

AFFIRMATIVE ACTION AND RACIAL PREFERENCE

A DEBATE

Carl Cohen
James P. Sterba

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PREFACE ONE

Rejected by the Harvard law school some years ago, Stephen Carter (now a distinguished professor of law at Yale) was later called by a succession of Harvard officials who told him that his rejection had been a mistake. Said one: "We assumed from your record that you were white." Carter had been managing editor of the *Stanford Daily* as an undergraduate; Harvard, having acquired "additional information" about his skin color, now wanted him badly. "I was good enough for a top law school," Carter later wrote, "only because I happened to be black."

Race preference, ugly and unfair, is standard practice in American colleges and universities; it is enforced by rule in state and local governments, and in the federal government also; it plays a critical role in hiring and promotions in much of the private sector. Well-meaning racism is unhappily but widely ensconced. My essay, with which this book begins, presents the case for a great and wholesome change: the elimination of all preference by race.

The book continues with an essay in defense of race preference by my friend and colleague, James Sterba. He calls what he defends "affirmative action," and he defines affirmative action so that it will encompass both unobjectionable, non-preferential efforts to be fair *and* outright race preference. He is at liberty to define and defend as he pleases, of course. But clumping the just with the unjust obscures what is truly at issue. Many good policies are appropriately called affirmative action, but outright race preference is not made good by giving it that name.

The appropriate *order* of the pieces in this book was a source of intense disagreement between Professor Sterba and me. He very much wanted to present a defense of "affirmative action" first, to be followed by my critical essay. This was unacceptable to me because

affirmative action (some of which is entirely honorable) is not the object of my critique, and I certainly do not wish to be understood as opposing all affirmative action. What I oppose are those forms of affirmative action giving preference to the members of some ethnic groups over the members of others.

Race preference is the heart of the matter now before the courts and the nation, and before us as well. How Professor Sterba defines affirmative action is not a matter of general interest, nor is it my concern in this book. The central question is this: shall persons of some races (and national origins) be preferred over persons of other races (and origins) *because of their race (or origin)*? Ought some be favored, and others disfavored, because of the color of their skin? I contend that preferential practices, whatever they may be called, are *morally wrong*. Invidious classifications by race are also *unlawful* in my view, and *unconstitutional*. In the highest courts of the land the uses of racial classifications were under attack even as we wrote, but the expression “affirmative action” is rarely encountered in those proceedings.

Beyond its wrongfulness, race preference is also unwise. It is counterproductive for the minorities preferred, and it does serious damage to relations among the races, on university campuses and in our society at large. Its consequences, on balance, are dreadful. And so we open with an essay condemning (*not* all affirmative action but) all preference by race. This essay I entitle: “Why Race Preference Is Wrong and Bad.”

Carl Cohen

Ann Arbor, November 2002

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SECTION ONE

*Why Race Preference
Is Wrong and Bad*

Carl Cohen

PROLOGUE

Wrongness and Badness

There is a great and important difference between the rightness of an action and the goodness of its results. Some acts that are right have very unfortunate consequences; some acts that are wrong produce very satisfying outcomes. Some policies we condemn because they are *wrong*, that is, unjust or unfair. Others we reject because they are *bad*, that is, hurtful or counterproductive.

Race preference—the policy of giving special advantages to the members of certain minorities simply on the ground that they are members of those ethnic groups—is unjust to both minority and majority, *and* damaging to both minority and majority. Race preference is to be condemned, I argue in this book, because it is both wrong and bad.

To prefer whites because they are white, or blacks because they are black—or the members of any ethnic group because they are members of that group—is *wrong*. Such preference is forbidden by the guarantee of the Fourteenth Amendment of the U.S. Constitution that no person may be denied the equal protection of the laws. It is forbidden also, very explicitly, by an act of Congress, the Civil Rights Act of 1964. But above all, race preference is morally wrong because it violates the most fundamental principles of fair treatment.

Supporters of race preference commonly suppose that it gives justified redress for injury. It does not, as I will show. Naked race preference does not even address the injuries of those earlier damaged by prejudice. But it does penalize persons because of their skin color, persons who are themselves innocent of the wrongs for which redress had been sought. The wrongness of preference, in morals and in law, is explained in Part II of this essay.

Supporters of race preference commonly suppose that, although preference may be somewhat unfair, its very important objectives render it beneficial on balance. The preferential pill may be bitter, it is said, but we must swallow it because it is good for us. But preference by race is *not* good for us. It is deeply divisive, hindering the quest for a society in which racial segregation has been overcome and racial hostilities healed. It damages and corrupts the institutions in which it is practiced, especially the universities. And worst of all, it undermines, seriously and cruelly, the minorities it purports to assist. These unhappy consequences for all of us are explained in Part III.

Part I presents an overview of the tension between the American ideal of equality and our historical failures to realize that ideal. The major steps in our painfully slow progress toward a society that is racially just—and the origin and transformation of affirmative action—are there briefly traced.

Race preference, old and new, has been a moral catastrophe in our country from its beginnings. Its unfairness is matched only by its hurtfulness. What is unjust may sometimes be useful. But that cannot be said of preference by race which (as I aim to show) is as bad as it is wrong.