Affirmative Action

1. What is the issue?

- In affirmative action, a racial (or sexual) classification is used, and assigned more or less weight, in making a decision about the allocation of an important benefit—for example, admission to a university or hiring into a job. As a result, it is sometimes true (though not all programs work this way) that a woman or minority applicant gets a position that would otherwise have gone to a white man. So there are often serious conflicts of interest at work. And even when there are not conflicts of interest—say, if a university establishes a transition program for minority students—there are serious questions about the permissibility of using these categories in assigning benefits and burdens, given their malign history and that they distinguish among equal citizens on the basis of characteristic that are of uncertain relevance.

- Consider three cases.

Allan Bakke, the plaintiff in one of the early affirmative action cases decided by the Supreme Court (1978)[1], was rejected by the Davis medical school. The School reserved 16 of 100 slots for "educationally and economically disadvantaged minorities." Bakke, it seems, would likely have been accepted if all 100 places had been open to him. Or take the case of Adarand, a Colorado-based highway construction company that lost a subcontract bid to Gonzales Construction Company. The prime contractor, Mountain Gravel, said that Adarand Constructors would have received the

subcontract rather than Gonzales had it not been for the additional payment that Mountain Gravel received from the Department of Transportation for hiring Gonzales. The Department of Transportation offered the additional payment because Gonzales fell into the category of small business controlled by "socially and economically disadvantaged individuals."

In short, the stakes are real, and losers seem to have a reason to complain: why should they lose because of the human category they belong to?

- Consider the matter now from the other side: A recent study of 28 major colleges and research universities by William Bowen and Derek Bok indicates that affirmative action programs by those 28 resulted in an increase in black enrollment in 1989 from roughly 3% to roughly 7%. Graduation rates were reasonably high, and black graduates fared better economically and were more civically active than black graduates of less distinguished institutions.[2] Looking back to 1976, Bowen and Bok judge that 700 black graduates from their 28 schools would not have been admitted to such distinguished places under a race-neutral system. Of those 700, 225 earned professional degrees or doctorates; 70 are doctors, 60 are lawyers, 125 are business executives, and more than 300 are civic leaders. So, quite apart from the benefits to the pool of admitted students, and perhaps to the universities, then, we have some evidence of benefit to the broader community.

2. What are some reasons for supporting affirmative action?

Two distinct strategies of argument have been advanced in favor of affirmative action? (I will focus on the use of racial categorizations, although that has not been the only form of affirmative action.)

- The first line of argument says that beneficiaries are entitled to affirmative action to rectify past discrimination. A Nozickian might argue along these lines. Nozick thinks that people are entitled to what they would have gotten had there been no past injustice. So the Nozickian case for affirmative action might be that, for example, because of past violations of rights, women and black Americans are currently less well-off than would otherwise be. So they are entitled to rectification—to be made whole—and that affirmative action is essentially a program for such rectification.

- A second strategy of argument defends it in "forward-looking" terms. Thus, the claim is, first, that affirmative action is required to ensure *diversity* within institutions, like schools for example, in which diversity contributes to the institution's mission, according to the institution's best judgment. Student diversity in schools is arguably important to learning—part of achieving the civic education that is part of education. Universities in any case already aim for a diverse student body, in terms of geography, intellectual interests, and non-academic academic interests. Affirmative action adds to that diversity. The power of this rationale to justify affirmative action is now being tested in the courts, in a challenge to the University of Michigan's admissions program.[3]

Second, affirmative action is said to provide two kinds of benefits to the wider society. First, by helping to ensure a racially more diverse population of

successful citizens (a racially diverse middle class) it ensures that we draw on a fuller range of the community's talents and perspectives. Second, given a history of discrimination, it fosters equal opportunity for current and future generations, and thus promotes a future without the sharp racial inequalities in income, wealth, health, and housing that have marked our history and that persist to this day: a future in which race is less predictive of success.

- To illustate: the University of California thought that a more racially diverse medical profession would bring better care to underserved communities. In *FCC v. Metrobroadcasting* (1991), the Supreme Court upheld an FCC policy that gave additional points to minority applicants for broadcast licenses. The Supreme Court said that this policy was a permissible way to create greater diversity in broadcast messages: a more racially mixed broadcast community would enhance the range of contents on the radio, thus improving the quality of radio broadcasting.

In *Adarand*, Justice Stevens says that the subcontracting policy adopted by the Department of Transportation was, "most importantly a forward looking response to practical problems faced by minority subcontractors"—in particular, problems resulting from the important role of friendships and networks in getting subcontracts. So the policy might help to build the networks and experiences needed to compete on an equal footing in the future.[4]

3. What are some reasons for opposing affirmative action?

This forward-looking argument for affirmative action faces two objections.

- The first objection is pragmatic. Some opponents of the use of racial categories argue that proponents are misguided about expected effects. They say that affirmative action will not advance the proponents own goal of a society with racial equality. To the contrary, the use of racial categories will reinforce racial ways of thinking by giving them an official stamp of approval. By treating race, for example, as a basis for predicting a person's values or beliefs or practices, we reinforce stereotypes, and encourage the view that people ought to be treated as members of racially defined groups.[5]

- The second objection is moral. According to these critics, the strategy is unfair and demeaning. It is unfair to nonbeneficiaries because individuals have a right to be treated as equal individuals, not simply as members of groups: that, the majority says in *Adarand*, is the "basic principle" for which the 5th and 14th Amendments stand. The use of racial classifications violates that principle by assigning less weight to the interests of some people in the allocation of a benefit. What else, they ask, can we conclude from the fact that white men who would otherwise have gotten the position do not get it because of affirmative action?

The policies are demeaning to beneficiaries because the policies suggest that beneficiaries cannot succeed without state assistance. Concurring in *Adarand*, Justice Thomas says that "racial paternalism" lies "at the heart of" affirmative action programs, which "stamp minorities with a badge of inferiority;" for this reason, these programs are "at war with the principle of

inherent equality that underlies and infuses our Constitution," and "undermine the moral basis of the equal protection principle."

4. What is the basic issue?

- The crux of the issue about the political morality of affirmative action and its constitutional standing is this: Is there a distinction between what lawyers call malign and benign uses of racial classifications? Is there, for example, a fundamental distinction of political morality between the use of racial classifications to establish racially segregated schools that benefit a white majority (a malign use) and their use in affirmative action programs that benefit a black minority (what some think of as a benign use)? Or should we regard all uses of such categories as on a par.[6]

- Two answers now compete for public allegiance are that all such classifications are on a par and equally malign and unacceptable; and that some are benign and some are malign. Which answer is most compelling? Common ground among those who endorse these answers is a principle of equality: that the constitution, and the political morality underlying it, requires that people be treated as equals. The majority in *Adarand* argues that this principle—that we have a right to be treated as equals—requires "consistency" in the treatment of all racial categories: in particular, it stamps all as equally malign.[7] In *Metrobroadcasting*, Justice O'Connor summarized this view by saying that "benign racial classification" is a contradiction in terms. Let's call this the "Banned Categories" theory (I borrow the term from Dworkin).

> **Banned Categories**: the right to be treated as an equal establishes a right that racial categories not be used in determining the distribution of benefits and burdens (except perhaps when there are compelling reasons for the classification).

So there is a uniform presumption against the use of racial classifications (consistency), and that presumption is very high (skepticism). To put the point in common vernacular: color-blindness in policy is an implication of the principle that people are to be treated as equals.

Second, we have the theory—advanced in the Stevens dissent in *Adarand*—that the right to be treated as an equal is not in conflict with benign uses of racial categories, but only with malign. Thus, we deny a person's right to be treated as an equal if that person loses a benefit because others judge the person to be of lesser worth, or if their interests are otherwise counted for less, but otherwise not. The idea here is that it is not the very use of the category that denies treatment as an equal person, but its use in a way that indicates a judgment of lesser worth or concern. According to this view, we can, as a practical matter, distinguish benign from malign by asking whether the policy allocates benefits to a minority or disadvantaged group or instead allocates benefits to the majority:

> **Banned Sources**: The right to be treated as an equal supports a right that the distribution of benefits and burdens not be determined by policies that have their source in prejudicial beliefs (for example, beliefs that are in conflict with the principle that people have a right to equal concern).

5. Should we adopt Banned Categories?

Banned Categories and Banned Sources are very different theories about what is required to treat citizens as equals: to avoid making morally irrelevant factors determinative of life chances. The former asserts a uniform and very high presumption against the use of racial classifications: it says, in effect, that treating people as equals requires being colorblind (or gender blind).

- Why might we adopt **Banned Categories**? Three reasons for endorsing it correspond to three criticisms of affirmative action: such policies are ineffective, unfair, and demeaning.

- The *effectiveness* of affirmative action is of course hard to judge: though the most careful statistical study of affirmative action in universities—Bowen and Bok's *Shape of the River*—indicates that it has produced more racially diverse student bodies, has improved the earnings and social status of black graduates, and helped break down racial divisions.

Perhaps this effectiveness should not be so surprising. To see why not, we need to understand an ambiguity in the ideal of a color-blind society. On one construal, a society is color-blind just in case people do not think in racial categories at all; on another, a society is color-blind just in case no one suffers disadvantage on grounds of race. Surely the latter is the right way to describe the goal: it should not be a goal of public policy to ensure that people stop using racial categories—any more than religious or sexual categories. People classify each other in all sorts of ways. Justice does not condemn the

classifications, but that we ensure that *differences are turned into disabilities*. But if the goal is to ensure that racial differences are not turned into sources of disadvantage, then why can't policies that use racial categories help to produce a color-blind society?

Someone might accept that categories are acceptable, but argue that trouble sets in when we use categories in ways that suggest that beneficiaries of affirmative action are less qualified.[8] So here the idea is that affirmative action policies suggest lesser qualifications, and that that suggestion perpetuates racial inequality by perpetuating assumptions of racial inequality.

Is this right? Think of a different use of affirmative action: special advantages given in university admissions to alumni children, who are admitted in higher numbers than they would otherwise be. Some people may object to the practice, but no one thinks that it threatens to produce a society that condemns alumni children to a lower status. What accounts for the difference? One fact that seems important in explaining this difference is that there is *no prior assumption* of alumni-child inequality. What might explain the perception of lesser qualification in the racial case, then, is not the policy of assigning additional weight, but prior assumptions of intrinsically lesser qualification for the beneficiary groups. But to reject affirmative action policies because they encourage this perception, and are therefore ineffective, would be to reject them because many people in the society already believe that there are basic racial differences in qualifications. It would be tantamount to giving in

to the very assumptions of racial inequality that are condemned by the principle that citizens are to be treated as equals.[9]

- Consider, next, the thesis that all racial classifications are *unfair* to nonbeneficiaries because they fail to treat them *as equals*. Of course, the objection can't simply be that they lose out: nor can it be that they lose out because of an immutable characteristic: that's true of people who are too short or slow to play basketball, or lack the gifts of a mathematician. Allan Bakke, for example, was rejected by two medical schools because the admissions committees thought he was too old (at 33). Nor can it be said that people lose out because they are judged inferior or less worthy of consideration. When most students at a university do not belong to affirmative action categories, how can it be said that those who would otherwise have been admitted were excluded *because* they belong to a despised group. Can it be said that students from New York are despised because concerns about geographical diversity lead to fewer of them attending elite universities than in a world without geographic preferences.

It must be, then, that they lose out because of an immutable characteristic that is irrelevant to the task at issue. But it begs the question to say that the characteristic is irrelevant. The issue is precisely what characteristics are relevant: as Lani Guinier and Susan Sturm have suggested, we might think of affirmative action as a challenge to rethink our ideas about what it is to be *qualified*.[10] If the judgment behind an affirmative action policy is that such a policy is an effective means—perhaps the only really effective

means—for transforming an unequal society into a society with greater equality of opportunity and racial equality, then racial characteristics are relevant. Or suppose that the aim has to do with the mission of an institution: say the institution is a university, the mission is in part to provide civic education, and the means is to increase the diversity of a student body. Then why is race irrelevant? Consider what already happens in university admissions: alumni children have an easier time; and some universities look for geographic distribution, and for a mix of athletes, musicians, and scholars. So my qualifications are in part a function of who else is admitted, and in part a function of properties that do not predict GPA. In a society in which racial differences are associated with experiential and cultural differences, and which is filled with racial division and racial prejudice, it is not clear why race is an irrelevant category, and why the use of it fails to treat people as equals.

- Finally, we have the third objection: the stigma/racial paternalism objection, according to which affirmative action fails to treat beneficiaries as equals because it implies that they cannot make it on their own. Here, I think there are two replies. First, though racial paternalism may animate some support for affirmative action, why assume that that is the principal animus? After all, we also have the diversity and equal opportunity rationales. So the accusation of racial paternalism seems unwarranted, just as the accusation of class paternalism seemed unwarranted in the case of labor legislation.

Perhaps the point is that the policies are stigmatizing: that there is a presumption of lack of qualification. But here, again, we need to ask about the

sources of that presumption: doesn't the presumption have roots deeper than affirmative action? Justice Thomas claims that affirmative action policies engender attitudes of racial superiority: surely he can't mean that such attitudes have only arisen in the past 25 years. Is there really any evidence that affirmative action has this effect?

In short, treating people as equals does not require Banned Categories.

6. Should we adopt Banned Sources?

I can be briefer with Banned Sources because my criticism of Banned Categories suggests that some distinctions need to be drawn between uses of racial categories, and once we have agreed to that, then Banned Sources falls naturally into place as an interpretation of the requirement of treating people as equals.

- Let's interpret that requirement as stating that people are not to do worse than others as a result of preferences that discount their interests, or fail to take their good fully into consideration. What is objectionable, then, is not that some lose, or lose out on the basis of immutable characteristics, but that they lose because they and their interests are simply discounted as of lesser importance by the process of collective decision-making.

- One test for whether legislation falls afoul of this ban is that it uses categories that enable benefits to be conferred on the majority that regularly dominates the legislative process. But the problem lies in the underlying sources of the categories—the reasons that motivate the legislation—not in the

categories themselves. So the use of racial categories does not as such offend against the right to be treated as an equal (some such categories will be benign), because some uses of such categories do not show the demeaning denials of dignity condemned by the principle of equality.

But if the categories do not violate the requirement of treating people as equals, then the principal obstacle to affirmative action loses its force.

Endnotes

[1] UNIVERSITY OF CALIFORNIA REGENTS v. BAKKE, 438 U.S. 265 (1978)

[2] Reference to Bok and Bowen.

[3] See *Gratz v. Bollinger*.

[4] In *Bakke*, the issue was affirmative action in medical school admissions: part of the idea was that a more racially diverse group of doctors would be more likely to serve a wider range of underserved communities. So the institution would better fulfill its mission of providing medical services to the country if it adopted the policy (so the school judged).

[5] Government will—in Justice O'Connor's majority opinion in *Adarand*—"exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant factor."

[6] More precisely, should we adopt the very strong presumption that all racial classifications are malign, and are acceptable only to rectify past injustice; or should we presume instead that the use of such categories to benefit minorities is acceptable, and presume that their use in benefiting majorities is unacceptable?

[7] Whether they benefit the majority or a minority, and whether they are used by the federal government or a state or local government. *Richmond v. Croson* established strict scrutiny for all uses of racial classifications by local governments: *Adarand* extends this to the federal level.

[8] Justice O'Connor says that the use of racial classifications is "perceived by many as resting on an assumption that those who are granted this preference are less qualified in some respect that is identified purely by their race."

[9] It would be analogous to a heckler's veto: to depriving someone of protection for their speech because heckler will start trouble.

[10] See *Who's Qualified* (Beacon 2001).