NAKED RACIAL PREFERENCE

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Prologue

What Is Affirmative Action?

In the middle decades of the twentieth century American society turned away from its history of racial and ethnic discrimination. That turn was not sharp, and is still far from complete. It began in earnest with the civil rights movement in the years following World War II; the first great triumph came with the Supreme Court decision in *Brown v. Board of Education* (1954) ordering an end to public school segregation. There followed a series of cases in which the deliberately preferential treatment of whites in public institutions was held unconstitutional. With the passage of the Civil Rights Act of 1964 a moral watershed was reached. Discrimination on the basis of race, nationality, or other like categories was forbidden for both public and private institutions, in most settings. Preference (in employment, in public accommodations, in college admissions, and so on) given *to anyone* simply "because of such individual's race, color, religion, sex, or national origin" became then and remains still, in our country, a violation of federal law.

Compliance did not come quickly. Defiant discriminatory treatment forced blacks and others to seek redress in federal courts. Recalcitrant parties were repeatedly ordered to cease to engage in discriminatory conduct. Federal agencies through their regulations, and the president by Executive Order, condemned every form of racial discrimination. Still it persisted.

Angered and exasperated, the courts were obliged to intervene more deeply. Striking down deliberate discrimination was not enough. They came eventually to order the deliberate eradication of practices that, although apparently innocuous, sustained entrenched patterns of racial preference. Admissions practices in colleges and universities that were superficially neutral but had historically discouraged the enrollment of racial minorities; recruitment practices in industry that had the effect of racial discrimination in hiring even though on the surface they made no mention of race; methods of voter registration that were superficially fair but had been designed to discourage the registration of minorities; membership practices in trade unions and promotion practices in police and fire departments that effectively excluded blacks and others — all these were to *stop*. The habits and devices, subtle and unsubtle, maintained by thoughtless oversight or by insidious design that had arisen to sustain preference for one race over another were at last to be rooted out. These steps, required to bring preference to an end, were given the generic name "affirmative action."

Affirmative action so conceived was a right and honorable response to deeply embedded problems. Putting an end to discrimination would involve more than ceasing to do deliberately evil things; *action* must be taken, *affirmative* action, to change the institutional environment in which racial discrimination had flourished. And that is precisely the spirit in which that phrase was used when it was introduced in the Civil Rights Act. When a court has found some practice to be unlawful discrimination, that court (the law said) may enjoin it, and may also "order such affirmative action as may be appropriate." The original object of affirmative action was the elimination of all preference by race.

But this original aim was soon diametrically transformed. The goods of society were plainly not being enjoyed proportionately by racial and ethnic groups; the lack of racial balance, it was argued, must everywhere be due to some residual, covert discrimination. If affirmative action in the original sense did not solve the problem, stronger medicine was needed. To overcome the deep-seated evil (it was argued) only the redistribution of the goods themselves — jobs, promotions,

admissions, and the like — would do the trick. Treating applicants equally, applying a single standard to all in judging promise or performance, did not achieve the outcomes hoped for. Therefore, to make racially proportional distributions a reality, new preferences, deliberate racial preferences this time favoring the minorities formerly oppressed, were widely introduced.

These new preferential devices were also called "affirmative action" with an irony that was not intended. Programs that specified the ways in which opportunities for persons of different races were not to be equal were defended under the banner of equal opportunity. "Goals" were established for the number of blacks, Hispanics, American Indians, and so on, to be enrolled, hired, or promoted. Administrative failures to meet the established goals were heavily penalized by censure, or by superiors fearing censure, as they are still. Prudent administrators (who themselves had little to lose from the racial favoritism given) made certain that ethnic goals were met, or nearly met, and to this end they did whatever was needed. The demand for fairness in the process of hiring, or admission, was replaced by the demand for results in the form of numbers proving racial proportionality. Racial "quotas" were everywhere denied, while everywhere in practice "goals" functioned exactly like quotas, openly or surreptitiously. Accounts of minority hiring and admissions came to be pervaded by dishonesty; decent people with decent motives lied to themselves, and told themselves that the lie was justified by the results sought. Justice having been defined as a proportional outcome antecedently determined, affirmative action was transformed into machinery designed to yield that outcome. And that is what it is still.

The phrase "affirmative action" has lost the flavor of fairness that was its birthright. It no longer signifies fair treatment, and the application of a single standard to all, but the reverse of these. Affirmative action has come to *mean* the programs and devices used to insure certain results, results specified by the counting of minority members. The phrase is now a widely accepted euphemism for institutionalized favoritism.

Affirmative action has thus been turned completely on its head. What was once the name for the active pursuit of equal treatment regardless of race has become the name for instruments designed to give deliberate preference on the basis of race.

Racial preference breeds resentment, anger, and eventually (in this country) litigation. The Civil Rights Act forbidding racial preference was invoked by those disadvantaged, but defenders of preference contested the meaning of its words. The Constitutional guarantee of equality under the law was also invoked with anguish, but often, in the lower courts, without success. Losing parties appealed their cases; some appeals eventually reached the U.S. Supreme Court.

The most important of these Supreme Court battles over racial preference gave rise to the essays in this book. The first great test of racial preference (*DeFunis*, 1974) is examined in part A; the decision governing racial preference in college admissions (*Bakke*, 1978) is examined in part B; the tortured arguments pertaining to racial preference in employment (*Weber*, 1979) are examined in part C; racial preference in the public schools, leading to a landmark formulation of the standard for judgment (*Wygant*, 1986) is examined in part D. In part E the most recent major cases are reviewed, analyzing the continuing controversy through 1994.

The preferential programs at issue in these cases, or programs very much like them, remain largely in place today — in law and medical schools, in undergraduate colleges, in private industry, and in government policy. Indeed, the number of institutions in which racially preferential affirmative action is practiced has multiplied. Details and numbers change — but the schemes for preference described in these essays may be readily replaced with schemes currently in force and equally preferential. Administrators have become more adroit in obscuring what they do, advocates more subtle in describing double standards so as to make them palatable. But the preferential spirit of affirmative action has been retained, even reinforced. Every observant

citizen of this country knows well that preference flatly based upon race, nationality, and sex is now widespread.

The object of the essays in this book was and is to marshal the arguments against racial preference, to explain in detail why racial preference is both *wrong* and *bad*. Put shortly, preference is wrong because it is a violation of fundamental moral principles, a violation of the U. S. Constitution, and a violation of the civil rights laws of the United States. It is bad because it does serious injury to all concerned. It corrupts the colleges and the companies that employ it, and it fosters the resentments and hostilities that now tear our society apart. Perhaps worst of all, racial preference does direct and serious harm to the very minorities it was designed to assist. However honorable the character of those who support it, preference by race is morally indefensible and socially counterproductive.

Race relations in our country continue to deteriorate. The practices examined in these essays, because they contribute directly to that deterioration, must concern us now more painfully than ever. The issues argued here will continue to confront us so long as race — any race — is used as the ground for advantage in employment or competitive admission, or in distributing public goods. We must thoughtfully reconsider the wisdom of our present widespread practice of naked racial discrimination.