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Equal Opportunity

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Heated controversy about the legality (and the wisdom) of affirmative action as a social policy was a prominent feature of the 1970s. No less novel in law than in policy, affirmative action, in its increasing emphasis on a policy of racial preference to aid minorities, lacked any reliable body of judicial precedent for its justification and was, as one observer aptly put it, "a fragile commodity" that had "a sort of tenuous existence between the lines of the Constitution."[1] So rapid was its expansion, both as a concept and as a set of operating programs, that authoritative judicial resolution of the severe disputes it provoked inevitably lagged well behind. The resulting uncertainty about what was constitutionally permissible or impermissible in the generic name of affirmative action intensified public conflict over the appropriateness of the policy.

At the outset of the 1980s, the legal picture was less ambiguous because of the U.S. Supreme Court's decisions in *Bakke* (1978), *Weber* (1979), and *Fullilove* (1980).[2] Although each decision proceeded from a divided Court and left many important questions unanswered, the trio of cases nonetheless provided helpful clarification. In *Bakke*, the Court held it permissible under both the Equal Protection clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 for a state medical school to include race as a factor in competitive admissions; four of the justices composing the bare majority advanced a broad constitutional justification of government-adopted compensatory racial preferences intended to offset the present effects of past societal discrimination. In *Weber*, the Court held that Title VII of the Civil Rights Act permitted the private sector voluntarily to apply a compensatory racial preference

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in employment. And in *Fullilove*, a 10 percent set-aside of federal funds for minority businessmen, which Congress provided in the Public Works Employment Act of 1977, was held constitutional. These cases also made clear that the adverse effect of such racial preferences on members of the unpreferred groups—commonly called reverse discrimination—was not by itself sufficient grounds for invalidation of the preference.

Many significant aspects of affirmative action still remain to be considered by the Court, such as whether a government agency that has not itself engaged in racial discrimination may adopt, *Weber*-style, voluntary compensatory racial preferences; whether women may be granted the same preferential treatment as racial minorities; and how the scale and severity of permissible group preferences will be specified. It is admittedly premature, therefore, to conclude with certainty that the legality of compensatory racial preferences is solidly assured. High probability exists, however, that judicial judgment will allow and perhaps even encourage increased use of compensatory racial preferences in the government and in the private sector to counter the effects of previous societal discrimination. For purposes of this study, judicial endorsement of the permissibility of compensatory racial preferences is assumed.

Although dispute over the legal standing of affirmative action may consequently recede during the 1980s, public controversy about the maintenance or extension of racial preferences will persist because the issue inescapably involves basic values and interests. Such earlier conspicuous policy and political concerns as the acceptability, perceived fairness, and effectiveness of the programs can be counted on to continue generating highly visible and intense public disagreement. The emphasis of this study reflects this shifting focus on the problem. While several aspects of the Court's role and its justifications for racial preference policy are treated, my main concern is to examine some of the policy and political hazards of compensatory racial preferences that its proponents neglect or misunderstand. This examination suggests, in turn, that the involvement of politically accountable officials in the determination of whether and, if so, when to adopt compensatory racial preferences should become a regularized feature of the decision process.

Nondiscriminatory Affirmative Action and the Traditional Concept of Equal Opportunity

Two days after hearing oral arguments on *Bakke* in October 1977, the U.S. Supreme Court requested the parties to the case and the

Department of Justice to submit supplemental briefs on Title VI of the Civil Rights Act of 1964 "as it applies to this case." Section 601 of Title VI requires that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." The Court's request could reasonably be taken as an indication that it might prefer to decide *Bakke* on statutory grounds rather than on the Equal Protection clause of the Fourteenth Amendment. It is a measure of how much affirmative action concepts had changed since the mid-1960s that many civil rights and minority activists were fearful of the Court's decision if the Civil Rights Act of 1964 was used as the principal basis for determining the legality of the Davis medical school's preferential admissions practices.[3]

The national commitment to nondiscrimination established in the mid-1960s was broadly understood to encompass the eradication of intentional and overt discriminatory practices against minorities and the elimination of laws and legally sanctioned traditions and practices that resulted in government classification and legislation on the basis of race. Spokesmen for minorities, together with a large majority of the public, endorsed the concept of a colorblind government and society committed to racial neutrality, that is, a nation in which racial categories would be both irrelevant and impermissible as classifications in law or policy.

The nondiscrimination principle attracted—and continues to attract—broad public backing because its meaning is clear, limited, and closely tied to the traditional view of equal opportunity held by most Americans. This traditional view, as applied, say, to jobs, emphasizes a fair process of evaluation among competing applicants, which means the assessment of all applicants on an individual basis by application of nongroup criteria relevant to the satisfactory handling of the job in question. The result of such a meritocratic process is the selection of the persons best qualified to do the job, judged by the current abilities of the competitors. Under this view, a genuinely meritocratic process is fair by definition, and, therefore, it guarantees both a fair outcome and equality of opportunity.

This traditional version of equal opportunity promises and justifies a large inequality of results among individuals in income, status, and the like. Its individualistic base precludes the consideration of group outcomes; that is, equal opportunity refers to individuals, not to groups or to individuals as group members. The widespread public acceptance of these attitudes is reflected in and reinforced by

popular beliefs in social mobility, in the chance for individuals to progress in line with their ability and effort.

The national commitment to end racial discrimination undertaken in the mid-1960s thus enjoys high popular support because it constitutes a much needed (albeit belated) purification of the traditional concept of equal opportunity, not a challenge to it. Putting the policy into practice is a relatively straightforward matter, at least conceptually, and it leads to an emphasis on ways to eliminate considerations of race from selection and evaluation processes. Both the nondiscrimination principle and government enforcement of nondiscrimination are comfortably incorporated, then, within the prevailing notion of equal opportunity and provoke no serious controversy.

It was assumed, naively but sincerely, that rapid and sizable minority strides toward equality would follow once discriminatory barriers were leveled. Soon, however, this assumption was recognized as unrealistic and in need of supplementation. Additional, special efforts were required, it was felt, to promote equal opportunity more effectively for members of minority groups extensively discriminated against in the past. Under the broad rubric of "affirmative action," the government stepped up efforts aimed not solely at ending discrimination but at remedying the effects of past discrimination. During the 1970s, these efforts transformed policy from nondiscrimination and equal opportunity for individuals as traditionally understood to racial preference and group proportional equality.

Some special actions on behalf of minorities may be linked without strain to traditional nondiscrimination attitudes. (These might be termed "nondiscriminatory affirmative action.") They can affirm the integrity of the accepted equal opportunity concept by improving its operation in the real world. Minorities have less knowledge of job opportunities, for example, and, because of previous bad experiences, are less motivated to apply for those job openings of which they are aware. To reduce this inequality, it is reasonable to have employers provide wide notice of job vacancies and engage in other forms of active recruitment to encourage minority persons to apply. Such "affirmative actions" square thoroughly with the popular view of equal opportunity because they serve to enlarge the competition by removing inappropriate disadvantages for some potential applicants, while leaving all else intact.

Other types of affirmative actions, more mixed in character, seek to help minority persons who are less able, because of past discrimination, to compete effectively for presently available opportunities (for example, special minority training and educational programs and

special financial aid to minority students to relieve them of the need for outside employment while at school). Such programs can appropriately be construed as perfecting competition because they aim to increase the number of qualified minority persons who can hold their own in an open competition. Depending upon circumstances, however, these special benefits can also be seen as reducing competition. With limited funds, for example, assigning extra financial aid to minority students results in a cutback of money available to nonminority students with equivalent needs. (An "add-on" of special benefits to minorities that leaves unaffected the funds available to others is much less troubling.) Further, the restriction of special programs solely to minorities invariably raises concern about official use of racial categories and about the treatment of persons as members of a group rather than as individuals. Because of these complications, this category of affirmative actions often produces a divided reaction from adherents of the traditional view of equal opportunity. Still, substantial support for varied kinds of special minority arrangements can usually be counted on, especially when they do not obviously handicap nonminorities.

Popular sentiment on affirmative action, in sum, appears to favor a "flexible" application of traditional values offering legitimacy to a wide range of policies supplementing formal nondiscrimination that stay well short of pronounced preferential treatment of minorities. Attachment to the traditional concept of equal opportunity leads to an emphasis on strengthening the skills and qualifications of minorities to hasten the entry of many more of them on the supply side of the equation. Provision of special resources and assistance to promote that development passes public muster also, at least as long as nonminorities are not openly penalized in the process. Even some kinds of "special consideration" for minorities in job hiring or university admissions, an ambiguous term that perhaps suggests some modification but not the elimination of competition, can be said to fall within the allowable bounds of flexibility, depending on the particulars of the situation. What a large majority of the public opposes, then, is the granting of clear-cut racial preferences as a means of achieving minority advance.

By its willingness to go beyond formal nondiscrimination and accept nondiscriminatory affirmative action and "special" minority assistance not directly damaging to others, this flexible version of traditional equal opportunity—if implemented vigorously and persistently over time—promises significant and enduring minority gains. Because of its inherent limitations, however, it cannot *guarantee* rapid, large-scale minority advance. Means that respect the indi-

vidualistic competition-perfecting standard cannot ensure predictable group outcomes. The traditional concept, in its emphasis on developing a larger supply of qualified minority applicants, is chancy as to, first, the swiftness and magnitude of that development and, second, the proportion of minority members with strengthened qualifications who actually succeed in the competition. For those concerned primarily with the certainty of racial outcomes, therefore, the chief virtue of the traditional view—a strengthened fair process of competition resting on a meritocratic evaluation of individuals—is its principal liability.

Discriminatory Affirmative Action and the Redefinition of Equal Opportunity

Nondiscriminatory affirmative action calls for the maintenance of an extraordinarily delicate balance, one in which race-conscious activities are constrained by respect for the nondiscrimination principle and as much attention is paid to the integrity of the process as to the satisfactoriness of the results. When, therefore, a concern for results becomes paramount, fidelity to nondiscrimination will surely be slighted and racial preferences (overt or covert) are likely to be introduced. (What may be termed "discriminatory affirmative action" is the outcome of that development.) The evolution of affirmative action during the 1970s, as illustrated by the following example, conforms generally to that pattern.

Among the "set of specific and result-oriented procedures" required of federal contractors was an affirmative action plan developed in accord with the Department of Labor's Revised Order Number 4, which governed employment practices in industry and higher education. The employer first had to survey his current work force to determine whether there was "underutilization," in any of the firm's job classifications, of blacks, persons with Spanish surnames, persons of Oriental ancestry, American Indians, or women. (These were the affirmative action group categories typically used in the mid-1970s; they have since been subdivided further.) Underutilization was held to exist whenever the proportion of any of these specified groups within a job classification was significantly smaller than would be expected if the employer had hired persons from the available work force in a random, nondiscriminatory way. Equal opportunity was defined, therefore, in terms of results, independent of whether the employer had or still was engaged in intentional or overt discriminatory practices, and underutilization was the statistical measure of unequal opportunity. Where underutilization was found, the contractor had to establish goals for each underutilized group,

specifying the number of persons in each group that should be employed in each job classification and establishing a multi-year timetable for reaching that numerical goal through good-faith efforts.

In response to public complaints that these procedures promoted racial preferences and quotas, antibias officials denied the charges and insisted that the process was proper and valuable. It established a reasonable and explicit target for achievement, they asserted, and permitted the employer and the government alike to measure the rate of progress in reaching the goal. Government officials also emphasized that goal setting was logically distinguishable from quota setting, and that no quotas were intended or expected. Thus, to take but one difference, quotas had to be filled, whereas goals did not have to be met. True, an unmet goal might trigger a fuller inquiry, but the employer was then entitled to provide evidence explaining why his good-faith efforts had not been fully successful. If the employer's explanation was supported by the agency's review, no penalties could be levied for failure to meet the goal.

Critics of the program attacked both its theory and especially its practice. The de facto equation of underutilization with discrimination was open to serious question, not the least because it smacked of a "group proportional results" view of equal opportunity. The concept of underutilization (with its attendant goals and timetables) was understandable, perhaps, as an enforcement device, but only if public officials were sensitive not to coerce employers simply because of their unmet goals, no matter what their good-faith efforts or explanations. Since it was obviously far easier to monitor the results than the process, it was incumbent on antibias agencies to take special care to encourage employers to hire through genuinely nondiscriminatory processes. In their actual operation, however, the agencies all too frequently sent enforcement signals that went in the opposite direction: the employer who failed to realize his group-hiring goal, not the one who achieved his goal by use of racial preferences or quotas, was the one who might have to face vigorous investigation, bad publicity, or the threat of contract cancellation or denial of future contracts. By exhibiting a greater concern for deficiencies of outcomes than of methods, the agencies provided a pointed lesson for firms anxious to do business with the government. The present perception of many of those with authority to hire that the affirmative action employment program encourages racial preference and reverse discrimination is thus neither mistaken nor paranoid, but rather a clear-eyed recognition of reality.

In justification of the turn to racial preferences, an alternative

formulation of equal opportunity was often asserted. Unlike the traditional notion, it stressed groups and outcomes, not individuals and process. This view held that if all other things were truly equal, a genuinely fair process would result in roughly the same proportion of nonminorities and minorities gaining the jobs, the admissions to higher education, or whatever the competition. Disparate group proportions signaled, therefore, less-than-equal opportunity for the underrepresented groups because of the present effects of past discrimination. Group proportional results (or "statistical group parity") thus was advanced as the definition and guarantee of fair process and equal opportunity and as the policy objective to guide and measure minority progress.

From this perspective, the recruitment and selection processes set by nondiscriminatory affirmative action were inadequate because they functioned as a "pass-through" rather than as a corrective for previous group inequities. Applied to the *Bakke* issue of professional school admissions, for example, proponents of this view argued that the disproportionate exclusion of minorities because of admissions criteria that reflected the traditional concept of equal opportunity produced, in effect, unequal opportunity because the criteria rewarded and perpetuated differential group achievement rooted in past unfair group inequalities. A corrective policy was needed, therefore, to break this circle and to ensure that more minority members actually entered the schools and professions, as distinct from competing for admission relatively ineffectively because of disadvantages unfairly imposed on them by society. Racial preference—such as the Davis medical school's reservation of 16 of 100 entering places for minority applicants—obviously constituted the type of corrective policy that could reliably be counted on to provide rapid, certain, and sizable results.

This rationale for racial preferences, together with its underlying restatement of what equal opportunity meant and entailed, were given heightened credibility and standing when both were implicitly endorsed by four members of the Court (Justices Brennan, White, Marshall, and Blackmun) in their *Bakke* decision in 1978. That a near-majority of the Court subscribed to these views took on even more significance in light of the fact that in *Bakke* the Court for the first time dealt substantively with the issue of whether a government institution not itself guilty of past discrimination could voluntarily engage in compensatory minority preferences and reverse discrimination in order to counter the effects of past societal discrimination. Indeed, had but one more member joined in Justice Brennan's opinion, thereby forming a Court majority, *Bakke* would have been the land-

mark constitutional decision that much of the media and the public had anticipated it might be.

In its review of the Court's treatment of cases involving Title VII (employment discrimination) of the Civil Rights Act, the Brennan opinion in *Bakke* argued that the Court's decisions demonstrated that the permissibility of race-conscious actions did *not* turn on any of the following four conditions: first, recipients of preferential advancement did not have to be confined to those who have been individually discriminated against; "it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination." Second, the fact that minority preferences would "upset the settled expectations of nonminorities" constituted no effective objection to the preferences. Third, "judicial findings of discrimination" were not required to justify preferences. Fourth, "the entity using explicit racial classifications" did not itself have to have been in violation of equal protection or of an antidiscrimination regulation.

Summing up their reading of Title VII case law, the Brennan justices concluded:

> Properly construed . . . our prior cases unequivocally show that a state government may adopt race-conscious programs if the purpose of such programs is to remove the disparate racial impact its actions might otherwise have and if there is reason to believe that the disparate impact is itself the product of past discrimination, whether its own or that of society at large.

But the second condition specified above—"if there is reason to believe that the disparate impact is itself the product of past discrimination"—lacks independent substance and is, in effect, no condition at all. For those minority groups whose disadvantaged status is the core concern of racial preference policy, is there a prominent or acceptable public explanation for disparate racial impact other than that it results from previous discrimination, broadly defined? In reality, then, the Brennan thesis posits that disparate minority-group impact per se provides sufficient constitutional justification for racial preferences intended to modify or eliminate that impact.

The same conclusion applies upon examination of an essential element of the middle-ground standard of constitutional review—less severe than "strict scrutiny" but more exacting than the "rational basis" test—that the Brennan foursome held appropriate for racial classifications designed to further remedial purposes. Among other

requirements called for by the standard, official use of racial classifications had to be justified by "an important and articulated purpose" that served "important governmental objectives." Justice Brennan had no difficulty in determining that the Davis medical school program met this requirement.

> Davis' articulated purpose of remedying the effects of past societal discrimination is . . . sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the medical school.

Here again, as in the previous instance, the second condition set—"where there is a sound basis for concluding . . . that the handicap of past discrimination is impeding access of minorities to the medical school"—is more nominal than real. What reason other than "the handicap of past discrimination" would constitute an acceptable explanation for the inability of minorities to compete successfully with nonminorities when evaluated by traditional admissions criteria? In effect, then, Justice Brennan's two conditions become only one, namely, that if a university has persistent and severe minority underrepresentation, it may adopt racial preferences in admissions.

Having equated disparate group outcomes with the effects of historic discrimination, and having constitutionally validated compensatory racial preferences intended to counter minority underrepresentation, the Brennan opinion carried the thesis to its logical conclusion: whites displaced by racial preferences are really not "innocent victims," because they would not have won out in the competition had minorities not been handicapped by previous discrimination. Justice Brennan's argument proceeded by analogy to the adverse effects on white employees of remedial race preferences required of a company that violated the antidiscrimination provisions of Title VII, for example, seniority adjustments and promotions favoring minorities. Even though the employer was to blame and the employees were technically innocent, those expectations of nonminority workers (as to seniority, promotions, and so on) that were upset by the racial preferences were "themselves products of discrimination and hence 'tainted.'" The claims of the burdened white employees are thus entitled to less deference as a limitation on racial preferences; the white worker whose promotion opportunity is delayed or lost is not really harmed because if the minority employees had not been discriminated against, they would have been ahead of him anyway.

"The same argument," asserted the Brennan opinion, "can be made with respect to [Allan Bakke]."

> If it was reasonable to conclude—as we hold that it was—that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, [Bakke] would have failed to qualify for admission even in the absence of Davis' special admissions program.

The troubling problem of the reverse discrimination effects of compensatory minority preferences is thus disposed of, in this view, by defining reverse discrimination out of existence.[4]

Over the 1970s, then, both the rationale and practice of affirmative action more openly and frequently favored the use of preferential policy to promote equality for racial minority members. Many advocates of the broad-scale adoption of compensatory racial preferences represented them as being a complementary expansion of the earlier notion of nondiscrimination and of traditional equal-opportunity values. The opposite conclusion, however, is nearer the case. As traditionally and popularly understood, the concepts of equal opportunity, equal protection, and nondiscrimination would be transformed—not simply "extended," "deepened," or "strengthened," as the proponents of preferences urged—if the idea of statistical parity among groups were to become their widely accepted meaning and the measure of their achievement. Since the public, as noted earlier, also distinguishes sharply between what in this study is called nondiscriminatory and discriminatory types of affirmative action, the accelerating turn to compensatory racial preferences is certain to fuel continued controversy over the acceptability and wisdom of such policies.

Minority Preferences as Only a "Temporary Deviation"

The argument for compensatory minority preferences emphasizes their transient and short-lived nature as urgent remedies for past discrimination. Racial neutrality is affirmed as the appropriate value and norm, and preference policy is explained and justified as a temporary deviation required by short-term circumstances and needs. At some future time, when the currently preferred minorities have "made it" into the mainstream of American life, group preferment will be eliminated. How realistic is this prognosis?

There is no reason to suppose that the political dynamics of

discriminatory affirmative action will differ greatly from those of other social programs. Consequently, the development of racial preference policy can be expected to go in a direction opposite that of self-destruction. Social programs characteristically perpetuate themselves and expand rather than contract and die. Transfer payments to individuals, for example, which have grown to constitute almost half of the federal budget, are politically very difficult to cut back because of their supportive constituencies and bureaucracies and because the recipients have come to consider their benefits as entitlements, not as temporary assistance subject to later reduction or elimination. Since minority preferences involve newly created benefits, which, in turn, develop their own vested interests, the same developmental pattern can be anticipated for them. At the least, those who argue that minority-preference policy will constitute an exception to the pattern have the obligation to explain why this should be so.

The durability of compensatory preferences is further ensured by the fact that the changes in society's values and beliefs necessary to allow initial use of the "temporary deviation" subsequently function to promote its continuance. Consider, in this regard, the implication of the prevailing justification for preferential policy, as stated by the Department of Justice in its *Bakke* brief:

> As long as prior discrimination has present effects, mere neutrality to race is insufficient. As long as the effects of past racial discrimination persist, the employment of race-consciousness in rectifying that discrimination should not be abandoned.[5]

Since the measure of discriminatory effects increasingly relied on is that of group proportionality, the foregoing justification calls for preferential treatment until such time—however indefinite and long it may be—as minorities achieve an approximate parity with whites.

In the *Bakke* litigation, supporters of the Davis program emphatically characterized it as temporary in duration. As one representative formulation of this position put it:

> [Special admissions programs] are . . . transitional steps, pending the achievement of a more complete racial equality in the professions, which the political process can be counted on to abolish when the felt need for them no longer exists.[6]

But when would the "felt need" for preferential admissions disappear, and how would it come to be generally acknowledged that such programs should be ended? The varied "answers" to these key questions, which more often were guesses rather than reasoned estimates,

provide no support for the depiction of preferences as a transient feature of the policy landscape.

"We hope," said the Carnegie Council on Policy Studies in Higher Education, "that the current period of transition will not last longer than until the end of the current century—less than one generation."[7] The University of California (of which the Davis medical school was a part) suggested in its brief that the program may terminate "a generation or two from now."[8] Others offered no time predictions but instead set conditions that, when met, would supposedly cause the policy "to expire of its own force."[9] One such condition, which fixed "its own time limitation" for preferential admissions, was offered by the Law School Admissions Council: "when the applicants coming to the graduate and professional schools are no longer the products of segregated elementary and high schools."[10]

The University of California's brief implied that special admissions programs might be ended, some decades from now, if they were considered to have failed. One measure of failure, the brief stated, would be if the academic scores of the various minorities "continue[d] to lag behind other groups."[11] By the standard set forth by the Justice Department (quoted above), however, this finding would lead to exactly the opposite conclusion. The relatively weaker academic records of minority applicants would be interpreted as evidence confirming the continuing detrimental effects of past discrimination and, hence, as evidence calling for the maintenance or enlargement of preferential admissions, not its elimination.

The effect of conditioning the demise of compensatory admissions practices on the realization of a close proportional equality of outcomes between minority groups and whites is to ensure a lengthy and perhaps even indeterminate life for such programs.[12] Moreover, since there is no agreement on what outcomes to compare in determining the extent of group equality, the core notion of parity can itself become so elusive and subject to dispute as to preclude securing consensus on what is required to demonstrate that parity has been achieved. Is parity reached when minority applicants gain regular admissions at the same rate as white applicants, and/or when minorities constitute at least the same proportion of the applicant pool as of the relevant age cohort in the general population, and/or when the minority proportion of the profession equals its percentage of the general population? Each of these applications of parity (as well as others unmentioned here) can be defended, but it may be confidently predicted that the dynamics of social policy development will result in the adoption of the more demanding and expansive constructions

of parity. Compensatory minority preference policy cannot realistically be considered, therefore, as only a "temporary deviation" whose justifiable elimination later would be easy to agree on and to accomplish.

The Extension of Preferences to Other Groups

Supporters of minority preferences reasonably expect that such preferences will be widely applied within both the government and the private sector, and that significant minority gains will result. They nonetheless also anticipate that preferences can and will remain confined to today's "protected classes" (the term used by courts and others to designate the major clientele groups of affirmative action). The realism of this second view is questionable, however, and the opposite outcome seems more likely.

An extension of preferences to other groups may be expected for the following reasons. The award of benefits to favored racial groups is certain to whet the appetite of other groups for comparable advantage. If the ticket of entry to the roster of preferred minorities is the statistical underrepresentation of a group in a particular profession, occupation, or industry, then virtually any number of ethnic groups can claim to qualify. Finally, the dynamics of the political process make it more likely to accede to than to block expansion of the number of group beneficiaries.

Some comments in late 1977 on affirmative action and *Bakke* by J. F. Paulucci, national chairman of the Italian American Foundation, suggest how some ethnic groups might react once compensatory racial preferences took firm hold.[13] Paulucci strongly favored preferential policy, but wanted it extended to white ethnics from Southern and Eastern Europe—Italians, Greeks, Poles, Slavs, Hungarians, and others—who also were underrepresented in higher education and the professions. "To do anything less," he asserted, "is to promote racism, not to eradicate it." Paulucci called for every college and university to analyze the general population from which it drew its applicants "to assure that no significant group in that population [was] being systematically excluded by its admissions procedures."

In upholding the constitutional permissibility of compensatory racial preferences in *Bakke,* Justice Brennan was not unmindful of the problem of how preferences could be restricted to certain groups and denied to others. He chose, however, to formulate the problem only as one in which a white ethnic group member also sought preferential admissions treatment on constitutional grounds. In those circumstances, Brennan observed, a court had only to determine whether

the school had a rational basis for concluding "that the groups it preferred had a greater claim to compensation than the groups it excluded." Consequently, Brennan concluded, although the "claims of rival groups . . . may create thorny political problems, [they] create relatively simple problems for the courts."

But what of the problem implicit but left untreated by Brennan? Suppose that the "thorny political problems" posed by the "claims of rival groups" were resolved in favor of including various ethnic groups for preferred treatment. Could the courts then do anything to overturn the decision of the political process to extend compensatory preferences to such groups? Under Brennan's criterion (discussed in detail in the second section of this study), as long as each newly preferred group was able to demonstrate significant and persistent underrepresentation, the essential condition for awarding preference was satisfied. Hence the Brennan rationale for racial preferences supplied no effective basis for confining permissible preferences to racial minorities. Quite the contrary, the logic of statistical group parity provides a variety of ethnic groups with both a strong incentive to pursue special treatment and an excellent basis for getting it.

Notions of group parity as the hallmark of equal opportunity have not effectively come to terms with the empirical reality that America's ethnic groups are not distributed proportionally across occupations, industries, and geographic areas. Logically, either of two broad explanations for these group disproportions must be offered. One set of explanations, having nothing to do with discrimination as that term is commonly understood, stresses such factors as cultural differences, the varying economic conditions facing immigrant groups at the particular time of entry, the economic skills and experiences of the group in its homeland, and the accident of concentrated geographic settlement. The clear implication of these explanations is to deny any direct connection between group proportionality and equality of opportunity. Why, then, should statistical group parity serve as the measure and definition of equal opportunity for racial minorities?

The other set of explanations treats group disproportions as the product of discrimination, broadly defined. For example, the clustering of an ethnic group in a narrow range of industries is seen as the effect of historic discrimination against the group in its early years in America and/or in its homeland. The implication of this line of interpretation, however, is to qualify such ethnic groups for preferential treatment in order to correct the group imbalance that is directly traceable to historic discriminatory patterns. In short, once group disparities are equated with discrimination, there is no logical

reason for confining compensatory preferences to only a few of the many eligible groups.

Increasing the number of self-conscious claimant groups covered by preferential policy could result in either greatly strengthening or seriously undercutting affirmative action. Since the list of groups protected by affirmative action has already been expanded well beyond the original target group of blacks to include many other racial and ethnic minorities, women, the aged, the handicapped, and Vietnam veterans, the inconclusive debate within the civil rights movement on the impact of this expansion suggests the difficulty of estimating which of the two outcomes is more likely. Some believe "the more, the better," on the plausible argument that enlarging the political constituency of affirmative action reduces the opposition to the idea and practice of group preferment and gives to each included group a shared stake in strengthening preferential programs for all its participants. Others worry, no less plausibly, that there may now be "so many protected groups that none are protected," referring to the generic difficulties of satisfying so large an array of competitive preferences, particularly in a period of recession, high unemployment, and inflation.[14] There is also a genuine political danger, especially in a recessionary economy, that the diverse groups may behave less as allies in a common cause than as suspicious competitors for special advantage. If the aggregate of group claims for preferences became an overload precluding accommodation or if the rivalry among contending groups became too divisive, a discrediting of the workability (if not the idea) of compensatory preferences might follow.

The Desirability of Involving Elective Officials in Decisions Whether to Employ Compensatory Minority Preferences

Once voluntary compensatory racial preferences aimed at remedying the effects of past societal discrimination are held permissible, the question of which government bodies may make the decision whether to employ such preferences follows. The argument in this section reflects my belief that, whenever possible, elective officials should be explicitly involved in that decision. The U.S. Supreme Court's promotion of that involvement is, however, necessary to bring it about, and there appears little chance the Court would agree to take on such a role. The unfeasibility of the argument must be conceded at the outset, then, in that the condition for its effective implementation is not likely to be met. The argument is nonetheless worth presenting because it highlights the extent to which minority preference policy

has developed without the expressed endorsement of the elective sector of the political process.

The argument develops from the view that the determination of whether to employ a compensatory minority preference is a public policy decision in which those public officials, legislators or elective executive officials who have the most direct political accountability to the citizenry, should be active participants. The fundamental political choice that must be made when deciding on the use of compensatory preferences is aptly expressed in a mid-1977 editorial in the *New York Times* on *Bakke*.[15] As the nub of the *Bakke* problem, the editorial poses the following "stark question": "should we reduce opportunity for some whites—somewhat—so as to accelerate opportunity for some blacks and other victims of pervasive discrimination?" No less instructive and apt is the title of the editorial: "Reparation, American Style." At bottom, compensatory minority preferences may fairly be considered a form of voluntary reparations, and government decisions to grant racial reparations for historic societal discrimination should be solidly based on a public consensus that accepts the policy as a necessary or desirable departure from the norm of racial neutrality. Because elective officials have a distinctive role both in shaping that consensus and in revealing what it is, they should be significant participants in such government decisions.

This general argument can be usefully applied to the *Bakke* dispute, in which the direct input of California elective officials was conspicuously absent. The special admissions program at issue was established by the Davis faculty, soon after the medical school opened, when it became clear that relatively few minority students were able to compete effectively for entry through regular admissions. If the program had been adopted for primarily educational purposes, it might be concluded that the decision was properly one for educators to make and, accordingly, that courts should give considerable weight to the faculty's judgment in determining the validity of the preference. But the Davis plan reflected mostly political-social concerns relating to racial advancement and social justice. Consider, in this regard, the following defense of the Davis program made in mid-1977 by the chairman of the governing board of the University of California:

> It's Bakke and these other fellows who are going to have to look elsewhere to other schools perhaps for their education. . . . In the past it was others who had to look elsewhere and couldn't find those schools. . . . What we're saying is we can and should be allowed to discriminate to allow those who have suffered inequities in the past to gain admissions at this time.[16]

Archibald Cox, in representing the university at the oral argument held in October 1977, offered a similar explanation:

> The decision of the University to assign 16 of 100 seats to special admissions was that there are social purposes, or purposes aimed . . . at eliminating racial injustice . . . and bringing equality of opportunity . . . served by including minority students.[17]

The professional schools around the nation that employed one or another variant of preferential racial admissions were motivated by the same purposes as those of Davis. A telling illustration of this is unwittingly provided by a senior admissions officer from Harvard, who chose to write a letter to the *New York Times* on the heels of the public announcement of the *Bakke* decision in June 1978. (The Harvard program was commended by Justice Powell in his *Bakke* opinion as the model of how a university could appropriately decide, on its own, to use race as an admissions factor and how it could then implement that decision effectively and legitimately in its admissions practices. One of the core distinctions Powell drew was that race could be properly used for the purpose of promoting student diversity and thereby enhancing the quality of the educational program, but not for the purpose of redressing the effects of past societal discrimination.[18]) The Harvard official's letter endorsed the practical outcome of the *Bakke* decision—the allowable use of race—in the (noneducational) terms of urgent social necessity:

> To the Editor:
> It is strange that on the day of the famous *Bakke* decision ABC televised a frightening documentary, "Youth Terror: A View from behind the Gun," about the millions of bitter and hopelessly lost members of minorities in the urban center of this country.
>
> If that documentary accurately reflects the existence of these young people (I have no reason to think it does not), then debating the correctness of the Supreme Court's *Bakke* decision is like arguing over sun-deck chairs on the *Titanic*.[19]

Even though political rather than educational concerns animated the Davis faculty's turn to racial preferences in admissions, deference to faculty judgment might still be urged if the setting in which the professors came to that judgment so closely resembled the political process itself as to be an acceptable surrogate for it. But no matter how thoughtful the deliberative process of the Davis medical faculty might have been (and the trial record revealed nothing about it), it

could not serve as a genuine substitute for the political process. The factors affecting a determination of a professional school faculty whether to adopt preferential minority admissions plainly fall far short of those that would envelop and influence a state legislature, a governor, or other politically accountable officials. (Broadly speaking, the incentives and considerations most salient for faculty and university officials are skewed in favor of granting preferential treatment; as a result, nearly all medical and law schools have chosen to institute some form of special admissions.)

In sum, the form in which *Bakke* came up for Court resolution involved a compensatory racial preference that educators had put into operation and that elective public officials had not explicitly considered. If the Court felt—consonant with the argument under discussion in this section—that such officials should be involved in government decisions to proffer voluntary racial preferences, it would have to promote that involvement by treating it as a significant criterion in its own determination of the validity of such preferences. One possibility, for example, would be for the Court to assert that only legislatively sanctioned compensatory racial preferences would be eligible for substantive review of their legality. Alternatively, the Court could affirm the legality in principle of such preferences, subject to certain constraints, but require prior legislative approval of the principle before it could validly be applied within the state.[20] Although the practical effects of the two would differ significantly, both would reflect the Court's concern to include the public judgment of electorally accountable officials as an integral part of any acceptable resolution of the conflict over compensatory minority preferences.

Whatever the theoretical merits of this argument, its practical deficiencies are all too evident. Plainly, in deciding *Bakke* the Court was under no obligation to consider whether or not the California legislature, for example, had acted on racial preferences for admissions to the public medical schools or what the legislature's views might be if it did act on the matter. Under standard legal doctrine the Court could fully determine the validity of voluntary official preferences without concerning itself with, let alone insisting on, the basic concern expressed in the argument here presented. Moreover, endorsement of the argument would result in the Court's constriction of its own role and might be publicly misconstrued as "judicial abdication," "passing the buck" to the states, or as resting the constitutional rights of individuals on the shifting base of political-legislative decisions. Not surprisingly, then, none of the several opinions in the Court's *Bakke* decision touched on, much less supported, the idea that affirmation of compensatory minority pref-

erences by elective officials might be a desirable condition of the legitimacy of such programs.

If the argument presented in this section can charitably be said to have been neglected in *Bakke*, it was implicitly repudiated by the Court in its *Weber* decision a year later. Rejecting the clear policy constraints set by the political process when Title VII of the Civil Rights Act was hammered out after long debate and extended negotiations, the five-member Court majority (speaking through Justice Brennan) substituted its own value and policy preferences for those of the Congress by disingenuously interpreting the "spirit" of that law to conclude that it countenanced precisely what, in fact, it proscribed, that is, private sector use of voluntary compensatory minority preferences.[21] In effect, the Court "updated" the meaning of Title VII by reinterpreting the commitment of Congress to nondiscrimination in light of the subsequent bureaucratic and judicial development of an expanding range of race-conscious programs and activities.

Conclusions

The accelerating government turn to minority preferences has momentous implications and consequences for the character of the nation that go well beyond its immediate intent to promote minority advance. As soon as racial preferences are broadly legitimated, institutionalized, and widely adopted, their durability is ensured. Moreover, to the extent they provide visible benefits to their beneficiaries, other claimant groups will press for comparable favored treatment. A formal recognition of groups and group membership on the one side, together with the equation of discrimination and group inequality on the other, promises to transform basic values, rights, and relationships in the society. The notion of statistical group parity, initially introduced as a measure of the effects of past discrimination, subsequently becomes the new definition of equal opportunity. Group underrepresentation and its seldom-mentioned companion, group overrepresentation, become indexes of discrimination that, in turn, justify treating individuals simply as members of favored or disfavored groups. Once the speculative and questionable concept of group "fair shares" is made the foundation of the rationale for racial preferences, it will inevitably raise serious and far-reaching questions about the organization of American society.

In light of the potential for fundamental change inherent in minority preference policy, there is no need to belabor the conclusion that the elective political process—that is, the Congress and the

president—should play an influential if not determinative role in the future of that policy. This has not been the case in the past, however, and there is no assurance that it will happen in the foreseeable future either. The chief architects of racial preferences have been the bureaucracies and the courts, not legislators or elected executive officials. Congress, for example, has on occasion taken action in one direction or another on the issue, but for the most part has chosen to stay clear of it because most legislators feared the political risks to themselves in becoming involved in that kind of intense dispute.[22] As part of that same self-protective strategy, Congress (and the president) have not been unhappy that administrators and judges have taken on the contentious problems of fixing the meanings and measures of discrimination, determining the specifics of policies and programs, and deciding whether and, if so, when racial preferences should be used.[23]

Fortunately, this strategy of noninvolvement is likely to become untenable during the 1980s. One likely source of pressure for its abandonment is the probable growth in public controversy once the proliferation of racial preference programs makes them more visible and salient to the public. What happened on the school busing issue is suggestive in this regard. As the Court expanded its initial mid-1950s education desegregation position to require busing to achieve racial balance in the schools, Congress was forced to address the issue because of intense public feelings generated by the latter policy. The shift under affirmative action from racial neutrality to racial preferences may set in motion much the same sequence of events.

The point of putting the question of racial preferences on the active political agenda is not, it should be emphasized, to secure a particular favored outcome. It simply is not possible to predict how Congress would resolve this policy problem. The expected benefits would relate, rather, to the quality of review of the problem and to the public acceptability of the outcome. On the first, the problem is likely to be formulated and debated in appropriately larger terms than racial redress and to take into account the broader complications for society discussed above. On the second, Congress can, through careful consideration of the problem, both enrich public understanding of it and strengthen the public's belief in the fairness and legitimacy of the policy that emerges.

A broad reliance on racial preferences would be at least as consequential for our society, after all, as the national endorsement of nondiscrimination was. In the latter case, however, the wisdom and acceptability of the policy received extensive consideration by our national elected officials, and the result was enactment of the Civil

Rights Act of 1964. The same categories of officials should now give equivalent close attention to the question of racial preferences as a suitable means to achieve the agreed-on end of minority advancement. The time has come to move the resolution of that question from the administrative and judicial branches to the Congress and the president.

Postscript

The combination of Ronald Reagan's presidential victory and Republican control of the Senate raised a realistic possibility that a basic political reexamination of affirmative action policy as called for in this paper might actually take place. After the first eighteen months of the Reagan administration, only an interim assessment can be made of how that possibility has progressed. Two broad judgments seem warranted. The first is that the executive branch under Reagan has asserted and acted on a view of antibias policy significantly different from that of the Carter administration. The second judgment is that, notwithstanding the policy changes introduced under Reagan, no new durable political resolution of the core issues by either the president or Congress has as yet been considered, much less accomplished.

The administration's stance on affirmative action derived from two general positions. One was its hostility to the expansion of government regulation over the past two decades and its concomitant promise to cut back that activity. In this context, the Reagan administration considered the affirmative action programs it inherited as an excellent example of overly rigid and intrusive bureaucratic controls it had pledged to correct. As Reagan officials saw it, the antidiscrimination regulation that had developed was excessively detailed and burdensome on the one hand and ineffective in its results on the other.

The second general position was belief in the traditional notion of equality of individual opportunity and, therefore, a rejection of the group concept underlying racial preference theory. Attorney General William French Smith, in a mid-1982 speech before the National Urban League, stated that the Department of Justice would no longer seek imposition of racial quotas "precisely because we will not seek to have individuals treated as members of some group and marked for different treatment because of their race or sex."[24] William Bradford Reynolds, assistant attorney general for civil rights, shared the administration's position that race-conscious policy was wrong in principle and divisive in practice, and offered his personal view that the *Weber* case had been "wrongly decided," that is, that private employers did not have a right to establish voluntary race-preference

programs.[25] A comparable view was asserted by Clarence Thomas, the new chairman of the Equal Employment Opportunity Commission (EEOC): "I am unalterably opposed to programs that force or even cajole people to hire a certain percentage of minorities."[26]

In keeping with these commitments, the executive branch significantly revised the enforcement of antibias regulations, as illustrated by the following examples. The Justice Department indicated it would not pursue employment discrimination suits that sought to provide broad relief (such as back pay and hiring quotas) to large classes of discrimination victims (blacks, women) in a particular company or industry. Instead, the department would focus on individuals who were identifiable victims of intentional discrimination and on the more limited types of relief appropriate for such persons. The EEOC exhibited a comparable disinterest in class action suits or in investigating large patterns of possible industry discrimination. The Department of Labor sought to modify the regulatory authority of its Office of Federal Contracts Compliance (OFCC) by proposing to ease requirements for small contractors on record-keeping and hiring of minority and women workers and to limit back-pay awards to individuals who were able to demonstrate economic loss because of job discrimination. (Big-business organizations opposed the proposals as inadequate tinkering, while civil rights groups attacked them as handicapping effective enforcement by the OFCC. As a result, the administration's consideration of these changes was postponed until after the 1982 elections.)

These shifts in antidiscrimination policies and enforcement were greeted by heavy criticism from civil rights and minority organizations. In their view, the Reagan administration has tried to reverse the progress achieved in the past twenty years by crippling affirmative action through a redefinition of policy, inadequate funds, and an effort to dismantle the machinery of effective enforcement. In repeatedly denying these charges, administration spokesmen have insisted that the same goals are shared by all—nondiscrimination, racial neutrality, and minority advancement—and that the disagreement is only over the appropriate means of pursuing those objectives. Many critics of the Reagan record on minorities, Attorney General Smith complained, have "mischaracterized" that record because they "have chosen to brand a debate over some remedies as a difference over rights."[27]

The actual changes in affirmative action implementation have been considerably less sweeping than either the administration's rhetoric or the critics' charges would suggest. Still, there can be no doubt that the changes constituted a marked departure from the

administrative practices of the past two decades. The approach of the Reagan administration has broken with the prevailing pattern whereby the bureaucracy (and the courts), whether supported by the president or not, expanded the meaning of discrimination and equal opportunity and increasingly relied on race-conscious remedies and group preferences. By directly reaffirming the older tradition of equal opportunity in opposition to that pattern, the Reagan administration created the possibility that a fundamental examination of the core issues of antibias policy might take place in the Congress and the nation. Such a review could produce, in the manner of the Civil Rights Act of 1964, an authoritative political resolution of the conflicting concepts embodied in affirmative action.

That review, however, has not been undertaken to date, and the chances of its occurring during the latter half of President Reagan's term appear very slim. Domestic economic problems and foreign policy crises were given priority in attention, with divisive social issues deliberately deferred or slighted. And even when, as in the second half of 1982, contentious social issues were tackled by the Congress, they involved such concerns as abortion, school prayers, and school busing, not antibias policy. It seems fair to conclude that unless President Reagan chooses to direct Congress's attention to the question of the legitimacy and limits of racial preference policy, it will not be taken up on the initiative of Congress itself.

There have been no indications, however, of the president's willingness to promote and lead a congressional reexamination of this controversial policy area. It is instructive to note, in this regard, what the Reagan administration has *not* done in its own "reforms" of affirmative action. Although the entire structure of compliance by federal contractors rests on an executive order by President Johnson (as subsequently interpreted by the bureaucracy and the courts), there has been no effort made to revise or replace that order.[28] As a result, the use of the concepts of group underutilization, group goals, and timetables—which many commentators identify as the key elements in the practice of racial group preference—has continued largely unchanged.

Admittedly, there are powerful reasons for the reluctance of national elective officials to become involved in the morally difficult and politically divisive question of defining affirmative action policy and practice. Nevertheless, as argued earlier, racial preference policy is too fundamental a matter to be decided mostly by administrators and judges. Nor can it durably be determined by presidents alone, whose policy shifts for the executive branch may not last beyond a term of office. The determination of our national policy on affirmative action

should come from the careful exercise of political judgment—in the best sense of that term—by both the Congress and the president.

Notes

1. *Change,* May 1977, editorial, pp. 11, 49.

2. University of California Regents v. Bakke, 438 U.S. 265; United Steelworkers of America v. Weber, 443 U.S. 193; Fullilove et al. v. Klutznick, 448 U.S. 448.

3. The realism of these fears was confirmed by the actual *Bakke* decision. Four justices disposed of the case by reference to Title VI alone; they resolutely refused to engage the constitutional question of Equal Protection. All four held the Davis preferential admissions program to be in violation of the statute. The other five justices held that the meaning of Title VI was the same as that of Equal Protection. Four of them upheld the Davis program as valid under both criteria. By interpreting Equal Protection and Title VI more restrictively, the remaining member, Justice Powell, became the "swing" vote that produced the Court's decision to invalidate the Davis plan and to order Allan Bakke's admission to the school on the one side, but also to allow the use of race as one among other admissions factors on the other.

4. The Brennan positions here discussed appear thoroughly inconsistent with a governing principle for Title VII cases set by the Court in Griggs v. Duke Power Company, 401 U.S. 424 (1971). In *Griggs,* a unanimous Court (Justice Brennan not participating) carefully rejected racial preference in employment:

> [Title VII] does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. . . .

Under *Griggs,* findings of disparate racial impact trigger the requirement that both job qualifications and tests to measure them be validated. Once validated, however, the qualifications and tests are entirely proper, regardless of their disparate impact on racial groups. In short, *Griggs* repudiates the notion that minority underrepresentation in itself justifies the adoption of racial preferences.

5. *Amicus* brief, U.S. Supreme Court, *Bakke,* United States (Department of Justice), pp. 53–54.

6. *Amicus* brief, U.S. Supreme Court, *Bakke,* Lawyers' Committee for Civil Rights Under Law, p. 12.

7. *Selective Admissions in Higher Education: A Report of the Carnegie Council on Policy Studies in Higher Education* (San Francisco, Calif.: Jossey-Bass, 1977), p. 17.

8. Brief, University of California, U.S. Supreme Court, *Bakke,* p. 43, n. 53.

9. *Amicus* brief, U.S. Supreme Court, *Bakke,* Law School Admissions Council, p. 28.

10. Ibid.

11. Brief, University of California, U.S. Supreme Court, *Bakke,* p. 43, n. 53.

12. To prevent possible confusion, I should remind the reader that the Court's decision in *Bakke*, because of the pivotal nature of Justice Powell's opinion, allowed a school to use race as one among other admissions factors in order to enhance the diversity of its student body, not for purposes of compensatory preference. Since most schools employ preferential admissions for compensatory reasons, however, it is highly plausible to suppose that many schools in practice will honor Powell's stricture more in form than substance. Further, it should be noted that while Powell's student-diversity justification of racial preference led him to invalidate rigid racial quotas, the position implies no time limit whatsoever for the continued use of less extreme forms of preference.

13. J. F. Paulucci, "For Affirmative Action for Some Whites," *New York Times*, November 26, 1977.

14. Dr. Kenneth B. Clark, as quoted in "A Debate over Affirmative Action: Will Blacks Lose to Other Groups?," *New York Times*, August 12, 1980.

15. "Reparation, American Style," editorial, *New York Times*, June 19, 1977. This date was nine months after the California Supreme Court overturned the Davis special admissions program and four months before oral argument on *Bakke* was heard by the U.S. Supreme Court.

16. William K. Coblentz; quoted in *Daily Californian* (student newspaper, University of California at Berkeley), June 13, 1977.

17. Oral argument, U.S. Supreme Court, *Bakke*, pp. 10–11.

18. Justice Powell's opinion did imply that compensatory racial preferences might be allowable if based on appropriate findings of administrative, judicial, or political bodies. The argument advanced in this section includes Powell's position, but goes beyond it to emphasize the special importance of securing the participation of elective officials in the official determination of whether to use compensatory racial preferences.

19. *New York Times*, July 6, 1978; written by David L. Evans and dated June 29, 1978.

20. See Terrance Sandalow, "Racial Preferences in Higher Education: Political Responsibility and the Judicial Role," *University of Chicago Law Review*, vol. 42 (1975), pp. 653–703, esp. pp. 693–703, for an alternative Court position and a general review of the theme indicated in the article's title.

21. Justice Rehnquist's dissent presents a detailed analysis of the legislative history and intent of Title VII that fully rebuts that of the Court majority.

22. A few examples on either side should suffice. In 1971, the Court (in the *Griggs* case cited in footnote 4) chose to accept the Equal Employment Opportunity Commission's aggressive and highly debatable interpretation of Title VII of the Civil Rights Act by adopting an effects standard for employment discrimination. This standard put the burden of proof on the employer to demonstrate, when job qualifications and qualifications tests had a disparate racial impact, that both the qualifications and the tests were valid. In 1972, the Congress nonetheless strengthened the authority of the EEOC. Other examples of support would include the special position given to racial minorities in the Small Business Administration and the set-aside for minority contractors held constitutional in *Fullilove*. On the other side, the House has tried several

times without success to get the Senate to adopt explicit anti-quota provisions with respect to student admissions in higher education and to employment. Also worth noting is the fact that Congress's current use of the legislative veto and of riders to appropriations bills to constrain various regulatory agencies has not included the civil rights or contract enforcement units most directly involved in administering preference policies and programs.

23. Recognition of the reluctance of elective officials to enter the politically booby-trapped thicket of affirmative action underlies the argument made in the preceding section that the Court's help is needed to secure their participation.

24. *New York Times*, August 3, 1982.

25. Reynolds made this comment in an interview with the *Wall Street Journal;* it was reported in that paper on December 8, 1981.

26. *New York Times*, July 3, 1982.

27. *New York Times*, August 3, 1982.

28. For a strong argument on the necessity and desirability of a Reagan-led initiative to have Congress come to grips with antidiscrimination policy, see Jeremy Rabkin, "The Stroke of a Pen," *Regulation* (May/June 1981), pp. 15–18.

Equal Opportunity

On the Policy and Politics of Compensatory Racial Preferences

ALLAN P. SINDLER

Affirmative action has been reinterpreted over the past decade from a policy emphasizing racial neutrality to one justifying compensatory racial preferences. Sindler examines some of the hazards of compensatory racial preferences that its proponents neglect or misunderstand. He recommends that politically accountable officials—elected legislators and chief executives—become involved in determining whether and when to adopt compensatory racial preferences. In a postscript to his essay, the author evaluates the record of the President and Congress in meeting this objective in the first two years of the Reagan administration.

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