1992

Group Versus Individuals

Neal Devins
*William & Mary Law School*, nedevi@wm.edu

Repository Citation

http://scholarship.law.wm.edu/facpubs/1504

Copyright © 1992 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
http://scholarship.law.wm.edu/facpubs
The affirmative action wars seem destined to continue. Race-designated scholarships, the Clarence Thomas nomination, and battles between Congress and the Bush White House over civil rights legislation are only the tip of an ever-growing iceberg. Indeed, the pervasiveness of the current struggle over racial diversity in the 1990s is best seen in the "style" section of American newspapers. A reader of the Washington Post during a week in August 1991 could find three such stories. One concerned Italian clothes-maker Benneton's unflattering portrayal of a black child in one of its ads; a second addressed jazz pianist John Eaton's refusal to play a program dedicated solely to black composers; the third described the Today Show's decision to prevent a black actor from portraying a mugger in a martial arts instructor's self-help demonstration.

These stories seem emblematic of a much larger truth: That the distinction between desirable racial diversity and debilitating racial polarization is becoming murkier and murkier. The more group identity becomes the basis of decisionmaking, the further we move away from classical liberalism's reliance on individual achievement. At the same time, racial discrimination is a reality that must not be left unattended.

The task at hand—impossible as it may be—is to determine where racial discrimination ends and a racial spoils system begins. Equality Transformed, Herman Belz's literate, insightful, and unrestrained account of affirmative action in employment goes a ways toward solving this modern day Sphinx's riddle.

Belz, a professor of constitutional history at the University of Maryland, portrays the affirmative action debate as an epic struggle over "whether the United States will remain a free society." With the stakes this large, Belz is not satisfied merely to recount the rise of affirmative action programs. Instead, he forcefully lets the reader know that government approval of race preferences is "destructive" and "auda-
The focus of his attack is Title VII of the 1964 Civil Rights Act and Executive Order 11246. Title VII, the principal congressional statement on employment discrimination, prohibits employers from making hiring decisions on account of race, color, religion, sex, or national origin. Title VII also established the Equal Employment Opportunity Commission (EEOC), which enforces the nondiscrimination demand. Executive Order 11246 is a Johnson administration directive demanding that government contractors engage in "affirmative action" hiring.

In his too brief history (only ten pages) of the enactment of Title VII, Belz claims that the bill's sponsors "unequivocally rejected the view that it was in any way intended or capable of being interpreted to promote race-conscious preferential practices." Belz is on strong footing here, for, as enacted, the law authorizes ability testing, protects seniority plans that may adversely affect disadvantaged groups, and specifies that employers should not give preferential treatment to rectify racial imbalance. In the hands of the EEOC, however, Title VII was transformed into the principal arsenal in the war for numerical equality.

*Equality Transformed* is at its best in depicting how the EEOC disregarded congressional purpose in order to—as Carter EEOC chair Eleanor Holmes Norton put it—get "black and brown bodies ... into places." First, Belz demonstrates that the seeds of race preferences were planted before the 1964 Civil Rights Act. From the early days of the Kennedy Administration, civil rights groups had advocated race-consciousness. Indeed, while President Kennedy was arguing against "hard and fast quotas," he was also advising employers to "look over employment rolls, look over areas where we are hiring people and at least make sure we are giving everyone a fair chance." With the establishment of the EEOC, civil rights advocates both inside and outside of government argued in favor of numerical proofs to show discrimination. In August 1965, only one month after the Commission formally came into existence, EEOC officials proclaimed that "discrimination should be defined as patterns of social and economic disadvantage" and that employers should "conduct racial surveys, generate and publicize profiles of under-representation problems, and hire minorities."

Second, Belz uncovers how, in "one of the most remarkable examples of unwarranted bureaucratic policymaking," the EEOC made a mockery of Title VII's explicit approval of "any professionally developed ability test ... not designed, intended or used to discriminate." The EEOC's 1966 guidelines on employee selection procedures
urged employers to recruit minorities and demanded that job screening and interviewing be undertaken by individuals fully committed to equal employment opportunity. These guidelines, moreover, required statistical validation for any test that rejected blacks at a rate higher than that for whites. Perceiving that cultural factors may affect test performance, the agency was determined to fight "credentialism" at every turn. William Enneis, the EEOC's chief psychologist, advocated separate racial testing so that minorities with lower test scores could be hired ahead of higher scoring whites. By 1978, the EEOC had endorsed guidelines earlier condemned by the Justice Department as "set[ting] aside objective selection procedure in favor of numerical hiring.

Third, Belz describes the EEOC's role in helping "the judiciary transform Title VII into a one-sided pro-plaintiff measure." Accepting the EEOC's reasoning that discrimination could be found "at every turn where minorities are adversely affected," a unanimous Supreme Court ruled in Griggs v. Duke Power Co. (1971) that employment practices adversely affecting minorities must be "shown to be related to job performance." By placing such attention on "the consequences of employment practices, not simply their motivation," Griggs encouraged employers (who preferred not to defend civil rights lawsuits) to pay attention to the racial composition of their work force. For Belz, Griggs signalled the "repudiation" of "the color-blind equal rights principle... in favor of... race conscious affirmative action."

This criticism is only half right. Belz is quite right in criticizing the conclusion in Griggs that Title VII addresses "the consequences of employment practices, not simply their motivation." The 1964 Congress did not go that far; clearly, it expected plaintiffs to bear the burden of proof in employment discrimination suits. On the other hand, Belz fails to see the merit of Griggs as public policy. The Court's reliance in Griggs upon disparate impact proofs of discrimination is concerned with remedying discrimination, and not with economic redistribution along social lines. In the Court's view, an employer unable to show its hiring practices to be job-related was guilty of illegal discrimination. Consequently, disappointed job applicants, unable to meet nonjob-related hiring standards, were the victims of this discrimination.

Thus, although Griggs may have encouraged employers to hire by the numbers to stave off costly litigation, it also has prevented employers from hiding racist and sexist hiring decisions behind neutral-sounding explanations. Belz acknowledges that "[t]he essential element in race-conscious affirmative action is the conferral of a benefit
on members of a racial group who have not been discriminated against.” But he fails to recognize that a numerical proof can be useful in identifying victims of discrimination.

There is an important distinction between affirmative action and numerical measures of discrimination. Recently enacted civil rights legislation explicitly endorsing the *Griggs* standard at once encourages numerical hiring and is responsive to illegal discrimination. While incentives for hiring on the basis of color, gender, etc. are undoubtedly problematic, the codification of *Griggs* in a way that allows employers a fair opportunity to show that their employment practices are reasonable is nonetheless an appropriate anti-discrimination measure.

The EEOC-generated and Court-approved transformation of Title VII is only part of Belz’s story of the subversion of democratic norms in favor of racial preferences. Indeed, for Belz, Executive Order 11246 is the issue that “more than any other displayed the conflict between affirmative action and the principle of individual rights.” The story of Executive Order 11246 begins in the final months of the Johnson administration. Troubled by racially discriminatory labor unions that effectively cut off the supply of minority workers to government contractors, Department of Labor officials held up contracts in Philadelphia and other select industrial cities until contractors submitted pledges to hire minority workers. But the General Accounting Office, Congress’ budgetary watchdog, objected to this maneuvering. In response, the Labor Department rescinded the so-called Philadelphia Plan.

The Philadelphia Plan and Executive Order 11246 were revitalized by the Nixon administration. The Nixon Department of Labor demanded that government contractors establish “result-oriented procedures” such as “goals and time tables . . . [that] increase materially the utilization of minorities.” Through an elaborate eight-factor analysis, the only sure way that a government contractor could avoid investigation and the possible termination of its contracts was to hire by the numbers.

That the Nixon administration proved a principal progenitor of affirmative action runs contrary to Nixon’s anti-quota rhetoric and his anti-busing policies. Yet, pointing to both the 11246 program and the administration’s expansion of minority business enterprise set-asides, Belz convincingly shows that “Nixon preached equal rights for individuals, while consolidating and extending preferential policies.”

Though some may find the Nixon administration’s support for race preferences surprising, the Reagan administration’s tacit ap
proval of affirmative action, as told by Belz, is shocking. Reagan made opposition to affirmative action a centerpiece of his campaign, arguing that the “noble concept” of equal opportunity was “distorted [by] federal guidelines or quotas which require [consideration of] race, ethnicity, or sex.” Once in office, however, his administration found affirmative action too entrenched to challenge it effectively. For example, the administration heartily endorsed minority business set-aside programs in the Department of Transportation and Small Business Administration. Moreover, the 11246 program was ultimately left undisturbed. Finally, while the Justice Department was arguing in court that explicit race preferences were illegal, Griggs-type numerical proofs of discrimination were being embraced by Justice and other agencies. In discussing the Reagan administration’s contradictory posture, Belz astutely points to “conflicting political and ideological pressures” within the administration as well as to the predominance of other domestic and foreign policy issues which “possessed greater political salience and had a higher priority than race relations.”

That race issues operate within the larger tug and pull of politics is undeniable but often overlooked. It certainly applies to the Bush administration. In an attempt to win favor with divergent civil rights constituencies, President Bush has openly embraced contradictory positions on civil rights issues. On minority scholarships, minority business set-asides, and race preferences in broadcasting, the Bush administration is a strong advocate of affirmative action. In sharp contrast, however, the Justice Department has filed numerous briefs attacking affirmative action. Finally, President Bush’s statement on Griggs-type numerical proofs of discrimination are at war with themselves, first calling proposed civil rights legislation a quota bill for utilizing such proofs, and later capitulating on this so-called quota issue. Belz’s observant portrayal of the Reagan era suggests that such contradictions are as inevitable as affirmative action is deeply rooted.

*Equality Transformed* expertly demonstrates how race-conscious initiatives have dominated civil rights for more than three decades. Conceived in the Kennedy and Johnson administrations, expanded during the Nixon and Carter presidencies, and grudgingly accepted by the Reagan and Bush administrations, race preferences now appear to be a permanent feature on the civil rights landscape.

Belz opposes this state of affairs. He perceives that “[a]ffirmative action reinforces and places a premium on race consciousness and prejudice” thereby “inverting the relationship between the individual and the group that characterizes pluralism in the United States.”
His "ultimate criticism," however, is procedural. Affirmative action, he writes, "is in reality a policy of resource allocation and social redistribution that in a substantial sense has not been approved by democratic decision-making."

This is Belz's strongest point. *Equality Transformed* demonstrates that affirmative action in employment is a byproduct of White House and agency initiatives, not a result of congressionally approved anti-discrimination laws. Unfortunately, the ample lessons of this book are ultimately muted by an overly ideological presentation. Although Belz's open disdain of race-conscious practices makes for lively reading, a skeptic can too easily dismiss the work as a polemic. This is especially evident in Belz's repeated attacks on "liberal assumptions" and his characterization of Title VII proofs of discrimination as simply quotas.

REVIEWED BY NEAL DEVINS