"Eastland calmly demolishes the fallacies, deceptions and euphemisms that underlie the protean rationales for affirmative action." —*Wall Street Journal*

ENDING AFFIRMATIVE ACTION

THE CASE FOR COLORBLIND JUSTICE

WITH A NEW AFTERWORD BY THE AUTHOR

TERRY EASTLAND

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For Jill and Katie

We all want progress, but if you're on the wrong road, progress means doing an about-turn and walking back to the right road; in that case, the man who turns back soonest is the most progressive.

—*C. S. Lewis*

Contents

1

By Any Other Name

When he joined the police department in Memphis, Tennessee, in 1975, Danny O'Connor wanted someday to make sergeant. In 1988, he took a shot at it. Like the other 209 officers competing for 75 promotions, O'Connor completed the written exam and sat for his interview. When his scores on both parts were added to points awarded for seniority and on-the-job performance over the past year, he placed fifty-sixth on the Composite Scores List. The department had indicated that the 75 top-ranked officers on this list would be the ones promoted. O'Connor knew his ranking and thought he had realized his dream. But then affirmative action struck.

When the candidates took the written exam, they were required on the answer sheets to indicate their race and sex. On the basis of this information, the department created a

second set of rankings—the Promotional Eligibility List. This new list, created to satisfy the department's affirmative action plan, modified the Composite Scores List by bumping blacks up into every third position. Necessarily, whoever had been there originally was bumped down. Some 26 blacks were on the eligibility list; 7 had been on the composite list. So 19 blacks (originally ranked between 76 and 132) had been bumped up the list—in some cases way up—and were promoted. Whites were bumped down, and those who had been ranked in the lower regions of the composite list were bumped below the seventy-fifth spot—and thus out of a promotion. Danny O'Connor, who is white, was one of these.

Undaunted, O'Connor tried again the next year. The department proceeded much as it had in 1988, using the same four-part process (though it changed the basis for awarding seniority points). Of 177 candidates, 94 would be promoted. They received their composite scores and on the basis of those scores were ranked. Affirmative action stepped in again, however, as the department used race to rerank the candidates. Where 15 blacks had made the top 94 on the composite list, 33 blacks were among the top 94 on the new list. Eighteen blacks had been bumped up into the top 94, and 18 whites previously in the top 94 had been bumped down. One of these was O'Connor, seventy-fifth on the original list.

Over the two years, while Danny O'Connor remained a patrol officer, 43 candidates with lower composite scores were bumped ahead of him and promoted to sergeant in the name of affirmative action.

Affirmative action was begun in the late 1960s to benefit blacks and over time has come to embrace certain other minority groups, as well as women (in the areas of employment and public contracting). There are, of course, forms of affirmative action that do not bump people out of an opportunity on

account of race or sex. In employment, these forms of affirmative action can include outreach, recruitment, and training programs that are open to all, regardless of race or sex. But the affirmative action Danny O'Connor experienced is the kind that for years has been unsettling America. While it takes different guises and has different justifications, this type of affirmative action makes a virtue of race, ethnicity, and sex in order to determine who gets an opportunity and who does not. To call it by its proper name, it is discrimination.

Cheryl Hopwood had an experience like Danny O'Connor's. In 1992 she applied for admission to the University of Texas School of Law. She had earned a degree in accounting from California State University in 1988, achieving a 3.8 grade point average and scoring 39 (the highest score being 48) on the Law School Admissions Test (LSAT). She was, in addition, a certified public accountant. In the four years since finishing at Cal State, Hopwood had married and moved close to San Antonio, where her husband, an Air Force captain, was stationed. A Texas resident, she had just given birth to her first child when she applied for admission to the prestigious University of Texas law school.

Hopwood thought her credentials were excellent, but the law school turned her down. "The only thing I could think of," she says of her initial response to the news, "was that the class the school admitted must have been very, very good." Wanting to find out just how good, she discovered instead that because she is white she had not been able to compete with all other applicants for admission. Under the school's affirmative action plan, 15 percent of the approximately 500 seats in the class had been set aside for blacks and Mexican-Americans, who were admitted under academic standards different from—in fact, lower than—those for all other students. Hopwood's admissions score—a composite number based on

her undergraduate grade point average and her LSAT score—was 199. Eleven resident Mexican-American applicants had scores this high or higher, and only one resident black had a score of 199. The school admitted all twelve of these applicants but not Hopwood, and then, in pursuit of its 15 percent affirmative action goal, admitted 84 additional resident Mexican-American and black applicants. Their scores were lower—in some cases substantially lower—than Hopwood's. Indeed, the school admitted every resident black with a score of 185 or higher. If Hopwood were black or Mexican-American, she would have been admitted.

Hopwood's experience differs from O'Connor's only in terms of the opportunity she sought, an educational one. Like O'Connor, she was bumped down and out by affirmative action that bumped others below her up and in. "I can't change my race," she says.

Neither can Randy Pech. The owner of Adarand Constructors, Inc., in Colorado Springs, Colorado, Pech, who is white, submitted the low bid for the guardrail portion on a federal highway construction project. But the business went to Gonzales Construction Company, which submitted a higher bid but is Hispanic-owned. That happens to be a virtue in the eyes of the U.S. Department of Transportation, which enforces a law that "sets aside" a portion of federal construction funds for businesses owned by minorities and women. Pech says he competes with four other companies in Colorado that build guardrails. Two are owned by Hispanics. Two are owned by women. Set-aside laws, he says, work solely against him. "If I weren't here, they'd have no impact."

Jerry Henry learned about set-asides at a university. Henry owns a painting company in Columbus, Ohio, and for years had bid on jobs at Ohio State University, the source of about 20 percent of his business, by his estimate. One day in the

spring of 1983, he recalls, he was at the university's Decorating Department, where "I was told that there was a bid coming up but that it was only for minority bidders." Henry, who is white, discovered that under a relatively new state law—the Ohio Minority Business Enterprise Act of 1980—some 15 percent of the work the state contracts out to the private sector was reserved for minority-owned firms. "We were still invited to bid on some projects," he says, but the situation worsened. "By late 1985, I was totally shut off from the Decorating Department." And by 1989, the Residence and Dining Halls Department also dried up as a source of business. The university decided that to meet the 15 percent goal for all of its contracting, it would have to set aside 100 percent of the painting jobs for minority bidders.

Unlike Randy Pech, Henry did not simply lose business because a minority contractor with a higher bid than his got the job instead. Rather, he was barred altogether from bidding on painting projects at Ohio State. Because of his race, he was not even allowed to compete.

Sharon Taxman knows what it is like to be an explicit target of affirmative action. In the late 1980s, the Board of Education of Piscataway Township in New Jersey faced a decline in the number of students choosing business education courses at Piscataway High School. In the spring of 1989, the board decided to lay off one of the school's ten business education teachers. The decision came down to a choice between laying off Taxman, who is white, and Debra Williams, who is black. Invoking its affirmative action plan, which prefers blacks and other minorities over whites, the board chose to retain Williams. The board used its affirmative action plan as skillfully as a surgeon does a scalpel, removing Taxman, the white person.

Danny O'Connor, Cheryl Hopwood, Randy Pech, Jerry

Henry, and Sharon Taxman decided to challenge in court the discrimination that goes by the name of affirmative action.[1] They are gallant foot soldiers in the fight against a policy that by allocating opportunity on the basis of race and sex is dividing and damaging the nation. The time has come for us to end it.

A Bargain with the Devil

More than half a century ago, during World War II, our government unjustly assumed disloyalty on the part of all Japanese-Americans on the West Coast. They were evacuated and forced to live in camps resembling prisons. The Supreme Court upheld as a wartime emergency the government's racially discriminatory action in two cases decided in 1943 and 1944.

Nonetheless, the opinions by the justices made clear that they understood the moral principle at stake. Indeed, one could say that the Court made its decisions even though its members knew better. Specifically, they knew, as the Court's opinion in the first of the two cases declared, that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[2]

The civil rights movement, then battling against segregation in the South and border states, agreed. The movement's lawyers knew that racial distinctions invariably lead to racial discrimination and its constant behavioral symptom: different treatment on account of race. These lawyers began arguing for law that would deny government the ability to distinguish and discriminate on the basis of race—colorblind law, as it was called. In the 1950s, the political leaders of the civil

rights movement took their moral case to the nation, arguing from colorblind principle that each person should be treated as an individual, without regard to race. The principle was vindicated when Congress passed the landmark Civil Rights Act of 1964, which comprehensively outlawed racial discrimination. Congress understood "discrimination" to mean, in the words of Senator Hubert Humphrey, "a distinction in treatment given to different individuals because of their different race."[3] But colorblind law and colorblind principle were soon made to yield to affirmative action.

The original purpose of affirmative action was to remedy the ill effects of past discrimination against blacks. "To get beyond racism," as Justice Harry Blackmun famously put it in his opinion in the 1978 case *Regents of the University of California* v. *Bakke*, "we must first take account of race."[4] "Taking account of race" meant distinguishing on the basis of race and treating blacks differently. In the old days, this would have looked like racial discrimination. But the first advocates of affirmative action assured us that affirmative action was well intentioned. Race could be regulated to good effect, we were told, and affirmative action would end soon enough, with the nation the better for it. As one of the early architects of affirmative action put it, "We are in control of our own history."[5]

By the early 1970s, affirmative action was extended to cover additional minority groups and in some contexts women, and over the years its backers have offered additional justifications, such as overcoming "underrepresentation" and achieving "diversity." But the nation has paid a steep price for departing from colorblind principle, for affirmative action has turned out to be a bargain with the devil. Not only has the policy worked discrimination against those it does not favor—a Danny O'Connor or a Cheryl Hopwood, for example—but it also has guaranteed the salience of race and ethnicity in

the life of the nation, thus making it harder to overcome the very tendency the civil rights movement once condemned: that of regarding and judging people in terms of their racial and ethnic groups.

To state the obvious: affirmative action makes race and ethnicity salient by naming the minority groups it ostensibly benefits. The affirmative action that the police officer Danny O'Connor encountered targeted blacks. The Texas law school applicant Cheryl Hopwood experienced a plan that drew a circle around blacks and Mexican-Americans. The affirmative action plan employed against the Piscataway high school teacher Sharon Taxman encompassed blacks, Hispanics, Asian-Americans, and American Indians. The same groups were included in the Ohio Minority Business Enterprise Act, which cut Jerry Henry out of competition for painting business. Randy Pech, the owner of Adarand Constructors, lost the job on which he was the low bidder to a business owned by Hispanics, one of the minority groups preferred by the U.S. Transportation Department's affirmative action scheme (others are blacks, American Indians, and Asian-Pacific Americans). The Small Business Administration (SBA), which keeps the federal government's list of racial and ethnic groups targeted for set-asides at Transportation and other agencies, spelled out almost two decades ago the subgroups within the Asian-Pacific American classification: persons with roots in Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territory of the Pacific, the Northern Marianas, Laos, Cambodia, and Taiwan. In the 1980s, the SBA accepted petitions from Sri Lankans, Tongans, Asian-Indians, and Indonesians to be included on its affirmative action roster.[6]

By formally drawing racial and ethnic lines, affirmative action invites judgments about the abilities and achieve-

ments of those who are members of the targeted groups. One persistent judgment is that those who received a benefit through affirmative action could not have secured it on their own. In many cases, this happens to be true. Indeed, the whole point of many affirmative action programs is to help those who otherwise could not have landed the opportunity in open competition. The program Cheryl Hopwood encountered at the Texas law school lowered the school's academic standards in order to admit blacks and Mexican-Americans. The school also segregated the applications of blacks and Mexican-Americans, assigning them to a separate admissions committee while a different committee reviewed the merits of the "white and other" applicants. Thus treated differently, the members of the two minority groups competed only among themselves. Had they competed among all applicants under the same standards, many fewer blacks and Mexican-Americans would have gained admission to the Texas law school.

This is not, however, the whole story. The black and Mexican-American applicants admitted under affirmative action were not *un*qualified to study law; their academic qualifications were good enough to win admission under non–affirmative action standards at fully two-thirds of the nation's law schools.[7] Affirmative action thus stigmatizes beneficiaries who could succeed—and be seen to succeed—without it. At the same time, it stigmatizes those eligible for it who are not its beneficiaries. At the Texas law school, one Hispanic student who had a composite score good enough to warrant admission under the standards applicable to "whites and others" said that he felt he needed a shirt indicating he got in on his own, just to let people know the genuine nature of his accomplishment.[8] It is sadly ironic that affirmative action can put a non–affirmative action minority student in this

situation, but the student's response is hardly irrational. He knows that the mere existence of the law school's program invites people to think, in his case: "You're Hispanic, so you got in through affirmative action."

An abiding truth about much affirmative action is that those who are its ostensible beneficiaries are burdened with the task of overcoming it—if, that is, they wish to be treated as individuals, without regard to race. It is possible, of course, for someone extended an opportunity through affirmative action to overcome it by doing extraordinarily well, meeting the highest standards. But some minorities have concluded that the best way to escape the public implications of affirmative action is to say "no" when they know it is being offered. In 1983, Freddie Hernandez, a Hispanic who serves in the Miami fire department, rejected an affirmative action promotion to lieutenant. Instead, he waited three years until he had the necessary seniority and had scored high enough to qualify for the promotion under procedures that applied to nonminorities. This decision cost Hernandez $4,500 a year in extra pay and forced him to study 900 additional hours to attain the required test results. But, as he proudly told the *Wall Street Journal,* "I knew I could make it on my own."[9]

Hernandez rejected the affirmative action bargain. He wanted to be judged as an individual, on his own merits, without regard to his ethnic background—just the way the old civil rights pioneers said he had a right to be judged.

The Language of Affirmative Action

Affirmative action has taken a toll on public discourse. Through the years its supporters have said, for example, that they do not support quotas. But painter Jerry Henry experi-