Review Essay

Affirmative Action, Jobs, and American Democracy: What Has Happened to the Quest for Equal Opportunity?

Paul Burstein

Herman Belz, *Equality Transformed: A Quarter-Century of Affirmative Action*. New Brunswick, NJ: Transaction Publishers, 1991. 320 pages. $32.95 cloth, $19.95 paper.

Russell Nieli, ed., *Racial Preference and Racial Justice: The New Affirmative Action Controversy*. Washington, DC: Ethics & Public Policy Center, 1991. xii+532 pages. $25.95.

When Representative Vito Marcantonio introduced in 1942 the first bill proposing that Congress ban employment discrimination, he and his supporters probably expected a long and difficult struggle. Indeed, it took 22 years for Congress to act, prohibiting employment discrimination in title VII of the Civil Rights Act of 1964. Even then, supporters of equal employment opportunity (EEO) doubtless expected it to be some time before equal opportunity was a reality; the enforcement provisions of title VII were weak, and some employers and unions were bound to resist.

Few supporters of EEO, however, could have anticipated the circumstances they would confront in 1992, 28 years after passage. Although black men earn far less than white men and women far less than men, much of the public and many politicians and judges believe that minority and women workers receive preferential treatment from employers forced by the federal government to hire and promote them ahead of better-qualified white men. Alleged special treatment of blacks, in particular, has aroused strong feelings; opposition to employment quotas is widely believed to have helped Jesse Helms to retain his U.S. Senate seat in 1990 and David Duke to win a majority of the white vote in the 1991 Louisiana gubernatorial election. President Bush based his 1990 veto of a civil rights bill on a

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claim that the bill would lead to employment quotas for minorities and women; having signed an amended bill in 1991, he found himself under attack in turn, as Patrick Buchanan accused him in the Republican presidential primary campaign of favoring quotas. EEO and affirmative action will be near the center of U.S. domestic politics for a long time.

This review considers what Herman Belz's *Equality Transformed*, Russell Nieli's *Racial Preference and Racial Justice*, and other works can tell us about the 50-year fight for EEO and why many have come to see it as a fight for special preferences rather than equality. Belz (p. 3) presents his book as an account of "the redefinition of equality that has resulted from over two decades of race-conscious affirmative action." He contends that although title VII was intended to prohibit employers from taking race into account, it has been transformed into a law "authorizing government officials and private employers to adopt preferential practices benefitting designated racial and ethnic groups" (pp. 1–2); the federal contract compliance program initially enforcing nondiscrimination in government contracts has undergone the same transformation. *Equality Transformed* is Belz's attempt to show how this transformation took place and what its consequences are likely to be.

Nieli's book is an edited collection of previously published works on affirmative action. It includes articles by well-known scholars, activists, and columnists (including Nathan Glazer, Harvey Mansfield, Jr., Ronald Dworkin, Thomas Sowell, Glenn Loury, Morris Abram, and Charles Krauthammer) and judicial opinions in important court cases. Although Nieli includes pieces both defending and attacking affirmative action, he clearly sees affirmative action policies as extending "various kinds of preferential consideration to members of racial and ethnic groups officially designated by government agencies as disadvantaged minorities" (p. ix). He also is concerned that if the United States maintains current policies of racial favoritism, the result could be "ethnic tribalism . . . social chaos, and ultimately, a formula for civil war" (Nieli 1991:103).

The debate over affirmative action begins with fundamentals: how "discrimination" and "affirmative action" should be defined. I will begin this review by describing disagreements over these terms and will then discuss other key issues in the debate: the extent of discrimination and reverse discrimination in the labor market; federal enforcement policies and whether they lead to preferential treatment of blacks; the impact of EEO legislation and affirmative action on blacks; the theories about U.S. politics implicit in arguments about affirmative action; and finally, the motives of those involved in the debate. I will normally describe the debate as if it had only two sides: one including those who, like Belz and Nieli, oppose affirmative action

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and believe that it means racial preferences; the other including those who favor affirmative action, whatever their beliefs about preferences. For some purposes this might be an oversimplification, but for the issues addressed below, it is a reasonable way to proceed.

What Is "Discrimination"? What Is "Affirmative Action"?

Affirmative action is a proposed solution to the problem of discrimination. But one of the most critical issues in the debate over affirmative action is how "discrimination" should be defined. Title VII itself is rather vague. It prohibits some specific practices—for example, "to fail . . . to hire . . . because of . . . race, color religion, sex, or national origin" (42 U.S.C. 2000e, sec. 703(a))—but then adds that it shall be an "unlawful employment practice . . . otherwise to discriminate" without saying what that means.

For many, Congress had no need to say more because the definition is so obvious. To discriminate, Belz writes (pp. 9, 15–16), is to intentionally use race or another ascribed characteristic as a basis for employment decisions. It means being "color-conscious" rather than "color-blind" (Glazer 1991:5). As described by a recent U.S. Department of Justice report (1987:1), "The traditional concept of discrimination . . . embodied in the post–Civil War constitutional amendments . . . as well as the non-discrimination legislation of the 1960's and early 1970's, holds that the necessary element of an act of discrimination is . . . discriminatory intent: the deliberate use or consideration (overtly or covertly) of a racial or other proscribed criterion in the decision-making of the alleged discriminator."

But others disagree that only deliberate consideration of race (or other ascribed characteristics) constitutes discrimination. Since the 1960s they have argued that many seemingly fair employment practices, such as requiring all applicants for particular jobs to have certain educational credentials or test scores, had been adopted to reduce minorities' or women's chances for advancement. Going further, some argue that practices which adversely affect minorities or women should be considered discriminatory, whatever the intent behind their adoption, unless the employer could demonstrate that they really helped distinguish good employees from poor ones (Blumrosen 1972). In 1971, the Supreme Court adopted this view in *Griggs v. Duke Power Co.*, expanding the definition of discrimination to encompass not only intentional disparate treatment but many practices having a disparate impact (unless justified by "business necessity") as well (Schlei & Grossman 1983:ch. 1).

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As a result of this and other Supreme Court decisions, guidelines issued by the Equal Employment Opportunity Commission (EEOC), executive orders, and congressional action, the *legal* definition of discrimination has changed dramatically since Title VII was adopted.

There has also been controversy over the meaning of "affirmative action." Unlike "discrimination," "affirmative action" has no "traditional" definition, and its "exact meaning," Nieli writes (p. ix) has been "highly fluid and often elusive." Since the 1960s, however, three views of affirmative action have competed for acceptance (Gamson & Modigliani 1987): a "remedial action" view, whose proponents argue that affirmative action is the use of race-conscious policies to redress the continuing effects of past racial discrimination; a "delicate balance" view, whose proponents contend that affirmative action involves helping minorities without adopting quotas which harm the majority; and a "no preferential treatment" view, whose proponents see affirmative action as inevitably granting unfair preferences to minorities, most often by requiring reverse discrimination. The remedial action view dominated discussions of affirmative action in the mass media in the late 1960s and 1970s, but since the mid-1980s, the "no preferential preference" view has predominated; affirmative action has come to be presented as linked to reverse discrimination.

These disputes over definitions are important because their outcomes have potentially important consequences. Those favoring the traditional definition of discrimination are upset by the *Griggs* decision because, they argue, its definition of discrimination distorts an important concept in order to win preferential treatment for blacks. Under a "disparate impact" standard, they claim, any negative labor market outcome can, with sufficient imagination, be interpreted as the result of "discrimination." Departures from the discriminatory intent definition lead to quotas, a concern with group representation in the workplace rather than justice for individuals, and a new (reverse) racism (see, e.g., Glazer 1991, Abram 1991, Scalia 1991, Gold 1985, U.S. Department of Justice 1987).

Those supporting the changed—and still changing—definition, in contrast, assert that relying on the traditional definition would make it impossible to end many employment practices which perpetuate the subjugation of blacks and other groups. The economists Ashenfelter and Oaxaca argue (1987:322), for example:

> It is not hard to see that the appearance of disparate treatment is easy for an employer to eliminate without making any change in behavior at all . . . . To most economists the insistence on finding "smoking gun" evidence of discriminatory actions, intent, or motivation seems quite irrelevant to deter-

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mining whether labor market discrimination exists. (Cf. Posner 1987:517–18)

The history and complexity of modern employment practices are such that practices harming particular groups can be institutionalized without there being any way to attribute discriminatory intent to anyone (as the Supreme Court concluded had happened at Duke Power; see, e.g., Blumrosen 1972, Bielby & Baron 1986, Eichner 1988).

How affirmative action comes to be defined is important as well. Americans are somewhat sympathetic to remedial action but hostile to preferential treatment. If proponents of the "no preferential treatment" view succeed in convincing most Americans that, as Senator Orrin Hatch has written (1980:25), "*affirmative action means quotas* or it means nothing" (emphasis in original), then they will have gone a long way toward eliminating anything labeled "affirmative action" as a viable policy option (see Gamson & Modigliani 1987).

At this point, it should be clear that there is no single, "correct" definition of either discrimination or affirmative action (cf. Burstein 1990). With regard to discrimination, the traditionalists are trapped in a paradox. They claim that there is a correct definition not subject to debate, but their claim is itself part of a debate. More to the point, proponents and opponents of affirmative action both try to define discrimination and affirmative action in ways which serve their purposes. Both sides seem to agree that, at least in the short term, widespread adoption of the traditionalist definition of discrimination and the "no preferential treatment" view of affirmative action would slow the advance—deserved or undeserved—of minorities and women, while adopting the newer legal definition of discrimination and the "remedial action" view of affirmative action would hasten it. By propounding the traditional view of discrimination and assuming that affirmative action means preferential treatment for minorities, Belz and Nieli are, at least in part, taking a political position and expressing the hope that their books will contribute to the demise of affirmative action.

How Much Discrimination?

Philosophically, the stance of those opposed to affirmative action is "color-blindness," the belief that employment decisions should ignore race and other characteristics irrelevant to job performance. To take race into account, they argue, "offends against . . . the primacy of individual rights" (Glazer 1991:22), is "violative of . . . democratic ideals and principles" (Abram 1991:33), and "is racist" because it is "based upon concepts of . . . racial entitlement rather than individual worth and individual need" (Scalia 1991:218). They claim to oppose

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existing programs because color consciousness in employment decisions inevitably leads to preferences for blacks who are often less qualified than their white competitors.

Presenting their argument in terms of values enables opponents of affirmative action to avoid empirical questions having a bearing on their argument. If there is little discrimination against blacks, and a great deal of reverse discrimination against whites (perpetrated in the course of giving special preferences to blacks), the opponents of affirmative action have a powerful case. If, however, there is a great deal of discrimination against blacks and little against whites, the case against affirmative action would be weaker. How much do blacks suffer from discrimination? And how much do whites suffer from preferences given to blacks?

It is difficult to find specific answers to these questions in Belz's or Nieli's books, or, indeed, in any works on affirmative action. Those opposed to affirmative action seldom say much about current discrimination against blacks. There is no way to be sure why this is the case, but let us suppose that they say little about it because they assume it is no longer serious. Are they correct?

Although it is very difficult to gauge the amount of discrimination suffered by any group (Cain 1986), most social scientists believe that employment discrimination against blacks has declined since the adoption of title VII.[1] Estimates vary as to how much discrimination there now is against blacks, but the lowest that would be widely agreed on would probably be Ehrenberg and Smith's (1991:534), based on Smith and Welch's (1989) work. Using the approach to gauging discrimination conventionally employed by economists and sociologists, they compare the earnings of black and white men estimated to be equally productive, meaning that they are equal in terms of education, experience, and a variety of other factors thought to affect wage rates. Recent analyses show, Smith and Ehrenberg claim, that black men earn about 85% to 90% of what equally productive white men earn. The 10–15% gap which remains is attributed to discrimination. Black women earn almost as much as white women do when productivity is taken into account.

Assessing the significance of a 10–15% racial gap in men's earnings is a matter of judgment, but no one suggests the gap is zero or that it narrowed significantly during the 1980s. If black men still suffer from employment discrimination, do

[1] The legal term "employment discrimination" is the equivalent of the economists' "labor market discrimination." Economists often distinguish between "employment discrimination," by which they mean discrimination in hiring, and "wage discrimination," calling the sum "labor market discrimination." I use the legal term, "employment discrimination," here to encompass what economists call "labor market discrimination."

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whites suffer similarly from reverse discrimination? Opponents of affirmative action (Belz; many essays in Nieli; Glazer 1978) claim that racial preferences favoring blacks are widespread; presumably the result is a great deal of reverse discrimination.

But there is little evidence of reverse discrimination comparable to the evidence on discrimination against blacks, other minorities, and women. A good part of the reason is methodological. Standard statistical methods used to gauge the impact of discrimination permit an estimate only of the total impact of discrimination on a group; they do not permit the analyst to distinguish how discrimination against a group might be balanced out by discrimination in its favor (Cain 1986). If the amount of reverse discrimination were greater than the amount of discrimination against blacks, then the data would show blacks benefiting from reverse discrimination, that is, earning more than equally productive white men. No study of the labor force as a whole has ever produced such a result, and the finding of a 10–15% wage gap between white and black men suggests that however much reverse discrimination there might be, it is outweighed by discrimination against blacks.

This does not mean that that there is no measurable reverse discrimination. Sowell (1976) found that black professors earned more than comparably qualified whites in the early 1970s, and Smith and Welch (1989) conclude that young, well-educated blacks fared better than their white counterparts for a brief period in the late 1960s and early 1970s. But there do not seem to be other such findings. In the largest study using conventional statistical methods to seek evidence of reverse discrimination, Jonathan Leonard cautiously concluded (1986: 362) that "governmental . . . antidiscrimination and affirmative action efforts have helped to reduce discrimination without yet inducing significant and substantial reverse discrimination. However, the available evidence is not yet strong enough to be compelling on either side of this issue."

A recent attempt to investigate employment discrimination directly (rather than by inferring its existence from data on labor market outcomes) did find evidence of reverse discrimination. In a 1990 Urban Institute study (Turner et al. 1991), black and white "testers" were sent to apply for entry-level jobs in Chicago and Washington, DC. The testers were carefully matched on all attributes that could affect the hiring decision, including age, physical size, education, experience, apparent energy level, and articulateness, so differences in employer responses are plausibly attributable to the testers' race. The black applicant received a job offer where a white counterpart did not in 5% of 576 "hiring audits." However, the white applicant received an offer where the black did not in 15% of the audits. Thus, there arguably is reverse discrimination with regard to

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the entry-level jobs in question, but it is considerably less frequent than discrimination against blacks.

Thus, opponents of existing affirmative action programs do have a point: There are studies that find reverse discrimination, and others (such as Leonard's) that make the weaker but still important argument that its existence cannot be ruled out. Nevertheless, it is also quite clear that discrimination against blacks is far more common than reverse discrimination.

Opponents of affirmative action sometimes argue that we lack evidence of reverse discrimination, not because it is infrequent, but because political and professional pressures deter researchers from investigating it (Belz p. 259; Lynch 1989:ch. 8). Such pressures apparently influence social scientists' willingness to take stands on some civil rights issues (Chesler et al. 1988), but that would hardly seem to be a problem here. With the federal government dominated by anti-affirmative action forces since 1981, many major businesses allegedly opposed to affirmative action, and the rise of conservative think tanks employing highly competent scholars (see U.S. Office of Management & Budget 1985; O'Connor & Epstein 1983), it is hard to believe that the resources necessary to determine the consequences of racial preferences are unavailable.

To the extent opponents of affirmative action base their case on the belief that it has led to widespread reverse discrimination, they have yet to prove their case. Alternatively, they may base their case on the argument that existing affirmative programs are unjust because they attempt to cure one wrong—discrimination against blacks—by another—forcing employers to prefer blacks to other workers. Is this what affirmative action programs do?

EEO Enforcement and Racial Preferences in the Workplace

Belz presents a scathing indictment of the federal EEO enforcement effort. In his account, the push for EEO legislation by civil rights groups and members of Congress in the early 1960s was for the most part a well-intentioned effort to ban race-conscious employment practices, and it was this intention that title VII enacted into law.

Some black leaders, members of Congress, and members of the executive branch had another agenda, however. From the very beginning, Belz claims (pp. 18, 20), they wanted to use EEO legislation and federal executive orders banning discrimination by government contractors to promote color consciousness. The EEOC and Department of Labor essentially took it upon themselves to define "affirmative action" as requiring employers and unions to prefer blacks in hiring and promotion,

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and almost immediately "many companies engaged in preferential practices" (p. 29). Following the lead of the Johnson administration, the Nixon administration demanded special preferences for blacks by government contractors (p. 30), federal judges turned title VII into a one-sided pro-plaintiff (that is, pro-black) measure (pp. 44–45), and employers were held accountable for the long American history of "societal discrimination" (pp. 46, 55). Belz argues that as a result of these pressures, imposed contrary to the intent of Congress (p. 55), employers have been forced to abandon objective tests (p. 62), are "practically compelled" (p. 135) to adopt preferential practices, and have to employ blacks in proportion to their representation in the population (p. 165).

Careful analysis of federal policy, Belz argues, shows that policies favoring blacks continued not only during the Carter administration but under President Reagan as well. Although Reagan and his assistant attorney-general for civil rights, Bradford Reynolds, are often portrayed as opposed to affirmative action, they generally continued previous policies, maintaining goals and timetables for minority hiring and promotion, and accepting preferential policies (pp. 184, 195). Businesses have seen "routine business practices" interpreted as racially discriminatory (p. 236); the courts have "finally acknowledged" (in *Johnson v. Transportation Agency*, according to Belz p. 224) that their true goal in affirmative action enforcement is the proportional representation of blacks in all employment contexts; and, in effect, supporters of affirmative action have managed to make their belief that all members of protected groups are entitled to preferential treatment into a reality (p. 241). These policies have not been democratically arrived at, and in fact threaten basic American political traditions. "[T]he struggle to define American equality" through the debate over affirmative action," Belz concludes (p. 265), "will determine whether the United States will remain a free society."

Not everyone opposed to affirmative action policies takes quite so strong a stand. Nathan Glazer (1991), for example, distinguishes between policies that he believes manifest the original notion of "affirmative action," such as making special efforts to recruit or train blacks, and policies that involve setting statistical goals by ethnic group, which he calls "affirmative discrimination." Although both are color-conscious, statistical goals are much more consequential and objectionable. Whereas Belz claims (p. 80): "In the 1960s, the EEOC tried to make racial group membership rather than individual merit *the* critical factor in employee selection practices" (emphasis added) and seems to think it succeeded (1991:165), Glazer believes (1991:7) it is still "disputed" whether this is becoming a society in which everyone's race, color, or national origin is

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crucial to "his opportunity . . . to gain a livelihood, and to advance in a profession." Nevertheless, those in Nieli's volume who oppose affirmative action clearly see it as producing overwhelmingly negative consequences, including crude political struggles between ethnic and racial groups (Abram 1991:39), violations of federal law (which, according to Nieli, forbids affirmative action) and the hiring and promotion of the less-qualified (pp. 84–85, 89), and increasing anger and resentment on the part of whites (Cohen 1991:298; van den Haag 1991:390).

How strong is the evidence that the federal government has long been single-mindedly and effectively forcing a policy of racial preferences on employers? Despite the intensity of the debate over affirmative action and its duration, surprisingly little evidence is available.

Two elements of the argument about affirmative action enforcement seem especially crucial. First is a claim about the critical role of the courts. Those opposed to affirmative action claim that the 14th Amendment forbids racial preferences, Congress was opposed to such preferences when it adopted Title VII, and the executive branch has far exceeded its authority, going far beyond the intent of the Civil Rights Act, in imposing preferences on employers and unions (see, e.g., Belz p. 8). Only approval by the courts would make it possible to maintain preferential policies under such circumstances, and the courts have indeed provided an indispensable stamp of approval of racial preferences in the workplace (pp. 214, 219; Glazer 1991:26).

The record of the courts on EEO and affirmative action is very much subject to dispute. Although Belz sees the Supreme Court as one-sidedly favoring EEO plaintiffs at least until the late 1980s (Belz pp. 44, 227–28), other scholars tell a different story. Many, perhaps most, legal scholars favoring affirmative action (see, e.g., Blumrosen 1984) agree that in the late 1960s and early 1970s, the U.S. Supreme Court and some appellate courts were supportive of relatively strong EEO enforcement; they also argue, however, that the U.S. Supreme Court began to reverse its course in significant ways in the mid-1970s, when it restricted the award of attorneys' fees to victorious plaintiffs in civil rights cases (*Alyeska Pipeline Service Co. v. Wilderness Society,* 1975) and made it more difficult to challenge the consequences of segregated seniority systems (*International Brotherhood of Teamsters v. United States,* 1977; see Ralston 1990, Blumrosen 1984).

In addition, there is some evidence that the Supreme Court has not gone far beyond what Congress intended in adopting EEO legislation. Although Belz claims (pp. 44, 55) that the Court was consistently going far beyond what Congress originally intended in civil rights enforcement, subsequent Con-

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gresses seem to have felt differently; between 1976 and 1988, they overruled restrictive Supreme Court civil rights rulings six times, and in 1991 adopted a Civil Rights Act overturning seven recent Supreme Court EEO decisions (Ralston 1990). It is at least a matter of serious dispute as to whether the Supreme Court has gone beyond the will of Congress; arguably the case could be made that it often does not go as far as Congress would prefer.

A secondary point must be made about courts' direct impact on employers. Belz, Glazer, and others argue that judicial decisions have forced employers to prefer blacks. Rosenberg (1991), Handler (1978:ch. 4), Posner (1987), and others, in contrast, assert that the courts' capacity to bring about direct social change is very limited, perhaps especially so with regard to employment practices, because enforcement of court orders requires monitoring capacity courts do not have.

Second is a claim about the impact of federal policies on employers and unions. Due to the intensity of federal pressure, as well as fear of appearing opposed to civil rights, vast numbers of employers and unions supposedly prefer blacks to whites in employment. Belz reports how government contractors are required to prepare written affirmative action plans that take the racial and ethnic composition of their workforces into account, and argues that lack of clarity in government requirements gives government agencies the discretion to pressure employers to adopt de facto quotas for minority employment (pp. 32, 36). EEOC staff members have proposed that employers should adopt quotas (p. 78), quotas have indeed been imposed against specific firms and unions (p. 214), and firms have been debarred from government contracts for failure to meet their affirmative action obligations.

How extensive are all these efforts? Despite Justice Scalia's (1991:214)[2] belief that employers run a "substantial risk of cutoff of government contracts and the substantial certainty of disruptive and expensive government investigations," in fact no more than 30 or 35 firms have ever been debarred, and even preliminary steps toward debarment are taken in no more than 4% of all compliance reviews (Leonard 1990:54; Belz p. 99).

Congress has held numerous hearings on EEO since the 1970s, and the Reagan administration often stated its strong opposition to preferential treatment. In an environment long supportive of attacks on preferential treatment, there have been many opportunities for employers and unions to come forward and show how they have been forced to adopt preferential policies. But they have not done so. After many years of studying affirmative action, what Nathan Glazer (1991:19) can

[2] In an article written before he was appointed to the Supreme Court.

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say about company practices that allegedly turn goals into quotas is that he has the "impression" from discussions with personnel officers that such practices are common (ibid.; cf. Belz p. 29).

On the existing evidence, governmental efforts to compel government contractor preferential hiring are not nearly as great as affirmative action opponents presume. Even more difficult to assess is the actual extent of preferential policies in other settings.

The Impact of EEO Legislation and Affirmative Action on Blacks

Just as it is difficult to determine the pervasiveness of preferential policies, it is also difficult to gauge their impact. Those opposed to affirmative action argue that it deemphasizes merit in the employment process (Belz p. 80; Nieli 1991:89), reinforces beliefs in blacks' inferiority (Belz p. 263; Mansfield 1991), and intensifies conflict between blacks and whites (Belz p. 97; Abram 1991:39; Cohen 1991:298; van den Haag 1991:390). Unfortunately, those who make these claims provide very little supportive evidence.

The impact of affirmative action on the role of merit in the employment process is extremely difficult to assess. Opponents of affirmative action seem to assume that employers would hire and promote workers solely on the basis of merit were it not for affirmative action policies and that merit itself can be clearly defined and accurately measured (see Kennedy 1991:51). When supporters of affirmative action challenge particular criteria for assessing merit or evaluations of particular workers, they are seen as attempting to weaken the merit principle (e.g., Belz ch. 5; Scalia 1991). And when employers hire or promote a black worker in preference to a white who claims to be better qualified, they, too, are seen as undercutting the merit principle. But four objections may be raised to opponents' views.

First, what constitutes "merit" is often subject to dispute (Fallon 1980; White 1982); for example, people disagree on what criteria should be applied in particular employment decisions and how they should be weighted. How should technical expertise and interpersonal sensitivity be weighted when trying to evaluate a physician's skills? Which should be more important when deciding whether to promote a professor, teaching or research? What some see as a deemphasis of merit, others might see as a reasonable change in how it is defined in a particular employment context.

Second, even if everyone agrees on what, in principle, constitutes merit in a particular job, it will often be difficult to assess the relative merit of different workers. Sociologists and

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economists know that employers find it very hard to estimate worker productivity, often relying on relatively simple rules of thumb to develop estimates known to be somewhat inaccurate (see, e.g., Jacobs 1981, Lundberg 1991, Stinchcombe 1990). The difficulties involved in evaluating workers have at least two implications. First, although many white workers and opponents of affirmative action may believe that particular employment decisions involve preferring less-qualified blacks to more-qualified whites, employers may view the blacks as equally or better qualified; the employment decision may involve a legitimate disagreement over productivity rather than reverse discrimination. Second, because estimates of likely productivity are often inaccurate, sometimes employers will favor less productive blacks to more productive whites, not because they are engaging in reverse discrimination, but because their estimates of productivity were simply incorrect. If such employment decisions are interpreted as the result of affirmative action rather than as common, unavoidable mistakes, the pervasiveness of reverse discrimination will be greatly overestimated.

A third objection to the view of opponents of affirmative action—that employers would base their decisions solely on merit were it not for affirmative action—is that the opponents ignore nonmerit bases of employment decisions other than racial preferences, such as nepotism or personal favoritism. Anyone who has studied employment practices in detail, however, is bound to realize how much uncertainty is involved in evaluating job applicants and the substantial role played by other factors (Baron 1984), such as seniority (Schlei & Grossman 1983:ch. 3), which would be difficult to argue as having a close relation to merit.

Finally, there is the question of how much blacks have benefited from preferential treatment. Widespread preferential treatment, partially spurred by enforcement of the EEO laws, should result in substantial gains for blacks in the labor market. But if blacks have made only modest gains, it becomes more difficult to see them benefiting significantly from preferential treatment unless one assumes that blacks are so inferior to whites that they cannot compete on an equal basis (see Belz, p. 246; Nieli 1991:89).

As it turns out, among those who have studied the impact of EEO legislation and affirmative action most systematically, the major debate is between those who believe EEO enforcement has had a modest effect and those who believe it has had virtually none (Leonard 1991; Smith & Welch 1989; Heckman & Verkerke 1990). No serious scholar suggests that EEO enforcement has dramatically improved blacks' labor market outcomes. In sum, opponents of affirmative action provide very

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little systematic evidence that merit systems are often compromised by affirmative action.

Has affirmative action reinforced beliefs in blacks' inferiority? Some argue that affirmative action convinces many whites and some blacks that blacks cannot succeed in a fair competition with whites; they need preferential treatment because they could not hope to do well without it (Belz p. 263; Mansfield 1991:129; Howard & Hammond 1991; Scalia 1991; Sowell 1991). There is no doubt that some whites believe blacks to be inferior. For example, in the late 1980s, about 10% thought that blacks have worse jobs, income, and housing than whites mainly because "most blacks have less in-born ability to learn," and an additional 10% thought that inborn ability was at least part of the explanation for black-white differences (Kluegel 1990:517). What is difficult to determine is the extent to which beliefs in blacks' inferiority are the result of affirmative action.

Historically, substantial proportions of American whites have always considered blacks inferior. During the last few decades, the proportion feeling that way has tended to decline slowly but fairly steadily (Kluegel 1990). There is certainly no evidence that the proportion has risen since the advent of affirmative action, so what opponents of affirmative action are arguing is essentially that the decline in belief in blacks' inferiority would have proceeded more rapidly were it not for affirmative action.

Unfortunately, as with so many claims made in the affirmative action debate, there is simply no evidence. Affirmative action might lead whites to conclude that blacks cannot compete without special assistance; but by placing blacks in positions from which they had been excluded, affirmative action might enable whites to see for the first time that blacks can perform well. We simply do not know the impact of affirmative action on whites' beliefs about blacks.

A similar argument can be made regarding claims that affirmative action intensifies conflict between blacks and whites. Affirmative action has unquestionably produced a negative reaction among whites, as manifested, for example, by reverse discrimination cases (Burstein 1991) and Belz's and Nieli's books. But the level of antagonism between whites and blacks has always been high in the United States, and many whites have always resisted means proposed to improve blacks' circumstances (Lieberson 1980).

Although opponents of affirmative action attribute much of the current conflict between blacks and whites to affirmative action, some is no doubt due to traditional prejudice, and part of the rest would presumably result from even a color-blind antidiscrimination policy. When whites have been benefiting for a

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very long time from discrimination against blacks—by not having to compete with them for jobs, for example—then movement toward a merit system will hurt less-qualified whites. There is, at this point, simply no way to tell how much white resentment is the result of preferential treatment benefiting blacks.

Affirmative Action and Democratic Politics

One of the most serious charges against affirmative action policies is that they represent a profound failure of democratic politics. According to many opponents of affirmative action, such policies have been implemented in the face of public opposition (Belz p. 68; Glazer 1991:23; Sowell 1991:419) and a clear congressional intent to prohibit most of the racially preferential policies now referred to as affirmative action (Belz ch. 1).

How could this have occurred? Opponents of affirmative action who address this issue generally agree that the policies were adopted at the behest of a powerful civil rights lobby (Belz p. 109; Glazer 1991:23; Sowell 1991). Belz argues that social protest and urban violence played a critical role in transforming color-blind prohibitions of discrimination into color-conscious preferential policies; "the origins of affirmative action," he writes (p. 234; see also pp. 17, 21, 38), were "an expedient response—if not a capitulation—to political (if not simply criminal) violence." Nieli (1991:ix) makes a similar claim. Once adopted, affirmative action policies have been implemented and maintained by powerful and power-hungry bureaucracies and by judges not subject to popular control (Belz pp. 103, 207; Glazer 1991; Sowell 1991). They are abetted by the mass media, whose reporting consistently follows the line of the civil rights lobby (Glazer 1991:24). Both Republicans and Democrats have favored preferential policies favoring blacks (Belz pp. 74, 86).

There is, of course, opposition to affirmative action, but according to Belz, Nieli, and others, the opponents are weak compared to supporters. Belz argues (p. 86): "Organized labor, contractor associations, the National Association of Manufacturers, and the U.S. Chamber of Commerce at various times . . . publicly opposed the emerging policy of racial preference. These groups were unable, however, to organize an effective political opposition." Their weakness was at least partly due to "liberal Democrats and the civil rights lobby poised to go on the attack" (p. 181; also see p. 202). Public opinion, too, is unorganized (Glazer 1991:24).

There are several problems with this argument. First, continuing conflict over the issue has rendered parts of it incor-

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rect. Gamson and Modigliani found (1987), for example, that although the media did portray race-conscious programs favorably through the late 1970s, by the mid-1980s the dominant way of presenting the issue was through the use of a "no preferential treatment" package, emphasizing the importance of ignoring race and ethnicity in policy decisions and opposing the use of "goals" as covert quotas.

Second, parts of the argument sound implausible when considered in light of other analyses of U.S. politics. The claim that the civil rights lobby, which represents poor and disadvantaged minorities and took 22 years to win passage of EEO legislation, is strong, while organized labor, contractors, and the major business organizations are weak, does not conform to most people's sense of how American politics works (Schlozman & Tierney 1986). Studies of the impact of civil rights protest, riots, and other factors on policymaking tend to show that riots either do not help the group behind the riots, or have small, short-term effects; the impact even of peaceful protest tends to be indirect, and public opinion—which Belz and other emphasize is against preferential policies—is of far greater significance (Burstein 1985).

Third, the portrayal by Belz, Glazer, and others of the politics of affirmative action runs counter to the two dominant social-science theories about American politics and society: that either government follows public opinion, at least in a general way (e.g., Dahl 1956), or it follows the desires of capitalists or other elites (Alford & Friedland 1985). Given the claim by Belz and others that both the public and elites oppose preferential policies, it is not at all clear how preferential policies could be adopted.

Recent events create even more anomalies for the failure of democratic politics hypothesis. Although Belz and others describe the Supreme Court and administrative agencies as adopting preferential policies far more extreme than intended by Congress, by 1991, as noted above, Congress had several times overturned Supreme Court decisions which it saw as too restrictive. Business, described as once opposed to affirmative action but too weak to influence the government, by the mid-1980s had seemingly decided to accept it (Belz pp. 196–97). And Glazer's claim (1991:24) that "the civil rights lobby can ensure that no president, whatever his views on reverse discrimination, would appoint to the EEOC someone who opposed strong affirmative action"[3] was contradicted by the appointment in 1982 of Clarence Thomas as EEOC chair.

In their less rhetorical moments, authors opposed to affirmative action, as well as some others, may provide a scenario that

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explains the anomalies and is consistent with accepted understandings of U.S. politics. EEOC was a controversial policy, adopted when social protest drew congressional attention to the fact that public opinion favored the adoption of antidiscrimination legislation (Burstein 1985). There was some initial tendency for the public, enforcement agencies, the courts, and the mass media to favor preferential policies, but resistance to doing so developed almost immediately, manifested in the collapse of bipartisanship on civil rights in the late 1960s (Belz p. 34), backtracking by the courts beginning in the early or mid-1970s (Belz p. 58; Ralston 1990; Blumrosen 1984), the Reagan victory in 1980 (Belz p. 179), and changes in the media presentation of the issue in the early and mid-1980s (Gamson & Modigliani 1987). Blacks' economic gains relative to whites ceased around the time the courts began to shift direction in the mid-1970s (Heckman & Verkerke 1990), although it is impossible to tell whether this is the result of a reduction in preferential treatment favoring blacks, an increase in outright discrimination, or other factors. Some form of affirmative action does continue, however, because both the public and business favor some help for blacks (Belz pp. 181, 196–97).

In this scenario, affirmative action does not turn into a preferential treatment juggernaut imposed on an unwilling populace by a ruthless civil rights lobby and bureaucrats and judges operating on their own. Instead, affirmative action, when first used in an EEO context, may be seen as a term of uncertain meaning (Nieli, p. ix). Various individuals and groups struggled over what, if anything, should be done to help blacks overcome discrimination. Some groups took extreme stands, and there was considerable trial and error as new approaches to dealing with discrimination were tried. In the end, public policy is not all that different in broad outlines from what public opinion polls would suggest: that a majority of the American people oppose discrimination and are willing to do a bit to help blacks but not to the extent of widespread preferential treatment. Work on affirmative action, even work by opponents, suggests that what has happened shows American democratic institutions at work—perhaps not especially efficiently or nobly—in their response to employment discrimination.

The Motives of Opponents of Affirmative Action

"There remains a disturbing lacuna in the scholarly debate [on affirmative action]," writes Randall Kennedy (1991:55). "Whether racism is partly responsible for the growing opposition to affirmative action is a question that is virtually absent from many of the leading articles on the subject." Although civil rights activists often get very emotional about the possible

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racist basis for opposition to affirmative action, "conventional scholarship leaves largely unexamined the possibility that campaigns against affirmative action now being waged by political, judicial, and intellectual elites reflect racially selective indifference, antipathy born of prejudice, or strategies that seek to capitalize on widespread racial resentments" (ibid., p. 56). It is necessary, Kennedy argues, to examine motives.

The diversity of background of affirmative action opponents undermines simple conclusions. Many opponents of affirmative action have devoted much of their lives to the cause of racial justice and sincerely believe that this goal is endangered by policies they interpret as mandating preferential treatment for blacks (e.g., Abram 1991). Others are blacks who believe that many problems faced by the black community are simply not amenable to the kinds of solutions provided by a civil rights approach or think that affirmative action may do more harm than good (Loury 1991; Sowell 1991). It is wrong to accuse them of indifference or prejudice.

Kennedy is more suspicious of the motives of those in high office. He finds unconvincing former President Reagan's proclaimed devotion to the cause of civil rights, noting that over the course of his life, Reagan's "active opposition to racial distinctions *benefitting* blacks is not matched by analogous opposition to racial distinctions *harming* Negroes" (Kennedy 1991:57; emphasis in original). He finds (p. 58) in the Reagan administration's civil rights policies a consistent, underlying "impulse to protect the prerogatives of whites at the least hint of encroachment by claims of racial justice."

One indicator of the Reagan administration's "impulse" on affirmative action is its emphasis on race. Title VII has since 1972 explcitly mandated employers to "reasonably accommodate" to employees' religious practices (sec. 701 [j]), a requirement that has aroused concern about religious minorities' being granted special preferences (see Justice White's opinion in *Trans World Airlines v. Hardison* 1977). Feminist legal scholars have argued very strongly that what they see as fairness to women will require far greater changes in traditional employment practices than fairness to racial minorities; and they define sex discrimination in ways highly objectionable to those holding to the traditional definition (see, e.g., Eichner 1988). Yet the Reagan administration did not attack the demands of religious minorities or women with anything like the intensity directed at those favoring what they saw as preferential policies favoring blacks (see also U.S. Office of Management & Budget 1985).

Similarly, Belz and Nieli focus virtually exclusively on the alleged preferential treatment of blacks, even though women, Hispanics, and other groups also benefit from the same policies blacks do (to the extent there is any benefit to be had) and rep-

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resent, because of their numbers, a far greater threat to traditional business practices than blacks do. Belz describes the famous 1973 AT&T consent decree as a test of government policy on minorities, for example, but by his own description (p. 82), women gained far more from it than minorities did.

Others have also asked why some opponents of affirmative action object so strongly only to decisions made on racial grounds. Charles Krauthammer asks (1991:147) why opponents insist that government make no racial distinctions which might benefit blacks when they state no objection to the large number of other groups (e.g., women or Hispanics) benefited (or harmed) by government policy. Ronald Dworkin (1991: 187–88) points out that when Bakke was rejected by the medical school at the University of California at Davis (and elsewhere), he would have been accepted if he were more intelligent, or made a better impression in his interview, or had he been younger, or, as the Supreme Court concluded, had he been black. Why the intense focus on race rather than other attributes?

In the face of evidence that blacks' gains from affirmative action have been small, that groups other than blacks also demand changes in employment practices, that employers are influenced by factors other than merit and requirements for racial preferences, and that EEO enforcement may conform to what the public sees as acceptable, Randall Kennedy's argument becomes persuasive: at least some of those opposed to affirmative action are motivated by the desire to "protect the claims of whites" from any encroachment by blacks.

Conclusion

I have observed instances of reverse discrimination, and I do not like it. I have seen merit standards modified to accommodate members of particular groups, and I do not like that either. At the same time, it is important to maintain some perspective. The adoption of EEO legislation was a critical step in the United States's attempt to end employment discrimination. It was adopted when social-scientific theories about employment discrimination were new, in a time of crisis, after a heated debate, by members of Congress who could hardly be sure what would happen next. Enforcement has taken directions not anticipated by the sponsors of title VII or by anyone else. Some of these directions are upsetting because they involve challenges to traditional employment practices, burdensome paperwork, race and gender consciousness, and demands for jobs.

This does not mean that affirmative action is undemocratic or has led to significant reverse discrimination or lowering of

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standards. On the contrary, enforcement of the EEO laws seems to reflect fairly well Americans' collective ambivalence about dealing with discrimination (as expressed by critics of affirmative action, among others), and there is no substantial evidence that affirmative action has had the disastrous consequences decried by its opponents.

It is true that affirmative action has not ended employment discrimination and has caused resentment. The most constructive kinds of criticism of current affirmative action policies do two things. They try to develop more effective ways of ending discrimination and to show how to strengthen the black and other minority communities from within, so that their members can do well competing in school and on the job (Loury 1991; cf. Howard & Hammond 1991).

Title VII forces employers, unions, and workers to confront in the political and legal arenas the capacities, needs, and demands brought to the workplace by America's diverse groups. It is not surprising that the confrontations are sometimes bitter or confusing, or that they seem to go on forever. No other country has solved the problems we are dealing with either. I do not think that proposals to do away with affirmative action will end the confrontations, bring about racial justice, or enhance the prospects for American democracy.

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