From Civil Right to Affirmative Action

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This is a research paper that traces the development of how the United States has dealt with the issue of race from the 1960s to the present. It gives a brief history of how the initial Civil Rights legislation and its equality of opportunity intentions promoting individual rights to the eventual implementation of affirmative action. This course in American history is further examined by illustrating key legislative and judicial decisions, which set the standard for how America is to deal with race.

The United States is often regarded as a liberal and egalitarian society under which its denizens are seen as equal before the law. The legal system should not place restrictions on the liberties of individuals to compete on the basis of their merit, skill, ability, and effort. This American ideal is, however, considerably modern, developed only after the liberation of slaves and the initiation of the first Civil Rights Acts in the 1960s. The civil rights movements of the 20th century were designed to overcome the past by creating equal opportunity for individuals. Civil rights reform aimed to remove discriminatory racial barriers so that individuals could exercise their rights and pursue their interests according to their personal talents, abilities, and qualities[1]. One of the largest debates regarding civil rights is whether the removal of discriminatory barriers is enough to overcome and undo centuries of injustice experienced by minorities. It is inevitable that progress towards a non-racist society requires overcoming the past, but this article questions whether overcoming necessarily requires remedying[2].

After the first civil rights measures taken in the early 1960s, the United States initiated civil rights policies under the theory that true equality cannot be achieved without giving preferential treatment to groups in order to raise

Law and Society Journal at UCSB, Volume IV (2005).

their status to a level at which they may be said to have equality of opportunity. These affirmative action polices give race-preferential treatment to minorities in areas such as employment and university admission. Instead of simply removing discriminatory barriers, affirmative action creates a system of new racial barriers that are as unjust and discriminatory as the ones that existed before the Civil Rights Movement. Affirmative action is a step backwards for civil rights and the notion of common citizenship in the United States. It instead leads to a system of discrimination based on group membership instead of individual rights.

Affirmative Action's Roots in Civil Rights

Race-conscious affirmative action policies are founded in the theory of group rights and the goal of equality in outcome and condition. Ironically enough, affirmative action polices are a development of early civil rights legislation originally intended to promote individual rights and equal opportunity. America's focus shifted from *individual* rights policies designed to improve the future toward *group* rights policies seeking to remedy the past. This occurred due to an interplay of conflicting civil rights legislation, presidential orders, and the governmental organizations that enforce the policies. In the 1960s the Civil Rights Movement in the United States was committed to abolishing discrimination in all sectors of society. The Civil Rights Act of 1964 was the first all-encompassing civil rights legislation since the slaves were emancipated in America. It banned discrimination in voting, places of public accommodation, public facilities, federal programs, public education, and employment. Most importantly, it guaranteed the right of equal employment opportunity to every individual[3].

Title VII of the Civil Rights Act, the first piece of legislation to use the term "affirmative action," exemplifies the original purpose of affirmative action policies to promote individual rights. It declares it unlawful for an employer to fail or refuse to hire, to discharge, segregate, classify,

or discriminate against any individual in a way that would deprive them of employment opportunities because of race, color, religion, sex, or national origin[4]. In Section 706(g) it states:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate."

Such affirmative action, as mentioned in this act, was taken broadly to mean any policies that encouraged employers to end discrimination in the work place and offer more opportunities to minorities. Furthermore, such affirmative action polices were not fixed in numbers and could only be enforced if an employer had been found guilty of prior discrimination. By the early 1970s, however, this term had come to be associated with race-conscious hiring and promotion policies based on statistical goals and quotas[5].

The Civil Rights Act of 1964 also created the Equal Employment Opportunity Commission (EEOC). Its was designed to seek out unlawful employment discrimination, and to ensure that affirmative action be taken as a remedial procedure. The commission allowed for two ways of doing so[6]. The first involved observation of hiring practices: an employer must have hired members of minority groups in proportion to their presence in the population, labor force, or specific occupation. The second method was to show that the tests for employment used by employers were discriminatory. The EEOC developed tough requirements for employers to use tests, making it difficult to prove them as non-discriminatory. This was done purposely to pressure employers into abandoning tests and using quotas instead.

Many tests that were legitimate in determining whether the potential employee was competent for the job were dismissed as discriminatory because the passing rates of

minorities were significantly lower than whites. However, this becomes problematic for the cases in which disproportionate minority employment is due to an employee's lack of necessary skills and not because of discrimination.

President Lyndon B. Johnson furthered civil rights reform in 1965 when he issued Executive Order 11246. Executive Order 11264 asserts that federal contractors agree on the following point:

> "not to discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin, and to take affirmative action to ensure that applicants are employed and employees are treated during employment without regard to their race, color, religion, sex, or national origin."

Although Executive Order 11246 seems to be race-neutral with an aim towards equal opportunity, it leads toward race-preferential treatment and quotas in practice. This order gave the Secretary of Labor the power of enforcement, which led to the creation of the Office of Federal Contract Compliance (OFCC). Contractors were required to develop a written affirmative action program designed to ensure equal employment opportunities and set forth specific and action-oriented programs[7]. Unlike Title VII, Executive Order 11246 did not stipulate that unlawful discrimination must take place in order to require employers to take affirmative action measures. The OFCC could require affirmative action as a condition of doing business with the government, and could define it to mean whatever they pleased[8]. The OFCC used coercion to deal with contractors who wanted to acquire government contracts in order to promote specific affirmative action goals.

The coercion tactics of the OFCC, in compliance with the contract, went largely unchecked despite the clear violations of Title VII of the Civil Rights Act of 1964. Furthermore, they undermined the conditions of unlawful discrimination, conditions that were required by the EEOC

have occurred in order to prescribe affirmative action polices. This discrepancy between the two bodies of authority was often considered when disputes in employment practices arose. Race-preferential measures, including quotas, were authorized in judicial decisions under Title VII as a remedy for unlawful discrimination practices found by the EEOC. Meanwhile, contract compliance officers from the OFCC had pressured contractors to hire more minorities based solely on low minority utilization without evidence of unlawful discrimination. The U.S. stance regarding its laws and agencies that were created to further civil rights was demonstrated through Supreme Court decisions regarding employment practice disputes.

Affirmative Action and the Courts

To resolve the conflict between Title VII of the Civil Rights Act of 1964 and Executive Order 11246, the Supreme Court made many findings of unlawful discrimination in order to justify race-conscious affirmative action. These decisions favored equality of opportunity, and sought to remedy effects of societal and institutional discrimination instead of just employment discrimination against individuals. The first case regarding Title VII to reach the Supreme Court was *Griggs v. Duke Power Company* in 1971. Employees of Duke filed a class action suit against the company, claiming that Duke's racially neutral policies were inherently discriminatory. (Duke's previous employment practices had unconditionally held blacks to low-level jobs, and the change led to hiring, transferring, and promoting polices that required a high school diploma and the passing of an objective performance test). The *Griggs* decision resolved a discrepancy between two sections of Title VII: section 703(a) asserts that "it is an unlawful employment practice for an employer to limit, segregate, or classify employees to deprive them of employment opportunities or adversely to affect their status because of race, color, religion, sex, or national origin;" however, section 703(h) authorizes the use of any professionally developed

ability test "provided that it is not designed, intended, or used to discriminate[9]."

The attorneys for the employees claimed that the test impacted blacks as a group, who had lower passing rates than whites. The Supreme Court agreed, and pointed to evidence of the inferior education of blacks in segregated schools as barriers preventing them as a group from passing such objective tests at the same level of white employees. Although seemingly race-neutral, the objective test reduced the number of potential black employees because previous discrimination had made them less capable of passing it. *Griggs* is an example of how the courts labeled racially neutral policies as discriminatory because such policies continued previous societal discrimination. "If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance the practice is prohibited[10]." Consequently, *Griggs* led to the greatly restricted the use of tests in hiring and promoting practices unless they were essential for employment.

Griggs demonstrated that the dissolution of racially discriminatory employment practices was not enough to satisfy the government's civil rights requirements of equal employment. Desegregation of the workplace and the new racially neutral practices of employers were inadequate. Objectivity was potentially discriminatory because minorities' education and job qualifications were inferior as a result of societal discrimination. The Supreme Court said that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices[11]." In doing so, Griggs supplied the theoretical basis for preferential treatment[12]. In Griggs and other cases surrounding Title VII, the courts adopted the disparate impact theory of discrimination. This theory holds that the cause of racial inequality is found in societal discrimination rather than individual prejudice. According to this theory, group rights and equality of result were assumed as the founding principles of civil rights policy[13].

Later cases surrounding civil rights legislation, such as *Weber v. Kaiser Aluminum and Chemical Company* (443 U.S. 193 (1979)), stretched the limits of Title VII to legalize quotas as a part of affirmative action measures. Brian Weber was a white employee of Kaiser Aluminum and Chemical Corporation who claimed that the company's promotion polices were in violation of Title VII[14]. Kaiser's training program awarded positions in equal numbers to white and black racial groups based on the seniority of the members within each group. This quota policy was developed in order to increase the percentage of black employees within the company to the proportion they represented in that area's labor market. Kaiser adopted its plan at a time when its union, The United Steelworkers of America, was under contract compliance pressure from the OFCC[15]. They faced charges of racial and sexual discrimination under Title VII for failing to employ a sufficient number of blacks. While accounting for only 14 percent of Kaiser's work force, blacks constituted 39 percent of the labor market in the area[16]. Weber claimed reverse discrimination as he was denied a position that was granted to blacks who had less seniority.

As a defense for its program, Kaiser argued that they took preliminary action in order to avoid OFCC charges of non-compliance with Executive Order 11246 and subsequently to retain their government contracts. Furthermore, Kaiser asserted that if they were found guilty for discrimination and told to take action, it would be difficult to know how much action to take without fixed numbers.

The Supreme Court decided in favor of Kaiser and upheld its training program based on quotas. This was yet another victory for race-preferential affirmative action policies. The majority opinion, written by Justice Brennan, ignored the fact that Kaiser's quota was a response to contract compliance pressure. It further added that it was not a violation of Title VII as its prohibition in 703(a) and (d) against racial discrimination did not condemn all private, voluntary, and race-conscious affirmative action plans[17]. The decision diverged from the decision in Griggs by allowing employers

to use racial preference and quotas in hiring, notwithstanding whether or not the employer had been found guilty of previous discrimination. The decision offered employers protection from policies they introduced that were sanctioned by Executive Order 11246 but in violation of Title VII. Now employers could operate according to the disparate impact theory and take affirmative action to remedy the effects of societal discrimination in their workplace[18].

The Supreme Court's interpretation of Title VII in *Weber* was the first to uphold a policy that could conceivably lead to reverse discrimination simply because such changes would be "consistent with the spirit and intent of the Civil Rights Act[19]." Many such new policies could even occur in the absence of unlawful discrimination[20]. The Civil Rights Act of 1964 and Title VII were written to eliminate race as a factor for discrimination by employers in hiring decisions. By eliminating discrimination, Title VII was intended to increase economic opportunities for minorities but not at the expense of others. The Court's decision made the non-discrimination ideologies behind Title VII and Executive Order 11246 obsolete, compared to the affirmative action plans that rose from contract compliance pressure (but widely approved judicially), demonstrating a considerable deviation from Title VII's intended purpose.

Affirmative Action in Theory

The basic principles of anti-discrimination that were first set forth in the Civil Rights Act of 1964 have become distorted over the last forty years. The statutory language intended to confer an individual right to equal opportunity in employment (without distinguishing by color) has been interpreted in a way that authorizes preferential practices benefiting certain racial and ethnic groups[21]. The United States has operated according to a disparate impact theory in approving race-preferential affirmative action policies, asserting that we must make amends for previous societal discrimination, which has caused racial inequality. Despite

good-natured intentions of equality and reversal of unjust acts of discrimination, group rights policies giving preferential treatment to minority groups are inherently unequal and counterproductive to a society in which many assert that race ought no longer have a significance. The debate surrounding affirmative action is essentially a conflict between group and individual rights, and which of these better achieves true equality in society.

Affirmative action and other race-preferential treatment guides America away from the idea of a racially-blind society. The U.S. Commission on Civil Rights stated that the purpose of affirmative action was to "eliminate, not perpetuate, practices stemming from ideas of racial, gender, and ethnic inferiority or superiority[22]." On the contrary, affirmative action almost insinuates an inferiority of races in the implication that some are unable to compete in society without compensation and assistance. Race-preferential treatment heightens awareness of race by making it a criteria in employment and admissions practices, subsequently drawing increased attention to the presence of race as a factor in ability.

Affirmative action is viewed as a temporary policy necessary to undo the effects of past societal discrimination[23] but leaves the question unanswered as to when it is no longer needed. If a purpose of affirmative action is to raise the level of minorities in employment and universities to equal their proportion in society, then race-preferential policies can in theory be abandoned once that level is reached. The solution is not that simple; it would conceivably be difficult to rescind benefits from groups accustomed to receiving them. Furthermore, creating a society in which races are employed at precisely the proportion of their presence in society cannot be said to be equal either. There is no evidence that the racial profile of America's work force ought to identically represent the population distribution of minorities had past discrimination against blacks not taken place. Attempting to create this 'proportionate equality' denies individuals recognition of their differences both within a group and in groups as a whole. The goal of affirmative action regarding

racial quotas is a delicate statistical balance that is impossible to maintain. The slightest inequality in racial representation in employment could be cause for claims of unlawful discrimination based on misrepresentation of groups. Such social engineering is better off abandoned so that individuals can compete based on individual rights and equality of opportunity.

Affirmative action policies can also adversely affect the morale of its beneficiaries. Those who have retained a position as a result of preferential treatment may ask themselves, "Would I have been offered this position if I had not been black[24]?" In the shadow of affirmative action polices, it is makes it difficult for a minorities to know if their achievements and status are a result of hard work and merit or if they were aided by policies that favored them[25]. It seems dangerous to implement policies that overshadow accomplishments, formulate doubt, or leave feelings of guilt in the recipient as to whether they have really earned what they received. Amelioration of such conditions could conceivably improve race relations as a whole.

Policies intended for those who suffer from forms of deprivation are unquestionably justifiable and indeed morally necessary[26]; however, problems arise with regard to the question of inclusion—it is not ultimately clear who ought to be included in such groups. Designing polices to aid groups always involves the risk of defining the group under or over-inclusively. This concerns the prospect of giving aid to group members who are not in need, or neglecting those who are. It seems difficult to draw a fine line. There are always members of every group, whether entitled to preferential treatment or not, that conceivably do deserve treatment, but do not receive it. To whom ought it be given? Instead of turning to group rights to create equal outcomes the goal might be better achieved by universalistic policies that assess need based on the individual and not his membership to a group[27].

Affirmative action is not the solution to achieving civil rights and equality. True equality is for every individual to have the same opportunity to pursue one's own will, to

not be discriminated for or against, and to not be restricted from life's liberties. While it is certain that aid should be given to those who are underprivileged and in need of help, assistance should also be given to underprivileged people on an individual basis (for example based on medical, social, and economic need) independent of their race or other group identity[28]. Assistance should furthermore be given early on in life: this would involve giving aid to elementary schools in communities that are poorer and where the adults are generally less-educated. This would elevate and standardized the conditions of education for young children so that the 'playing field' will be more balanced when they apply for universities and seek employment. Giving help to racial groups at the stages of university admission and employment is an ineffective "quick-fix" that attempts to remedy problems instead of attempting to help people from the beginning. The United States should abandon affirmative action programs based on racial group identity, and instead proceed in the spirit of the Civil Rights Act of 1964 with non-discriminatory policies that guarantee equality of opportunity and recognize the innate equality of all individuals.

End notes

[1] *Belz*, pp. 3
[2] *Barry*, pp. 114
[3] *Belz,* pp. 7
[4] *The U.S. Employment Opportunity Commission*
[5] *Nieli,*pp. 3 (*Glazer, Nathan:* Racial Quotas)
[6] *Nieli,*pp. 9 (*Glazer, Nathan:* Racial Quotas)
[7] *U.S. Department of Labor*
[8] *Belz,*pp. 30
[9] *Findlaw.com:* Griggs v. Duke Power Co., 401 U.S. 424 (1971)
[10] *Belz*, pp. 52
[11] *Findlaw.com: Griggs v. Duke Power Company* (401 U.S. 424 (1971))
[12] *Belz,* pp. 52
[13] *Belz,* pp 69
[14] *Belz,*pp. 159
[15] *Belz,* pp. 159
[16] *Belz,* pp. 159
[17] *Leadership Conference on Civil Rights*

[18] *Belz,*pp. 166
[19] *Belz,* pp. 162
[20] *Belz,* pp. 165
[21] *Belz,*pp. 1
[22] *Belz,*pp. 263
[23] *Belz,* pp. 5
[24] *Nieli,*pp. 450 (*Loury, Glenn C:* Beyond Civil Rights)
[25] *Nieli,*pp. 447 (*Loury, Glenn C.:* Beyond Civil Rights)
[26] *Barry,* pp. 114
[27] *Barry,*pp. 115
[28] *Barry,* pp. 114

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