which equal opportunity no longer matters, the debate is likely to become a political power struggle:

> Affirmative action has always been a fundamentally unsound approach to racial equality. Indeed, in a nation that is based upon freedom and equality, it is a perplexing inconsistency to assert the propriety of a policy that, by definition, promotes racial inequality and discrimination. (Meyer, 2004, p. 531)

If the justifying rational behind affirmative action is to eliminate discrimination, then reverse discrimination as a corrective measure is inherently suspect. While the ends might justify the means, this may be a slippery slope that negates the principles that allow society to judge discrimination as wrong.

A Biblical Assessment

"Do you not know that in a race all the runners run, but only one gets the prize? Run in such a way as to get the prize" (1 Corinthians 9:24, New International Version). A Biblical view of this case must necessarily encompass more than merely disparate impact. A reading of the Scriptures reveals that hard work and industry are praised, while sloth is harshly condemned: "Lazy hands make a man poor, but diligent hands bring wealth" (Proverbs 10:4, New International Version). There is clear instruction that work is a good thing: "He who gathers crops in summer is a wise son, but he who sleeps during harvest is a disgraceful son" (Proverbs 10:5, New International Version). This does not necessarily imply that affirmative action causes laziness, but the Bible clearly mandates individual effort without qualification because of the past: "For even when we were with you, we gave you this rule: 'If a man will not work, he shall not eat'" (2 Thessalonians 3:10, New International Version).

However, the Bible also is very clear that Christians are commanded to love the poor and needy: "He who mocks the poor shows contempt for their maker" (Proverbs 17:5, New International Version). Christians are given a concise definition of the application of faith: "Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress and to keep oneself from being polluted by the world" (James 1:27, New International Version). With those considerations in

mind, care must be taken to be neither unsympathetic to those who are less fortunate, nor unfair toward those who exhibit industry and hard work. Both of these ideas can be summed up by Micah 6:8, "He has told you, O man, what is good; and what does the LORD require of you but to do justice, to love kindness, and to walk humbly with your God?" (New American Standard Version). From this passage, it is clear that justice and kindness are not mutually exclusive, but rather, complementary.

The basis for this consideration of disparate impact and race in employment and promotion comes down to these two central concepts of justice and kindness. It is abundantly clear that the protected classes have been abused for much of this country's history and that racial fairness has only recently been a concern. Because of that shameful history, there are many conflicting opinions concerning justice in areas such as employment law. In fact, "several of the most valid predictors used to make employment decisions create a diversity-validity dilemma" (Kravitz, 2008, p. 173). Most people advocate equal opportunity, but most also disagree on what equal opportunity is. Some see fairness as a completely level playing field, but others see fairness as benefiting those who have been historically discriminated against. From the above Scripture passages, it seems that those who can work should work, and those who can help others should help those who cannot help themselves. This potentially calls into question the practice of giving special privileges on only the basis of group membership. Such advantages administered because of class status have the potential to harm protected classes and discourage the hard work and industry that the Bible advocates.

Far from showing justice and kindness, policies that advance and require different treatment because of race have the potential to be detrimental: "To suggest that

considering an applicant's race is the same as a considering his past professional experiences…vastly oversimplifies the fact that a person plays no part in choosing his own race, whereas he alone is accountable for his past professional experiences" (Meyer, 2004, p. 514).

With the two principles of justice and kindness in mind, making employment decisions based on racial discrimination should be enough of a reason to give pause and consider the situation. While the Bible does not speak directly on the policy of affirmative action, making selections for employment and promotion on the basis of race rather than merit does seem to go against the principle of justice and does not seem to provide long-term assistance to the underprivileged. Such group classifications, as pointed out by Meyer above, vastly oversimplify the situation.

Conclusion

Opponents of the policy argue that, despite good intentions, reverse discrimination may harm the protected classes in the long run. It may send the message to protected groups and non-protected groups alike that those helped by affirmative action could not have achieved success without this. McWhorter (2000) explains the impact of such an entitlement philosophy upon one specific protected class: "Victimology has become…part of the very essence of modern black identity" (McWhorter, 2000, p. xiii). This crippling mindset stunts initiative and perpetuates the idea that blacks need special help to succeed (Hall, 1991, para. 27). Affirmative action is not limited to one group of people and neither are the potential debilitating effects of victimology as described above.

Should success be assigned to a class of citizens by legislators? Or should it be earned? It must be earned. The most effect way to ensure this success is available to all, regardless of race, may be to meticulously guard equal opportunity. This especially includes equal opportunity for those who have been historically underprivileged but also for those who have been privileged. The wrongs of the past cannot be righted by going against the principles that make discrimination wrong. Rather than perpetuating the notion that protected classes cannot succeed without special preference, care should be taken to assure that merit, not group membership, is the basis on which employment and promotion decisions are made.

Whether one looks at this issue from a Biblical or secular view, the conclusion should be the same. The Biblical mandates of justice and kindness and the anti-discrimination employment legislation in the Civil Rights Act of 1964, Title VII should cause the reader to reach the same conclusion. Chief Justice John Robert's advice to stop discriminating on the basis of race as the means to stop racial discrimination may be a succinct, yet profound solution to the racial inequalities that face those concerned with employment legislation.

In summary, the debate will come down to the concept of justice. Considerations of the benefits of diversity in society and the stigma of affirmative action will necessarily be secondary in light of the moral imperatives of justice. Both positions claim the high ground of equality and morality, but only one can be right. If justice means equality before the law, then racial preferences are wrong. However, if justice means that employment opportunities should reflect society at large, then certain applications of affirmative action are justified, even a moral necessity. Clearly, the choice is not an easy

one. If decisions are made without regard to color, there seems to be the risk that imbalances will continue and formerly protected classes will continue to suffer adverse impact. On the other hand, if racial preferences continue, there seems to be the risk that the ideals upon which equity is based may be rendered void. Few would argue that the gap in achievement and outcomes is a good thing. Likewise, not many would hold the position that racial preferences should continue beyond the point at which past wrongs are corrected, as ambiguous a standard as that may be. It seems, then, that the dilemma is one of results versus individual rights. Based on the ideals upon which America was founded, it would seem that individual rights cannot but take precedent. Collectivism and group equity were renounced long ago in favor of rugged American individualism and ideals of the "American dream". Is the pride of self-reliance and hard work to be denied to countless Americans because their skin color confines them to a class that is deemed to need government intervention to succeed? Has Dr. King's dream that his four children would not be judged based on the color of their skin been lost?

This great nation began with the declaration that all men are created equal and endowed with "certain inalienable rights." Among them are life, liberty, and the pursuit of happiness. Such a declaration is void of a guarantee of outcomes, but it does give the promise of freedom, the like of which the world has never seen. If the great blot in America's history of slavery and racism is to be forever relegated to the history books, the discrimination on the basis of race must end. The practice of racial preferences may hold the ostensible promise of correcting past wrongs, but its enactment only seems to serve to undermine the principles of individual freedom that cause us to prize equal opportunity so greatly: "Such a socialistic ideology is perverse to capitalism and the

American dream itself, which would mean nothing without a competitive social, educational, and economic structure of which individualism, accountability, and self-sufficiency are fundamental ingredients" (Meyer, 2004, p. 499).

Thus, the arguments for affirmative action are ostensibly noble and compassionate. However, violating the very principles upon which the policy is based is a slippery slope. If American ideals and individualism are to be preserved and all Americans are to be judged on the content of their character, then racial discrimination, in whatever form, must be replaced with a system that prohibits discrimination and ensures equality before the law.

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