Affirming the Individual: An Assessment of Preferential Treatment

Clayton J. Stallbaumer

Follow this and additional works at: https://publications.lakeforest.edu/allcollege_writing_contest

Part of the Civil Rights and Discrimination Commons

Recommended Citation

This Article is brought to you for free and open access by Lake Forest College Publications. It has been accepted for inclusion in All-College Writing Contest by an authorized administrator of Lake Forest College Publications. For more information, please contact levinson@lakeforest.edu.
Affirming the Individual: 
An Assessment of Preferential Treatment

by Clayton J. Stallbaumer

Programs of affirmative action, having been brought to the forefront of the nation’s collective consciousness in recent times, represent one of the most fundamental conflicts at issue in our concept of a legal system: the confrontation between individual rights and social policies. In assessing the responsibilities, validity, and motivations of these programs, consideration must be given to the balancing of competing rights to equality and that tempering act’s placement within or opposed to the relevant larger social interests. Such analysis is often confused by disagreement over the substantive and causal nature of social reality as well as the ideals of equality to which affirmative action policies aspire. The idea of equality itself proposes a unique problem, for any attempted definition or abstraction of the concept is necessarily subjective, having emerged out of a social context fraught with both innate and overt prejudices and institutions that impart a certain degree of influence to such interpretation. Comprehensive descriptions are also understandably discouraged by the ethereal and extensive nature of equality, suggesting that any effort at explication is necessarily exclusive or shortsighted.

Arriving at a definition of equality will not be the emphasis of this essay, though such a critical concern cannot be wholly ignored. Rather, it will be the goal of this study to examine situations of inequality—the underlying discrepancies of social reality—as the aggregate object of various proposed and implemented correctives, including those offered by affirmative action plans. To simplify this argument, analysis will be restricted to the appropriateness and influence of preferential treatment in hiring and college admission practices. In addition, consideration will be given to the rationales behind such willful suppositions, revealing an inherent contrariness both between and within the various...
schools of thought surrounding the issue. By way of conclusion, this report will advocate an individuated policy of arbitration and decision that considers both the rights of the individual as well as the relevant social interests at work.

While combatants on the issue of affirmative action differ drastically in their opinions of that policy’s credibility and effects, there is a general consensus on the distinct social inequalities perpetrated by past discrimination that persist into the present as part of a tainted social reality. Richard Wasserstrom clarifies the notion of “social reality” when he asserts that such a concept “is concerned with rendering a correct description of the existing social arrangements, including the existing institutional structures, practices, attitudes and ideology.”¹ As a true-to-life contemplation of surrounding circumstances, social reality offers insight into patterns of behavior that dictate these conditions. Existing instances of discrimination appear in a multitude of forms, most often identifiable by the suffix -ism, as in racism and sexism. This discrimination is based on perceived differences, though, as Martha Minow suggests, such distinctions are invariably relative: “To be different is to be different in relationship to someone or something else – and this point of comparison must be so taken for granted, so much the ‘norm,’ that it need not even be stated.”² It becomes essential, then, to identify and establish the perspective and prerogative from which discrimination evolves and in which it operates; Minow calls this “making explicit the unstated points of reference.”³ By doing this, one realizes that discrimination is an act of both volition and cognition that emerges from and exercises its influence within prescribed spheres of interest. Indeed, as Wasserstrom purports, “Racism and sexism consist in taking race and sex into account in a certain way, in the context of a specific set of institutional arrangements and a specific ideology which together create and maintain a specific system of institutions, role assignments, beliefs and attitudes.”⁴ Discrimination can be seen, therefore, as a cooperative and reflexive agent of the society that fosters it, perpetuating and exacerbating the circumstances of inequality that it exhibits and by which it is exhibited.

A major difficulty embodied by discrimination is rooted in a basic misconception of that society in which it operates. Minow proposes that this misconception can be explained in terms of five unstated assumptions. The first has
already been addressed, that of differences being relative in reality rather than innate, as is the common faulty premise. The second tacit tenet, that of “an unstated point of reference [adopted] when assessing others,” was similarly addressed in the repudiation of the first assumption. It should be realized that such a perspective (or any perspective, for that matter) is necessarily subjective and specific to the circumstances surrounding it. To accept this prerogative as implicit is to disregard its comparative nature. The third assumption Minow contemplates is an “aspiration to impartiality” on the part of the observer, the idea that one can make judgments without incorporating or imposing one’s own beliefs. This goal of objectivity is an admirable one but also one that cannot be realized, for inevitably the observer succumbs to preconceptions and affected perceptions. The fourth unstated premise Minow attacks is the supercilious disregard for other perspectives assumed by the dominant viewpoint, by either deeming them irrelevant or believing them to have been already assimilated. The final fallacious supposition is perhaps the weightiest, for its overarching scope takes the other assumptions into account. The dilemma posed by difference “appears only when the background assumption is that the status quo is neutral and natural rather than part of the discriminating framework that must itself be changed.” Such a notion suggests, somewhat paradoxically, that discrimination and inequality are at once symptoms and causes of an unjust society. If this is the case, however, what corrective measures, if any, can be taken? What degree of success can they be expected to achieve? And finally, what should be the emphasis of such policies? Answers to these questions can be found in an assessment of past and current plans of affirmative action and their respective motivations, as well as commentary and criticism on such practices.

Policies of affirmative action have existed and continue to exist according to varying degrees of preferential treatment and social aims. In its strongest sense, affirmative action proposes to correct or compensate for past discrimination and its present consequences and effects by giving strong preference to disadvantaged groups, by stressing difference in order to achieve some concept of equality whose definition, it has been shown, is problematic. The significance given to the end goal—“the reduction of a great social injustice”—reveals such
policies to be arguably product-oriented. Moderate to weak approaches, on the other hand, emphasize difference less than equality in the sense that any preference shown is of medium to minimal import and at least ostensibly non-compensatory. As such, these policies can be seen as more process-oriented. Despite the intrinsic differences of these programs, however, there emerge common concerns and issues about their necessity, applicability, validity, and social responsibility. These issues are prompted by and addressed in numerous works of legal scholarship that incorporate a number of different perspectives both advocating and condemning practices of preferential treatment. Much of this discourse stems from the controversial 1978 Supreme Court case *Regents of the University of California v. Bakke*, in which a college admission policy of racial quotas was repudiated on the grounds that it violated the Fourteenth Amendment. A more in-depth examination of the Court’s decision will be entertained later.

A fundamental issue that arises in the debate over affirmative action is the balance to be struck between the rights of the individual and the pursuit of a specified social goal. Deciding which contending entity bears greater weight has been a prominent sticking point in this discourse and is often reduced to temporal terms, i.e., to considerations of long-term versus short-term effects and intentions. While all sides are in agreement that there are social ills to be remedied, argument also ensues over the appropriateness of preferential treatment in hiring and college admissions, with contention expressed as to whether those venues are where corrective social initiatives with such obvious preference should be most explicitly implemented.

Ronald Dworkin, an astute legal scholar, considers that such measures are indeed befitting given the pattern of shortcomings demonstrated by past attempts at social remedy, especially those addressing race discrimination. In his consideration of the Bakke case, Dworkin concludes that the preference associated with affirmative action policies, particularly strong ones, is necessary, for “we have not succeeded in reforming the racial consciousness of our society by racially neutral means,” and that such racially conscious programs are justified in using “strong measures because weaker ones will fail.”10 This heightened deference to seemingly divisive measures poses substantial difficulties, however.
First, such an outlook has the arguable potential to exacerbate existing racial discord through its racially conscious emphasis. Second, it remains to be seen if such a rift can be justified or ameliorated by the policies’ good intentions.

Dworkin addresses both these concerns by separating the issue into short-term and long-term considerations. The programs’ conceded short-term friction, he confutes, would be eclipsed by its beneficent long-term goal “to lessen not to increase the importance of race in American social and professional life.” Taking an extended view, the subsequent standardization and recalibration of hiring and college admission policies to take account of past and present discrimination—the proverbial leveling of the playing field—would, by Dworkin’s reasoning, render dilatory the compensatory preference currently brought to bear on race and other equally disadvantaged (and uncontrollable) attributes. This utilitarian benefit of a strong affirmative action policy, because “it makes the community as a whole better off,” thus outweighs the interim disadvantage accorded to some individuals.

Much issue has been taken with this inclination to value social goals over individual rights. Alan Goldman, presenting the Libertarian stance on affirmative action, is the foil to Dworkin’s argument. Goldman’s main contention in this presentation is the assertion of the supremacy of individual rights that do not infringe upon the rights of others. In stating this belief, Goldman stresses that the “principal purpose of recognizing individual rights within a system of social justice is to protect individuals from losses whenever utilitarian calculations run against them in particular cases.” Goldman goes on to claim that the determination of a social interest does not necessarily justify a society’s pursuit or furthering of that interest, particularly not at the expense of individual rights.

Indeed, Dworkin concedes that the only “genuine principle” at work is “the principle that no one should suffer from the prejudice or contempt of others.” The question persists, however, as to the impetus behind such a decision to promote individual rights and how such a decision can take account of and address existing social discrepancies.

In a contest of competing interests, Goldman recognizes the importance of striving toward some sense of equality and, in so doing, makes a key distinction
within that abstract concept that is echoed in other works. The idea that “rules must not only apply to all, but as far as possible operate to the good of all . . . [to] result not in equality of goods, but in something approaching an equal chance to acquire goods through effort” suggests that there exists a recognizable difference between equal treatment and treatment as an equal. This dualistic concept is developed more fully by Dworkin, who contends that the former involves equal distribution of benefits or burdens while the latter indicates equal consideration, though not equal outcome, for those distributions. In general, it can be said that the strength of preference advocated by a program of affirmative action corresponds to the relative degree to which that program seeks the right to equal treatment. By corollary, the weaker the preference shown by such a program, the greater its aspiration is to guarantee the right to treatment as an equal, though any delimited preference cannot fully achieve this more fundamental right because such preference, no matter how slight, values not the rights of individuals but the assumed or conferred rights of one group over another.

Shelby Steele makes a provocative case against strong-sense affirmative action in the vein of conferred group rights by asserting that such preference on the basis of race has a substantially deleterious effect on its recipients. The only affirmation Steele identifies in programs of compensatory preferential treatment is the reaffirming of black inferiority through messages emphasizing victimization and deterred responsibility. The former, Steele asserts, “is what justifies preference, so that to receive the benefits of preferential treatment one must, to some extent, become invested with the view of one’s self as victim.” Such a self-concept encourages the exploitation of past victimization as a source of privilege and power. This emphasis runs counter to the promotion of responsibility and self-determination by sending the message to blacks that “there is more power in [their] past suffering than [their] present achievement—none of which could bring [them] a preference over others.” The crux of this account is that compensatory preferential treatment encourages its recipients to rely on others rather than themselves for a reprieve from disadvantage. As such, programs of strong affirmative action do little to address underlying social discrep-
ancies in Steele’s estimation. Instead, the results of these policies are hollow, token displays that attempt to remedy the symptoms of disadvantage rather than the cause. Steele condemns affirmative action for “leap[ing] over the hard business of developing a formerly oppressed people to the point where they can achieve proportional representation on their own.”

19 Rather than leveling the playing field, affirmative action by this argument instead changes the rules of the game at the expense of both the individual and fairness in the sense of treatment as equals.

The inherent arbitrariness and unavoidable subjectivity of group identification and redressing group disadvantage provide another point of contention in the debate over affirmative action. The problem of indeterminacy is most apparent in the decision of the Bakke case. For the majority opinion, Justice Powell became the prominent voice against the particularly strong-sense affirmative action inherent in UC-Davis’ medical school admission policy’s quota system. Claiming that “no formal definition of ‘disadvantaged’ was ever produced,” Powell makes clear the Court’s historical forbearance in determining legitimate exercises of preference: “We have never approved preferential classifications in the absence of proved constitutional or statutory violations.”

20 Furthermore, Powell asserts that “there is no principled basis for deciding which groups would merit ‘heightened judicial solitude’ and which would not.”

21 The Court’s resistance to defining appropriate instances of preference is also a testament to the inherent difficulties of determining when those measures would be deemed to have sufficiently completed their assigned and assumed purpose. As George Sher suggests, “there would be no way for us to decide how much preferential treatment is just enough to make up for the efforts that a particular disadvantaged individual would have made under happier circumstances.”

22 Determining those groups which are disadvantaged—how much preference they are to be granted and even if that preference is justified—becomes and remains of central concern in the consideration of policies of affirmative action.

The issue of indeterminacy is echoed in the work of Lon Fuller, another prominent legal scholar. In The Morality of Law, Fuller declares that the gener-
ality of proposing to remedy discriminatory social ills is an end too broad to be defined or justified. “If a legislator is attempting to remove some evil,” Fuller contends, “and cannot plainly identify the target at which his statute is directed, it is obvious he will have difficulty in making his laws clear.” The implicit failure of making laws to fulfill a general and indefinable goal lies in the lack of clarity that such laws would possess, a shortcoming detrimental to the legality of a system of legal justice. Fuller also affirms the existence of a commonness to our humanity that prevents any preferential distinctions from being made. Asserting that what he calls the morality of aspiration—the intrinsic human effort at self-betterment—is “after all a morality of human aspiration,” Fuller proposes that such a fundamental and innate ambition “cannot refuse the human quality to human beings without repudiating itself.” Fuller advances his argument by professing that policies of preferential treatment represent an effort to “qualify our answer by adding some biological tagline to our own title,” and that such an endeavor necessarily denies “the human quality to ourselves in an effort to justify denying it to others.” In the course of his refutation of affirmative action programs, Fuller depicts the efforts of these practices and the unclear rationale behind them as divisive and, in a sense, ultimately dehumanizing.

Given the glut of substantive criticisms against policies of affirmative action, it is worthwhile to consider alternative hiring and college admission methods that focus on other evaluative criteria, the most common of which being the loosely defined idea of performance qualifications or, even more abstract, merit. It will be revealed, however, that policies emphasizing merit and subsequently disregarding race as a relevant factor in decision making are as unjust as their counterparts that embrace compensatory preferential treatment based on perceived disadvantage. This failing is due in large part to the faulty assumption that merit-based policies operate in an ideal world where social discrepancies, if they exist, are irrelevant to evaluative consideration. Such a presumption is fatal and condemns those programs of consideration as stridently as the five unstated assumptions of affirmative action condemn those policies of preference.

Not recognizing disadvantage unwittingly perpetuates it; such is the primary deficiency captured in hiring and college admission policies that focus
solely on performance qualifications and merit. Again, though, the distinction must be made between equal treatment and treatment as equals. Merit-based programs ostensibly act in advocacy of the latter, though this facade collapses when one considers that prevailing social discrimination and discrepancies, which such programs fail to acknowledge, act against equal consideration. Initial disadvantage, the argument insists, prevents the attainment by the disadvantaged of equal success as measured by and reflected in performance qualifications such as educational background and test scores. Indeed, as Goldman suggests, "what is most unjust about the present practice of hiring by competence . . . is the fact that some have initial headstarts toward [social] benefits which are insurmountable." Ignorance or neglect of existing social discrepancies is an equal if not greater misdeed for society and disadvantaged groups than compensating for them at the expense of individual rights.

Such a realization prompts one to consider, somewhat paradoxically, as Minow does, that "the problems of inequality can be exacerbated both by treating the members of minority groups the same as members of the majority and by treating the two groups differently." The question then becomes whether different treatment, not necessarily but quite often preferential, hinders social development more or less so than treatment that is insensitive to perceived differences. Misguided corrective policies that erroneously address this inquiry often further worsen the existing situation. The resulting discrepancies in competence "constitute reasonable barometers of prior efforts to acquire competence only where the educational system has attempted to correct for initial inequalities." In light of this consideration, it becomes a point of contention as to whether corrective policies can exist apart from or be implemented without embodying the immanent discrimination of the disadvantage-conscious society that advocates them.

A less grounded but no less relevant condemnation of merit-based programs exists as an argument similar to the problem of indeterminacy demonstrated in the consideration of affirmative action programs. The twin concepts of performance qualifications and merit are no less arbitrary or subjective than the loosely contrived definitions of disadvantage. Indeed, as Dworkin suggests, "there is no
combination of abilities and skills and traits that constitutes ‘merit’ in the abstract.” Standardized test scores, despite their claims to the contrary, are the measure of one’s aptitude at taking that particular test only, not a generalized indication of competency and ability, abstractions for which there exist no satisfying and definite conceptions. Patricia Williams takes this argument further by suggesting that standards are “concrete monuments to socially accepted subjective preference” and “nothing more than structured preference.” Revealing the inequality evident in society as inherent to an evaluative process and its criteria casts doubt on that program’s credibility.

With what are we left, then, as a paradigm for evaluative consideration in hiring and college admission policies? Programs of affirmative action have been demonstrated as both socially ineffectual and injurious to individual rights. Such policies’ major failing can be found in their preferential consideration of groups rather than individuals. Nagel recognizes this treatment as “a departure from the ideal . . . that people should be judged on the basis of individual characteristics rather than involuntary group membership.” Minow echoes this sentiment, stating that “specifically articulating permissible and impermissible uses of difference may enshrine categorical analysis,” a departure from the ideal of individual consideration similar to that offered by Nagel. Conversely, practices emphasizing merit qualifications have been shown to be ill-defined and ignorant or neglecting of existing social discrepancies and discrimination. Both types of policies perpetuate and even exacerbate the disadvantage that engenders them, though in sublimely different ways. The prevailing choice among these policies is a decision rooted in determining the lesser of the social evils offered by each. The policies’ respective detriments can be traced to their short-sightedness, a downcast tribute to their respective preferential and singularly arbitrary focuses.

A plausible policy that defies the demonstrated limitations of preferential treatment based on disadvantage or merit accomplishment involves a broad-based consideration of the applicant as a whole and as an individual. Such a program would have as its driving ideology the pursuit of John Stuart Mill’s
marketplace of ideas, the development of an open society in which the opinions and thoughts of all could be voiced and heard. This emphasis does not dictate a condition or practice of equal treatment, however, for some will inevitably be less qualified than others for such a society. Instead, through open and equal consideration, it is the process by which those qualifications would be determined and assessed that would set such a policy apart from others. An open assessment of the applicant as a whole would involve consideration of the entirety of contributions that the individual could bring to the community concomitant with a goal of diversity set forth by the institution’s mission statement. Diversity in this sense is not limited to race or economic disadvantage, but includes a multitude of various attributes deemed beneficial to the institution that do not infringe upon an individual’s right to treatment as an equal. In some instances, such a policy might mistakenly be construed as promoting affirmative action in the weak sense, but it should be noted that any preference shown is non-compensatory and so minimal as to be regarded as marginal. A full consideration of the particular attributes an applicant could contribute to the open community and an assessment made on that basis is an affirmation of the individual and a worthy goal for which society should strive.

Endnotes


3 Ibid., 298.

4 Wasserstrom, 268.

5 Minow, 294.

6 Ibid., 298.

7 Ibid., 294.
8 Ibid., 301.


11 Ibid., 319.


15 Goldman, 308.

16 Dworkin, Rights, 227.


18 Ibid.

19 Ibid., 274.


21 Ibid., 255.


24 Ibid., 183.

25 Ibid., 183-84.
Goldman, 313-14.
Minow, 293.
Goldman, 315.
"Bakke," 323.
Nagel, 270.
Minow, 302.

Bibliography


