



Affirmative Action

A Reflection on Faith and Public Life from Protestants for the Common Good

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A Note to the Reader

This statement is addressed to citizens who recognize the injustice in our society toward minorities and women but doubt or deny that affirmative action is a proper form of redress. Affirmative action, it is said, violates a fundamental moral principle of democratic society, which requires that laws never differentiate among people on the basis of natural differences such as race or gender. This view, we hold, misunderstands our shared democratic commitment. It is true that no law may conflict with the fundamental equality of all individuals as members of "we, the people." Thus, natural differences can never in themselves justify differential treatment among people. But laws may treat people differently based on natural distinctions when doing so serves the common good, and our political community has many laws of this kind. Affirmative action, too, has this purpose, and we advocate effective programs of affirmative action as essential to the common good.

Statement on Affirmative Action

At its inception in the 1960s, affirmative action meant special efforts to solicit minority applicants. Subsequently, it came to include favoring African-Americans and women over men and whites who, as judged by test scores and other prevailing criteria, are better or equally qualified. In part, the practice has developed voluntarily, but some of its better-known forms occur by governmental mandates. Though punctuated by public controversy from time to time, the evolution of affirmation action proceeded with minimal dissent until the past decade. More recently, however, major political opposition to virtually all forms of the practice has emerged.

Many critics charge that some of these programs have allowed widespread abuse and that most have failed to serve their stated purpose, namely, to help correct the persisting effects of generations of institutionalized discrimination. But this indictment is typically coupled with a principled claim that affirmative action, whatever its results, is inherently unjust or unfair, committing the very kind of injustice whose consequences it is supposed to correct. Against all forms of the practice, we are told, our public life should always be blind to differences of religion, race, sex, or ethnic origin. To deny this principle is always an offense to human dignity, and to justify current violations on the grounds that the principle has been violated in the past is a practical contradiction. However worthy the ends sought, opponents say, reverse discrimination is no less discrimination and, for this reason, they believe that affirmative action should be declared unconstitutional.

We are aware that attacks on the practice are sometimes a covert attempt to maintain established patterns of racial and gender advantage. But we recognize that many citizens of good will also question affirmative action because it appears to run against the moral vision of a society that is fair to all. Even while they insist that minorities and women are often denied equal access to the social conditions of human flourishing, they also doubt that affirmative action is an appropriate form of redress. Many are genuinely torn.

The Central Question

We seek here to address this uncertainty by clarifying the moral grounds for affirmative action. We take for granted that the problems affirmative action is meant to help solve are real and acute. We further assume that some forms of the practice (involving, say, employment decisions, governmental contract awards, or higher education admissions) do or could help correct the legacy of institutionalized discrimination. We also assume

common commitment to a democratic political community that guarantees to all the rights belonging to free and equal citizens. The question, then, is whether the very idea of affirmative action violates an overriding moral principle of a democratic society. Only if doubt on these grounds is overcome can the practice be defended as important to the common good.

A Moral Issue

Our address to this question is not a legal brief and thus does not argue for an interpretation of the United States Constitution. The issue for us is a moral one. We are concerned with the principles of justice that a democratic political community at its best will honor and to which finally the law itself is accountable, and we believe that many of our fellow citizens also approach affirmative action in this way. Democracy is government by the people, so that even its constitution is ordained and established by “we, the people.” Only the entire community itself is the final political authority, and decisions or activities of the state are rightly determined only through a process of full and free debate among all the people. Thus, the proper task of the fundamental framework is to provide the essential conditions for this kind of political process, such as rights to freedom of religion, speech, assembly, and the press; the right to vote; and offices and procedures of political decision-making that maximize government by all the people. Fundamental laws ought to provide the architecture of a political community in which all political norms and policies, actual or proposed, are open to full and free public assessment.

Equal Protection

One essential pillar is agreement that all individuals are equal members of “we, the people.” All natural and historically created differences, those not resulting from differing choices of the individuals in question, are constitutionally irrelevant. In a full and free discourse, the only differences that matter are differences in the validity of claims, the force of arguments, and whether people are willing to seek the truth. What we now call “equal protection of the laws” (a long-standing political and moral concept, recognized in the Fourteenth Amendment to the United States Constitution) is central to our fundamental equality as citizens who rule together, and thus it belongs to the architecture of a democracy. This concept means that no law can prescribe differential treatment of individuals solely because they exhibit some natural or historically created difference. For instance, no law can prescribe differential burdens or benefits solely on the basis of differences in race or gender or ethnicity. Treating persons differently solely for some reason of this kind implies that such differences have a fundamental moral importance, as if they mark a difference of status within “we, the people.” The basic equality essential to government by the people is violated.

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This equality is why, for some citizens, affirmative action appears to be inherently unjust. But clarity about the principle also provides the context for assessing that view. If “equal protection of the laws” asserts the constitutional equality of all as members of “we, the people,” does this mean that natural or historically created differences are never relevant to political purposes, so that differential treatment on this basis is never permitted?

Consider what’s implied by that interpretation. It would be unconstitutional to exempt older people from military conscription or entitle them to special treatment, since differences in age are natural. Similarly, all statutes that prescribe differential advantage on the basis of physical circumstance (for instance, special support for those who are physically challenged or who are victims of natural disasters) would violate the constitution. Indeed, we would need to question any law that requires differential treatment based on differences in past performance or present abilities, since these differences are due at least in part to talents and opportunities that are naturally given or historically created. A law that prescribes admission to public law schools based on past

grades and L.S.A.T. scores, or one that prescribes selection for governmental employment on the basis of civil service examinations, would be suspect. Though differences in ability may be due in part to people's efforts to develop their potentialities, how could the relevant institutions ever decide whether or to what extent superior capacities derive from individual initiative rather than beneficial conditions?

In truth, there are many laws that distinguish among people based on natural and historically created differences and that no one calls unconstitutional because the differential treatment serves some other end. Equality within "we, the people," in other words, is not equality with respect to all specific political purposes. To the contrary, the first means that natural and historically created differences can never *in themselves* justify differential treatment, as if these differences alone had some fundamental moral importance. Hence, the basic moral concept expressed in "equal protection of the laws" can only mean that natural and historically created differences are irrelevant *unless* differential treatment is justified by some purpose assigned or permitted to the state - for instance, raising an army, relieving the suffering of people who are victims of circumstances beyond their control, or educating a competent legal profession.

Constitutional Principles and Questions of Justice

Democratic citizens, we are persuaded, must distinguish between questions of principle proper to a constitution and questions of justice in the democratic process. To be sure, all questions about the fundamental framework are questions of justice, because a constitution is meant to provide the architecture of a just community. But only some questions about justice are properly constitutional. The public school segregation declared inherently unjust by the United States Supreme Court decision in 1954 did indeed violate a basic democratic principle because the practice served no plausible purpose except to assert that differences in race have in themselves moral importance. In contrast, a law prescribing that academic record alone shall be relevant for admission to public universities, enacted say, because the democratic process decides that this rule for selection serves the long-term welfare of the community, may or may not be unjust. But it does not violate the idea of "equal protection of the laws," even if the differential treatment it prescribes is based on differences due in large part to naturally given talents and historically created benefits.

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In like manner, our debate about affirmative action programs cannot be settled by appeal to the architectural principle captured in "equal protection of the laws." These programs do not assert the fundamental moral importance of differences in race or gender or ethnicity. To the contrary, affirmative action serves another purpose: to help correct the persisting effects of generations of institutionalized discrimination. As we have noted, some argue that the practice is not effective in pursuit of that aim. But we have here assumed that some forms of affirmative action have consequence they seek in order to clarify that the relevant question of moral principle is not constitutional but, rather, concerns justice in pursuit of the common good.

Our contemporary public life includes major disagreements about principles of the common good. Many of our fellow citizens appear to hold that government should minimize its interference with the actions of individuals, who should be at liberty to make of themselves whatever they can, given the capacities and social circumstances they happen to inherit. Others appear to believe that justice also requires the state to cultivate habits of personal moral responsibility, especially with respect to family life, disciplined work, and perhaps private charity. Together, adherents of these views typically resist public policies designed to transform the social patterns or institutions that emerge through voluntary interactions or associations. Whatever arguments there may be for these beliefs, however, they are views of the common good and cannot be defended on the grounds that they simply restate a constitutional principle. Appeal to the basic equality of "we, the people" is a confusion of the issue.

The Christian Ideal

We believe, moreover, that the Christian faith authorizes a very different ideal. For Christians, the source and end of all human life is the all-embracing love of God, which calls our politics to help structure a community by which all are empowered and to which all contribute. Our common life should pursue the kind of mutuality in which all are at once both beneficiaries and benefactors. Justice, then, is achieved by laws and policies that provide or promote general conditions of human flourishing to which all have equal access. Because discrimination against minorities and women has caused acute inequalities in access to the general conditions of human flourishing, policies that correct those consequences are imperative. For this reason, we vigorously advocate effective programs of affirmative action as essential to the common good.

An Appeal

We urge citizens, at this crucial time, to ponder the issue of affirmative action, and to be active in ensuring their voices are heard in places where decisions are being made.

Contact Protestants for the Common Good to learn how we can be a resource for you or your congregation.



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