PERMISSIVE AFFIRMATIVE ACTION
FOR THE BENEFIT OF BLACKS†

Geoffrey C. Hazard, Jr.*

I. INTRODUCTION

The purpose of the Baum Lectures is to clarify our understanding of civil rights and civil liberties. To further this objective this article considers certain aspects of affirmative action regulation, particularly the problem of its justification. This article continues the Baum Lecture tradition by addressing the legal policy of affirmative action regulations and the legal politics of their implementation but does not discuss the problems of their technical content. This choice does not presume that these technical problems are simple or insignificant, for affirmative action is as technically intricate as any body of contemporary law. The choice simply recognizes that the technical problems mostly reflect the more difficult problems that this article addresses. Moreover, the discussion does not address affirmative action for the benefit of women. For reasons that will appear presently, gender-based affirmative action involves different considerations, although it could also be justifiable.

This article's basic theme is as follows:

The goal of a race-neutral society theoretically could be achieved through rules requiring neutral action, that is, non-discriminatory decision-making in education, the workplace and government; an aggregate of neutral decisions over time should result in a race-neutral society. The goal of a race-neutral society might also be achieved by affirmative action, i.e., giving blacks marginal preferment in decision-making in those situations.

Affirmative action is legally, morally, and politically controversial and infirm.1 A perspective exists, however, from which giving blacks marginal preferment seems clearly justified. This perspective can be variously described as paternal, caretaking, Tory reformist, or elitist. We

† An abbreviated version of this article was delivered at the University of Illinois College of Law, March 4, 1987, as the second 1986-87 lecture of the David C. Baum Memorial Lectures on Civil Liberties and Civil Rights.

* Sterling Professor of Law, Yale Law School. B.A. 1953, Swarthmore College; LL.B. 1954, Columbia University School of Law. The author is deeply grateful to David A. Jones, Jr. for his most helpful research assistance, and to his colleague, Drew Days III, for reading and commenting on the paper.

shall call it paternal, even though that term and that concept are currently so opprobrious. Whatever this perspective is called, it is a viewpoint of a person, group, or institution occupying a position of responsibility and authority in our society. The incumbents are concerned with our society's long run stability and decency. They are willing to commit economic resources for that purpose rather than for shorter run and more personal gains, and are willing to risk their own institutional capital. By definition, they also are not immediately threatened by the social costs that affirmative action entails. Holders of this paternal view are, however, at risk of overcommitting their institutional capital with resultant impairment or destruction of their positions of authority and power.

From this perspective, it appears necessary and therefore justified that a policy of giving marginal preferment to blacks be at least permissible when adopted by a governmental body exercising authority and responsibility commensurate with a paternal position. Such a policy is implicit in several key Supreme Court decisions—University of California Regents v. Bakke,2 Fullilove v. Klitznick,3 and more recently, Wygant v. Jackson Board of Education.4 Some legal directives, however, constrain this policy, particularly statutory directives protecting seniority interests in employment relationships. General concern that the costs of affirmative action be diffuse and individually moderate further limit the preferment policy.5

A policy giving preference because of race seems unintelligible from any viewpoint except a paternal one.6 A problem of social choice, which is what affirmative action involves, can of course be considered from the

---

5. See Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1982). Compare United Steelworkers v. Weber, 443 U.S. 193 (1979) (approving affirmative action plan, voluntarily adopted by employer after collective bargaining, which reserved 50% of openings in in-plant training program for black workers until percentage of black craft workers equaled percentage of blacks in local labor market; plan did not “unnecessarily trammel” interests of white employers) with Wygant, 106 S. Ct. at 1851-52 (“While hiring goals impose a diffuse burden ... layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption in their lives. That burden is too intrusive.”). See also Fallon & Weiler, supra note 1.
6. Recently appointed Justice Scalia has called attention to this aspect of affirmative action:

My father came to this country when he was a teenager. Not only had he never profited from the sweat of any black man's brow, I don't think he had ever seen a black man. There are, of course, many white ethnic groups that came to this country in great numbers relatively late in history—Italians, Jews, Irish, Poles—who not only took no part in, and derived no profit from, the major historic suppression of the currently acknowledged minority groups, but were, in fact, themselves the object of discrimination by the dominant Anglo-Saxon majority . . . . Yet curiously enough, we find that in the system of restorative justice established by the Wisdoms and the Powells and the Whites, it is precisely these groups that do most of the restoring. It is they who, to a disproportionate degree, are the competitors with the urban blacks and Hispanics for jobs, housing, education—all those things that enable one to scramble to the top of the social heap where one can speak eloquently (and quite safely) of restorative justice.

Scalia, The Disease as Cure: “In order to get beyond racism, we must first take account of race,” 1 WASH. U.L.Q. 147, 152 (1979).
premise that all citizens are equal, including those who make and apply the policy in question. Positing such a position of equality seems necessary if one is to talk about equality. From a premise of equality, however, it is difficult to see how one could give any individual or member of a group the kind of marginal preferment entailed in the affirmative action programs sanctioned by Bakke, Fullilove, and Wygant, unless the programs were remedial of individual wrongs suffered by persons entitled to equal treatment. In none of these cases, however, was the program remedial in this sense. These cases therefore seem intelligible only if they are understood in a different way both expressively and reflexively. Expressively, these cases affirm affirmative action policy; reflexively, they are statements about the position of the courts in American society, particularly the Supreme Court, and about the social interests to which the courts give special protection.

The problem of affirmative action therefore is an especially difficult example of the problem of justifying judicial law-making in American society. As so often happens with regard to crucial domestic issues in this country, the task of articulating the justification and legitimate scope for affirmative action has fallen to the courts. To perform this task the courts, particularly the Supreme Court, must assume a vantage point from which to consider how our society works and how a particular legal policy works within it. Since affirmative action regulation can clearly be justified from a paternal vantage point, but is difficult or impossible to justify from the position of equality among ordinary citizens, the Supreme Court has necessarily adopted a paternal vantage point in justifying affirmative action regulation. That vantage point, however, contradicts the idea of equality that is supposed to justify affirmative action regulation in the first place, and thereby makes the Court vulnerable to attack on the basis of its own rhetoric. For this reason, justification of affirmative action regulation seems destined to remain confused. If we could better understand why that is so, however, we might also better understand both the necessity for affirmative action and the nature of law-making in our society.

II. THIS COUNTRY'S ULTIMATE GOAL AND PRESENT CONDITION
SO FAR AS RACE IS CONCERNED

A. The Ideal of Equality

This country's ultimate goal is that race should not make an invidious difference in how people are regarded by others and by themselves, and how they fare in life. That is the essence of the American ideal of equal opportunity. Equal opportunity, as de Tocqueville has observed, has been the American credo at least since the time of Jackson,7 and has

7. "Among the novel objects that attracted my attention during my stay in the United States, nothing struck me more forcibly than the general equality of condition among the people." A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 3 (1945).
been the American ethos except as regards racial minorities. The credo holds that all persons are equal in principle and have a right to pursue the course of life in quest of happiness, however people may define happiness, without limitations as to how they were born. As an immigrant who entered adult life as a workingman once stated to me, "Everybody the same."

The American credo of "everybody the same" does not fully correspond to fact. It never has and never will. One reason for the incongruity is that the ideal of equality coexists with another ideal with which it is operatively inconsistent. This is the idea of liberty, particularly the liberty to better one's self—in abilities, in money, in power, in status. It is not possible for most people to exercise the liberty to strive for improvement and at the same time for everyone to remain equal. Hence, the American ideal of equality is, in an operative sense, the equal right to compete.

Even this ideal is impossible to realize, at least so long as many parents love their children more than they love other people's children. This set of preferences on the part of parents is apparently a universal inclination, at least in social systems larger than subsistence villages. Animated by this preference for their own, the winners in each generation of striving are able to endow their children with a head start in the next generation's round of striving—head starts in nurture and culture at home, in education, in style and manners, in access, in self-esteem, and in ascribed competence. I take this kind of head start to be "natural" in the sense of being irrepressible. Plato observed and decried it in his time and the Soviet nomenklatura anathemizes but sedulously practices it in our time. George Orwell correctly predicted that even in a state constituted to effectuate equality, some would be more equal than others. Credos are ideas, however, and ideas to be perfectly good do not have to be perfectly true. The ideal of equality is intelligible as a principle in social criticism, and social criticism is an ongoing responsibility of a morally serious society. The ideal of equality is a standard in making the adjustments in laws and institutions that are the daily grist of politics.


10. The official Soviet institution of nomenklatura consists of "a list of people who are regarded as competent and politically reliable—and suitable, therefore, for appointment to one of a number of responsible posts—and a list of posts considered to be of . . . political or social importance . . . ." The Cambridge Encyclopedia of Russia and the Soviet Union 301 (1982) [hereinafter Encyclopedia]. In practice, the system has created "a nomenklatura class of zealous defenders of position and privilege." Cohen, Friends and Foes of Change, in The Soviet Union Since Stalin 23 (S. Cohen, A. Rabinowitch & R. Sharlet eds. 1980). One such privilege is the availability of better opportunities for this class's children. See M. Matthews, Privilege in the Soviet Union: A Study of Elite Life-Styles Under Communism 47-48 (1978).

11. G. Orwell, Animal Farm 148 (1954) ("ALL ANIMALS ARE EQUAL, BUT SOME ARE MORE EQUAL THAN OTHERS.").
Nothing is inconsistent, let alone corrupt or mendacious, in a society's professing the ideal of equality while being unable to make it fully operative in fact.

What would a race-neutral American society look like, given the other characteristics of our society? Members of ethnic groups would still interact from unequal positions determined by such factors as class, occupation, geography, cultural heritage, and religion, but race would no longer limit personal choice and autonomy. Blackness would cease to constrain fair opportunity, not merely in education and at the workplace, but in socializing, getting married, and having a family. Race would remain a separate variable in demographic analysis, but would not continue to be the powerful social and economic indicator than it is today.

In the political arena, the marketplace, and in professional and social circles, race-neutrality would entail equal opportunity to attain positions of recognition, authority, and power. For several reasons, the present discussion implicitly focuses on this kind of opportunity for upward mobility. First, a social goal of general equality of status and material condition is humanly impossible and its pursuit therefore foolish and dangerous. Pareto and many others seem correct in claiming that stratification is a characteristic of human society. Second, if Pareto's view is correct, then the key long-run question concerning the position of blacks in this country is not whether blacks in general are more or less equally situated with whites in general, but whether blacks are reasonably well represented in the middle and upper middle classes. Third, whether blacks become better represented in positions of recognition, authority, and power will be the determinative evidence as to whether the American ideal has genuine promise for blacks or is merely a shuck. The essence of the American Dream is a dream—the imagination of future—that has some nontrivial possibility of its realization.

B. Racism

If our society's goal is equality of competitive opportunity, we have a long way to go. Some sociologists formerly stated that immigrants required three generations to find their proper level on the basis of individual merit. In retrospect, we can see that the process requires more like five or six generations. If the assimilation of white ethnics requires that

---

15. Chinese offer the closest analogy to blacks, because many of them came to this country under conditions of indenture that white America equated with slavery. They also suffered from racist "scientific" analysis of their genetic inferiority, which was widely believed. Chinese began arriving in 1850 and can only be said to have been "accepted" into mainstream American life in the 1970's—six generations later. On the other hand, restrictions on Chinese were lifted at roughly the
kind of time span, the assimilation of blacks will require at least as long. Judged by public utterances, neither civil rights reformers nor others have been prepared to accept any such time frame for full assimilation of blacks into competitive equality. Probably few Americans of any political persuasion are willing to contemplate that even by the year 2050, three generations from today, blacks will remain in a significantly worse position than the average of the rest of the population. Sober recognition of how far we must go only teaches us how hard we must press on.

There are discrepancies between an ideal and reality that cannot plausibly be explained on comfortable terms. For a social ideal to fail because of the sluggishness of human initiative, the randomness of events, the limitations of institutional process, and the inevitable tendency to put aside all impulses except immediate personal gratification is one thing. It is quite another for an ideal to fail because of the systematic influence of an unacknowledged variable.

In the case of the present condition of blacks in our society we may be dealing with a situation that is plausibly explained in terms of innocuous variables. Thus, the condition of blacks may be the result of historical accident, a genetic inferiority of blacks that manifests itself in this country but not elsewhere, or the supposition that the condition of blacks is not really unequal but only more visible and more politicized. All these possibilities are irrefutable. Yet the situation of blacks was unequal not only before the 1954 Brown v. Board of Education 16 decision, but also during the 1960's and 1970's when the civil rights policy began to turn from neutral treatment to affirmative action, and the unequal situation persists today. The justification for affirmative action in the 1960's and 1970's, grudgingly accepted by a white generation who had personal knowledge of legalized segregation, was that blacks still suffered from the legacy of historical racism. That historical racism is a "legacy" remains the acceptable predicate of affirmative action. 17 But that explanation of the situation, and therefore the justification for affirmative action, has worn thin. How could a merely residual effect of merely historical racism keep continually advancing as the present continuously overtakes the future?

Northern Ireland provides a case of comparative social anthropology. The fact that Protestants have higher employment levels, education, political authority, and social status than Catholics in that land

same time as those against blacks. Since the law was changed, integration and assimilation have been much more rapid for Chinese than for black Americans. See T. Sowell, THE ECONOMICS AND POLITICS OF RACE: AN INTERNATIONAL PERSPECTIVE (1983).


17. See University of Cal. Regents v. Bakke, 438 U.S. 265, 307 (1978) ("The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination.") (plurality opinion); Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1853 (1986) ("remedying past or present racial discrimination . . . is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program.") (O'Connor, J., concurring).
cannot be explained by random imperfections in humankind. The explanatory variable is that most of the Protestant majority in Northern Ireland loathe and fear Catholics. Similarly, mere random human failing does not account for the fact that the Soviet Union’s Politburo membership has for three generations been overwhelmingly Russian in ethnic identity.

And so also in this country. Simply put, while most Americans avow and genuinely believe in the principle of equality, most white Americans still consider black people as such to be obnoxious and socially inferior. This prevalent attitude is generally and appropriately called racism. "Racism" is to be distinguished from "racists." These days only a small discredited minority of Americans are willing to say explicitly that they regard blacks as inherently obnoxious and inferior. We have no racists in this country, or only a handful of them, because being a self-acknowledged racist has become socially and politically impermissible. To be sure, many white Americans will acknowledge that "everyone has his prejudices" or that "every individual is different." Most white Americans know individual blacks with whom they get along and some whom they like and some whom they respect. Most white Americans, in my observation, try to be fair and try to do the right thing in specific dealings with blacks, at least where they do not feel threatened. Nevertheless, most white Americans do not have the same positive attitude toward blacks that they have to others in general, or even that they have toward whites who are quite different from themselves in respects other than race.

The attitude of American whites toward racial minorities other than blacks has often been similarly negative. I refer particularly to the attitude of white Anglo-Saxon Protestants toward Native Americans, Asians, and Hispanics, and in different degree toward Jews and Southern and Eastern European ethnics. Viewed in broad historical and social perspectives, however, the attitude toward blacks has been qualitatively different—more persistent, more manifest, and more resistant to eradication. From one individual white to another this negative attitude is more or less intense, more or less repressed psychologically, and more or less consistently suppressed in behavior. But it is there.

Those who are not oblivious therefore must acknowledge that although there are few racists in this country, there is pervasive racism.


Perhaps no more convincing proof need be adduced than President Reagan's recognition that lingering traces of racism can still be found in our very midst. Abundant empirical evidence exists as well. The statistics on the plight of black Americans are as familiar as they are shocking. One of every two black children lives in poverty; black unemployment has not fallen below 14% in the last two years, while overall unemployment has hovered around 7%; nearly 50% of black families with children are headed by a woman, as compared to 15% for whites; more than 50% of black babies are born out of wedlock, and one of four is born to a teenage mother; murder is the leading cause of death for young black males.

These statistical averages conceal important and, on the whole, propitious variances. Within the black population a division exists—a division between a distinct underclass, on the one hand, and, on the other hand, middle classes whose members participate in the dominant American culture on terms at least similar to those enjoyed by other racial or ethnic groups. This division has grown more pronounced as barriers to black participation in higher-status and better paying social and economic positions have fallen, while at the same time macro-economic forces have reduced the demand for unskilled labor. The result has been middle class black flight from the ghettos to which all blacks were once confined, leaving behind an urban underclass that is economically, culturally, and physically separated from mainstream American society. Middle class blacks have made steady progress in narrowing the economic gap between them and whites, while the underclass is falling ever farther behind. Nevertheless, the fact remains that ambitious, well-qualified blacks disproportionately fail to reach positions of recognition, influence, and authority and that progress by the black middle classes in recent years has leveled off, or perhaps even suffered a reversal.

This was not the outcome envisioned three decades ago. In the ten years after Brown v. Board of Education, when the fundamental tenets of civil rights law were laid down, Americans were told to expect that eliminating the bonds of legal segregation would, in not too many years, lead to an America integrated at every "rung" of the occupational and

22. President Reagan has said that he is "opposed with every fiber of [his] being to discrimination." TIME, Feb. 1, 1982, at 15.
25. For example, the annual income of black two-parent families is now 78% of that of similar white families. June ATLANTIC MONTHLY at 33.
social ladder. Analogy was drawn from the success of other ethnics in attaining power and wealth, with a focus especially on the success of Catholics, epitomized in the election of Kennedy, and of Jews, epitomized in their prominence in academia and the professions. Americans professed to believe that the “Negro problem,” like the “War on Poverty,” once confronted would be “solved.”

Not surprisingly, the expectation of total integration has been frustrated. This expectation was based upon several false premises. First, the mythology of immigrant success focused on the rapid assimilation of immigrant “superstars” rather than the more gradual process of assimilation that was typical. Second, release from domestic slavery and segregation was not “immigration.” The institution of slavery had cut off cultural roots many generations before. Black slaves, unlike other immigrant groups, could not develop in their own enclaves for transitional generations but were dispersed to rural isolation. They had no expectation that they would become like everyone else, but were instead told to stay in their place. Blacks have constituted a much higher percentage of our population than any other racially distinct group, particularly in the regions in which they have concentrated. As if their skin color alone did not make them visible enough, the concentration of their numbers made them more so, and hence engendered greater hostility in the unavoidable competition for jobs and power. Finally, nineteenth century scientific theories of race designated blacks as peculiarly inferior.

Contemplating that blacks would enter the American mainstream of course reflects only one concept of self-realization—that of “making it.” This conception ignores other American definitions of self-realization. From Puritan times onward, many groups have defined successful life in very different terms, particularly a good life through insulation if not isolation from the American mainstream. Today, groups of Quakers, Amish, Hasidic Jews, and Black Muslims pursue that vision of the good

28. See infra text accompanying notes 55-60.
29. See T. Sowell, RACE AND ECONOMICS 209-10 (1975) (history of American ethnic minorities suggests that progress for minority groups in general is more gradual than for “outstanding” examples often cited).
30. That is the issue here: the disabilities of blacks in America are of a different genre, a different origin.... We live with the evidence that Chief Justice ... Taney's famous dictum “Negroes have no rights that a white man is bound to respect” expressed the conscience and reflected the behavior, not only of his generation, but of successive generations thereafter. Taney based his conclusions on the theory that “the class imported into this country and sold as slaves” were not “constituent members of [American] sovereignty” and that “they are not included under the word ‘citizen’ in the Constitution.” This language has never been applied to any other American minority, and while it is true that amendments to the Constitution have created citizenship for blacks and gave them the franchise, those amendments did nothing to rectify the accumulated damage of 200 years of chattel slavery.

C. ERIC LINCOLN, IN THE WAKE OF BAKKE, in BAKKE, WEBER AND AFFIRMATIVE ACTION 221 (Rockefeller Foundation 1979) (quoting Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857)).
31. See T. Gossett, RACE: THE HISTORY OF AN IDEA IN AMERICA 54-83, 253 (1965); J. HALLER, OUTCASTS FROM EDUCATION: SCIENTIFIC ATTITUDES OF RACIAL INFERIORITY, 1859-1900 (1971) (“science ... [was used as] an instrument which ‘verified’ the presumptive inferiority of the Negro and rationalized the politics of disenfranchisement and segregation .......”).
life. But the self-isolation of the religious sect is not the same thing as the imposed isolation of a segregated minority. While blacks are entitled to their version of the self-insulating minority, society cannot permanently endure the continued frustration of blacks who accept the competitive-hierarchical definition of success and want to strive like most of the rest of us.

The ideal of equal opportunity is critical to the cohesion of American society. Our political and economic system is predicated on the possibility of change in individual lives. Without faith that individual effort can result in self-fulfillment, recognition, wealth, power, and status, the system could not sustain itself. Social intercourse would devolve into group action and status quo politics committed to preserving rights, status, and a future for one's extended family—a society-wide seniority system. Lebanon, Sri Lanka, Ireland, and India are but current examples of ethnic and confessional pluralistic states that have lost—or never had—confidence in approximately equal opportunity for all members of society. The want of that confidence in individual fulfillment can turn peaceful, open societies into clusters of fortified camps and divert a nation's productive resources into police protection.

If the American Dream remains viable because it is a plausible life script for most people, but is an implausible script for blacks, the implications are ominous. If the observable paucity of blacks in positions of recognition and authority convinces most blacks that they have no hope of succeeding by the majority's rules, we continue to face the prospect of "The Fire Next Time." More likely than societal conflagration, however, is the slow incineration of emergent black generations, manifested in dropping out, unemployment, alcoholism, drug addiction, family breakup, random violence, depression, and despair. These signs are visible today for those who are willing to see them.

Because only a few whites are racists, we have racism without racists. Racism without racists actually or potentially affects every social transaction in this country, particularly the myriad mundane transactions that cannot be systematically observed, precisely measured, or historically recorded. Only a small part of life consists of athletic competitions or I.Q. tests or performances measured by audience ratings. Most of life consists of low visibility, loosely structured complex transactions at the workplace or in school or in politics—fixing the conveyor belt, handling the cash register, dealing with the customer, teaching the class, diagnosing the patient, arguing with the division manager, or working out a business or political strategy. Life's everyday transactions all have contexts, histories, futures, nuances, imponderables, and latencies. They involve sets of players who are interconnected in an endless network of other transactions, each of which has its context, history, future, imponderables, and connections to still another set of players.

Every player has played before, or at least been through practice, and enters every next scrimmage with expectations on his part and on the part of others as to how it will play.

For most people in this country, excluding those who have dropped out in one way or another, this set of expectations is positive. Most people think they can learn the subject or do the job or handle the situation. If they are out of their element—in a new job or away from their turf—they will be uncertain, watchful, and nervous in one way or another, but will consider this normal and adjust accordingly. By the same token, other people in the transactions ordinarily will understand and react and make their appraisals of performance accordingly. The average American thus will have made it through school, through work, through the day, and through life more or less satisfactorily and successfully.

This is not to say life is a rose garden. Even WASP males endowed with good health, intelligence, and prospects suffer failure, humiliation, prejudice, rejection, and exclusion. Those hurtful transactions are how we learn the difference between being and wishing. Many white Americans suffer from serious discrepancies between their wish systems and their existence, to the point where they are incompetent in various respects and degrees, or partially or totally deranged. Nevertheless, most of us find some kind of a way, continue to function, and have a niche.

So do most black Americans. But black Americans live in a society where the large majority of people are white, where an even larger majority of those who are in positions of power and authority are white, and where the very large majority of those white people have a relatively negative attitude toward blacks. In the everyday transactions of an American black, the fact that he or she is black is a highly salient datum. In some transactions being black is generally a positive, such as when relating to another person who is also black, and where a group’s racial composition is positively significant to someone. For a small minority of strong individuals, being black in American society is a positive in a more fundamental sense, for it is a social identity the transcendence of which is indisputable proof of self-worth. Unashamedly being one’s self is a positive accomplishment in such a society. Other things being equal, however, being black in America generally carries with it negative consequences.

The negative consequences of being black generally are cumulative. Not being positively evaluated in grade school affects chances, performance, and evaluation in high school; not being positively evaluated in high school affects the next chance in life, whether toward college or toward work; the first performances on the job affect the next performances and the next job or next exit from a job; every life transaction affects the next one. Life takes on irreversible shape.

This is what I mean by racism and its significance. What do we do about it? And who is “we”?
III. AFFIRMATIVE ACTION

A. The Conflicting Concepts of Affirmative Action

"Affirmative action" means different things to different people. To some, affirmative action affirms treating individuals equally, transaction by transaction, in the world of education, work, and government.\(^33\) The policy says that a worker, a student, a professional, a bureaucrat, an executive, or a politician should be selected, compensated, promoted or discharged, and otherwise dealt with on the basis of his or her abilities without regard, as the conventional statutory phrase expresses it, to "race, religion, national origin, or gender."\(^34\) The formulation now also includes age, at least age on the upper end, and, in some localities, sexual orientation.\(^35\) This kind of affirmative action gives minorities and women the right to be evaluated neutrally; special consideration is offered up to the door of any particular opportunity but not in going through it. The cumulative result will be equal treatment according to merit, by means which themselves consist of equal treatment.

"Affirmative action" also means something very different. Bluntly defined, it means that in education, work, and government, marginal preference should be given to blacks.\(^36\) This definition is not found in the law nor in the official conversation of leadership groups but is what sometimes is signified in the various code languages of politics, government, and management that refer to "goals" and "measured progress." A clear-eyed few, however, are willing to acknowledge that a quota by any other name is still a quota.\(^37\) Marginal preferment is also what "affirmative action" means to most white working people—blue collar, pink collar, up through middle-level management. The decoded policy is that a student, a worker, a professional, a bureaucrat, an executive, or a politician who is or "happens to be" black should be given marginal preferment in selection, promotion, and discharge. It does not mean preferment regardless of qualifications but rather refers to a calculus of selection in which qualification criteria and pattern of result are simultaneously considered. No explicit preference in compensation is required. That would be both impermissibly invidious and unnecessary, because

---

33. This is the view expressed by Assistant Attorney General William Bradford Reynolds. See e.g., U.S. Assistant Attorney General Talks About Civil Rights at Yale, New Haven Journal-Courier, Mar. 12, 1987, at 23, col. 2 ("Reynolds said that affirmative action programs should consist of recruitment and outreach for qualified minorities, but that numerical hiring goals are degrading and discriminatory . . . ."); Reynolds, Justice Department Policies on Equal Employment and Affirmative Action, 35 N.Y.U. CONF. ON LAB. 443 (1983).

34. See e.g., 42 U.S.C. § 2000a (1982).

35. See CAL. CIV. CODE § 51.7 (West 1986) (including sexual orientation as a forbidden basis for discrimination).


preferment within the existing compensation structure would have the effect of giving preference in compensation.

The conflicting conceptions of affirmative action thus are simple neutrality, on the one hand, and unapologetic marginal preference on the other. Of course, other formulations of the concept of affirmative action exist that are more abstract, more extreme, or more ambivalent. But the underlying problem of justification can be most clearly appreciated in terms of the sharply contrasting formulations of equal treatment and marginal preferment.

Neither formulation, whether equal treatment or marginal preferment, goes the whole way toward a perfect world, or even close to it. However affirmative action is defined in this country, its contemplated operation is confined to the spheres of education, the workplace, and government. This limitation is practically necessary but pervasively significant, for it leaves large spheres of social action outside the purview of regulation. No serious person in this country proposes a constitutional or legal requirement that individuals exhibit equal treatment, let alone marginal preferment of blacks, in selection of marriage partners or personal friends, in the practice of religion or in maintaining religious affiliations, or in purely social associations. Furthermore, we have learned that it is impossible to maintain a substantially effective program of equal treatment, let alone marginal preferment for blacks, in either public or private housing.\(^{38}\) The continued de facto segregation in housing carries with it pervasive de facto segregation in primary school, where the children initiate their understanding of the wide world.

This means that the spheres of family, church, and ordinary leisure are immune from affirmative action regulation as a matter of law, and that the neighborhood and primary school are generally immune as a matter of fact. The fact that these spheres are beyond reach of the law is a severe practical constraint on realizing anything like full equality in education, work, and government. What sane person at home and in his neighborhood can consider blacks to be persons apart, but when on the job or at a school board meeting consider them to be “all the same”? Who thinks the domestic nomos does not permeate the public nomos?\(^{39}\) The equal opportunity law, whatever its content, does not intervene in the private places where the attitudes take shape that are acted upon in the spheres where the law does intervene.

At best, therefore, neither equal treatment nor marginal preferment for blacks can operate pervasively in our society. Affirmative action is possible only in limited “public” sectors of community life, and even there it is continuously subject to entropy.


\(^{39}\) For an explanation of the concept of nomos, see Cover, The Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 HARV. L. REV. 1 (1983).
B. Equal Treatment in Theory and Practice

It is thus not hard to explain why a program formulated as one of equal treatment would detect and redress only transactions that involve manifest discrimination. A program of equal treatment in fact will not operate neutrally in a population that is predominantly white and whose predominant sentiment is that blacks are intellectually inferior and socially obnoxious.

Formulating a program is a verbal act, the utterance of a set of words such as “equal treatment” or “without discrimination.” Programs formulated as equal treatment now comprehensively govern education, the workplace, and government. They have existed for thirty years. If formulating and implementing programs were the same thing—if legal words were social deeds—we would have arrived where we say that we have been heading.

But implementing a legal program requires real life decisions by school boards, school teachers, and fellow students; by employers, division managers and foremen, and fellow workers; by investigating agencies and agents; by courts and judges and juries. Real life decisions require real live people to make them, and in this country most of the real live people who make such decisions are white.

Since being a racist has become inadmissible in this country, we would expect that race has generally ceased to be an explicit decisional factor in the spheres of social action where regulation is operative. These days classified advertising for employment and housing does not expressly differentiate between “white” and “colored,” although it formerly did so. Access to school, jobs, promotions, and positions of power today is not expressly dependent on race, although it used to be. We have changed our avowals and our verbalizations, in the play-by-play and game commentary of life by which we interpret what we are doing to ourselves and to others. Crude racial epithets are still used, but only when intended as insults or when the communicants assume they are among like-minded people. Low-level managerial staff know better than to “discriminate,” and certainly know better than to say such things as “that’s a white job” or “a black probably couldn’t handle that kind of responsibility.” We no longer have schools, regiments, work crews, boards, and hierarchies that are segregated by explicit design, and no explicit decision-making is based on racial factors.

Accordingly, it is now difficult to prove cases of racial discrimination except through a presumption drawn from “disparate impact.” This makes it possible for people to say, and for many people perhaps actually to believe, that racial discrimination in this provable sense has largely been erased in education, the workplace, and government.40

If the absence of racial discrimination in this provable sense meant also that racial discrimination had been eradicated, it would be a realization of yesteryear's great expectations and would fulfill current day wishthinking. In the decade immediately following Brown v. Board of Education the prevailing view, or at least the prevailing published commentary, foretold that the legal changes then occurring would duly lift blacks out of second-class citizenship. The republication in 1964 of a triumphant "20th Anniversary Edition" of Gunnar Myrdal's An American Dilemma was such an example. This landmark work, originally published in 1944, examined in detail the conflict between democratic egalitarian ideals and the racial realities of wartime America, but predicted a post-war upsurge in corrective action against racial inequality. The 1964 edition apparently sought to demonstrate fulfillment of the prediction. A postscript written with Myrdal's endorsement said:

There could be no doubt that the races were moving rapidly toward equality and desegregation by 1962. In retrospect, the change of the preceding twenty years appeared as one of the most rapid in the history of human relations. Much of the old segregation and discrimination remained in the Deep South, and housing segregation with its concomitants was still found throughout the country, but the all-encompassing caste system had been broken everywhere . . . . The change had been so rapid, and caste and racism so debilitated, that I venture to predict the end of all formal segregation and discrimination within a decade, and the decline of informal segregation and discrimination so that it would be a mere shadow in two decades. The attitude of prejudice might remain indefinitely, but it will be on the minor order of Catholic-Protestant prejudice within three decades.

Oscar Handlin had given an even more optimistic assessment in Race and Nationality in American Life:

[W]hether with the aid of legislation or without, the practices of discrimination in employment, in education, and in social life have all but disappeared . . . . American practice has come to accept the premise that all men are created equal no matter what degrees of diversity divide them. In this sense it may no longer be appropriate at all to refer to "minorities" . . . .

. . . .

Evidence of discrimination still forms blemishes upon [American] life. But the pattern has been irreparably shattered . . . . [I]t is a matter of time before equality of status and opportunity is within reach.

Social scientists were not alone in these forecasts. A 1966 National

41. G. MYRDAL, AN AMERICAN DILEMMA (1962).
42. ROSE, POSTSCRIPT TO AN AMERICAN DILEMMA at xliii-xliv.
43. O. HANDLIN, RACE AND NATIONALITY IN AMERICAN LIFE 181 (1957).
44. Id. at 178.
Industrial Conference Board survey of forty-seven major corporations found that “companies have integrated their workforces with less difficulty than was feared,” even though business leaders had been surprised how quickly “the pressures on companies to extend the same opportunities to Negroes that were accorded others developed . . . . Many companies were not well prepared to meet it.” The Conference Board found rapid progress: “[A]ccomplishments that would have been considered noteworthy in the area of equal opportunity just two or three years ago are commonplace today.” With deeper meaning than intended, however, the Conference Board’s 1966 Report also noted: “Negroes are average workers in most respects, but are rated somewhat low on promotability and on taking responsibility.”

There is other evidence of a widespread belief in the coming of a new day. While the decade following 1954 witnessed sustained protest over racial discrimination, the protestors were nonviolent even though they often risked injury, and sometimes death. The non-violence of this period, when compared with the violence that erupted later in the 1960’s, suggests that in the beginning there was widespread faith that the civil rights movement would achieve its goals. The urban riots following the death of Martin Luther King conveyed another message. Many explanations have been given for these outbreaks, but fading hopes for future progress was among them.

Of course, some commentators who favored racial equality had been less sanguine. Moynihan and Glazer, writing in 1963, accurately predicted the economic and social factors that would impede black progress after overt discrimination disappeared. They saw bleak economic prospects for “those who will have to work with their hands in a society that has less and less work for people with only hands.” In their view, the critical problem of Negro unemployment has been created by a general economic change—the rapid elimination of unskilled and semi-skilled jobs. This social change has nothing to do with discrimination, and yet it has dealt Negroes (and the whole community, picking up the tab in the form of increased costs of relief, youth projects, police, and so on) as severe a blow as discrimination. . . . The facts still show that Negroes, at the same levels of education as whites, do not get as good jobs, as high incomes. These are the crude, brute facts of discrimination.

Moynihan and Glazer also saw bleak social prospects in a tradition that stultified scholastic achievement:

46. Id. at 8.
47. Id. at 7.
48. Id.
51. Id. at 43.
[O]ne cannot help asking: why were schools that were indifferent to
the problems of the children of other groups, forty and fifty years
ago, adequate enough for them, but seem nevertheless inadequate
for the present wave of children? Why is the strong and passionate
concern of the Negro community and Negro parents so poorly re-
warded by the children?

There is little question where its major part of the answer must
be found: in the home and family and community—not in its overt
values, which . . . are positive in relation to education, but in its
conditions and circumstances.52

Glazer and Moynihan’s 1963 analysis reads as if it had been published in
yesterday’s Atlantic Monthly.

Bettelheim, the reknowned psychiatrist, and Janowitz, the
reknowned sociologist, identified the underlying moral and psychological
problems:

Only when socially enforced regulations become—through
such influences as the mass media—an inner moral stance (i.e., also
part of personal control) can societal control fully achieve its goals.

. . . .

. . . [If] stable integration is to be achieved, more than deseg-
regation is required. Social controls must operate to strengthen per-
sonal controls to produce attitudes and sentiments of mutual self-
respect.53

Those “attitudes and sentiments of mutual self-respect” are not yet
generally shared in the white population of our country. Instead of “so-
cietal control” we have “societal discrimination,” as the Supreme Court
has recognized most recently in Wygant v. Jackson Board of Education.54

C. Marginal Preferment of Blacks

The course of events since 1954 and its implications for the future
are not part of the ordinary citizens’ focused consciousness. Citizens
could not make them their concern if they were. If they allowed them-
selves to see the situation as it is, they would then have to accept that
they are racists who think desegregation has gone too far already, or they
would have to take responsibility for doing something, or they would
have to acknowledge that they are essentially powerless to do anything.
None of these is an acceptable possibility. Average white Americans do
not see themselves as racists, nor see themselves as responsible for the
present condition. They do not see themselves as having power to
change things much, even if they wished to do so. Average citizens have
to worry about their own jobs and the opinion of their own immediate
peers; their own homes and own neighborhoods; their own churches and

52. Id. at 49.
54. 106 S. Ct. 1842, 1847 (1986).
bowling teams; the schools where their own kids go; and staying away from the city streets that they are afraid to walk. Thus, segregation perpetuates itself.

While the transactions of everyday life appear to the ordinary citizen to occur one-by-one, in aggregate they have a quite different pattern from another vantage point. An observer actually or psychologically external to the contemporary American scene sees the transactions of our everyday life at a distance, as a whole, in terms of statistics, and in historical perspective. This is the intellectual vantage point of the social scientist, the historian, and most other literati. It is the political vantage point of those holding the positions of special responsibility and authority, because it is from such positions that social aggregates impinge directly on consciousness and require response.

It is from this paternal vantage point that Congress comprehended the problem of black voter participation and responded with the Voting Rights Acts. It was from the same vantage point that some, if not all, members of Congress adopted the minority set-aside provisions at issue in Fullilove v. Klutznick, and from which private businesses have adopted and often resolutely pursued affirmative action programs in employment. This is also the vantage point of the courts, particularly the Supreme Court, in comprehending and responding to the issue of affirmative action.

The situation seen from the paternal vantage point could be described as follows: The hope and need of American society is that our pursuit of diverse definitions of happiness be a race-neutral competition. We have adopted an equal treatment policy but it governs only limited spheres of community life and even there is frustrated by racial bias that is pervasive and persistent, but unperceived. As a result, what is nominally a program of equal treatment remains actually a pattern of discrimination not generally perceived to be such.

If this is the perception from a paternal vantage point, what is an acceptable strategy for doing something about it? Particularly, what can the courts do about it? The courts' decisional process requires that they justify their decisions. The strategic task faced by the courts, particularly the Supreme Court, is therefore correspondingly difficult because it implicates not merely what is done but what is said. We can appreciate the difficulty only if we fully recognize the operative legal, constitutional, and epistemological constraints under which the courts must proceed.

The courts cannot proceed on the basis of a social reality they perceive but which the majority of the citizenry either does not perceive or refuses to acknowledge. Two reasons prevent the courts from adopting

such an approach. First, it would be legally impermissible for the Supreme Court explicitly to say “We see something that you do not.” The rules of procedure allow a court to “know” only those things that are in the record\(^\text{57}\) and the rules of evidence allow it to take judicial notice only of those things that are matters of common knowledge.\(^\text{58}\) Legally unprovable discrimination cannot be built into a record on appeal and courts cannot take judicial notice of that which is commonly denied.

Second, the courts’ constitutional position inhibits them from relying upon an idiosyncratic perception of reality as a basis for their decisions. The courts constantly risk acting in this impermissible way. For example, this risk exists whenever courts see an infringement of civil liberties in a transaction that most other people see as a threat to public safety. How far the courts’ understanding of reality departs from the majority community’s sense of reality varies from context to context and is generally a matter of degree. But this difference in degree cannot become a difference in kind. It is one thing to reflect the will of the people, and radically another thing to disregard their *Weltanschauung*.

 Preferential treatment for blacks therefore has to be predicated on grounds that are cognitively intelligible and normatively acceptable to the white majority. Some predicates for such preferments are simply unacceptable. For example, a community would find it unacceptable for blacks, having established control of a local government where they are the dominant majority, simply to vote themselves preferments the way emergent ethnic groups often did in the past. If such crude redress were condoned, the whites could do the same thing where they had control, and we would soon regress to a legally segregated society.\(^\text{59}\) The same criticism would apply to explicit “benign quotas” imposed by local “rainbow coalitions” or narrowly based white elites having control of strategic educational and employment resources.

 Other justifications, however, might pass muster. Preferment for blacks could be justified where participation of blacks as such would facilitate some independently justifiable purpose. This rationale appears to be the basis of *University of California Regents v. Bakke*\(^\text{60}\) and for affirmative action in higher education generally. Another justification that is morally intelligible, if only uneasily so, is where the preferment represents redress of a particularly identified wrong, even though neither the wrong nor the remedy involves the specific individuals affected by the preferment. Although the notion of a “group wrong” is very troubling, a group remedy is intelligible if proponents have established that there was a group wrong. Such a group wrong was the predicate for the prefer-

\(^{57}\) See, e.g., United States v. Gilmore, 698 F.2d 1095 (10th Cir. 1983).

\(^{58}\) Fed. R. Evid. 201 (judicial notice of adjudicative facts).

\(^{59}\) See Days, supra note 1.

\(^{60}\) 438 U.S. 265, 311-15 (1978) (pursuit of ethnic diversity in student body legitimate concern of university admissions program).
ment in government contracting sustained in *Fullilove v. Klutznick*. As noted previously,\(^62\) this justification is unavoidably troublesome because the preferment is almost inevitably at the expense of individuals whose only personal fault lay in being white.

If the wrong of discrimination is evident in aggregate but unprovable in particular, however, the choice is between affording no remedy or granting a "group remedy" notwithstanding that it may entail immediate individual injustice. Given that choice, and compelled by circumstances and the responsibility of office to make a choice, the courts have sustained marginal preferment of blacks. Justice O'Connor summarized the Court's position in *Wygant v. Jackson Board of Education*:

Ultimately, the Court is at least in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference.\(^63\)

This kind of justice is the essence of paternalism—the imposition of disproportionate costs on individually innocent but strategically situated persons to protect the general welfare of the community.\(^64\) It is fashionable these days to deprecate paternal justice. Neoliberals argue that imposition of individual injustice is unjust,\(^65\) while neoradicals argue that such remedies would be unnecessary in a just society. Both criticisms are well-founded. The criticisms would be persuasive if governing in the real world were unconstrained by considerations of time, circumstance, transaction costs, and public perception. But it is not. To borrow Disraeli's words from another context, what we are talking about "is not a principle, it is an expedient."\(^66\)

Having to act on such a basis is the moral burden of exercising authority. It is a burden that Congress can carry more or less competently, because people see Congress as understanding both the obligation of paternal choice and the constraints within which such choice must be exercised.\(^67\) On the other hand, the public officials who tried to work out the

\(^61\) 448 U.S. at 476-78 (Congress had "abundant evidence" from which to conclude prior government procurement practices had discriminated against minorities).

\(^62\) *See supra* note 6.


\(^67\) *Fullilove v. Klutznick*, 448 U.S. 448, 490 (1980) ("[I]n the continuing effort [to achieve the goal of equality of economic opportunity] . . . Congress has the necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives . . . . ").
remedial formula and the justifying rhetoric in *Wygant* exceeded their competence.  

### IV. Conclusion

The courts generally perceive that there is persistent and persuasive racial bias against blacks—"societal discrimination"—but they also recognize that the majority of ordinary white people does not share that perception. The courts are therefore impelled to sustain affirmative action programs that entail marginal preferment for blacks, but only under conditions that are consistent with preserving the position of the courts themselves. These conditions include a cognitive or empirical element and a political and normative element. In instances of overt or "blatant" racial discrimination, the transaction provides a sufficient basis for redress. Overt discrimination is recognizable as such by average citizens, who also generally now believe that such discrimination is wrong. Situations where specific discrimination is unprovable, however, must be handled differently. Many of these situations involve what can be called "discriminatory result without discriminatory intent." In these cases, the courts infer that there probably was discrimination, but have nothing in the record to demonstrate its existence. Hence, they are powerless to take remedial action unless a statistical inference is very powerful or unless some mediating agency independently "finds" that discrimination has occurred.

The necessary "finding" does not require the usual evidentiary standards for judicial findings, nor is it given the collateral effects accorded to judicial findings. For example, such a finding should not constitute a determination that can be a basis for damages liability, although the rules of evidence may require that it be treated as an admission against interest. The function of the "finding" is not to establish the fact of discrimination as a predicate for a judicial conclusion that a remedy is appropriate. The courts do not require such an evidentiary predicate because they are assuming that there was discrimination in fact if some responsible agency says there was. Their willingness to presume discrimination does not follow from the "finding" itself, whether by Congress or by a local school board. It follows from the courts' own assumption that since racial discrimination against blacks is socially endemic, very likely it existed in the particular situation.

The function of the "finding" by a responsible agency therefore is

---


69. See Local Number 93 v. Cleveland, 106 S. Ct. 3063, 3067, 3072 (1986) (Court accepts defendant city's assessment that it had discriminated in part as adequate basis for adopting affirmative action by consent decree). Compare *Wygant* v. Jackson Bd. of Educ., 106 S. Ct. 1842, 1848-49 (1986) ("[A] public employer like the Board must ensure that, before it embarks on an affirmative action program, it has convincing evidence that remedial action is warranted . . . . [Here,] no such determination ever has been made.") (Powell, J., for plurality).
something else. Its function is to establish the fact of discrimination for the benefit of another audience and decisionmaker, i.e., the ordinary citizenry. Pronouncing the fact that discrimination existed serves to educate the public that racism persists and is itself a significant act. It is also an important link in justifying the marginal preferment of blacks. Without an independent “finding” by someone outside the courts, the ordinary citizenry would perceive the courts as granting remedial preferments in situations where no discrimination is apparent. The “finding” also politically commits the agency involved to the remedial program, and thus more widely distributes the economic and political burdens which the program entails.70

In this fundamental sense, affirmative action remedies in cases other than overt, provable discrimination depend on factual recognitions and moral initiatives on the part of responsible social agents outside the courts. Such an agent has to say that there has been discrimination in a specific situation, whether in employment or in education or in voting or whatever. The cognitive act, the making of the “finding,” has to be intrinsically plausible and must emanate from an agency with authority and responsibility proportional to the specific situation. The moral responsibility is that of making such a finding and, having done so, limiting the remedial scheme to one that is proportional to the exigencies upon which it is justified.

The performance of these cognitive functions and moral responsibilities are constitutional conditions precedent for justifiable judicial action. As such they can be legally protected but they cannot be legally initiated. In this sense, affirmative action from the vantage point of the courts is legally permissive rather than obligatory. The burdens of recognition and moral initiative rest with those of us who are below the bench.

---

70. Compare Fullilove, 448 U.S. at 490 (Congress “has the necessary latitude”) with University of Cal. Regents v. Bakke, 438 U.S. 265, 309 (1978) (“isolated segments of our vast governmental structures are not competent to make decisions [to prefer one racial group over another], at least in the absence of legislative mandates and legislatively determined criteria”) (opinion of Powell, J.).