

## MORE HARM THAN GOOD: ENDING AFFIRMATIVE ACTION

by Lisa DiNoto CC '00

Today the debate over affirmative action rages, but the context from which it initially emerged in the early 1960s only can be described as noble. In a dramatic reversal of *Plessy v. Ferguson's* (1894) precedent, the Supreme Court, with *Brown v. Board of Education* (1955), identified discrimination on the basis of skin color to be a constitutionally intolerable evil. During the following decade, the color line came under attack. It was in this setting that President John F. Kennedy introduced Executive Order No. 10925, initially defining "affirmative action" as active recruitment and outreach measures aimed at enhancing employment opportunities for all Americans. Today, President Clinton's Committee on Affirmative Action defines the measure as "any effort taken to expand opportunity for women or racial, ethnic and national origin minorities by using membership in those groups that have been subject to discrimination as a consideration [in decision making or allocation of resources]."

In reviewing discrimination, three key questions present themselves. (1) Is discrimination still a problem? (2) Does affirmative action work? (3) Is affirmative action consistent with the American principles presented in the Constitution? (Edley 15, 44). The answer to the first question seems to be a resounding *yes*. Social science studies present us with numerous examples of continued discrimination. For example, in a test performed by the Fair Employment Council of Greater Washington during 1990-92, equally qualified testers were sent to apply for a job, an apartment, a bank loan, etc. Blacks were treated worse than equally qualified whites 24 percent of the time; Latinos were treated worse 22 percent of the time (Edley 47-8). Examples such as these suggest that discrimination still exists in America, for African Americans and other minority groups. The answer to the second question also seems to be *yes*. Despite the difficulties in separating the effects of affirmative action from anti-discrimination norms, it is largely believed that affirmative action has had modestly positive results. For the purposes of this paper, this claim will be accepted. The third question, is affirmative action "consistent with inviolable principles," yields a resounding *no* as an answer (Edley 15). Affirmative action proves inconsistent with inviolable principles because it inevitably undermines both the independence of the courts and the consistent application of the Constitution.

Affirmative action measures are largely based on the Fifth and Fourteenth Amendments. According to the Fourteenth Amendment's equal protection clause, a state cannot "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws." In the Supreme Court decision of *Boiling v. Sharpe* (1954), "the Supreme Court held that the limits on racial discrimination applicable to the states under the Fourteenth Amendment's equal protection clause are also applicable to the federal government, using the interpretive device of 'incorporating' its equal protection guarantees into the Fifth Amendment's due-process guarantee" (Edley 55). The general findings of the Court, according to these two amendments, is that nondiscrimination is a right. Affirmative action had been founded as a *possible means* to that right (Edley 15).

However, the Fourteenth Amendment is guaranteed to "citizens of the United States." As Justice Powell says in his decision on *Regents of the University of California v. Bakke* (1978):

It is settled beyond question that the 'rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights'...The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

This raises some serious questions about affirmative action. By affording certain groups of people with benefits on the basis of membership in that group, it may be said that we deny individuals equal protection. Edley's view is that it "takes an affirmative effort to break a comfortable old habit [of discrimination]" (52). Yet, the Fourteenth Amendment does not discuss affirmative efforts for certain *groups*, but only the equal protection of *individuals*.

Proponents of affirmative action claim that disadvantaged groups must receive benefits to raise them to the level of "equal protection" afforded the "majority." In the words of Dr. Martin Luther King, Jr.:

It is impossible to create a formula for the future which does not take into account that our society has been doing something special *against* the Negro for hundreds of years. How then can he be absorbed into the mainstream of American life if we do not do something special *for* him now, in order to balance the equation and equip him to compete on a just and equal basis? (Edley 85).

Equal protection requires benefits for disadvantaged groups to bring them to the level of equal protection afforded the majority. These two interpretations are due to the subjective interpretation of an amendment framed on vague terms. Both parties largely base their arguments on the same phrase, "equal protection," and neither side is entirely correct. Looking into the Fourteenth Amendment in this way cannot provide us with a

verdict on affirmative action.

The next step requires an investigation into quotas. Quotas are illegal. An affirmative action program cannot set rigid numerical straightjackets on the number of minorities to be chosen in any decision-making process, be it university admissions or government contracts. In the Supreme Court decision of *Hirabayashi v. U.S.* (1943), the Court declared that, "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of inequality." The absence of prescribed theoretical quotas, however, by no means leads to a guarantee of avoiding quotas *in practice*. "In practice, flexible numerical goals can become rigid numerical straightjackets, or quotas, if the people implementing the affirmative action measure are badly trained, indifferent to the law, or poorly supervised" (Edley 18). It is precisely this problem that conservatives have in mind when objecting to the Johnson-Nixon program embodied in Executive Order No. 11246, which demands:

Large government contractors to develop flexible goals and timetables when there is a manifest imbalance between the diversity of their workforce and the diversity of the relevant pool of qualified labor. Their concern...is that numerical goals and guidelines, flexible in theory, become rigid quotas in practice (Edley 27).

The government resources necessary in successfully choosing, training and supervising those implementing affirmative action measures would be enormous.

Even with these efforts, there is still no absolute guarantee that flexible goals will not become quotas in practice. The time and money spent attempting to ensure a low incidence of quotas may be beyond the scope of government resources. It would be nearly impossible to monitor constantly and attempt to eradicate quotas.

Still, let us assume that somehow the practice of affirmative action programs will succeed in eliminating quotas. Let us put our faith in the possibility of implementing affirmative action programs with race as a flexible factor in decision-making.

Is affirmative action now consistent with inviolable principles? The answer, when considering the effect of affirmative action measures on the judicial branch and the Constitution, is *no*. To identify the problems, we must return to the Fourteenth Amendment. Though Congress largely enacted this amendment with African Americans in mind, the Fourteenth Amendment was enacted on universal terms, without reference to race. According to Justice Powell's decision in the *Bakke* case,

The 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet

the particular and immediate plight of the newly freed Negro slaves...The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and Negro.

This interpretation is consistent with the definition of affirmative action supplied by Clinton's Committee on Affirmative Action, which addresses all groups suffering discrimination, not just African Americans.

In order to evaluate the implications of this idea, we must look at a substantial section of Justice Powell's decision. Powell's thoughts proceed as follows:

Once the artificial line of 'two-class theory' of the Fourteenth Amendment is put aside, the difficulties entailed in varying, the level of judicial review according to a perceived 'preferred' status of a particular racial or ethnic minority are intractable. The concepts of 'majority' and 'minority' necessarily reflect temporary arrangements and political judgments...the white 'majority' itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination...Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality...There is no principled basis for deciding which groups would merit 'heightened judicial solitude' and which would not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary.

When Powell refers to "scrutiny," he means the way in which the Supreme Court chooses to examine any law. All laws divide people, but most attempt to do it in a common sense fashion. For example, laws against murder divide murderers from non-murderers. Laws such as these receive tests of mere reasonability. Other divisions cast by laws raise immediate red flags. For example, an affirmative action measure divides people on the basis of race. Laws such as these receive the application of strict scrutiny. Strict scrutiny is a two-pronged test. The first prong is *compelling governmental interest* and the second is *narrow tailoring*.

Compelling interest, as defined by the Court in *City of Richmond v. J. A. Croson Co.* (1986), involves several factors, listed below:

1. The discrimination to be remedied may be in acts of the govern-

ment, or it may be in acts of private parties where the government is a 'passive participant.'

2. The government must have a strong basis in evidence for concluding that present discrimination and/or lingering effects exist.
3. The government [must] identify with precision the discrimination to be remedied (Edley 59-60).

Narrow tailoring, as explained in *Adarand Constructors, Inc. v. Peña* (1995) involves:

- (i) Whether the government considered race-neutral alternatives;
- (ii) the scope of the affirmative action program; (iii) the manner in which [race] is used, that is, whether race is a factor in determining eligibility...or whether race is just one factor in the decision making process; (iv) the comparison of any numerical target to the number of qualified minorities in the relevant sector or industry; (v) the duration of the program; (vi) the degree and type of burden caused by the program (Edley 60-1).

Clearly, Powell was concerned with how the Court was being forced to vary levels of scrutiny based on the temporary level of discrimination suffered by a given group. Because the level of discrimination is, according to Powell, a political judgment, the Courts would be forced to adapt the level of scrutiny applied to a law based on political forces.

Powell's concerns may seem overstated. His fear was that numerous minority groups, when seeing the affirmative action benefits afforded African Americans, would claim to be at a disadvantage and force the Court to evaluate their levels of discrimination in comparison. The argument against this is largely based on the fact that African Americans are still, after many years of affirmative action, suffering the most discrimination. Thus, African Americans are consistently the most disadvantaged group and the temporary arrangements discussed by Powell have proven, with time, to be nonexistent, exempting the Courts from the sort of evaluations that Powell feared.

However, this argument does not penetrate deep enough into the situation. If affirmative action actually worked, the success of affirmative action would, in time, raise African Americans to the level of equal protection afforded the majority. When this occurred, new judicial rankings would be necessary because another group then would suffer the most discrimination. As noted in the beginning of this paper, other groups, such as Latinos, also suffer discrimination, and their plight would need to be addressed by the Court. Once affirmative action worked for the Latinos, the Court then would have to approve affirmative action programs for, say, Japanese Americans, because their level of equal protection would be far below that of the majority, which would then include African Americans and Latinos. And after the Japanese, why not the Chinese or the Indians? This list may

seem to border on absurdity. However, once the Court sets a precedent that interprets the Fourteenth Amendment as proponents of affirmative action requests, requiring the bringing of groups up to the level of equal protection enjoyed by the majority, every group that faces discrimination must have its turn with affirmative action measures after the group below them is helped. Thus, if affirmative action actually worked, serving its purpose for African Americans, the result would be exactly what Powell feared. For this situation to be avoided, affirmative action could never achieve its desired purpose for any group. This, of course, would imply that affirmative action does not work, and it would still need to be abandoned.

Since the *Bakke* case, the Supreme Court has set precedents that require strict scrutiny for any type of affirmative action measure. In *City of Richmond v. A. Croson* (1986), the majority opinion delivered by Justice Sandra Day O'Connor concluded that all state and local affirmative action measures are subject to strict scrutiny. In *Adarand Constructors, Inc. v. Peña* (1995), the Court ruled that the strict scrutiny applied to state and local affirmative action measures in *Croson* also applies to Congressionally authorized programs. At first, the notion that all affirmative action measures are based on strict scrutiny due to the precedents set by *Croson* and *Adarand* seems to free the court of the problems presented in *Bakke*. Powell based his concerns about affirmative action on the Court's deciding each case's level of scrutiny based on temporary political forces.

Unfortunately, the method by which strict scrutiny is applied still subjects the judiciary to social and political forces. The courts are instructed to judge narrow tailoring and compelling interest independently. A strong sense of compelling interest requires the court to be more flexible in its narrow tailoring requirement. In other words, where discrimination, as discussed under the compelling interest prong, is judged to be extreme—a judgement heavily affected by political and social forces—the court must be more lenient when reviewing how narrowly a program is tailored. As a result, "legislators and program administrators may not, when faced with a dramatic problem, take the time and trouble to study the alternatives [to affirmative action] exhaustively" (Edley 61). Faced with a group suffering severe discrimination, an affirmative action measure that heavily burdens non-beneficiaries may prove Constitutional in the Court. Moreover, the same problems which present themselves in Powell's decision remain despite the blanket application of strict scrutiny on (non-gender-based) affirmative action measures. The court, as a result, must still judge affirmative action measures on the basis of temporary arrangements and political forces that would exist if affirmative action actually worked. As the compelling interest for African American based affirmative action measures disappeared, the compelling interest for another group would increase in comparison.

By attaching the interpretation of the equal protection clause to these transitory considerations, the Court, according to Powell, "would be

holding, *as a constitutional principle*, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces..."

This sort of precedent would be nothing short of dangerous. In reality it is true that the Court is not completely free from political forces, even after the Justices are appointed by the President and approved by the Senate. The Supreme Court may overrule prior decisions with the flow of political and social forces, as it did in *Brown v. Board of Education* (1954), after *Plessy v. Ferguson* (1896). However, the Court must be free to do this as it sees fit. It took almost sixty years for the Court to reverse *Plessy v. Ferguson*. Consistent applications such as this, according to Powell in *Bakke*, allow the Court to develop "principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place." The Court cannot be forced by a-precedent to be attached to temporary political forces. Attaching the Equal Protection Clause to transitory considerations would do just that.

By attaching the Court's findings to political forces, we undermine the very goals set by our founding fathers in Article III of the Constitution. The Courts need to interpret the Constitution as they see proper, without attachment to the other branches of government. Of course, the courts will often respond to changing political and social mentalities in the country, but these responses must be allowed to come slowly, allowing for the consistent application of the Constitution over significant periods of time. Hamilton recognized this need for judicial independence in Federalist 78. In fact, he insisted upon it. According to Hamilton, "There is no liberty if the power of judging be not separated from the legislative and executive powers" (Woll 441). Interpreting the Equal Protection Clause of the Constitution on the basis of political forces and transitory considerations sets a precedent that will dangerously undermine the Court's independence and the consistent application of the Constitution.

Thus, affirmative action undermines the very goals of our founding fathers in attempting to separate the judicial branch from the executive and legislative branches, and denies the possibility of applying the equal protection clause with consistent results. Regardless of all of the basic cases presented against affirmative action measures—that it stigmatizes beneficiaries, that it deepens racial divisions, that it compromises meritocratic standards, etc.—as potentially subjective, affirmative action *still* cannot be condoned because it breaches inviolable principles presented in the Constitution, and impedes the Constitution consistent application. If the Fourteenth Amendment does condone affirmative action, and affirmative action undermines the clear intent of Article III, then the Constitution contradicts itself. When we look at affirmative action on these terms, whether it seems morally right or not, its threat to the Constitution becomes clear and it must be stopped. If the Court does not rule against affirmative action, it will

undermine the Constitution. When this idea comes into light, arguments for affirmative action must inevitably fail. ©

#### REFERENCES

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