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DISCRIMINATION AND AFFIRMATIVE ACTION

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AS RECENT EVENTS in California exemplify, affirmative action has become one of the most controversial issues of this decade. In August 1995, California Governor and then-presidential candidate Pete Wilson filed suit against his own administration, seeking an injunction to prevent the implementation of a variety of state-sponsored affirmative action programs. In the previous month, the Regents of the University of California had voted to end affirmative action in its nine-campus system.[1] The decision exacerbated the simultaneous controversy created by the California Civil Rights Initiative, a proposed ballot measure to prohibit consideration of race, sex, or ethnicity in awarding state jobs, promotions, contracts, or admissions to state colleges and universities.[2] Nor is the political climate in California unique. As of July 1995, the National Conference of State Legislatures counted at least ten other states in the process of introducing legislation or organizing ballot measures to ban "preferential treatment" based on race, color, ethnicity, gender, or sexual preference.

The meaning of the term "affirmative action" is by no means clear.[3] In its first appearance in an executive order signed by President Kennedy in 1961, it connoted assiduous efforts to combat decision making on the basis of race rather than any form of special consideration or preferential treatment. Affirmative action acquired its current overtones of preferential treatment over the next several years, as the Department of Labor began to require federal contractors to bring members of designated groups into their workforces. Today, the term can be applied to a broad spectrum of activities, including recruiting efforts targeting qualified minorities, programs giving them a flexible, competitive edge in admissions or employment decisions, and firm quotas reserving a certain percentage of slots on their behalf. The imprecision of the term has hindered thoughtful public debate; when Americans are asked to assess affirmative action, the precise phrasing of the question significantly affects their response.[4]

[1] See Amy Wallace, "Thousands Rally at UC Campuses for Affirmative Action," *Los Angeles Times*, 13 October 1995, A-1; Martin Miller and Greg Hernandez, "Protesters End Fast, Declare Victory," *Los Angeles Times*, 2 November 1995, A-1.

[2] See B. Drummond Ayres, Jr., "Foes of Affirmative Action Claim California Ballot Spot," *New York Times*, 22 February 1996, A-14.

[3] For a history of affirmative action, see Andrew Kull, *The Color-Blind Constitution* (Cambridge, Mass.: Harvard University, 1992) chap. 11; and Nicholas Lemann, "Taking Affirmative Action Apart," *New York Times Magazine*, 11 June 1995, 36 ff.

[4] Susan Yoachum, "Wording Affects Polls on Affirmative Action," *San Francisco Chronicle*, 14 September 1995, A-17; Louis Harris, "Affirmative Action and the Voter,"

Despite the fact that affirmative action has received sustained treatment in philosophical and legal circles, it has garnered surprisingly little attention from religious ethicists over the past several years.[5] In an effort to facilitate theological ethical reflection upon this increasingly pressing issue of social justice, this note will first summarize the most recent Supreme Court case on affirmative action, *Adarand Constructors, Inc. v. Pena*,[6] which was decided in the summer of 1995. Then it will offer a brief taxonomy of the salient ethical issues. Finally, it will suggest ways in which theological perspectives may contribute to the contemporary discussion. I focus upon the paradigmatic contexts of affirmative action: efforts by employers or educational institutions to recruit or retain minorities or members of other disadvantaged groups.[7]

THE NEW STATUS QUO: ADARAND CONSTRUCTORS, INC. V. PENA

For more than two centuries, an intricate web of legal and social structures conspired to deny equal respect to a group of persons identified solely by their race. Can the state and federal government now make use of precisely the same classifications in order to assist historically oppressed groups by integrating them more fully into society? In a nutshell, this is the constitutional question raised by affirmative action.

In *Adarand*, the U.S. Supreme Court set stringent limits upon both the federal and state governments in their use of "benign" racial classifications[8] designed to assist minorities. The case concerned a program that offered federal contractors financial incentives to subcontract their

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New York Times, 31 July 1995, A-13. For an illuminating study of how support for affirmative action varies according to the specific justification offered for the program and its precise scope, see Bron Raymond Taylor, *Affirmative Action at Work: Law, Politics and Ethics* (Pittsburgh: University of Pittsburgh, 1991). Taylor surveyed employees of the California State Department of Parks and Recreation regarding their views of the Department's affirmative action program.

[5] Helpful, although somewhat dated, discussions in this genre include Wada Warren Berry, "The Dialectics of Affirmative Action," *Christian Century* 100 (1983) 1106–10; Robert F. Drinan, S.J., *Stories from the American Soul* (Chicago: Loyola University, 1990) 59–75; L. Shannon Jung, "Autonomy as Justice: Spaciality and the Revelation of Otherness," *Journal of Religious Ethics* 14 (1986) 157–83; Karen Lebacqz, "Preferential Treatment—Women and Minority Groups: Recent Ethical Studies," *Religious Studies Review* 7 (1981) 97–107; C. Eric Lincoln, "Beyond Bakke, Weber and Fullilove: Peace from Our Sins," *Soundings* 63 (1980) 361–80, and "The Legal Route to Remediation: From Desegregation to Affirmative Action," in *Race, Religion, and the Continuing American Dilemma* (New York: Hill & Wang, 1984) 189–227; Daniel C. Maguire, *A New American Justice* (New York: Doubleday, 1980); and Christopher F. Mooney, S.J. *Equality and the American Conscience* (New York: Paulist, 1982).

[6] 115 S.Ct. 2097 (1995).

[7] A full consideration of race-based affirmative action will need to take into account measures to integrate African-Americans and other minorities into public schools as well as efforts to reapportion voting districts.

[8] For a helpful introduction to some of the basic constitutional issues involved in affirmative action, see John H. Garvey and T. Alexander Aleinikoff, *Modern Constitutional Theory* (St. Paul: West, 1994) chap. 9.

work to "small businesses" controlled by "socially and economically disadvantaged individuals." The program relied upon a rebuttable presumption that "socially and economically disadvantaged individuals" include "Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans," along with women and certain minority groups. Adarand Constructors, Inc., which was not owned by a member of a designated group, submitted the low bid for a portion of a federal highway project but did not get the job. It brought suit against the federal government, charging that the program's race-based presumption of disadvantage was an unconstitutional violation of its right to equal protection of the law.[9]

The equal-protection clause of the Fourteenth Amendment to the U.S. Constitution provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." In *Adarand*, a divided Court held that the Fifth Amendment subjects the federal government to precisely the same constraints in the use of racial categories that the Fourteenth Amendment places on the states. Interpreting the equal-protection clause as extending its benefits to each and every individual, rather than to racial or ethnic groups as a whole, the *Adarand* majority refused to distinguish between oppressive and benign uses of racial categories.[10] Before *Adarand*, the Court acknowledged that Congress had broader constitutional powers than the states to use racial classifications in order to combat discrimination.[11]

In Adarand, the Court held that a state-sponsored affirmative action program making use of racial classifications will be subject to "strict scrutiny," and must withstand a two-pronged test in order to pass constitutional muster. Although the Court did not reach this issue in *Adarand*, the fragmented opinions from prior cases offer some perspective on the constitutional parameters of government-sponsored affirmative action programs.[12]

[9] The standard applicable to gender-based classifications is unclear. Under discrimination law, governmental classifications according to gender have traditionally been subject to a more lenient level of "intermediate scrutiny," rather than the strict scrutiny used for racial classifications; see John Galotto, "Strict Scrutiny for Gender, Via *Croson*," *Columbia Law Review* 93 (1993) 508–45.

[10] *Adarand*, 115 S.Ct. at 2111.

[11] *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547 (1990), which applied a more lenient standard of intermediate scrutiny to a federal program to increase diversity in broadcasting. The history of the Supreme Court's treatment of affirmative action is tortuous and fractured. Many cases have failed to generate a majority opinion. In addition to *Adarand* and *Metro Broadcasting*, the key cases dealing with "benign" racial classifications are as follows: *Regents of University of California v. Bakke*, 438 U.S. 265 (1978) (affirmative action in medical school admission); *Fullilove v. Klutznick*, 448 U.S. 448 (1980) (a federal set-aside program for minority business enterprises); *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (local school-board policy giving minority teachers preferential protection against layoffs); and *City of Richmond v. J. A. Croson Co.* 488 U.S. 469 (1989) (a local set-aside program for minority contractors).

[12] For a brief analysis, see Paul Gewirtz, "Affirmative Action: Don't Forget the Courts," *Wall Street Journal*, 2 August 1995, A-11. For a more extensive analysis, see Nicole

Under the first prong of the strict-scrutiny test, a proposed classification must be necessary to serve a "compelling governmental interest." To date, only narrowly focused "backward-looking" justifications for affirmative action have been consistently successful under this aspect of the test. According to the Court, a governmental department or division has a compelling interest in remedying its own demonstrated prior history of discrimination, and, at least at the state level, in combating discrimination in the local industry with which it does business. On the other hand, the Court has not found compelling a public employer's interest in remedying societal discrimination not traceable to its own actions, or even widespread discrimination in an industry taken as a whole (e.g. the national construction industry). Moreover, at least in the employment context, the Court has been generally unsympathetic to "forward-looking" justifications for affirmative action, such as increasing workplace diversity or providing students with minority teachers to serve as "role models." However, increasing diversity among members of the student body has been accepted as a sufficiently compelling interest to justify affirmative action in the context of a university admissions program.[13]

Once the Court is satisfied that a racial classification serves a compelling interest, it turns to the second prong of the strict-scrutiny test which considers whether the program is sufficiently "narrowly tailored." An affirmative action program using race-based classifications must be supported by evidence that alternative, race-neutral means (e.g. broadly based advertising or free assistance in completing application forms) are not likely to succeed. The Court also scrutinizes the context and components of a race-based affirmative action program. Preferential protection against layoffs for minorities is more problematic than preference in hiring. In the educational context, giving minorities a "plus" as part of a flexible affirmative action program has been deemed acceptable; a rigid, quota-based admission system has not.

An apt example of the Supreme Court's fractured affirmative action jurisprudence, *Adarand* was decided by a slim 5–4 majority. In the dissenting opinions, Justices Breyer, Ginsburg, Souter, and Stevens vigorously disagreed with both the reasoning and results outlined above. Nonetheless, despite the close vote, *Adarand* is widely perceived as confirming that affirmative action, already politically problematic, has become constitutionally problematic as well. The decision has already precipitated substantial changes in federal affirmative action practices. For example, in October 1995, the Defense Department announced its suspension of a contracting rule that had resulted in one

Duncan, "*Croson* Revisited: A Legacy of Uncertainty in the Application of Strict Scrutiny," *Columbia Human Rights Law Review* 26 (1995) 679–712.

[13] *Bakke*, 438 U.S. 265.

billion dollars in federal business for minority firms.[14] Building upon the momentum created by *Adarand*, a group of Congressional Republicans led by Senator Bob Dole introduced the Equal Opportunity Act of 1995, which would bar the federal government from conferring any benefits whatsoever on the basis of race, ethnicity, or sex.[15]

A MORAL TAXONOMY OF AFFIRMATIVE ACTION

While *Adarand* may signal the parsimonious political and legal climate that will govern affirmative action programs in the foreseeable future, it does not augur the end of moral and jurisprudential debate about the issue, any more than *Roe v. Wade*[16] silenced discussion concerning abortion. Affirmative action is not an element of a perfect world; its proponents believe it to be one plank in the bridge between a society marred by racism, sexism, and other culturally embedded presuppositions about the relative worth of human beings and a relatively better community in which such presuppositions have lost their power. In order to assess the bridge, we first need to understand its origin and terminus. What precisely constitutes the wrong of unjust discrimination? How, if at all, should categories such as race and gender figure into the ideal structure of our social institutions?

The Nature of Unjust Discrimination

Discrimination as Irrationality. In the original sense of the word, to cultivate the skill of "discrimination" was praiseworthy; it connoted an ability to draw judicious lines and construct helpful categories. The modifiers "invidious" or "arbitrary" have often been used in referring to morally unacceptable discrimination.[17] As they suggest, one way to understand the fundamental problem with discrimination is that it is irrational in at least two ways. First, someone who discriminates on the basis of such categories as race or gender inaccurately attributes characteristics regarding ability or character to an entire class of human beings. Second, when confronted with individual members of the relevant class, he or she judges them on the basis of misleading stereotypes rather than a particularized assessment of strengths and weak-

[14] Ann Devroy, "Rule Aiding Minority Firms to End," *Washington Post*, 22 October 1995, A-1.

[15] Steven A. Holmes, "G.O.P. Lawmakers Offer a Ban on Federal Affirmative Action," *New York Times*, 28 July 1995, A-17.

[16] *Roe v. Wade*, 4110 U.S. 113 (1973).

[17] For good discussion of the meaning of "discrimination," see Mark Strasser, "The Invidiousness of Invidiousness: On the Supreme Court's Affirmative Action Jurisprudence," *Hastings Constitutional Law Quarterly* 21 (1994) 323–403; and Owen M. Fiss, "Groups and the Equal Protection Clause," in *Equality and Preferential Treatment*, ed. Marshall Cohen, Thomas Nagel and Thomas Scanlon (Princeton: Princeton University, 1977) 84–154.

nesses. The view that discrimination is irrational excludes both positive and negative wholesale categorizations of groups.

Discrimination as a Violation of Equal Regard for Individuals. But what if, in any given instance, the generalizations based on suspect categorizations are accurate? For example, suppose it is statistically correct that male students have substantially stronger mathematical skills than female students, and that these statistics correlate with future performance. If this is the case, it may not be irrational for an engineering firm to concentrate its limited resources upon male candidates when recruiting.[18] Those who object to the use of racial classifications in these instances cannot base their objection on "discrimination as irrationality."

An alternative basis is something akin to "discrimination as a violation of equal regard for individuals." From this perspective, even if racial or gender-based categories offer reliable ways to streamline our decision-making process, they cannot be so used without violating the rights of particular persons to equal regard.[19] No person should be reduced to generalizations based upon his or her race or gender; each deserves individualized consideration.[20] However, this view alone cannot explain why classifications such as race and gender should be treated differently than the myriad of other favorable and unfavorable ways in which we permit ourselves to categorize one another in everyday life.

Discrimination as Harmful or Demeaning Categorization. The Supreme Court has frequently invoked the shameful history of race- and gender-based categories to justify treating them differently than other ways of categorizing persons. Although the *Adarand* majority would use this history to justify significant restrictions upon all use of racial categories, this historically based argument suggests that classifying persons by race or gender is not wrong in itself, but depends upon the nature and purpose of the classification for its ethical status.[21] More specifically, a race- or gender-based classification can be assessed from two vantage points.

First, is the basis of the classification itself positive, neutral, or derogatory regarding the qualities of the group it describes? Second, will the classification be used to assist or to subjugate members of the relevant group? For example, the presumption at issue in *Adarand* suggests that businesses run by minorities and women are less success-

[18] Richard Posner makes this point in "The *DeFunis* Case and the Constitutionality of Preferential Treatment of Minorities," in *Modern Constitutional Theory* at 589, where he also states that "to say that discrimination is often a rational and efficient form of behavior is not to say that it is socially or ethically desirable."

[19] Michel Rosenfeld develops his theory based upon the "moral postulate of equality" of each person in *Affirmative Action and Justice* (New Haven: Yale University, 1991).

[20] See Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University, 1985) chap. 14.

[21] See, e.g., Rosenfeld, *Affirmative Action and Justice* 14; and Ronald Dworkin, "DeFunis v. Sweatt," in *Equality and Preferential Treatment* 63–83.

ful than those run by white males. Yet the presumption was incorporated into a program designed to assist members of these groups. How do these factors contribute to our assessment of the relevant classifications? Theorists like Thomas Sowell, Stephen Carter, and Glenn Loury have expressed the view that affirmative action programs have been at best a mixed blessing, because they imply that African-Americans are unable to compete on the same basis as the white majority.[22] Gertrude Ezorsky, on the other hand, dismisses such claims, on the grounds that African-Americans are not to blame for any lack of competitiveness which may exist due to the lingering effects of institutional racism.[23] She believes that the beneficial aim and effect of affirmative action programs are decisive.

Discrimination as a Group-Regarding Harm. The moral objections to discrimination outlined above are compatible with the belief that discrimination works its primary wrong against individual members of society. From this perspective, it can make sense to speak of a white male as a victim of discrimination if the use of a suspect classification has disadvantaged or devalued him. However, it is also possible to interpret discrimination primarily as an injustice against specific groups, paradigmatically African-Americans, and as a wrong to individuals only derivatively as members of such groups. From this perspective, to speak of "discrimination" against a white male is entirely inapposite. The test of discrimination is not whether an "irrational" classification serves as the basis for action, but whether the fruits of that action advance or impede the interests of a specified group taken as a whole.[24]

One can hold that groups are the primary victims of discrimination, yet maintain that racism and sexism can be vanquished while leaving the larger cultural framework intact, particularly its social organization and conception of values. Yet one can also adopt a far more radical understanding of the group-regarding harm inflicted by discrimination. From this perspective, the problem is not that a generally open American society marginalizes the contribution of one or two "discrete and insular minorities"; it is rather that we illegitimately privilege the perspective of a single group composed of white, Western, heterosexual males in a way that renders the needs and contributions of other groups relatively invisible.

The foregoing arguments have been eloquently advanced in recent years by legal theorists belonging to a movement known as critical

[22] See, e.g., Thomas Sowell, *Civil Rights: Rhetoric or Reality* (New York: William Morrow, 1984); Stephen L. Carter, *Reflections of an Affirmative Action Baby* (New York: Basic Books, 1991) chap. 3; Glenn C. Loury, "Black Dignity and the Common Good," *First Things* 4 (June/July 1990) 12–19.

[23] Gertrude Ezorsky, *Racism & Justice: The Case for Affirmative Action* (Ithaca and London: Cornell University, 1991) 93–94.

[24] Fiss, "Groups and the Equal Protection Clause" 134 ff.

race theory.[25] Through the use of narrative and other unconventional methods of discourse, critical race theorists strive to expose the "normal" character of racism in American society, which is paradoxically so pervasive as to be invisible to us. From their perspective, seemingly neutral and objective standards for awarding jobs, university admissions, and other cultural goods are in reality shot through with a presumption in favor of the dominant white, male culture. The essence of discrimination consists in the hegemony of these standards, rather than in any societal unwillingness to allow individual minorities the opportunity to meet them. Minorities have not been able to shape the rules of the social game.

The key question facing thinkers who view discrimination as a harm against groups, of course, is one which arises in more muted form for all theorists on this matter: how to determine which groups merit special protection. Owen M. Fiss argues that the equal-protection clause should be interpreted to protect those groups, paradigmatically African-Americans, which have been in a position of perpetual subordination and currently possess relatively little political power.[26] Although women, the second group that usually comes to mind, have historically been subject to unequal treatment, they do not constitute a minority. One federal program considered by the Supreme Court gave special consideration to U.S. citizens who are "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."[27] What of the disabled, the elderly, the poor, or homosexuals?[28] This issue deserves greater theoretical attention than it has so far received.

The Shape of a Nondiscriminatory Society

Affirmative action takes its shape not only from its origins as a response to discrimination, but also from its ultimate goal of a nondiscriminatory society. Here, too, we find competing descriptions.

[25] Representative writings include the reader *Critical Race Theory: The Cutting Edge*, ed. Richard Delgado (Philadelphia: Temple University, 1995); Derek A. Bell, *Faces at the Bottom of the Well* (New York: Basic Books, 1992); Richard Delgado, *The Rodrigo Chronicles* (New York: New York University, 1995); and Patricia J. Williams, *The Alchemy of Race and Rights* (Cambridge, Mass.: Harvard University, 1991). Similar points are made with respect to gender classifications by certain feminists; see, e.g., Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard University, 1989) and "Difference and Dominance: On Sex Discrimination," in *Modern Constitutional Theory* 539–49.

[26] Fiss, "Groups and the Equal Protection Clause" 134 ff.

[27] See, among others, *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

[28] See, e.g., Paul Brest and Miranda Oshige, "Affirmative Action for Whom?" *Stanford Law Review* 47 (1995) 855–900; Jeffrey S. Byrne, "Affirmative Action for Lesbians and Gay Men: A Proposal for True Equality of Opportunity and Workplace Diversity," *Yale Law & Policy Review* 11 (1993) 47–108; Kimberly Papp Taylor, "Affirmative Action for the Poor: A Proposal for Affirmative Action in Higher Education Based on Economics, Not Race," *Hastings Constitutional Law Quarterly* 20 (1993) 805–23.

A Color-Blind Society. One common description of a world in which racism has been overcome is "color-blind." This view, which is often presented as the antidote to "discrimination as irrationality," believes that in an ideal world, race and other suspect ways of classifying people would be as irrelevant as eye color is today. At the very least, the government should entirely ignore race and ethnicity in all of its dealings. In constitutional theory, the ideal of color blindness can be traced to Justice Harlan's dissent in *Plessy v. Ferguson*: "There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens."[29] On the current Court, Justice Scalia has proven the most determined advocate of a color-blind society.[30] On this view, overcoming racism does not necessarily entail eliminating all differences in prosperity and achievement among various groups. It simply means eliminating race as a significant factor, positive or negative, in the decisions made by representatives of social institutions.

A Level Playing Field for All Individuals. Closely corresponding to the view of discrimination as a violation of equal regard for individuals is a positive vision of a society in which no person is denied an equal opportunity to participate in its benefits. On this view, overcoming racism and sexism is not simply a matter of preventing the use of racial categories in decision making. It is primarily a question of neutralizing the present effects of our discriminatory past, many of which are embedded in our social structure. For example, Gertrude Ezorsky argues that institutional racism continues to affect nearly all African-Americans. They are less likely to develop the personal connections through which many individuals discover employment opportunities, or to acquire the seniority that allows them to exert influence in the workplace. Inferior educational opportunities render them less qualified on paper for many of the better jobs, at the same time that amorphous criteria such as "ability to fit in" or "leadership potential" provide easy tools for racial prejudice.[31] From this perspective, a society will have conquered its discrimination not when decision makers no longer treat race or other categories as relevant, but when social structures insure that each individual is provided with equal means to achieve his or her goals, regardless of racial or ethnic group.[32]

Equal Participation of Groups. One could also conceive of a just soci-

[29] *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). In *Plessy*, the Supreme Court held that "separate but equal" facilities for black and white citizens did not violate the Constitution. It remained the law of the land for nearly 60 years until overruled by *Brown v. Board of Education* in 1954.

[30] See James L. McAlister, "A Pigment of the Imagination: Looking at Affirmative Action Through Justice Scalia's Color-Blind Rule," *Marquette Law Review* 77 (1994) 327–59; William Van Alstyne, "Rites of Passage: Race, The Supreme Court, and the Constitution," in *Modern Constitutional Theory* 560–64; and Kull, *The Color-Blind Constitution.*

[31] Ezorsky, *Racism & Justice* 9–28.

[32] Rosenfeld, *Affirmative Action & Justice* 22–29.

ety as one in which groups previously subject to discrimination now participate in various aspects of the power structure to a degree that is proportionate to their numerical strength in society as a whole. The two presuppositions of this viewpoint are: that, absent discrimination, the distribution of talents, interests, and values among the variety of racial and ethnic and other groups would be roughly the same; and that the mark of a stable and just society is the distribution of social goods and responsibilities to groups roughly in proportion to their numbers. On this view, numerical diversity is good because it insures the participation of previously excluded groups in key facets of our society.[33] It is possible to advocate this type of diversity while simultaneously believing that it is impossible to identify a "group" perspective on matters of social import, and that seeking "viewpoint diversity" is therefore illegitimate.[34]

Societal Transformation by Groups. However, viewpoint diversity is crucial to adherents of critical race theory, for whom the hallmark of discrimination is not only the exclusion of groups with a particular skin color or gender, but the suppression of the distinct manner in which they view the world. While most such theorists do not advocate essentialist or monolithic perspectives attributable to all members of a group, they do contend that many such groups have developed an identifiable culture and distinct values, which have been forged in the fire of their oppression. From this perspective, a society that has transcended discrimination will not only exhibit numerical diversity, but will honor and reflect a number of diverse cultural perspectives in shaping its common life. Moreover, a discrimination-free society would recognize and value the strengths and insights minority groups can offer in ameliorating broader social ills.[35]

Affirmative Action as an "Antidote" for Discrimination

With the two anchors in place, it is now possible to examine the role of affirmative action as a bridge between a world of discrimination and a more just society.

The Purposes of Affirmative Action

As described above, it is common to distinguish between "backward-looking" and "forward-looking" purposes of affirmative action.[36] Back-

[33] On the concept of diversity, see Sheila Foster, "Difference and Equality: A Critical Assessment of the Concept of 'Diversity'," *Wisconsin Law Review* 105 (1993) 105–61.

[34] For example, thinkers like Stephen Carter would deny that there is a monolithic "black perspective" on matters. "History *does* make black people different from white people. But it is both wrong and dangerous to insist that it makes us different in some predictable, correctly black way" (*Reflections of an Affirmative Action Baby* 199).

[35] Richard Delgado makes this point in *The Rodrigo Chronicles* chaps. 5 and 8.

[36] For a helpful analysis of the respective presuppositions of backward-looking and forward-looking justifications for affirmative action, see Kathleen M. Sullivan, "Sins of Discrimination: Last Term's Affirmative Action Cases," *Harvard Law Review* 100 (1986) 78–98.

ward-looking affirmative action emphasizes compensation and remediation; its paradigmatic case is a program enacted by an institution guilty of prior discrimination to make reparation to its own victims; for example, by giving preference at promotion time to African-American employees who were unjustly denied promotions in the past because of their race. Departures from the paradigm can occur in several ways. First, institutions that are not themselves guilty of previous discrimination may adopt affirmative action programs in order to remedy general discrimination in their respective industries or broad-based societal discrimination. Second, the beneficiaries of affirmative action programs may be members of designated groups who have not personally suffered from prior discrimination.

Backward-looking justifications for affirmative action are likely to be most attractive to those who understand discrimination as irrationality or as a violation of equal respect for individuals. The paradigmatic case presents the most compelling justification for the practice. In essence, affirmative action in this situation is a form of commutative justice; an institution guilty of discriminating against identifiable persons restores the balance by providing them with the benefits that they were unjustly denied.[37] However, the more significantly backward-looking affirmative action departs from the paradigm, the more problematic it becomes, at least according to those who understand discrimination as irrational or as a violation of equal regard. For example, if the essence of discrimination consists in the deliberate use of irrelevant categories in making judgments about particular persons, then an institution that is not guilty of past discrimination cannot enact an affirmative action program without committing discrimination at the present time. Furthermore, such a step can be seen as undermining rather than promoting the ideal of a color-blind society. Similarly, if discrimination is wrong because it denies individuals the opportunity to compete on an equal basis for societal goods, then affirmative action diminishes rather than enhances the goals of justice if it benefits individuals who already have achieved equal opportunity. One way of dealing with this problem, of course, is to claim that institutional racism actually does negatively affect the opportunities of all African-Americans or women.[38] However, a view of discrimination that focuses upon individuals is less likely to find this undifferentiated charge persuasive.

Forward-looking justifications for affirmative action are frequently most attractive to those who see the essence of discrimination as some form of group-regarding harm. From this vantage point, it is not necessary to allocate blame to specific institutions or identify specific victims in order to justify providing the young with role modes from minority groups, increasing diversity in educational institutions and the work-

[37] For example, Justice Scalia believes that affirmative action is legitimate in this situation.

[38] Ezorsky, *Racism & Justice* chap. 4.

place, or expanding the range of experiences, services, and opportunities available to oppressed groups. Both the harm and the victim have been recast in more general terms; combating discrimination is fundamentally a matter of restructuring society to allow for fuller participation on the part of previously oppressed groups. From the more radical perspective of critical race theory, it is not enough to allow the oppressed groups to "think white"; they must also be encouraged to contribute to society from their own distinct perspectives.[39] Consequently, from this perspective, affirmative action programs may legitimately take into account an applicant's communal ties and commitments, not simply his or her race or gender.

The Means, Methods, and Context of Affirmative Action

In addition to identifying the legitimate purposes of affirmative action, it is also necessary to examine the means used to achieve them. More specifically, it is necessary to ask certain questions, namely, whether the methods used to implement an affirmative action program themselves constitute morally unacceptable discrimination, whether affirmative action violates the rights of third parties in some other way, and whether affirmative action in any other respect impedes the development of a just and peaceful society.

The first of these questions has received the most attention. To those who believe that discrimination is dangerously irrational, affirmative action programs perpetuate the same wrong that they purport to combat—it is "reverse discrimination." Furthermore, to those who assume that the ideal society is color-blind, reliance upon the classifications embedded in affirmative action programs serves only to postpone the achievement of a more just state of affairs. By contrast, those who believe that the wrong of discrimination consists in its violation of equal opportunity for individuals can extend greater tolerance to affirmative action programs. On this view, giving preference to minorities may compensate for the prior disadvantage they have suffered because of racism or sexism in amassing the tools to compete for society's goods. Moreover, any corresponding disadvantage suffered by white males is not unjust, because it serves roughly to return them to the competitive position they would have occupied without the support of racism or sexism.

From the perspective of those who view discrimination as a system of disadvantage to and disrespect for historically oppressed groups, affirmative action designed to assist such groups is by definition not

[39] For advocacy of affirmative action directed toward members of minority groups who exhibit a perspective identified with their communities, see Ian Haney-Lopez, "Community Ties, Race, and Faculty Hiring: The Case for Professors Who Don't Think White," *Reconstruction* 1:3 (1991) 46–62; T. Alexander Aleinikoff, "A Case for Race-Consciousness," *Columbia Law Review* 91 (1991) 1060–1125; Duncan Kennedy, "A Cultural Pluralist Case for Affirmative Action in Legal Academia," *Duke Law Journal* 705 (1990) 705–57.

discrimination. Finally, those who call for social transformation undertaken by currently excluded groups exhibit an ambivalent attitude toward affirmative action. On the one hand, critical race theorists are often skeptical of the motives underlying affirmative action programs, which they see as designed to benefit the white, male majority by assisting "just enough" minorities to preserve social stability.[40] On the other hand and from a purely pragmatic perspective, critical race theorists recognize that in enabling some disadvantaged individuals to gain access to social power, affirmative action does increase opportunities to erode the "canonized status of any one group's control."[41]

A second objection frequently raised against affirmative action programs is that the means used violate the rights of third parties, particularly the "better qualified" white males who are passed over because of preferential treatment for minorities. To the extent that this objection reduces to the claim that affirmative action discriminates against white men, it has been addressed above. However, one could maintain that the rights of third parties are broader than the right to be free of invidious discrimination. More specifically, the intuitive claim at stake here is that the best-qualified person has a right to the position. Needless to say, this claim is strongest among those who believe that the rules of the competition are fundamentally fair, and least plausible among those who believe that neutrality is in fact a mask for racism or sexism. However, even apart from that dispute, both the concept of merit and the notion of a right to a specific job or slot at a university deserve critical examination.

Opponents of affirmative action often present the scenario of a white fire fighter passed over for a promotion in favor of a minority who earned a substantially lower score on the departmental test. The often unacknowledged problem with this example is its tacit assumption of a drastically truncated concept of "merit."[42] Depending upon the position, merit can encompass a candidate's physical and mental capacity to do the assigned function, initiative and responsibility, ability to get along with coworkers and clients, and likelihood of enhancing the goals of the institution. In certain cases, these goals may legitimately coincide with some of the forward-looking purposes of affirmative action, such as a company's desire to expand its customer base and a police department's aim to establish better relations with an alienated segment of the community.

When considering all the goals of an institution, a minority candidate may merit a position more than a person who is not a minority. Critics of affirmative action appear to forget at times that an institution or a

[40] See Richard Delgado, "Affirmative Action as a Majoritarian Device: Or, Do You Really Want to Be a Role Model," in *Critical Race Theory* 355–61.

[41] Williams, *The Alchemy of Race and Rights* 121.

[42] For an interesting discussion of the social construction of merit, see Lemann, "Taking Affirmative Action Apart."

company makes hiring decisions on the basis of an applicant's ability to further its own ends, not its own ability to further the career plan of the applicant.[43] The situation is analogous in the context of admissions to colleges and universities, most of which are charitable institutions. In order to justify their tax-exempt status, the purpose of such institutions must extend to benefit the community as a whole. Despite the instrumental value of an education to those who receive it, colleges and universities should not understand their function as selling a marketable credential to "student-customers." Institutions of higher education should make admissions decisions on the basis of their fundamental obligation to educate the next generation in service of their common life.

Second, it is not clear that an individual who most "merits" a position, even when that term is broadly construed, has a moral or legal claim to that position.[44] One does have a negative right not to suffer from discrimination. Yet this negative right does not entail the positive right that the merit of one's application trump other considerations.[45] For example, we normally do not consider it a violation of the rights of other applicants for a university to give preferential treatment to the children of alumni, or for a family-owned corporation to hire the president's daughter.

An additional issue that warrants exploration is whether the method utilized by a particular affirmative action program influences its moral status. In *Bakke v. University of California Board of Regents*,[46] Justice Powell rejected a medical school affirmative action program that utilized quotas, while indicating that a program that gives a "plus" to minority candidates would be acceptable. From the perspective of those who view race as irrelevant and an ideal society as color-blind, even this "plus" is likely to be too much. However, to those whose ideal is a society in which each person receives individualized consideration, a quota-based program might be far more problematic than one that gives minority candidates a more flexible preference. At the other end of the spectrum stand those who perceive the essence of discrimination as a group-regarding harm, and describe the ideal society as one in which currently disadvantaged groups enjoy significant participation in its power structures. To such thinkers, quotas are likely to be an appropriate means to the desired end.

[43] This does not mean, of course, that employers cannot be criticized for having too constricted a sense of their own ends, for example, by ignoring all conception of their responsibilities as corporate citizens in their pursuit of profits.

[44] There are, however, theorists who dispute even this claim; see Richard Epstein, *Forbidden Grounds* (Cambridge, Mass.: Harvard University, 1992).

[45] One issue that needs greater exploration is whether and to what degree employees have a right not to be laid off after they have begun work. Unlike a job applicant, who has no reason to expect to be awarded a given position, a person who has worked at a job for a significant period of time may justifiably rely upon his continued employment.

[46] *Bakke*, 438 U.S. 265. Although there was no majority opinion in this case, Justice Powell's opinion is commonly treated as such.

The third set of issues raised by affirmative action pertains to its likelihood of success. Do affirmative action programs truly achieve their desired goals, or do they in fact impede the creation of a more just society? Key questions that arise here are whether affirmative action does anything to help the poor and badly educated subclass of minorities who are discrimination's most desperate victims, whether it stigmatizes its beneficiaries, whether it exacerbates social dissension, and whether it slights the needs of impoverished whites and others who are not members of the protected groups. With respect to the last question, there have been numerous proposals in recent years to recast affirmative action programs to focus upon the economically disadvantaged, rather than members of historically disadvantaged groups.[47] Again, one's response to these proposals will depend upon one's assessment of the wrong of discrimination and the shape of a society that has overcome it. For example, if one believes that discrimination is a group-regarding wrong, then it will not suffice to provide assistance solely on the basis of economic disadvantage, if so doing will not significantly augment the role played by historically oppressed groups in American life. This does not mean, of course, that programs to aid all the poor are not morally obligatory on other grounds.

THEOLOGICAL VANTAGES ON AFFIRMATIVE ACTION

Two strains of theological reflection offer fruitful possibilities for reflection on the contemporary affirmative action debate: the notion of the common good as expressed in the tradition of Catholic social teaching; and liberation theology's preferential option for the poor and oppressed, along with its associated virtue of solidarity.

The imperative to overcome discrimination can be grounded in the documents of the Second Vatican Council. "With respect to the fundamental rights of the person, every type of discrimination, whether social or cultural, whether based on sex, race, color, social condition, or religion, is to be overcome as contrary to God's intent."[48] Furthermore, the theological anthropology presupposed by the council forestalls the interpretation of the rights of which it speaks in an excessively individualistic manner. All rights are referred to the common good, which David Hollenbach helpfully defines as the "social, economic and political conditions which are necessary to assure that the minimum human needs of all will be met and which will make possible social and political participation for all."[49] The emphasis here is on participation; from the perspective of Catholic social teaching, the fundamental wrong

[47] The neoconservative writer Dinesh D'Souza advocates such a shift in priorities for affirmative action programs in *Illiberal Education* (New York: Free Press, 1991) 251–53; see also Richard Kahlenberg, "Class, Not Race," *New Republic* (3 April 1995) 21–27.

[48] *Gaudium et Spes*, "Pastoral Constitution on the Church in the Modern World" no. 21 (Abbott translation).

[49] David Hollenbach, *Claims in Conflict* (New York: Paulist, 1979) 152.

targeted by affirmative action is the exclusion of entire groups of persons from exercising both rights and responsibilities toward the larger society. Consequently, any conception of individual rights that renders society incapable of remedying this wrong is fundamentally inadequate from the perspective of Catholic social teaching.

A more radical justification of affirmative action, which bears points of consonance with critical race theory, can be found in liberation theology. The concept of preferential option for the poor has been subject to many of the same criticisms in theological circles as affirmative action has attracted in the secular sphere.[50] In theological circles the fundamental question is how a just God can be partial to one socioeconomic group, while in the political realm it is how a democratic republic committed to the equality of all its citizens can give preference to one or more historically oppressed groups. Two recent articles in this journal provide helpful ways of addressing these issues, and at the same time emphasize the continuities between liberation theology and the mainstream social-justice teachings of the Catholic Church. William O'Neill argues that when liberal, democratic "justice as fairness" is properly interpreted, it is compatible with a preferential concern for the poor: "Our moral entitlement to equal respect or consideration justifies preferential treatment for those whose basic rights are most imperiled."[51] Stephen Pope makes a helpful distinction between proper and improper understanding of partiality toward the poor and oppressed, arguing that a proper partiality "strives to create opportunities for deprived and oppressed parts [of the community] so that all parts will be able someday to participate fully in the whole."[52] As Pope recognizes, the virtue that allows an effective preferential option for the poor to flourish is solidarity with the poor and oppressed,[53] by which, out of a shared sense of common humanity, "we shall make their problems and struggles our own."[54] At its deepest level, the challenge posed by affirmative action is how to make that virtue a plausible and attractive option in these morally and culturally fragmented United States on the eve of the third millennium.[55]

[50] See Thomas L. Schubeck, S.J., "Ethics and Liberation Theology," *Theological Studies* 56 (1995) 107–22.

[51] William R. O'Neill, S.J., "No Amnesty for Sorrow: The Privilege of the Poor in Christian Social Ethics," *TS* 55 (1994) 638–56.

[52] Stephen J. Pope, "Proper and Improper Partiality and the Preferential Option for the Poor," *TS* 54 (1993) 242–71, at 265.

[53] For a helpful discussion of solidarity in the context of affirmative action, see Chmielewski, "Affirmative Action," in *The New Dictionary of Catholic Social Thought*, ed. Judith A. Dwyer (Collegeville: Liturgical, 1994) 12.

[54] Ibid. 268, citing the First General Conference of Latin American Bishops (Medellín, Colombia, 1968), "On the Poverty of the Church" no. 10, from *Liberation Theology: A Documentary History*, ed. Alfred T. Hennelley (Maryknoll, N.Y.: Orbis, 1990) 17.

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