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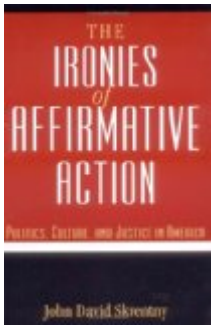


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## Inverted Ironies

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In the debate over affirmative action, irony is usually the device favored by opponents. It does not require great perception to recognize the irony of Justice Blackmun's statement, "in order to get beyond racism, we must first take account of race." It takes no greater acuity to see the irony of Title VII of the Civil Rights Act of 1964, whose text clearly outlaws preferential treatment and racial quotas, being used by judges to impose preferential treatment and racial quotas. Similary, it is easy to chuckle at Hubert Humphrey's promise to eat the statute if it were ever so interpreted. Opponents of affirmative action regard using discrimination to end discrimination as an example of "the disease as cure," as Justice Scalia put it. But John David Skrentny in *The Ironies of Affirmative Action* attempts to use a deeper irony in defense of affirmative action. It is a lively, original, and provocative effort, but ultimately unconvincing.

The common starting point for most discussions of American civil rights policy is Gunnar Myrdal's *American Dilemma.* Myrdal called attention to the irony that Americans professed equality of opportunity but made an exception for black Americans. Myrdal was confident that sooner or later the principle of "the American Creed" would prevail, and this is what the Civil Rights Act of 1964 is thought to have accomplished. In employment, Title VII of the Act established an individual right to equal treatment without regard to race or color. The fact that it has been used to erect a system of preferential treatment on the basis of racial group identity is the irony. A great puzzle for historians is to explain how we went from the color-blind aspiration of the civil rights movement to the color-consciousness of affirmative action in such a short time.

Skrentny proposes a deeper irony in that "the seeds of affirmative action were contained in the color-blind model" (p. 15). Affirmative action came about because it was the only means of assuring that equal racial group outcomes resulted from equality of opportunity–an expectation, he argues, which was present in fair employment thinking from the outset. "[T]his color-blind model," he writes, "was seen as legitimate and in the interests of blacks because at this time [1964] it was unreflectively attached to a causal principle: it was believed to *result* in black equality, understood in terms of near equal participation in society" (p. 34). Likewise, "while civil rights legislation was being called for in the name of equality, morality, and Americanism, equality was consistently being understood as both an equality of treatment and an equality of economic results" (p. 151).

Much hinges on this argument. If it holds, the stab-in-the-back conservative case against affirmative action–that the American people's consent to a color-blind standard was betrayed by arrogant federal bureaucrats and judges–falls apart. (Room remains for the alternative, Trojan Horse view, that proponents of Title VII deceitfully promised a color-blind statute knowing full well that a racial spoils system would result.) However, the

argument that racial proportionalism was assumed to result from equal treatment is untenable. The evidence that Skrentny presents is defective, and he ignores the mountains of evidence on the other side. He refers to proponents of Title VII who made the argument in Congress that the statute would address the black-white unemployment gap (the black unemployment rate being about double the white rate). But the report to which he refers (on S. 1937) was *not* the bill which became Title VII, but a discarded proposal that included too many tendencies toward preferential treatment for the Senate to consider. Realistic commentators recognized that Title VII would not bring about perfect group equality, because it applied the same equal-treatment standard that several states had been using since 1945. Those who wanted the federal government to go beyond equal treatment and ensure proportionalism were uniformly disappointed in Title VII.

>From this premise, Skrentny explains a further irony, that "affirmative action became a political possibility *without* the benefit of any organized lobby for the policy" (in fact, he notes that "affirmative action had almost no organized support *or* opposition") (p. 4). Administrators and judges simply followed the implicit equal-treatment-produces-equal-outcomes logic of color-blindness. "Civil rights groups," he writes, "were not pushing any ideology and were in no position for any sustained takeover activities, and in fact we do not need an ideological takeover theory to explain what happened" (p. 112). Again, it is clear that there were many militants in the civil rights community who favored a compensatory system, and were disappointed when Congress did not provide it. Their ideology was that of racial proportionalism–i.e., the assumption that a statistically significant deviation between the proportion of minority group members in an employer's work force and the proportion of minority group members in the population constitutes proof of discrimination, because, absent discrimination, we would expect racial and ethnic groups naturally to distribute themselves in proportional representation. Alfred W. Blumrosen, perhaps the most important of them, had abandoned the old, equal treatment standard long before 1964, and was able to move Title VII to an equal-outcomes position regardless of congressional intent. Blumrosen called this feat "administrative creativity," and when the Supreme Court ratified the feat in the *Griggs* case, he noted that the fulfillment made these ideologues feel like "Strangers in Paradise."

Skrentny does make forays into the period between 1945 and 1964, the era of the equal treatment, color-blind, fair employment standard. As Skrentny notes, there were precursors to affirmative action in the states and the presidential antidiscrimination committees. Fair employment officers were aware of the equal-treatment and proportionalist approaches to the problem of employment discrimination; they made a choice to stick to the equal-treatment standard (though the presidential committees, acting without the legislative authority of the state commissioners, began to experiment with proportionalist schemes by the late 1950s, and some New Deal agencies had done so in the 1930s). "In the early 1950s," Skrentny notes, "administrative pragmatism led to a simple conclusion: Choose race consciousness and effectiveness, or choose color-blindness and failure" (p. 117). If this was the dilemma that fair employment advocates faced, they were not aware of it. They remained convinced that fair employment could be enforced without resort to statistical proof of or remedies against discrimination. They did not understand "success" to mean racial proportionalism, and so the color-blind policies that they pursued, which clearly did not result in immediate equal outcomes, were not regarded as "failure." Many of them believed (and opponents of preferential treatment continue to believe) that black Americans were making significant economic progress under an equal-treatment standard–perhaps as much progress as could be expected while remaining faithful to that standard. It is remarkable how much discussion of the tension between color-conscious and color-blind approaches took place before 1964, but the evidence shows that antidiscrimination officials always deliberately rejected color-consciousness, and were almost always supported by mainstream civil rights groups. When civil rights groups opposed them, they did so in couched terms.

Skrentny then addresses the deeper irony that white Americans accept all sorts of preferences, but not preferences for blacks. Skrentny details two significant exceptions Americans have made to the equal-treatment, meritocratic standard–veterans preferences and nepotism–arguing by analogy that acceptance of these and rejection of race-based affirmative action is inconsistent. These analogies, however, are inapt. Most opponents of affirmative action object to the principle of racial classification. Any other preference is a preference of a different kind. Veterans are made, not born–such status is acquired, not ascribed. Serving one's country is easily regarded as an indication of merit. As for nepotism, Skrentny notes that "if a lack of discussion about an issue indicates its unproblematic acceptance, then we can conclude that Americans are quite comfortable with nepo-

tism in the job market" (p. 50). *Nepotism* is universally a term of opprobrium or derision. Though it is not always illegal, as it is in government civil service, most Americans regard nepotism as unpraiseworthy. Insofar as familial relation usually (given low rates of interracial marriage) correlates very strongly with race, nepotism has been a tough antidiscrimination issue. If performance on a certain kind of test is a qualification for a job, and racial groups do not perform equally well on that test, one could argue that, notwithstanding the racial disparity, performance on a test is an indication of some kind of merit. Familial relationship may be valuable for some businesses, but it is a much harder argument to make that it reflects merit. As a result, nepotism has been attacked when it shows racially adverse impact.

It is notable that Skrentny does not address the issue of nepotism as it was taken up in the 1960s and 1970s in labor union discrimination cases. He pays no attention to the economics of discrimination overall, and is strangely silent about this matter. Labor unions had been among the most egregious and defiant offenders against fair employment policy, going back to the 1930s. After World War II the national leadership of the AFL and CIO was committed to fair employment, but the locals often did not abide by that sentiment. Skrentny begins his discussion of labor unions by way of explaining the oft-noted irony of Richard Nixon doing more than perhaps anyone else to promote racial hiring quotas. The explanation Skrentny makes is that Nixon was using race to belabor the AFL-CIO, to drive a wedge between the civil rights and organized labor constituencies in the Democratic party. But he ignores the extent to which Nixon was, however unintentionally, calling attention to the fact that labor unions have an interest in exclusionary practices. They inherently discriminate against non-members, and, if someone is going to be excluded, it is likely going to be someone from the out-group. Nixon did not invent this issue–many labor unions had been scrutinized by state and federal fair employment advocates for decades before the Philadelphia Plan.

Explaining why so unpopular a policy as affirmative action got started in the first place, Skrentny attributes most of the development to "crisis management" and "administrative pragmatism," terms he defines at length with the theoretical help of Jurgen Habermas and William James. But "crisis management" can also be understood in lay terms as taking action with reference to the rapidly-changing circumstances of the moment–substituting expediency for principled action. Likewise, "administrative pragmatism" is ordinarily understood as administrators compromising principles, putting short-term political gain ahead of the long-term goals or mission of an institution. The idea that the people who made affirmative action were not acting in defiance of the principles of the civil rights movement, the text of the Civil Rights Act, and not following a new ideology would turn the usual ironic tale of the origins of affirmative action on its head. But, however much historians love irony, the history of affirmative action cannot sustain this much of it.

Myrdal's *American Dilemma*, and the ironies that arose out of it, is not Skrentny's. Rather, he falls on the side of those who argue that Myrdal missed the point: Racism is inherent in the "American Creed," which has never been one of equality of opportunity and meritocracy, but has accepted all sorts of preferential treatment, but now refuses to accept preferential treatment for blacks: "Americans who resist affirmative action are simply articulating the American model of justice as it relates to race and employment preferences. Affirmative action is objected to because of its racial beneficiary" (p. 63). Likewise, Skrentny argues that "The resistance to or uncomfortable acceptance of racial preferences does not result from the simple application of the rule of color/difference blindness, but from the rejection of an African-American claim for moral worthiness, for the status of being deserving" (p. 236). According to Skrentny, opposition to affirmative action ultimately cannot be thought of as anything less than racism.

Skrentny's thesi–that a person's view of a particular policy question involving blacks depends entirely on that person's feeling about blacks–is what Paul Sniderman and Thomas Piazza call the consensus view of the 1950-60s. A great deal has changed since then, they point out: "A quarter-century ago, what counted was who a policy would benefit, blacks or whites; now, what counts as much, or more, is what the policy aims to accomplish and how it proposed to go about accomplishing it" (*The Scar of Race* [Cambridge, 1993], p. 5.). But for Skrentny, race remains the key concept. His view is based on the philosophical (or anti-philosophical) premise that morality is socially constructed, and that American morality is constructed on the bedrock of racism. Skrentny tells us that "the disjunction between the *celebrated* American abstract individualism and the actual understandings and expectation was apparent from the beginning" (p. 58). The phrase "all men are created equal" was meant only in terms of competing groups of Britons and, "By couching their legitimating documents in universalist language, the Founding Fathers supplied a power-

ful discourse for two centuries of struggles with various marginalized groups" (p. 61). Far from a "charter of freedom," the Declaration of Independence was a device by which the clever founding racists frustrate efforts toward real equality–efforts like affirmative action.

Though Skrentny does not offer this as an explanation for his question of why so unpopular a policy as affirmative action has continued for so long, his own conclusion that opposition to affirmative action is based on racism provides a plausible one. A further commonly cited reason is that affirmative action is sustained by a tissue of lies, obfuscations, double-talk, underhandedness, and resolute ignorance. Skrentny does a laudable job of taking on the relevant issues and trying to devise new angles of defense for affirmative action. It is most promising that he recognized the *history* of affirmative action as a source for revisionism. But in the end the evidence simply does not sustain the argument.

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