The Case Against Affirmative Action

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I. INTRODUCTION

Thirty-one years have passed since President John F Kennedy began the modern era of affirmative action by issuing Executive Order 10,925 in response to the concerns of civil rights leaders. In addition to forbidding government contractors from discriminating on account of “race, creed, color, or national origin,” the order required them to “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.” In due course, lawmakers stitched affirmative action into a series of federal laws and regulations affecting all public employers and all but the smallest private employers. Affirmative action, however, was not limited to the employment context. Most notably, it extended to the admissions offices of colleges, universities, and professional and graduate schools.

Those whom affirmative action was intended to benefit came to include not only blacks, the original focus of Executive Order 10,925, but also, in most cases, Hispanics, Asian-Pacific Americans, and Native Americans. By the early 1970s, affirmative action had come to mean for most people most of the time, treating, as opposed to not treating, those belonging to the designated or protected groups with regard to their race, creed, color, or national


2. Id. at 449-50.
3. Id.
6. Affirmative action for women raises different issues and for that reason is not addressed in this paper.
origin. Indeed, it meant treating members of protected groups in such a way as to hire, promote, or admit the designated minorities in enough instances that the total numbers of those so advanced were not trivial.

However its supporters propose to justify affirmative action, treating people with regard to their minority status is what affirmative action means in practice today. It has become a way of life throughout the public sector and in many parts of the private sector. It is a way of life that many institutions, especially those of higher education, are proud of.\(^7\) Even affirmative action's most severe critics must concede that it has done some good. It has helped employers and other gatekeepers of opportunity understand that the United States is indeed a nation of many peoples and races—potentially as many as are found on the globe itself. It has forced an often useful rethinking of employment and academic standards and practices.\(^8\) Schools, businesses, and government, chief among other bodies, have in some important ways become fairer and more egalitarian.\(^9\) Also, many people who but for their race would not have been given an opportunity have made the most of the chances affirmative action afforded them; their achievements are truly of the first rank. Although affirmative action is not the only reason for these results, it is surely an important one.

Merely touting the successes of affirmative action, of course, is to glance at only one side of the ledger. On the other side are substantial costs. When examined in terms of both theory and practice, affirmative action deserves a negative judgment. Affirmative action cannot remain a way of life unless we wish to change for the worse the very essence of what it means to be an American.

\(^7\) See Judith Areen, Affirmative Action: The Benefits of Diversity, Wash. Post, May 26, 1991, at D7 (defending Georgetown Law Center's affirmative action program after a student newspaper reported that black students were admitted to the school despite lower grade point averages and Law School Admission Test scores).

\(^8\) See, e.g., id. (commenting on the value of diversity in the classroom which results from affirmative action admissions policies).

\(^9\) Through the success of minority group members in its ranks, the military serves as a prime example of a government body that has moved beyond its discriminatory past.
II. PROBLEMS OF AFFIRMATIVE ACTION

Affirmative action arose as a response to the special case of blacks in America, and indeed that is a special case. No other racial or ethnic group endured centuries of slavery and Jim Crow laws. Past wrongs, it is said, must be corrected today. Here, however, there is a set of problems for affirmative action. Even if past wrongs and compensation for those wrongs can be inherited across decades and centuries, how can blacks living today who are not the descendants of the victims of past racial discrimination\textsuperscript{10} be "owed" the compensation of affirmative action? Similarly, how can whites living today who are not the descendants of slave owners or segregationists be morally obligated to pay for affirmative action by losing out on a promotion or a place in medical school? Even if we could identify all the descendants of those wronged in ages past and all the descendants of those who committed the wrongs, and then limit affirmative action to transactions between these groups, the question would remain whether past wrongs and the duty to compensate them can indeed be inherited. Unless we wish to live our lives through our parents, grandparents, great-grandparents, and beyond, the answer is obvious: they cannot be.

None of this discussion is to deny the special experience of blacks in America. However, the best we can humanly do today, in a nation that changes daily through death, birth, and immigration, is to turn our face to the present and treat each one of those around us honestly and honorably. As Thomas Sowell has observed, this is more than enough moral challenge.\textsuperscript{11}

As Sowell notes, some have made the argument in a more socio-logical way, to wit, that blacks and other minorities living today are suffering from the ill effects of past wrongs inflicted on their forbears, and that it is these effects that affirmative action must overcome.\textsuperscript{12} One obvious problem with this argument is that, even if past discrimination against minorities has caused present disabling effects in their descendants, it does not follow that affirma-

\textsuperscript{10} West Indian immigrants are an example of blacks whose ancestors did not endure past racial discrimination in this country.
tive action is the best response. More than one way exists to improve the prospects for equality. Unlike preferential affirmative action, other means such as Head Start are more compatible with the best in the American political tradition, and they enjoy the majority support of the American people.\footnote{13}

A. The Case Against “Underrepresentation”

The arguments from history and sociology are sometimes made in shorthand fashion in terms of “underrepresentation.” Commentators label a certain minority group as “underrepresented” for reasons of historical discrimination or its present-day disabling effects in a given job or profession, and use percentages to make the point. The American Society of Newspaper Editors (ASNE), for example, believes minorities are “underrepresented” by about one third in the nation’s newsrooms because roughly twenty-five percent of the general population is black, Hispanic, Asian-American or Native American, and yet not quite nine percent of all newspaper journalists are members of these minority groups.\footnote{14} ASNE wants to correct this “underrepresentation” by hiring enough minorities by the year 2000 so that twenty-five percent of newspaper journalists will be minorities.\footnote{15} The problem with arguments (conceding that they are arguments) based on “underrepresentation” of this most general kind is that the term is practically meaningless. No one can say to what degree racial and ethnic groups should be “represented” in various jobs and pursuits, and social science has challenged powerfully the idea that they should be proportionately “represented.”\footnote{16} Nonetheless, concepts of “underrepresentation” and their like, such as “underutilization” and “disparity,” have crept into our language and law in such ways as to place a heavy burden of proof on institutions whose work forces do not divide into percentages reflecting approximate proportional representa-

\footnote{15. Alex Jones, Of Hiring of Minorities and Newsroom Ethics, N.Y. Times, Apr. 15, 1989, § 1, at 50. 
\footnote{16. Sowell, supra note 12, at 21 (noting that throughout the world it is extremely rare to find racial and ethnic groups proportionally represented in various occupations).}
tion based on race and ethnicity. Such institutions are under social pressure, if not also legal pressure, to justify the "underrepresentation" and correct their "deficiencies," or face correction by relevant authorities, including the courts.\textsuperscript{17}

Because the differences among racial groups in income levels and jobs can be explained to some degree by such variables as age, education, and work experience, advocates of affirmative action sometimes try to determine just how much "underrepresentation" is a result of these factors. Once they determine that amount, they make the problematic move of attributing the remaining amount to past discrimination or its disabling effects, maintaining that this irreducible underrepresentation must be "corrected" through affirmative action. Thus, in discussions about minority underrepresentation on a university faculty, the more sophisticated argument for affirmative action will point to any "disparity" between the number of minority professors hired in a particular academic discipline and the number of minorities nationwide with the requisite credentials to be hired. The problem with this facially more plausible comparison is that it errs in treating all credentials as though they were alike. Not every credential, such as a PhD, is created equal, and mere statistical comparisons cannot tell us the quality of each PhD, or of the other merits an applicant might possess. To speak of underrepresentation even in this way is still dubious. Inevitably, we must focus on individual cases if we are to have any hope of knowing who might be best qualified for a job, unless, of course, we wish merely to congratulate ourselves for having achieved a faculty that is demonstrably racially and ethnically diverse, even if at the expense of turning away more highly qualified candidates.

B. The Exclusionary Effect

In addition to the usual arguments for affirmative action, the actual practice of affirmative action also deserves review. One impact of affirmative action is visible in the line of Supreme Court cases.

initiated by plaintiffs named Marco DeFunis,\textsuperscript{18} Allan Bakke,\textsuperscript{19} and Brian Weber.\textsuperscript{20} These cases show that affirmative action is a barrier to those who otherwise, because of their superior qualifications, would have advanced had they been members of the necessary racial group. This denial of opportunity is a very real cost for those who lose out on account of affirmative action, considering especially that these individuals are innocent of discriminatory conduct. Advocates of affirmative action take different views of this cost, some even dismissing it,\textsuperscript{21} but there is no getting around the fact that affirmative action is unfair action when it unambiguously deprives nondiscriminatory actors of their opportunities.

Whites have been the primary victims of affirmative action, and it may well be, as William Van Alstyne of Duke University Law School has observed, that among whites, it is \textit{working-class} whites—or, in the case of educational opportunities, their offspring—who have been the largest class of affirmative action victims.\textsuperscript{22} If Van Alstyne is right, the elites in business, government, or academe, have had to “pay” little, if any, of the exclusionary cost of affirmative action.

Whites, though, are not the only victims of affirmative action. Bear in mind that to benefit from affirmative action, one must be a member of one of the minority groups covered by the program at issue. Affirmative action, therefore, necessarily has an exclusionary effect upon members of all noncovered groups. For this reason, not all alleged victims of affirmative action are white. For example, in early 1992, the United States Court of Appeals for the Fourth Circuit struck down a blacks-only scholarship fund at the University

\textsuperscript{18} DeFunis v. Odegaard, 416 U.S. 312 (1974). Thirty-six out of 37 minority applicants admitted to the University of Washington Law School had lower admission “Averages” than DeFunis based on grade point averages and Law School Admission Test scores. \textit{Id.} at 324.

\textsuperscript{19} Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). In both years Bakke applied to the Medical School at the University of California at Davis, minority applicants were admitted with lower “benchmark scores.” \textit{Id.} at 277.

\textsuperscript{20} United Steelworkers v. Weber, 443 U.S. 193 (1979). Weber had more seniority than seven black coworkers who received promotions for which Weber had been passed over. \textit{Id.} at 199.


\textsuperscript{22} TERRY EASTLAND \& WILLIAM J. BENNETT, \textit{Counting By Race} 170 (1979).
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of Maryland at College Park.23 The plaintiff in that case, Dennis J. Podberesky, had been admitted to Maryland. He had scored 1340 on the Scholastic Aptitude Test (SAT) and possessed a 3.56 high school grade point average.24 The minimum academic requirements for the scholarship he sought were a 900 SAT score and a 3.0 grade point average.25 The unchangeable racial requirement for the scholarship, however, was that the applicant be black,26 and Dennis J. Podberesky was and is Hispanic.27

Because affirmative action excludes all those whom it does not include, it creates incentives for those excluded to acquire the credentials necessary for inclusion. Stories are not uncommon of individuals who have attempted to give themselves the kind of surnames that might entitle them to affirmative action treatment.28 Business set-aside programs29 have attracted companies fraudulently representing themselves as being owned by minorities.30 Thus, although affirmative action has performed a useful function by reminding employers and admissions officers that ours is a nation of all peoples, it has also encouraged what the public choice theorists31 could have foretold—rent-seeking behavior. The correction of this behavior requires a vigilant enforcement apparatus that is able and willing to inquire into matters of race and ethnicity.

24. Id. at 53.
25. Id. at 54.
26. Id.
27. Id.
28. In 1975 two whites applying for jobs as Boston firefighters failed the applicable civil service exam. In 1977 they reapplied to take the test, saying they were black. They both scored below the standard minimum acceptable for white applicants but were hired apparently on the basis of their “race.” Both were dismissed in 1988 after a Department of Personnel Administration hearing on their case. Susan Diesenhouse, Boston Case Raises Questions on Misuse of Affirmative Action, N.Y. Times, Oct. 9, 1988, § 1, at 54.
29. Set-aside programs typically involve a government body “setting aside” a specific portion of government contracts or grants for minority group access only. See, e.g., Alan Finder, Daunting New Task: Helping Minority Companies, N.Y. Times, Feb. 16, 1992, § 1, pt. 1, at 46 (reporting New York City's Mayor David Dinkins' plan to set aside more than five billion dollars a year in city contracts for companies owned by minorities and women).
30. Id. (revealing that companies will often set up fronts, such as declaring a minority employee a 51% owner, in order to qualify for the preferential government treatment).
C. The Devaluation of Testing

Affirmative action has led to more careful consideration of qualification tests to determine their fairness, what they are testing for, and, in the employment context, their relevance to the job to be done. It has also led to an indefensible devaluing of testing. An example of such devaluation is the "race-norming" of what was until recently the most widely used job test in the country, the General Aptitude Test Battery (GATB). The Labor Department conceived the practice of race-norming GATB scores in the late stages of the Carter administration and pursued it during the Reagan and Bush administrations until its revelation in 1990 led to its proscription under the Civil Rights Act of 1991. In 1981, the United States Employment Service, a division within the Labor Department, recommended that state Employment Service agencies should stop reporting job candidates’ scores on the GATB in relation to all other test takers and report them only in relation to those of the same race. So it happened: the testers ranked black applicants relative only to other blacks, Hispanics only to other Hispanics, and "others" to all but blacks and Hispanics. Test officials converted raw scores on the tests to percentile scores according to the standing of the test takers within their own comparison group. Before presenting the results to a prospective employer, the officials combined the percentile scores from the several comparison groups without reference to the race of the test takers and then listed the scores as though they had graded everyone by the same nonracial norms. The fiftieth percentile score of a black, therefore, was not necessarily the same as the fiftieth percentile score of a white, even though both names were listed together without reference to race in the final ordering.

Neither employers nor jobseekers were aware of this practice, which no fewer than forty states adopted. Once the media publi-
cized race-norming in 1990 and 1991\textsuperscript{38} it could not survive. Although the Civil Rights Act of 1991 bans score adjustment of a test,\textsuperscript{39} the Bush Labor Department has warned, in announcing an end to race-norming, that raw GATB scores should be “only one factor in the selection and referral process, with appropriate weight given to other factors.”\textsuperscript{40} Thus, the devaluing of a particular test has stopped, but the general devaluing of objective testing measures in “the selection and referral process” has not necessarily ceased. Those “other factors” will intrude as long as affirmative action persists.

On this point, \textit{Regents of the University of California v. Bakke}\textsuperscript{41} is instructive. Allan Bakke challenged the admissions program of the Medical School at the University of California at Davis (UC-Davis), which set aside sixteen of one hundred places in each class for members of the preferred minority groups.\textsuperscript{42} The Supreme Court struck down this “rigid” program,\textsuperscript{43} but Justice Powell’s pivotal opinion said that race may be a “plus” in the admissions process.\textsuperscript{44} On this basis, after \textit{Bakke}, UC-Davis proceeded automatically to award each minority applicant five points on account of race.\textsuperscript{45} Because an applicant needed a total of only fifteen points before being grouped among those to be given first consideration for admission, the award of five points made the Medical College Admissions Test and undergraduate grade point average less important for the preferred minorities, and even more important for all others.\textsuperscript{46}

\textbf{D. The Stigma of Affirmative Action}

Perhaps the most damning judgment against affirmative action, as it is typically practiced today, comes in the form of objections

\textsuperscript{38} The \textit{Richmond Times-Dispatch} led the way. See \textit{Race-Norming, Finis, supra} note 32, at A12.
\textsuperscript{39} Civil Rights Act of 1991 § 106.
\textsuperscript{40} \textit{Race-Norming, Finis, supra} note 32, at A12.
\textsuperscript{42} \textit{Id.} at 279. The preferred minority groups included blacks, Chicanos, Asians and American Indians. \textit{Id.} at 274.
\textsuperscript{43} \textit{Id.} at 271.
\textsuperscript{44} \textit{Id.} at 317.
\textsuperscript{45} EASTLAND \& BENNETT, supra note 22, at 194.
\textsuperscript{46} \textit{Id.}
that could only be expressed by blacks and members of other minority groups typically included in affirmative action programs. Their criticisms concern the costs borne by the ostensible beneficiaries of affirmative action. For example, an Hispanic officer for the Bank of America asks: "Sometimes I wonder: Did I get this job because of my abilities, or because they needed to fill a quota?"\(^4\) Glenn Loury of Boston University has said that affirmative action can undermine "the ability of people to confidently assert, if only to themselves, that they are as good as their achievements would seem to suggest."\(^4\) In *The Content of Our Character*, Shelby Steele examines the "enlargement of self-doubt" caused by affirmative action.\(^4\)8 "Under affirmative action the quality that earns us preferential treatment is an implied inferiority. However this inferiority is explained it is still inferiority."\(^4\)9 So long as affirmative action governs an institution in which such concerns are expressed, objections of this nature can be expected to continue.

What is especially perverse about affirmative action is its suggestion that all protected minorities are alike, that for each minority group member, race has been an equal factor in his or her achievement. This suggestion, of course, is not true, but it will be surpassingly hard to know as long as affirmative action exists. In 1987, three black students at the University of Virginia Law School made law review just after the adoption of an affirmative action plan for selecting law review members.\(^4\)1 They were confident, however, that they could have made law review under the previous selection procedures and evidently wished they had.\(^4\)2 One of them told William Raspberry of the *Washington Post*, "Affirmative action was a way to dilute our personal victory. It took the victory out of our hands."\(^4\)3


\(^{48}\) Glen Loury, Crisis in Black America, Address at the National Press Club (Dec. 17, 1985).


\(^{50}\) Id.


\(^{52}\) Id.

\(^{53}\) Id.
The practical problems of affirmative action that I have surveyed stem from its central focus on race and ethnicity. To state the obvious, affirmative action is not race-neutral. Advocates, nevertheless, tout affirmative action as an instrument of equality. Affirmative action raises the question of how true equality can be achieved when ostensible equals know that there are different rules for different racial groups. Surely members of minority groups who have rejected the putative benefits of programs for which they are eligible have asked and answered this question in a telling way. The story of Freddie Hernandez, a Hispanic who serves in the Miami fire department, serves as an example. In 1983 Hernandez rejected an affirmative action promotion to lieutenant. Instead, he waited three years until he had the necessary seniority and had scored high enough to qualify for the promotion under procedures that applied to all nonminorities. This decision cost Hernandez $4,500 a year in extra pay and forced him to study 900 additional hours to attain the required test results. Hernandez told the Wall Street Journal, “I knew I could make it on my own.”

III. A Return to Race-Neutral Principles

Inevitably, affirmative action forces us to attend to the basic question of whether race should be a deciding factor in the allocation of society’s benefits and opportunities. The best in the American political tradition answered that question negatively, at least until the early 1960s. Drawing on this tradition, for example, Thurgood Marshall argued in the 1948 case of *Sipuel v. Board of Regents*, a forerunner to *Brown v. Board of Education*, that “[c]lassifications and distinctions based on race or color have no moral or legal validity in our society.” Embedded in this statement was the moral truth that the mere race of a person tells us nothing morally important about him or her that should compel

55. Id.
56. Id.
57. Id.
58. 332 U.S. 631 (1948) (per curiam).
either negative or positive treatment. In his book, *First Things*, Hadley Arkes elaborates: “Merely by knowing a person’s race we cannot know that he has done a wrong and deserves punishment; neither can we know that he has suffered an injury and deserves compensation.”\(^{61}\) This discussion is not to deny what social science reports about Americans when examined in terms of their racial and ethnic groups. However, social science by its own terms is interested in groups, not individuals, and it is to individuals that we owe just treatment.

Race-neutral principles informed our greatest civil rights legislation, the Civil Rights Act of 1964.\(^{62}\) This statute created a federal right of equal employment opportunity for every individual.\(^{63}\) Congress rejected the idea of race-based affirmative action, including in the new law a provision stating that nothing in Title VII is to be interpreted as requiring an employer to grant preferential treatment to any individual or group on account of racial imbalance.\(^{64}\) In *Equality Transformed*, Herman Belz writes that Title VII “constitutes a clear rejection of the demand for preferential treatment”\(^{65}\) and “requires equal opportunity based on individual rights and is intended to prohibit race-conscious employment practices.”\(^{66}\)

Until at least 1964, equal opportunity was central to the definition of America. Whereas traditional hierarchical societies had organized themselves on the basis of race, religion, social rank, or family, the United States, in its origins and development, aspired to an equality of opportunity for individuals in which these characteristics would not control. Toward this end, and in regard to race in particular, nondiscrimination laws became necessary to ensure that these inherited traits truly did not matter and that each individual was judged according to what he had done. “Equality of opportunity,” Belz observes, “is the social philosophy of modern in-

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63. Id. § 2000e.
64. Id. § 2000e-2(J).
66. Id.
dustrial societies. It is individual-regarding and presupposes a single class based on common citizenship.”67

A. The Primacy of Race-Consciousness in Affirmative Action

Affirmative action not only contradicts the principle that race should be irrelevant in the allocation of society's goods and opportunities, but also proposes to displace the philosophy of equal opportunity, of which the race-neutral principle is a key element. In the 1960s, and to some degree in the 1970s, affirmative action did not propose to undermine equal opportunity. Indeed, most initial advocates of race preferences implicitly recognized the moral superiority of the principle of colorblindness, arguing that race-conscious measures would be only “temporary.”68 Most supporters of affirmative action said they envisioned a day when race would not be a basis for employment or admissions decisions. Most also appeared to keep faith with the philosophy of equal opportunity, maintaining that someday each person would be allowed to rise to whatever level he could, on the strength of his own abilities and talents.69

Today, however, most advocates of affirmative action have accommodated their once-liberal principles to the practices they now endorse. Some supporters have come to embrace a new social philosophy. In *Bakke*, Justice Blackmun said that we must take race into account in order to get beyond racism.70 Now, we take race into account because race itself has become a basis for evaluation. For some advocates of affirmative action, the notion has transpired that race is morally interesting after all, and it is part of any re-

67. *Id.* at 10.
69. A Gallup survey in 1977 supports the idea of “ability as the main consideration.” Among nonsouthern Democrats and nonwhite respondents, traditional supporters of affirmative action, 81% and 64% respectively stated that ability, not membership in a minority group, should be the main consideration in getting jobs and places in college. *Racial Preference and Racial Justice*, *supra* note 68, app. C at 513.
spectable definition of individual merit.\textsuperscript{71} These advocates would decide the allocation of society's goods and opportunities on the very basis that the old liberalism once so firmly rejected. It bears emphasis that affirmative action, so conceived, cannot be temporary but must be permanent. This is because once race, or "diversity," as some now camouflage it, is admitted to be meritorious in and of itself, and thus relevant to the distribution of a society's opportunities, then race must be taken into account for its own sake in perpetuity.\textsuperscript{72} Equal results for racial and ethnic groups, rather than equal opportunity for individuals, is the essence of today's affirmative action. Indeed, the \textit{individual} disappears from the new philosophy of affirmative action.

If race should be the basis for the allocation of society's goods and opportunities, and if racial groups matter more than individuals, then we must accept affirmative action as it has evolved, even if such acceptance requires us to jettison the best in the American tradition. Race cannot serve this purpose, however, because the mere fact of a person's race is morally uninteresting.

The danger of affirmative action lies in the kind of society it proposes to create. When conceived as a permanent feature of American life, affirmative action requires permanent attention to race and, therefore, permanent social engineering of a kind necessary to overcome problems of "underrepresentation," "disparity," and the like.\textsuperscript{73} In such a society, race and ethnicity necessarily will become more and more important. Affirmative action that takes us in this direction must be considered disharmonious when judged against the best in the American political tradition.

\textsuperscript{71} See, e.g., Areen, supra note 7, at D7 (discussing the value of diversity in the classroom as a justification for preferential admission policies).

\textsuperscript{72} In 1983, the city of Richmond, Virginia, held a hearing on whether to adopt an ordinance requiring that 30\% of all public-works contracts be subcontracted to businesses owned by blacks or members of other officially designated minority groups. Terry Eastland, \textit{Racial Preference in Court (Again)}, COMMENTARY, Jan. 1989, at 32, 33. The ordinance's expiration date of 1988 drew a response from the Mayor, who said he believed "we were going to perpetuity with" the ordinance. \textit{Id.} at 36. The city did not change the ordinance, although the Supreme Court ruled it unconstitutional in City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989). My point here is that the Mayor spoke the new language of affirmative action, which now sees the policy not as an interim, but a perpetual measure.

\textsuperscript{73} See supra part II. A. (discussing underrepresentation and disparity).
B. Genuine Equality

Herman Belz observes that the federal government has never really tried race-neutral equal opportunity, at least not for long. Soon after Congress codified that idea in law in 1964, the federal bureaucracy and the courts began enforcing color-conscious equal results. The time has come, however, to consider trying what we once proposed to try. Now is as good a time as any to do so, because affirmative action has yielded a few, although only a few, useful benefits. Affirmative action has made almost all employers and universities think about recruiting truly far and wide. R. Roosevelt Thomas, Jr., has remarked that “[t]here are very few places in the United States today where you could dip a recruitment net and come up with nothing but white males.” Racial and ethnic diversity exists in almost every line queuing up for some opportunity or other.

Under race-neutral equal opportunity that does not compromise standards—or that holds everyone to the same standards—most minorities in the various queues would be hired or admitted, if not by the employer or institution of choice, then by someone somewhere. The difference, therefore, would be in the distribution, for minorities covered by affirmative action programs would find opportunities commensurate with their qualifications. Yet their qualifications would be the same as all those of nonminorities in the same positions. Genuine equality thus would be possible. In a universe explicitly without affirmative action, no one could doubt the basis for advancement, and no minority could doubt his own achievements. Furthermore, the exclusionary effects of affirmative action would not exist, nor would incentives that promote rent-seeking behavior and efforts by new or old immigrant groups seeking to establish themselves as a new protected group.

Phasing out affirmative action would require patience. It was impatience with the potential achievement of race-neutral equal op-

76. See Belz, supra note 65, at 43-68.
78. See supra part II. B (discussing these effects of affirmative action).
portunity that motivated many well-intentioned Americans to embark upon the experiment in preferential treatment. Indeed, the best argument for implementing affirmative action was not one that drew on history or sociology, or some combination. Rather the better argument was the practical one which maintained that having a much larger black middle class was in the public interest, and that the jump start of affirmative action, although requiring a temporary suspension of our best principles, might in a few years be able to achieve that end. The economic studies of affirmative action in employment are inconclusive, and affirmative action simply may have reshuffled middle class minorities into government jobs or jobs regulated by the government.

Whatever the economic impact of affirmative action, those who made this practical argument in the past must now reflect, as columnist Charles Krauthammer has, on the various costs of affirmative action. Whether one agrees that protected minorities would have been better off had the nation been more patient from the late 1960s onward, many good reasons support adopting race-neutral principles and fashioning policy accordingly. Such an approach would not foreclose affirmative action programs that focus on disadvantage rather than race. Affirmative action that takes into account individual circumstances such as racial discrimination, economic hardship, or family disintegration, which the applicant has worked hard to overcome, asks the right question—a question about the individual. This brand of affirmative action is a far cry from the program that simply awards points on the basis of race.


80. See Belz, supra note 65, at 235-39.

81. See Charles Krauthammer, Quota by Threat, WASH. Post, May 18, 1990, at A19 (noting the danger of “implied inferiority” that results from affirmative action, which not only demoralizes blacks, but also incites white racism).

82. I first argued this position in 1979. See Eastland & Bennett, supra note 22, at 164.
C. Transcending the Current Political Structure

Inevitably the important question of political leadership remains. Through the end of 1991, neither political party has given reason to believe that it can provide the kind of leadership necessary to take us beyond affirmative action, as it has developed, toward the kind of public policies that are race-neutral and promise to enhance opportunity for more of our citizens. The Republican Party rails against racial quotas even as it accepts other forms of racial preference. Its opposition to quotas is merely a tactical ploy designed to wedge white Democratic voters into Republican columns. No prominent Republican has made the best case against today's affirmative action—the inclusive case, which points out that any race-based affirmative action program is necessarily exclusive of whites and noncovered minorities, and that such programs inevitably divide us all. Instead, as occurred in North Carolina in the 1990 Senate race, we see ads pitting whites against blacks. Republicans should look to their own heritage and to Lincoln in particular. Lincoln demonstrated unsurpassed statesmanship guided by the great truth of the Declaration of Independence that all men are created equal.

Republicans are not the only ones who need to be tutored by Lincoln. The Democratic Party has allowed itself to become, as the title of a recent book calls it, the “minority party”, a party defined by its commitment to certain minority groups. Manifestly untrue of the party in the 1960s, the Democratic Party today has no national figure willing to raise the standard of race neutrality and invite his party to take the lead in recovering the best in the American political tradition as the basis for a new pursuit of equality.

Given the current state of the two parties with respect to this fundamental issue, one can expect more of the same: Republican

83. Despite their rhetoric, neither the Reagan nor the Bush administration made coherent efforts to eliminate quotas and other race preferences.
84. See Alan McConagha, Helms' Victory Follows Pattern; Floors Pundits, Pollsters Who Thought Race Was Over, WASH. TIMES, Nov. 8, 1990, at B7 (discussing a Helms campaign advertisement depicting a white worker crumbling a job-rejection letter while the narrator says the position went to a less qualified applicant who was a member of a minority group).
85. The Declaration of Independence para. 2 (U.S. 1776).
rhetoric against quotas, Democratic agreement that quotas are bad, but that affirmative action grounded in race is nonetheless good, and policy stasis that allows affirmative action more or less to continue in its current, racially exclusionary form. The tragedy is that meanwhile, a great complex of issues lies untreated beyond affirmative action. Although these issues bear on life's prospects and the nature of opportunity in America, our leaders will not address them as directly as they should. These issues concern health, safety in the streets, and education, both academic and vocational. More attention must focus on, among other things, improving the quality of education in all schools. Especially deserving of improvements are those schools in which minorities are predominant, particularly the elementary grades, kindergarten, pre-kindergarten, and apprentice programs in which those without adequate job skills can learn them.

Curiously, polling data suggests that the American people might be receptive to principled, prudent leadership that proposes going beyond affirmative action and rebuilding the national consensus on civil rights and equal opportunity. For years now, large majorities of Americans have expressed opposition to preferential treatment on the basis of race. At the same time, Americans remain strongly opposed to racial discrimination and are willing to help minorities at the wholesale level through race-neutral programs such as Head Start.

87. See supra note 69.

88. Mass opinion remains invariably opposed to preferential treatment for deprived groups. The Gallup Organization repeated the same question five times between 1977 and 1989: Some people say that to make up for past discrimination, women and minorities should be given preferential treatment in getting jobs and places in college. Others say that ability, as determined by test scores, should be the main consideration. Which point of view comes closest to how you feel on the subject? In each survey, 10 or 11 percent said that minorities should be given preferential treatment, while 81, 83, or 84 percent replied that ability should be the determining factor.


89. Id. at 53.
IV Conclusion

Another reason exists for principled, prudent leadership of the kind I have described. With the end of the Cold War, as Seymour Martin Lipset has observed, undoubtedly “much of the world will see a new emphasis on competitive meritocracy and individualism.” In the world context, it would be ironic if the first new nation built not upon race, ethnicity, or religion, but upon the idea that all persons are created equal, continued policies whose focus on race may well make it less competitive in international markets.

One can only wish that some national politician of correct principle, who understands the case against the present regime of affirmative action, will map a prudent strategy for the American future that seeks to leave behind this affirmative action regime as the “interim” measure it was once vouchsafed to be. The alternative is a body politic increasingly embittered by measures that count by race but do not, and cannot, forge genuine equality.

90. Id. at 62.