Affirmative Action: An Ethical Evaluation

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ABSTRACT. This paper examines four major arguments advanced by opponents of race and gender conscious affirmative action and rebuts them on the basis of moral considerations. It is clear that the problem of past racial/gender discrimination has not disappeared; its effects linger, resulting in a wide disparity in opportunities and attainments between minorities/women and whites/males. Affirmative action, although not the "perfect solution," is by far the most viable method of redressing the effects of past discrimination. Thus it cannot be dismissed lightly by way of arguing for mere colorblindness.

I. Introduction

Affirmative action has been defined as "a public or private program designed to equalize hiring and admissions opportunities for historically disadvantaged groups by taking into consideration those very characteristics which have been used to deny them equal treatment."[1] As comprehensive as this definition may be, it is obvious that, in the employment area, affirmative action plans often encompass more than equalized hiring opportunities. Such programs often seek to increase the number of minorities and women in higher level/higher paying jobs by equalizing their promotion opportunities and protecting them from being laid off under the "last hired, first fired" rule of seniority. In all three of these situations – hiring, promotion and layoff – the effect is to deprive some individual, normally white males, of a "potential benefit, or opportunity, in order to enhance the opportunities of others," i.e., minorities and females.[2]

While one would think that this "redistribution of potentials"[3] would be less controversial than a redistribution of actual wealth, this is simply not the case. Unlike social welfare programs, affirmative action has given rise to rigorous debate.[4] In truth, even the coalition responsible for Civil Rights legislation is in disagreement over how the U.S. should remedy the effects of past discrimination.

Opponents of affirmative action adhere to a policy of strict colorblindness. They believe that all governmental distinctions based on race should be presumed illegal unless the distinctions pass the stringent requirements of "strict scrutiny".[5] Proponents of affirmative action contend that only malign distinctions based on race should be abolished; benign distinctions that favor minorities and women should be allowed. This is because, "in order to get beyond racism, we must first take race into account," and "in order to treat some people equally, we must treat them differently."[6]

Initially, the affirmative action debate was not aided by the Supreme Court's seemingly contradictory rulings.[7] And the controversy intensified when Reagan Administration officials, most notably Attorney General Edwin Meese and Assistant Attorney General for Civil Rights William Bradford Reynolds, voiced their opposition to affirmative action programs. Mr. Reynolds attempted to persuade fifty-one localities to abandon their affirmative action hiring and promotion programs, and announced his intention to ask the Supreme Court to overturn *United States Steelworkers v. Weber*,[8] which

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authorized companies and unions to adopt voluntary affirmative action programs. Pitted against the Administration's position are various civil rights and women's groups who view affirmative action as an appropriate remedy for redressing past discrimination, and as a way to open the doors for blacks and women to professions which have historically excluded them.

The Supreme Court re-addressed the issue of affirmative action and, in recent major decisions,[9] reaffirmed race- and gender-conscious hiring and promotion preferences in the work-place. These pronouncements signal a rejection of the Reagan Administration's stance on affirmative action. However, despite the Supreme Court's rulings, it is apparent that the controversy over affirmative action continues, and there are strong arguments to be met on both sides. Rather than examining the affirmative action debate from a purely legal viewpoint, this paper will look at it from an ethical perspective. The question this paper will address is, how can affirmative action be ethically justified?

II. The problem of discrimination

Affirmative action seeks to remedy the problem of the strong, persistent, and irrational discriminations made by large portions of society.[10] Irrational discrimination is taken to mean the use of such irrelevant characteristics as color or gender to judge an individual's human worth or capability.

In the past, women and minorities have been blatantly excluded from the process of attaining jobs sought by white males, and the effects of this discrimination continue today. For example, because blacks have historically been relegated to lower paying jobs, today's seniority systems, which effectively lock blacks into these jobs, perpetuate past discrimination against the entire group.[11] Affirmative action seeks to remedy the effects of this irrational discrimination by "alter[ing] our environment so as to weaken or extinguish such discriminations, or at least to break up the stratifications."[12]

III. Affirmative action mechanisms

There are two mechanisms by which affirmative action programs have been implemented.[13] One applies a fairly rigid formula or quota to determine how many minority group members should be granted a benefit.[14] For example, under the quota system, a given number of minority workers will be hired until the proportion of minority employees reaches the minimum percentage within the overall labor pool. Because a quota system precludes nonminority employees from consideration, this mechanism is viewed as inequitable and has been highly criticized; legally it is permissible only as a last resort effort to remedy egregious discrimination.[15]

Hiring goals, the second mechanism for affirmative action, does not designate positions for minorities only; in contrast to a quota system, a system utilizing hiring goals only requires that employers make every effort to hire minorities, but nonminorities are not barred from competition.[16] Quite understandably, hiring goals are less controversial, and more equitable, than quotas. The mechanism for affirmative action that this paper will be referring to is a hiring goal system.

IV. Ethical arguments for and against affirmative action[17]

A. *Colorblind v. race-conscious plans*

As stated earlier, affirmative action seeks to remedy the problem of irrational discriminations. However, as opponents of affirmative action argue, if race/gender is morally irrelevant, it should never be a consideration in hiring, promotions and other job related situations because to prefer one employee over another on this basis cannot be morally justified. The law, they argue, should be "colorblind" and totally neutral.

There are several responses to this argument. First, it is obvious that our culture has never considered race or gender irrelevant to employment decisions. A cursory reading of American history bears out this contention.[18] Thus opponents of affirmative action, by stripping the historical context from our employment practices with the demand for race- and gender-blind laws, favor a policy that will tolerate the effects of past discrimination for years to come. To suggest otherwise is simply to ignore a social reality.[19]

Second, if the social order which subjected groups on the basis of race or sex was unjust, why is it unjust to redefine that social order to fashion group remedies for group injuries? "To ignore the fact that a person is [black] would be to ignore the fact that there had been a social practice in which unjust actions were directed toward [black] persons as such."[20] It is obvious that our earlier social practices worked to the benefit of white males who attained and maintain an unfair advantage of the expense of blacks and women. To disregard collective injury, then, would be "morally speaking . . . the most hideous aspect of the injustices of human history: those carried out systematically and directed toward whole groups of men and women as groups."[21]

Third, in examining the historical income distribution in the United States, it becomes apparent that the disparity between races cannot be correlated to such morally relevant characteristics as "rights, deserts, merits, contributions and needs of recipients."[22] Under a distributive justice theory of affirmative action, group members are entitled to preferential treatment, not because society is admitting and paying for past errors, but because those persons deserve a greater "shot" at the limited resources available simply in virtue of being members of the human community.[23] Distributive theories require no admission of social or collective guilt; they merely require the acknowledgement that, from this time forward, society's resources be distributed on the basis of morally relevant factors.

Given this concept of justice, considering an applicant's race as part of the bundle of traits that constitute "merit" is entirely consistent with the understanding of merit as a unique combination of factors that best meets society's needs.[24] This understanding is buttressed by the observation that getting ahead in American society has often turned on quite obviously nonmeritocratic factors.[25]

Where does it end, and when? It ends when the proportion of women and minorities in unskilled positions approximates that of the population generally, and when their proportion in the ranks of skilled and professional positions approximates their appearance in the pool of qualified applicants. Affirmative action is not committed to maintain those targets. Once they are reached, it becomes a matter of personal choice for group members to decide whether they will seek these positions. If they do not, that is an issue that can be addressed (or not addressed) when it arises, and on a basis that will have no necessary connection with the reasons here advanced in support of affirmative action.

B. *Individual v. group protection*

If affirmative action is supposed to remedy the effects of past discrimination, opponents of such programs often ask, what of the fact that many of the victims of discrimination are dead? Further, are not many nonvictims receiving underserved compensation for injuries they never experienced?

First, it is apparent that historical injuries cannot be separated from the present effects of history.[26] The classic example involves seniority systems: in the past, black employees were relegated to the lowest paying positions in a company with no chance of elevating themselves. The higher paying jobs were restricted to "whites only." After civil rights legislation prohibited such segregation in the work place, blacks were allowed to compete for and attain higher level positions. However, when it came to receiving employment benefits and avoiding layoffs, black employees suffered by virtue of past segregation. Due to their lack of seniority, black employees were denied employment benefits and fell victim to the "last hired, first fired rule of seniority."[27] Then, as the "badges of slavery" continue, it becomes irrelevant whether affirmative action redresses past discrimination or the present effects of past discrimination.[28]

Second, it is also apparent that racial discrimination is "all encompassing". An examination of early American attitudes toward blacks documents the fact that race discrimination is directed not at individuals, but blacks as a group.[29] By way of illustration, note the language from *Scott v. Sandford*[30] referring to negroes as a "race fit for slavery." Further, Jim Crow laws stamped all blacks as the inferior race. The all encompassing nature of discrimination was further documented by the Supreme Court in *Brown* v. *Board of Education*.[31] Thus, it is almost inconceivable that individual group members did not suffer humiliation and injury".[32]

Next, the argument that affirmative action frequently aids those who need it least ignores the extent affirmative action has opened up opportunities for blue collar workers.[33] It also assumes that

affirmative action should be provided only to the most deprived strata of the black community, or those who can best document their victimization. To the contrary, however, affirmative action operates at its most effective level in assisting the efforts of those with threshold ability to integrate the trades and professions. After all, if it cannot be utilized to assist those on the verge of breaking through, i.e., those who will serve as role models for the remainder of the community, this may mean that additional social intervention to address unmet needs may be required for those left untouched by affirmative action.[34]

Finally, even if some individual group members managed to escape injury, affirmative action can be justified on the ground of administrative convenience.[35] The correlation between race or sex and relative inequality of opportunity is sufficiently high that it justifies use of such traits for the efficient administration of this policy.[36]

C. *Unfair burden on present generation of white workers*

Opponents of affirmative action also argue that, even if blacks and women deserve compensation, it is unfair to extract that compensation through the imposition of harm on innocent white males. Or, to phrase the issue in terms of utility rather than fairness, affirmative action causes unqualified persons to be placed in jobs that would otherwise be held by those of greater skills and abilities, and this is socially harmful because our resources are not producing "the greatest good for the greatest number."

In addressing both the unfairness and inefficiency claims of affirmative action opponents, note first that whatever injury white males incur does not give rise to a constitutional claim because the damage "does not derive from a scheme animated by racial prejudice."[37] The lessened opportunity that white males face is simply an incidental consequence of addressing a compelling societal need. If white males are deprived of anything, it is the expectation of unearned position. Only because they stand to gain so much from past discrimination do they stand to lose from affirmative action. But white males are not excluded on the basis of racial prejudice, they are excluded "because of a rational calculation about the socially most beneficial use of limited resources. . . .[38]

This paper does not undertake an analysis of the constitutionality of affirmative action plans, but recent observations of the Supreme Court in this context are supportive of a fairness evaluation. Justice Brennan, writing for the Court in *U.S. v. Paradise*,[39] related that governmental bodies, including courts, "may constitutionally employ racial classifications essential to remedy unlawful treatment of racial . . . groups subject to discrimination."[40] The following criteria will be employed to assess the constitutionality of racial classifications:

(1) The necessity for relief and the efficacy of alternative remedies,

(2) The flexibility and duration of relief including the availability of waiver provisions to be utilized in the event there are no qualified minority candidates,

(3) The relationship of the numerical goals to the relevant labor market,

(4) The impact of the relief on non-minority applicants.[41]

With regard to the issue of burdening white males who did not discriminate, it should be noted that, while these individuals may not have discriminated, they have received the benefits of a society that has discriminated and has supplied them better education and better economic conditions. Under these circumstances, a white male, aware of the discrimination against women and blacks, who insisted on being hired, would essentially endorse and condone prior discrimination. Even if a white male was ignorant of past discrimination against women and minorities, given our historical record, the assumption should be that these groups were discriminated against.

One way of analyzing the situation is by way of a hypothetical. Imagine two runners at the starting line. If one runner is somehow weighted-down but the other runner is not, it is obvious that, once the race begins, the first runner is at a severe disadvantage. Even if that runner is released halfway through the race, he or she is still far behind. In order to equalize the first runner's position with that of the second, the second needs to be handicapped in some way. The opportunity to catch up and to become competitive is only fair under the circumstances.

However, even upon applying this reasoning in support of affirmative action, opponents may argue that it results in the advancement of incompetent

workers. This argument can be addressed by setting up certain minimum standards of competence that every applicant must meet, i.e., applicants must demonstrate some basic degree of proficiency in order to qualify for the labor pool.[42] Affirmative action does not require employers to hire unqualified individuals, nor does it require the discharge of white employees, i.e. white employees do not lose their entitlements.[43]

It should be noted that by opening up opportunities for women and minorities, affirmative action broadens the talent base of business and leads to a recognition of the potential of these groups. A utilitarian argument would demonstrate that a refusal to employ these talents to their best use is "wasteful", and further that affirmative action would benefit the general welfare by (1) promoting minority role models, and (2) improve services for minority communities. For example, blacks who become doctors and lawyers are more likely to meet minority needs that white doctors and lawyers.[44]

> Suppose for example that there is a need for a great increase in the number of black doctors, because the health needs of the black community are unlikely to be met otherwise. And suppose that at the present average level of premedical qualifications among black applicants, it would require a huge expansion of total medical school enrollment to supply the desirable absolute number of black doctors without adopting differential admissions standards. Such an expansion may be unacceptable either because of its cost or because it would produce a total supply of doctors, black and white, much greater than the society requires. This is a strong argument for accepting reverse discrimination, not on grounds of justice but on grounds of social utility. (In addition, there is the salutary effect on the aspirations and expectation of other blacks, from the visibility of exemplars in formerly inaccessible positions.)[45]

Further, the virtual absence of black policemen helped spark the ghetto rebellions of the 1960s. However, after the police force became integrated through strong affirmative action, relations between the minority communities and the police improved.[46]

D. *Preference cheapens real achievement of women and minorities*

Finally, there is always the argument that affirmative action stigmatizes the preferred group and causes others to denigrate their achievements. Although affirmative action probably causes some white to denigrate black achievements, it is unrealistic to argue that these programs cause most white disparagement of black abilities. Such disparagement was around long before affirmative action.[47] Given this inevitable resistance, one must be wary of the fear of backlash to limit necessary reforms. Further, it is apparent that affirmative action can help combat disparagement of these achievements by breaking down stereotypes and changing people's attitudes. Thus, the uncertain extent to which affirmative action diminishes the accomplishments of women and minorities in the eyes of some people must be balanced against the stigmatization that occurs when they are virtually absent from important societal institutions.

Opponents of affirmative action argue that such programs sap the internal morale of blacks, i.e. their not truly earned positions cause them to lower their expectations of themselves. Again, although this might be true in some cases, it is incorrect to say that affirmative action undermines the morale of the black community. Most black beneficiaries view affirmative action programs as "rather modest compensation" for the many years of racial subordination; for them, affirmative action is a form of social justice.[48]

It is also apparent that many blacks view claims of meritocracy, as it applies to attaining employment, dubiously. The over-exclusion of blacks from public and private educational and employment institutions is an indictment of the concept of meritocracy. It is clear that many non-objective, non-meritocratic factors influence the distribution of opportunity. Most people realize the thoroughly political nature of merit, i.e., that it is a malleable concept determined by the perceived needs of society.[49]

Lastly, most blacks and women are aware that, in the absence of affirmative action, they would not receive equal consideration with white males. Racism and sexism continue, and the "rules" are not impartial. For example, many women are socialized to seek marriage and motherhood from birth. Additionally, as human beings identify most easily with members of the own race and sex, a white male employer may be unable to judge a black or female applicant objectively. Affirmative action forces employers to

consider the qualifications and potentialities of these individuals.

V. Conclusion

This paper has examined four major arguments advanced by opponents of affirmative action and attempted to rebut them on the basis of moral considerations. It is clear that the problem of past racial/gender discrimination has not disappeared; its effects linger, resulting in a wide disparity in opportunities and attainments between blacks/women and white males. Affirmative action, although not the "perfect solution", is by far the most viable method of redressing the effects of past discrimination. Thus it cannot be dismissed lightly by way of arguing for mere colorblindness.

Notes

[1] Duncan, 'The Future of Affirmative Action: A Jurisprudential/legal Critique', 17 HARV. C.R.—C.L. L. REV. 503 (1982).

[2] Barton, 'Affirmative Action: Making Decisions', 83 W. VA. L. REV. 47 (1980).

[3] *Id.*

[4] *Id.* at 60—61. As Barton notes, social welfare programs guarantee that, henceforth, no person shall suffer the consequences of any discrimination based on race, color, sex, age, ethnically, or creed. Social welfare programs do not seek to correct existing inequities or to prevent the making of discrimination. Affirmative action, on the other hand, seeks compensate for past harm by redistributing certain opportunities. Affirmative action seeks to prevent the effects and the making of unjust discrimination by, inter alia, changing the way people think.

[5] Kennedy, 'Persuasion and Distrust: A Comment on the Affirmative Action Debate', 99 HARV. L. REV. 1327, 1334 (1986).

[6] Regents of the University of California v. Bakke, 438 U.S. 265, 407 (1978) (Blackmun, J., plurality opinion).

[7] Cf. United Steelworkers v. Weber, 443 U.S. 193 (1979) (5—2) holding that Title VII does not prohibit all private, voluntary race conscious affirmative action plans, and Fullilove v. Klutznick, 448 US 448 (1980) (6—3), approving a 10% set aside for minority contractors under federal law, with Regents of University of California v. Bakke, 438 U.S. 265, 407 (1978) (5—4), holding that the admissions program of the University of California (Davis) which set aside 16 class positions for minority students to be unlawful, and Memphis Firefighters Local #1784 v. Stotts, 467 U.S. 561 (1984) (6—3), holding that the Civil Rights Act bars a federal judge from ordering that recently hired blacks can keep their jobs while whites with more seniority were being laid off except on evidence that the blacks were actual victims of illegal discrimination.

[8] Robinson, 'A Record of Hostility' 71 ABAJ 39, 40 (Oct. 1985); 'Justice Official Terms Court's ruling a Disappointment and Unfortunate', NEW YORK TIMES, Thurs. July 3, 1986, page 13, col. 3.

[9] Local 93, International Association of Firefighters v. City of Cleveland, 106 S. Ct. 3063 (1986) (6—3), held that lower federal courts have broad discretion to approve consent decrees in which employers, over the objections of white employees, settle discrimination suits by agreeing to preferential hiring or promotion of minority group members. The Court upheld a decree where Cleveland agreed to settle a job discrimination suit by temporarily promoting black and Hispanic workers ahead of whites who had more seniority and higher test scores. In Local 28, Sheet Metal Workers v. EEOC, 106 S. Ct. 3019 (1986) (5—4), the Court approved a lower court order requiring NYC sheet metal workers union to meet a 20% minority membership goal by 1987. The Court also held, 6—3, that judges may order racial preferences in union membership and other contexts if necessary to rectify especially "egregious" discrimination. During its next session, the court held, in U.S. v. Paradise, 107 S. Ct. 1053 (1987) (5—4), that because of the Alabama State Police's long history of egregious discrimination coupled with a strong federal interest in supporting prior judicial decrees, the enforcement of numerical quotas (one black promotion for every white), for as long as the upper ranks of the department had a smaller percentage of blacks than the lower ranks, was appropriate. In a companion case involving gender-based discrimination, Johnson v. Santa Clara County Transportation Agency, 55 U.S.L. W. 4379 (daily ed., Mar. 25, 1987), the court upheld a voluntary affirmative action plan that promoted a female instead of a male, though both were qualified for the job. The plan was based on a comparison of the county's work force with the level of women and minorities qualified for higher level positions rather than general population statistics.

[10] Barton, *supra* n. 2 at 50.

[11] E.g., Local 189 United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969); Teamsters v. United States, 431 U.S. 324 (1977) (relying on § 703(h) of Title VII, 42 U.S.C. § 2000e—2(h), the Court held that absent their having been entered into and maintained with a discriminatory purpose, such systems, regardless of their impact, do not violate Title VII. Individual claimants may, however, obtain relief in the form of back pay or retroactive seniority.)

[12] Barton, *supra* n. 2 at 51. In Barton's view, there are 4 ways society can respond to discrimination: (1) institutionalize it via legislation, (2) ignore it, (3) articulate principles prohibiting people from acting on their discrimination, yet take no affirmative steps to extinguish discrimination, (4) adopt affirmative measures to end existing stratification and extinguish the discrimination which strengthened the stratification. *Id.* at 49, n. 6.

[13] Specific methods often suggested to remedy the effects of historical discrimination in the workplace include: (1) retroactive seniority, (2) front pay (3) inverse seniority, (4) work sharing, (5) plantwide seniority, (6) governmental intervention. This paper will not examine specific mechanisms in implementing affirmative action, but will concentrate on the broader concepts of quotas and goals.

[14] Duncan, *supra* n. 1 at 507—508.

[15] *Id.* at 508; Local 28, Sheet Metal Workers v. EEOC, 106 S. Ct. 3019 (1986); U.S. v. Paradise, 107 S. Ct. 1053 (1987).

[16] Duncan, *supra* n. 1 at 508.

[17] Throughout this paper the following ethical concepts will be advanced to evaluate the worth of targets or goals as they are required by affirmative action programs: compensatory and distributive justice, and utility or utilitarianism. See Nickel, Preferential Policies in Hiring and Admissions: Jurisprudential Approach, 75 COLUM. L. REV. 534 (1975). Although these three theories will be refered to throughout this paper, the format is designed to set out the ethical arguments levelled at affirmative action, and to rebut them.

[18] M. Wasserstrom, *Philosophy and Social Issues* (1980), p. 14.

[19] *Id.* at 12.

[20] Taylor, 'Reverse Discrimination and Compensatory Justice' *Analysis* **33** (1973), p. 179.

[21] *Id.* at 181—182.

[22] R. K. Greenawalt, Discrimination and Reverse Discrimination — Essay and Materials in Philosophy and Law (1979), pp. 65—67. Statistics do not conclusively establish distributive injustice however, because careers are a function of individual priorities. Greenawalt, Judicial Scrutiny of 'Benign' Racial Preferences in Law School Admissions, 75 COLUM L. REV. 559, 589 n. 129 (1975).

[23] This is the distributive justice theory of affirmative action. It looks to the future, not to the past as compensatory justice does. Benefits and burdens are distributed in accordance with such relevant considerations as the rights, merits, contributions, needs and deserts of recipients. Nickel, *supra* n. 17 at 539. Duncan, *supra* n. 1 at 521.

[24] For the most part, with regard to hiring or admission policy, the institution will develop a benchmark/minimally qualified score consisting of aptitude test, admission score, grade point average, interview (subjective evaluation) and the like. If sex or race will enable a person to do a job better in the judgment of the hiring authority/admission committee, i.e., bring better medical care to the black community or break down the stereotypic image of women in the construction industry, then race or sex may well qualify as a meritocratic quality. The fact that race or sex may be a socially useful trait in particular circumstances should not be confused "with the very different and despicable idea that one race [or sex] may be inherently more worthy than another." Dworkin, The Rights of Alan Bakke, *The New York Review of Books* (1977), in J. DesJardins and J. McCall, *Contemporary Issues in Business Ethics* (1985), pp. 407, 411.

[25] After all, "Would anyone claim that Henry Ford II was head of the Ford Motor Company because he was the most qualified person for the job?" Wasserstrom, Rascism, Sexism, and Preferential Treatment: An Approach to the Topics, 24 U.C.L.A. L. REV. 581, 619 (1977).

[26] Duncan, *supra* n. 1 at 510. Present day discrimination in hiring is a "but for" result of historical practices. It contributes to housing patterns which in turn result in *de facto* school segregation. U.S. Commission on Civil Rights, Affirmative Action in the 1980's: Dismantling the Process of Discrimination 11 (1981).

[27] Teamsters v. United States, 431 U.S. 324 (1977); Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984); Wygant v. Jackson Board of Education, 106 S. Ct. 1842 (1986).

[28] See City of Memphis v. Greene, 101 S. Ct. 1584, 1610—13 (1981) (Marshall, J., dissenting); Sullivan v. Little Hunting Park, 396 U.S. 229 (1969); Jones v. Alfred H. Mayer Co., 391 U.S. 409 (1968).

[29] Duncan, *supra* n. 1 at 516.

[30] 60 U.S. 393, 407 (1856).

[31] 347 U.S. 483 (1954).

[32] Even on the argument that some blacks have overcome losses and humiliation through their own efforts and are not deserving of compensation, affirmative action can still be justified on a group basis for reasons of administrative convenience. Nickel, Discrimination and Morally Relevant Characteristics, *Analysis* **32** (1972), pp. 113, 114; Dworkin, *supra* n. 24 at 411.

[33] See, e.g., Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) (affirmative action for firefighters); United Steelworkers v. Weber, 443 U.S. 193 (1979) (affirmative action for craft workers).

[34] Kennedy, *supra* n. 5 at 1333.

[35] Nickel, *supra* n. 17 at 538.

[36] Although 11.2% of the U.S. population is black, blacks (and other minorities) comprise only 4.2% of the legal profession and account for only 5.9% of engineers. Only 5.2% of the nation's managers and administrators and 5.1% of its sales workers are nonwhite. 27.5% of cleaning workers, 25.3% of taxi drives and chauffeurs and 43.1% of garbage collectors are black. Similarly, 99.1% of secretaries and 80.1% of clerical workers in general are women. Domestic cleaners and servants are 96.9% women, 53.4% black. Statistical Abstract of

the U.S. (1981) at 402–404.
[37] Kennedy, *supra* n. 5 at 1336.
[38] R. Dworkin, *A Matter of Principle* (1985), p. 301.
[39] 107 S. Ct. 1053 (1987).
[40] *Id.* at 1065.
[41] *Id.* This framework is similar, though not identical, to that applicable to private sector, voluntary affirmative action plans such as the one approved in United Steelworkers v. Weber, 443 U.S. 193 (1979).
[42] *Supra* n. 9.
[43] Wygant v. Jackson Board of Education, 106 S. Ct. 1842 (1986).
[44] Nickel, *supra* n. 17 at 545.
[45] Nagel, 'Equal Treatment and Compensatory Discrimination', *Philosophy and Public Affairs* **2** (1973), p. 348.
[46] Kennedy, *supra* n. 5 at 1329.
[47] *Id.* at 1331–1332.
[48] *Id.*
[49] *Supra* n. 24.

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