BOOK ANNOTATIONS

THE PAST AND FUTURE OF AFFIRMATIVE ACTION. By Ronald Turner. New York, New York: Quorum Books, 1990. Pp. 169. N.p.

In *The Past and Future of Affirmative Action*, Ronald Turner strives to describe and explain the law without joining in the debate over the moral and political justifications of affirmative action. His goal is to explain in detail how the law developed, a step which Turner says "is often overlooked in the rush to judge affirmative action as moral or immoral, right or wrong, constitutional or unconstitutional." The book is designed to serve as a resource guide for those involved in, and responsible for, affirmative action in the workplace. To this end, Turner, a research associate at the Wharton School of Business and an associate with the legal firm of Schiff Hardin and Waite in Chicago, offers a concise and detailed examination of our nation's affirmative action record in employment and public contracting.

This is not to say that Turner's views are unapparent. As his title suggests, he believes that affirmative action is an evolutionary concept best understood against a backdrop of race-consciousness that has informed our nation's entire legal history. This history is replete with examples of race-conscious constitutional provisions, judicial decisions, and social policies that adversely impacted African Americans. Yet, as Turner points out, we also have a tradition of developing race-conscious legal remedies to redress that discrimination. Therefore, while affirmative action is a relatively recent development, the link between race-conscious discrimination and race-conscious remedies has firm roots in our legal culture.

After locating affirmative action within this historical context, the author commences with his substantive analysis. The arrangement of the topics and the printing format highlight guidelines and information most useful in practice. Turner also provides helpful summaries and subheadings in the interstices of his analysis.

Turner begins with a chapter examining the contours of United States Supreme Court jurisprudence with respect to affirmative action in employment. The discussion focuses on opinions rendered between 1979 and 1989, in which the Court evaluated voluntary as well as court-ordered race-conscious and gender-conscious measures. The author points out that these opinions are significantly "characterized by the absence of a majority view and cohesive exposition of the law." He indicates that this is in part due to the difficulty of the questions at issue in affirmative action jurisprudence. However, the chronological discussion of the Court's doctrines also draws attention to the changing composition of the Court and to its corresponding shift to conservatism

which leads one to believe that these changes may better explain the lack of cohesiveness.

Following the discussion of the jurisprudence of affirmative action in employment, the author analyzes the mechanics of Executive Order 11246, which bars federal contractors from discriminating on the basis of race, color, sex, and national origin. He outlines the provisions of the Order and the accompanying regulations for enforcing compliance. Turner also explains procedural aspects of complaint hearings and compliance reviews.

Since employment affirmative action plans frequently raise issues of reverse discrimination, Turner touches briefly on the relationship between affirmative action policy and Title VII, the broad anti-discrimination statute enforced by the Equal Employment Opportunity Commission. Turner highlights relevant provisions from the EEOC's Affirmative Action Guidelines, which state in part that affirmative action is conduct that "must be encouraged and protected."

The author finally turns to judicial rulings on minority business set-asides in public works contracting. He focuses on prominent Supreme Court decisions in the 1980s, drawing attention to the Court's shift from the validation of such programs. The most notable recent development in this area is the Supreme Court decision in *City of Richmond v. J.A. Croson Co.*, where the Court treated all racial classifications as suspect, regardless of whether the classification benefitted historically disadvantaged groups. Turner is certain that *Croson* will make it "more difficult for states, cities and other localities to promulgate and implement" minority business enterprise programs. In fact, *Croson* may prompt more suits because of the economic incentive for nonminority enterprises to challenge programs which set-aside a percentage of contracting dollars for minorities — an incentive which is heightened by the national economic recession; local governments may consequently be more reluctant to set up such programs. In spite of the doctrinaire analysis of set-aside programs in *Croson*, the importance of set-aside programs is illustrated by the *Croson* case itself: prior to the enactment of the minority business enterprise ordinance in Richmond, Virginia, "African-American contractors received less than 1 percent of Richmond's business"; after the ordinance was passed, they received "30 percent of contracting dollars"; and after the ordinance was challenged and invalidated by the Fourth Circuit Court of Appeals, African-American contractors received "less than 1 percent."

Turner concludes this chapter by exploring future implications of the Court's decisions. In particular, Turner examines how some state courts and lower federal courts have been interpreting and applying the standards enunciated in *Croson*. From this sampling, Turner articulates six distinct guidelines, of which state and local governments should be cognizant when considering minority business set-aside plans. Turner points out, however, that, due to the economic burdens these guidelines pose for local governments, few local governments will be able to afford seriously considering minority business set-

aside plans. Rather, the "real world effects of *Croson*," which have hindered minority business enterprises to the point of threatening their existence in "Atlanta, Georgia and Durham, North Carolina," will most likely continue unabated.

Turner effectively distills the essential elements of complex judicial opinions, legislative enactments, and social policies. Moreover, he accomplishes this without ever losing sight of his audience. While it is hard to read Turner's work without contemplating the moral and socio-political justifications of affirmative action programs in the workplace, Turner's commitment to describing and explaining the complexity and subtlety of the law of affirmative action highlights what is most at stake: the very livelihood of working people.

Julie Glass

INVISIBLE VICTIMS: WHITE MALES AND THE CRISIS OF AFFIRMATIVE ACTION. By Frederick R. Lynch. New York, New York: Praeger Publishers, 1991. Pp. xvi, 237. $14.95.

Charles Murray wrote that "[o]ver the last twenty years, the new liberal vision, implemented by means of the policy of preferential treatment and quotas, has led to a number of perfectly disastrous and perfectly predictable results. . . . Hardly a policymaker or academic anywhere wants to examine these results, and fewer still want to speak of them." Frederick Lynch, in *Invisible Victims: White Males and the Crisis of Affirmative Action*, adopts Murray's statement (which appears in the pages preceding the table of contents) as a fundamental tenet in his assault on affirmative action. Lynch argues that, as a result of a conspiracy of silence by academics and policymakers, the "real world" effects and weaknesses of current affirmative action programs in this country have largely been ignored. Lynch claims that the costs of this public ignorance have been the perpetuation of debilitating programs which unfairly disadvantage white males — a new class of invisible victims. Lynch's analyses, however, reflect an unyielding ideological bias that is perhaps predictable given his position as a senior research associate at Claremont McKenna College's Salvatori Center, an ardent conservative organization. His analyses are permeated by emotional appeals and do more to confuse the issues than clarify them; being based upon misconceptions and biases, his critique of affirmative action reveals an ignorance worse than that which he presumes to attack.

Invisible Victims begins with a discussion of the evolution of affirmative action policies. Lynch uses the metaphor of a steamroller to depict how affirmative action has been transformed from a policy of equal opportunity for all to one of equality of results, characterized by racial quotas and proportional representation. This revolution in social policy, according to Lynch's account, has occurred as a result of five factors: (1) independent government administrators and judges unilaterally promulgating affirmative action policies against the will of the public; (2) implementation of such policies behind

closed doors, without public debate or ratification; (3) the complicity of white male victims; (4) the ambiguous constitutional and legal foundations for affirmative action; and (5) the influence of a New McCarthyism and a spiral of silence. According to Lynch, these five factors, especially the fifth one, have contributed to "widespread confusion and ignorance" about affirmative action and have suppressed a critical discussion of its merits. Lynch explores these five factors throughout the remaining chapters of *Invisible Victims* in an attempt to break through this cloud of silence and reveal affirmative action's "negative" effects, such as the lowering of meritocratic standards and the exacerbation of racial relations. In addition, by presenting a case study of the psychological effects of reverse discrimination on the lives of thirty-two white males, Lynch attempts to illustrate how affirmative action programs have led to mounting feelings of frustration and hostility by white males in general. Lynch's description of the subjects of his case study and their feelings about losing their jobs to "unqualified" minorities, because of their race, is an oddly prominent and recurring theme throughout his book.

Lynch's main thesis — that affirmative action has been radically changed from an equal opportunity approach to a quota system — mischaracterizes the primary goal of affirmative action. Affirmative action is an attempt to redress the extensive injuries which have been wreaked upon certain identifiable groups for centuries. The long term goal of affirmative action is to reduce the extent to which American society is a race conscious society.[1] Yet, affirmative action programs use racially explicit criteria because their immediate goal is to increase the number of minorities in certain professions by counteracting the often insidiously pervasive and unrecognized forms of discrimination. Such programs are strong medicine, to be sure; but strong measures are necessary because weaker ones will fail.[2] These aims of affirmative action are fundamentally consistent with the constitutional value of nondiscrimination. Our constitutional commitment, at least since Reconstruction, is not to tolerate racial subordination and to ensure that "no one is ever subjugated to a position of second-class citizenship simply because of racial identity."[3]

The weakness in Lynch's argument is that he naively assumes that an open door approach alone will remove the barriers created by years of institutionalized racial prejudice and discrimination. This underestimation or misunderstanding of the impact of racism in American society rests upon the erroneous assumption that all races stand on equal footing. Unfortunately, "American society is currently a racially conscious society; this is the inevitable and evident consequence of a history of slavery, repression and preju-

1. RONALD DWORKIN, *Bakke's Case: Are Quotas Unfair?*, *in* A MATTER OF PRINCIPLE 294 (1985).

2. *Id.*

3. Joint Statement, *Constitutional Scholars' Statement on Affirmative Action After* City of Richmond v. J. A. Croson Co., 98 YALE L. J. 1711, 1712 (1989) (signed by thirty legal scholars, including Guido Calabresi, John Hart Ely, Frank Michelman, Cass Sunstein, and Laurence Tribe).

dice."[4] As an abstract intellectual exercise, Lynch's theory may have some appeal, but from a realistic standpoint, a flexible approach is needed. The use of relevant statistical comparisons in designing flexible programs to combat racial subjugation is a viable means to achieving these ends. Lynch does not even consider this justification of affirmative action policies.

One of the main objections to affirmative action articulated in *Invisible Victims* is that it leads to the hiring or admission of unqualified minorities over qualified whites. Lynch does not present any evidence or arguments for this assertion. He relies heavily on the emotional appeal of the adage that people should be judged as individuals in the hiring or admissions process, and not as a member of a particular group. The frequent references by the subjects of his limited case study to the unfairness of their situation seem to be included only for pity's sake. Although perhaps emotionally moving, these appeals serve only to detract attention from the plethora of arguments challenging the assumptions underlying Lynch's view. In attacking the "qualifications" of affirmative action beneficiaries, Lynch overlooks the historical reality that the "qualifications [insisted] . . . on are precisely the credentials and skills that have been long denied to people of color. Those credentials, moreover, are often irrelevant or of little importance and therefore serve mainly as barriers to most minorities and a great many whites as well."[5] Moreover, his argument rests upon an assumption that "admissions decisions derive from simple mathematical projections about the academic or intellectual ability of applicants. Although there is a grain of truth in this assumption, it seriously oversimplifies what may well be the most complex process in American higher education."[6]

By focusing solely on objective criteria and standardized tests, *Invisible Victims* presents a very one-sided picture of affirmative action. Lynch neglects the importance of other crucial factors in the admission process, such as personal recommendations, interviews, extracurricular activities, community service, and relationships to professors, to wealthy celebrities, and to alumni. Furthermore, to the extent that objective criteria or tests are used, most students fall in the middle range and have identical paper records, and some "departure from pure mathematical projections" is essential, "if any but the most arbitrary admissions choices are to be made."[7] Lynch's attack on the

4. Dworkin, *supra* note 1, at 294.

5. Derrick A. Bell Jr., *Xerces and the Affirmative Action Mystique*, 57 GEO. WASH. L. REV. 1595, 1605 (1989). *See also* Derrick A. Bell, Jr., *Law School Exams and Minority-Group Students*, 7 BLACK L.J. 304 (1980) (discussing the cultural bias inherent in the law school final exam writing process).

6. Robert M. O'Neil, *Preferential Admissions: Equaling the Access of Minority Groups to Higher Education*, 80 YALE L. J. 699, 701-02 (1971).

7. *Id.* at 702. Furthermore, as O'Neil notes, "the preferential admission of minority students cannot be attacked because it defiles the purity of the admissions process or because it involves a departure from a judgment heretofore based solely on narrowly-defined academic merit. The concessions already made to the special needs of individual applicants and to institutional desires for diversity belie any such blanket indictment." *Id.* at 705.

qualifications of minorities under affirmative action programs simply assumes an idealized "completely fair" admissions and evaluation process which is nonexistent.

Lynch's heavy reliance upon emotion is further demonstrated by the devotion of an entire chapter, filled with excerpts from news reports describing how "unqualified" minorities are reaping the benefits of a racial spoils system. This chapter, the longest in the book (28 pages), amounts to simply an appeal for sympathy. It also appeals to the fears of white males and others in this country, which are heightened even more so today by the lingering national recession. The author's constant emphasis throughout *Invisible Victims* on evoking sympathy for the plight of white males prevents him from conducting a disinterested, thorough, and balanced assessment of affirmative action programs. Lynch's reliance on rhetoric over substance undermines any valid concerns implicit in his arguments and makes his contention hard to take seriously.

Lynch's legal analysis of affirmative action is also deficient because, while he states that the constitutional and legal foundations for affirmative action are unclear, his arguments nevertheless reveal a bias toward the "colorblind constitutional" theory.[8] His discussion of the Supreme Court's decision in *Johnson v. Transportation Department*[9] and his claims that the Supreme Court has in effect, legalized discrimination against white males suggest that affirmative action is constitutionally impermissible. Unfortunately the book, by blatantly slanting its legal analysis against affirmative action, neglects the existence of powerful legal arguments such as those espoused by Justices Marshall, Brennan, and Blackmun and prominent legal scholars.[10] Although the author is not a lawyer, and thus his failure to comprehend fully the legal issues surrounding affirmative action is perhaps understandable, his narrow portrayal of the legal arguments contributes more confusion to the already complex debate over affirmative action. *Invisible Victims* dangerously runs the risk of providing readers who are unfamiliar with the affirmative action controversy with an inaccurate perspective. Instead of facilitating an informed discussion of the real effects and weaknesses of affirmative action, which was Lynch's stated intention, *Invisible Victims*, through its reliance on emotion and lack of objectivity, generates greater misunderstanding and ignorance.

David N. Fong

8. *See* City of Richmond v J.A. Croson Co., 488 U.S. 469, 520-528 (1989) (Scalia, J., concurring) (discussing the view that the Constitution is colorblind).

9. 480 U.S. 616 (1987).

10. For a discussion of the appropriate judicial standard of review for benign racial classifications, see Justices Marshall, Blackmun, and Brennan's opinions in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). *See also* John Hart Ely, *The Constitutionality of Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974); Randall Kennedy, *Persuasion and Distrust: A Comment on the Affirmative Action Debate*, 99 HARV. L. REV. 1327 (1986); *Constitutional Scholars' Statement on Affirmative Action*, *supra* note 3.

AFFIRMATIVE ACTION AT WORK: LAW, POLITICS, AND ETHICS. By Bron Raymond Taylor. Pittsburgh, Pennsylvania: University of Pittsburgh Press, 1991. Pp. xvii, 251. N.p.

In his book, *Affirmative Action at Work*, Bron Raymond Taylor, a professor of Religion and Social Ethics at the University of Wisconsin—Oshkosh, examines the moral attitudes of American working people toward affirmative action policies. Taylor takes two approaches: first, he gives a descriptive sociological account of these attitudes and the factors which contribute to them; and second, he offers a normative analysis of affirmative action based on the data he has collected for the descriptive account. Taylor collected his data from interviews with employees of the California State Department of Parks and Recreation, a population he selected because it had first-hand experience with an aggressive affirmative action policy. He concludes that the respondents support an equal opportunity principle but are reluctant to view distributive justice solely in terms of equal opportunity. He finds that this ambivalence amounts to a reflection of competing values in modern American culture, and, based on this insight, he suggests ways for employers to enhance support for and cooperation with their affirmative action policies.

Taylor begins with an introduction to the cultural and legal issues that inform the affirmative action debate. The first chapter suggests that the controversy over the propriety of affirmative action is a central dilemma in traditional liberal culture, a culture based on individual rights and self-interest. Liberal theorists clash over affirmative action because Western liberal culture does not identify the "proper relationship between individual rights and social justice, on the one hand, and the various principles of distributive justice that provide competing perspectives on rights and social justice on the other." To resolve the dispute, liberalism must select principles of distributive justice to guide public policy and justify this selection. The remainder of the chapter examines the definitions of terms associated with affirmative action policies, and surveys the history of United States anti-discrimination law from the Civil Rights Act of 1866 to the Americans with Disabilities Act of 1990. Taylor also discusses recent Supreme Court decisions concerning implemented affirmative action programs; however, some of these decisions were reversed by the Civil Rights Act of 1991, which was introduced as legislation after the publication of his book.

In Chapter Two, Taylor addresses the theoretical background of affirmative action. He explains that, "[s]ince the affirmative action controversy ultimately boils down to the question of how preferred jobs and incomes ought to be distributed," most ethical debates about affirmative action involve theories of distributive justice. He then describes four major theories of distributive justice: justice as freedom, justice as fairness, justice as productive freedom, and justice as the greatest good. The first view, justice as freedom, is a process-oriented analysis which rejects any redistributive principle as an unfair

imposition on individual freedom. Taylor attributes this view to Robert Nozick and other contemporary conservatives and libertarians.

The second view, justice as fairness, is identified as the liberal view and is the ongoing project of John Rawls, who is widely recognized as a leading theorist in the liberal tradition. Rawls' "difference principle" holds that differential treatment, such as affirmative action, can only be tolerated if it benefits the least well-off members of the society. Taylor also attributes this view to Ronald Dworkin, who has argued that inequalities such as affirmative action may be necessary in the short term to promote equality in the long term. Taylor concludes that liberal theories of distributive justice will support only affirmative action policies that address legal obstacles to opportunity, and that those who place greater emphasis on the individual are more likely to oppose affirmative action.

"Justice as productive freedom" is the name Taylor gives to Marxist theories of distributive justice. Under a Marxist analysis, affirmative action is inadequate because it does not address the underlying class structure of capitalism, which will inevitably perpetuate inequality.

The final theory Taylor discusses is justice as the greatest good, a view he derives from the utilitarianism of John Stuart Mill. Taylor notes that contemporary utilitarians, i.e., "consequentialists," argue that distributive policies should be analyzed in empirical terms to determine which will promote the greatest good. Defining the terms of that "good" is the primary object of consequentialism.

Having reviewed the cultural, legal, and ethical considerations behind affirmative action, Taylor offers an account of the views held by workers who are directly affected by affirmative action policies. The primary purpose of his empirical research was to determine if, in a workplace with a strong affirmative action program, there are differences in ways people think about affirmative action. Taylor organized his inquiry around four variables. First, he looked for differences along the lines of four social categories: women of color, white women, men of color, and white men. Second, he looked for a relationship between the immediate self-interests of the individual worker and her views. Third, with an eye toward the approaches of Durkheim and Weber, he examined the relationship between religious and ethical views and feelings about affirmative action. Finally, Taylor inquired into whether the ideal of individualism informed such feelings. Following the feminist analysis of Carol Gilligan, who has argued that women are more likely than men to make moral decisions in accordance with concerns about interdependence, Taylor looked for differences along gender lines that might reflect these alternate decision-making processes.

Taylor began his research in 1984, while he was an employee of the Parks and Recreation Department. He gathered his evidence through participant observations in curriculum development and training sessions for the Department's affirmative action policies, through interviews with individual employ-

ees, and through a survey of specific categories of employees. Based on his qualitative data, Taylor concludes that there is a wide range of views about the department's affirmative action policies, and that people are not sure how to make moral judgments about them. He finds that these judgments depend on how employees rank the interests of the individual in relation to the interests of the group as a whole. Not surprisingly, those people who are more individualistic are more likely to oppose affirmative action.

The quantitative data Taylor gathered show that, while there is significant support for the principle of affirmative action, support dropped for any concrete proposal of a particular program, particularly among white men. Women of color were the most supportive of affirmative action in theory and practice. Among all people of color, African and Asian Americans were the most supportive, followed by Hispanics. Native American men were as hostile if not more hostile to affirmative action than white men; the data on Native American women were inconclusive but pointed toward much stronger support than their male counterparts. Political ideology was most significant as a factor among white men, moderately significant among white women, and least important among people of color. Religion was not an important factor; and age was more important among people of color than among whites. From these data, Taylor concludes that most respondents were concerned with the needs of the individual and embraced the principle of equal opportunity.

Taylor also finds that majorities of every group believe that affirmative action violates the rights of white men and that success is a function of individual initiative. Only narrow majorities of people of color believed that affirmative action promoted equal opportunity, while large majorities of white people and Native American men believed the opposite. Also, more white women and people of color supported affirmative action than thought it promoted equal opportunity. This suggests that some workers support affirmative action even though they recognize that it does not simply serve the liberal principle of equal opportunity. Over two-thirds of women and people of color believed they would not be seriously considered for jobs without an affirmative action policy. And over two-thirds of white men disagreed with this belief. The willingness of many workers to support affirmative action, even while they acknowledge that it is not consonant with the tenets of liberalism, suggests that support for affirmative action must rest on some other principle of distributive justice. Taylor finds that consequentialism may be that principle.

In his conclusion, Taylor offers a descriptive ethical analysis of his research, a normative ethical analysis of affirmative action, and suggestions for applying his findings to affirmative action policies. His descriptive account supports the contention that working people's attitudes toward affirmative action are inconsistent and do not correspond to the philosophical approaches. He finds differences in attitudes along racial and gender lines, and notes that racial and gender characteristics are the most significant variables in analyzing attitudes toward affirmative action.

In the normative section of his conclusion, Taylor outlines the relative support among working people for the various theoretical justifications for affirmative action outlined in Chapter Two. He finds little support for conservative or libertarian objections to affirmative action, and more support for liberal versions of the equal opportunity principle. Although Marxist theories of distributive justice reject affirmative action, many respondents who voiced Marxist style suspicion of affirmative action were unwilling to reject it altogether. Taylor finds that his data best supports a consequentialist approach to affirmative action; part of the reason for this, as Taylor notes, is that context- and fact-specific justifications for particular results of affirmative action were the most readily accepted by workers. He finds that most respondents across every group are resigned to their social position and accept the culture that determines their position, including the affirmative action policies under which they work. It is for this reason he is confident that debates over affirmative action will not result in a social redefinition of the principle of distributive justice. Based on his empirical data, Taylor also rejects two common criticisms of affirmative action policies. First, he finds that most people are not overly concerned about the prospect of the hiring and promotion of unqualified people. Second, he refutes the contention that affirmative action stigmatizes the beneficiaries; affirmative action policies have had a positive effect on the self-esteem of beneficiaries, by opening doors to meaningful work opportunities which had previously been closed.

Taylor argues that there is general support for affirmative action programs in the workforce, and recommends to organizations affirmative action strategies which can capitalize on this support. First, he says, organizations must be consistent and honest in describing their programs. He attributes much of the suspicion of affirmative action programs to misunderstanding about the goals and principles behind them. To boost morale, employers should try to alleviate concerns about declining quality of the workforce, disseminate information about promotions, and provide a system for recognizing the efforts and achievements of specific employees. Finally, Taylor recommends more comprehensive affirmative action training programs for all employees, so that everyone affected by these controversial programs will understand the theories behind them and the mechanics which make them work.

Josh Goldfein

THE PURSUIT OF RACE AND GENDER EQUITY IN AMERICAN ACADEME. By Stephanie L. Witt. New York, New York: Praeger Publishers, 1990. Pp. 103. N.p.

In this study, Stephanie Witt, Assistant Professor of Political Science and Public Affairs at Boise State University, offers a unique contribution to the affirmative action debate. She examines attitudes of university faculty about

affirmative action programs for hiring and promoting university faculty and extrapolates from this microcosm conclusions about the effectiveness of affirmative action throughout society. Witt sees the university as a "synthesis of a high social purpose, a system based on meritocratic achievement and a forum for the legitimate pursuit of individualistic self-interest in the pursuit of one's academic career." Additionally, employment decisions in universities are based on collegial hiring and promotional evaluations. Faculty members themselves make employment and promotion decisions. Hence, given the professed commitment to meritocracy and also to social good, university affirmative action policies demonstrate the confrontation between meritocracy and individualism, on the one hand, and egalitarianism and the commitment to group compensation on the other. This tension between promoting the social good of group equity and maintaining procedural safeguards for the individual (i.e., individual rights) reflects in sharp relief the same conflict occurring in affirmative action programs outside of academe. By looking at the results of affirmative action policies within this limited environment, Witt hopes to gain insight into the future effects of such practices throughout society. The prognosis Witt draws, however, is far from encouraging.

Despite systematic efforts to increase the number of minority and women faculty, there has not been a substantial increase in the hiring of members of these two groups. Witt points to a study by Shirley Brown which shows a decline in the number of black faculty between 1977 and 1983. Although the figures for the total number of women faculty has increased, the data are somewhat misleading because a significant portion of women faculty members are found among the lower academic ranks and within smaller institutions. This "painfully slow" transformation of the universities, despite a "mixture of voluntary, compulsory, and court-moderated" affirmative action, led Witt to examine the attitudes of the faculty about affirmative action.

Witt lays the foundation for her study by describing the underlying theoretical social tensions inherent in affirmative action policies. She draws on theories of liberalism as elaborated by John Rawls and Ronald Dworkin and critiques of liberalism offered by Michael Sandel and Robert Bellah. Two competing values exist within liberal society: individual self-interest and social justice as a function of the collective goal. Affirmative action reinforces the dichotomy between these two values and sharply brings them into conflict. The traditional liberal notion of egalitarianism focuses primarily on procedural fairness, not "substantive equality." In other words, liberalism values equality of treatment and opportunity among individuals and provides for procedural equality through individual legal rights. The goal of affirmative action policy, on the other hand, does involve a conception of "substantive equality": the redistribution of goods and employment opportunities to certain groups as compensation for past discriminatory practices. To the extent that affirmative action reinforces the liberal egalitarian commitment to equality of opportunity, many accept affirmative action in the abstract. However,

many people directly affected by such public policy measures, namely white males, are opposed to their implementation because they find themselves directly threatened. Many self-professed liberals argue that affirmative action subordinates the individual rights of white males and illegitimately creates a system where race and gender have some impact in determining one's place in society. This underlying perennial tension leads Witt to conclude that "Americans tend to resolve this conflict by supporting the abstract idea of equality and the notion of affirmative action in the general sense, but express resistance to specific steps to achieve that equality or to implement affirmative action when the value of individualism and individual achievement is too directly challenged."

Witt further traces this tension in congressional, executive, and judicial actions. She provides a brief discussion of the landmark Supreme Court decisions that address affirmative action programs, including *Defunis v. Odegaard* and *The Regents of the University of California v. Bakke* (both of which involved challenges to affirmative action programs in the student admission procedures of universities). Witt explains that the Supreme Court's decisions reflect the underlying theoretical ambivalence about affirmative action. That is, the Court's decisions reflect "the desire to protect both the procedural safeguards of equal protection and due process afforded to individuals and the policy goal of increasing the educational and employment opportunities of minorities and women." She also briefly outlines the statutory framework and the executive orders which relate to affirmative action.

After discussing the theoretical and legal framework for affirmative action policies, the author begins her empirical study. Data for this study were collected in 1986 by the Fellows of the Interdisciplinary Research Center for Faculty Stress and Productivity at Washington State University. The 1986 National Faculty Stress Study was based on a total of 233 colleges and universities and 2,095 faculty members. Witt used a smaller sampling from this aggregate group to arrive at a total of 492 faculty subjects. The group was asked certain questions regarding affirmative action, such as questions about one's assessment of the impact of such policies on an individual person's career. The methodology used in Witt's analysis consisted of finding "matched pairs" of faculty; faculty members who completed the study questionnaires were matched with other faculty of similar background characteristics (such as tenure status, age, type of university, academic discipline, marital status, etc.). This compilation procedure allowed for greater certainty in suggesting that differences in response to affirmative action stem from differences in race and gender and not differences in tenure status, age, etc.

Witt concludes from this elaborate process that a faculty member's overall evaluation of the value and desirability of affirmative action within the academic setting is directly related to her own individual self-interest. For instance, minority and female faculty (those most likely to benefit from affirmative action), were much more likely to favor such programs than white male

faculty members (those most likely to be harmed). Similarly, white males were more inclined than minorities and women to believe that affirmative action perpetuates the "myth of female and minority inferiority" and deprives the beneficiaries of affirmative action of a sense of accomplishment and self-esteem. Attitudes about affirmative action also challenge the assumption of meritocracy. Some faculty regard their colleagues' advancement as not necessarily based solely on merit. This study provides an empirical basis for the argument that the perception of affirmative action is vital to the success of affirmative action programs in redressing discriminatory effects and curbing future discriminatory practices.

The book ends on a pessimistic note. The author creates the impression that affirmative action policy is not likely to lead to any advancement for minorities and women either in the university environment or elsewhere. Yet, this pessimism does not necessarily follow from Witt's study. Although her methodology is thought-provoking, Witt never makes it entirely clear how she is able to draw such broad conclusions about societal attitudes toward affirmative action by relying almost exclusively on a very small sampling of individuals. Furthermore, the bulk of Witt's study is based on a survey conducted in 1986 and hence is already slightly dated. Witt, however, is aware of the dangers of extrapolation and over-generalization and suggests that more qualitative information about the public's perception of affirmative action is needed. Nonetheless, Witt demonstrates the value of extensive analyses of peoples' attitudes toward affirmative action and the need to believe before we can effectively practice what we preach.

Patricia Le Goff

A "REPRESENTATIVE" SUPREME COURT? THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS. By Barbara A. Perry. New York, New York: Greenwood Press, 1991. Pp. xiv, 160. N.p.

In *A "Representative" Supreme Court*, Barbara A. Perry, Assistant Professor and Chairman of the Department of Government at Sweet Briar College in Virginia, pursues an intriguing idea that was recently brought to the forefront of the nation's consciousness when Justice Thurgood Marshall announced his retirement. She explores the argument that the appointments of Catholic, Jewish, African American, and female justices have been influenced by a desire on the part of the nominating President to provide representation for these groups on the Court.

With regard to Catholics and Jews, Perry identifies two phases of assimilation into the larger culture. In the first phase, the group has not yet become fully assimilated into the American mainstream, yet has moved past the point of social ostracism and become a significant enough voting bloc to warrant a President's attention. According to Perry, the religion of the nominee is a factor in the nomination process during this phase. The second phase, into

which Perry believes both Catholics and Jews have moved, occurs when a group has been fully assimilated and no longer requires obvious representation on the Court.

While Perry's argument is an engaging one, it is frustrated for two reasons. First, the evidence offered in support of her two-phase thesis is never more than anecdotal. Second, even this evidence frequently undermines the author's thesis.

Perry discusses eight Catholic justices appointed to the Court, beginning with Roger Taney as Chief Justice in 1836 and continuing to the present Court with Justices Scalia and Kennedy. According to Perry's theory, Catholic religious affiliation should have been a more critical factor in Chief Justice Taney's appointment than it was in the appointment of any other Catholic nominee. Yet Perry concedes that "[i]n the realm of religion, a study of the so-called Catholic seat revealed that Catholicism was not a factor in the appointment of the Court's first two Catholics (Chief Justice Roger Taney and Associate Justice Edward White)." In fact from Perry's text, it appears that Catholicism was a significant factor in the nominations of only three Catholic justices (Joseph McKenna in 1898, Pierce Butler in 1922, and Frank Murphy in 1940.) Moreover, in the cases of Justices McKenna and Butler, Perry contends that their religion was merely the factor that "put them over the top" after their political and ideological compatibility with their nominating Presidents had been established.

Likewise, this type of secondary consideration of "representative" factors appears true for the appointments of Jewish justices. Moreover, some evidence suggests that the nomination of Jewish justices were made in spite of their Jewish affiliation, not because of it. For example, Justice Louis Brandeis' Jewish religious affiliation was a political liability for President Wilson when Wilson appointed Brandeis to the Court in 1916. However, President Wilson went ahead with his nomination of Brandeis, despite potential ramifications in the 1916 Presidential elections and despite strong opposition in the Senate. Wilson wanted to appoint a progressive jurist to the Court, and he was confident of Brandeis' progressive political views.

By the time Benjamin Cardozo was nominated in 1932, the "Jewish factor" seemed to be of little significance. In fact, President Hoover's reservations over the appointment of Cardozo rested more on his desire to appoint a westerner, and so provide some geographical balance on the Court, than on Cardozo's religion. Judaism was also not an important factor in the appointments of Justices Felix Frankfurter, Arthur Goldberg and Abraham Fortas beyond the vague notion that there was a "tradition, and expectation of having at least one Jew on the Court." This tradition came to an end with Justice Fortas' resignation in 1969. Perry argues that there has not been a Jewish justice since then because "[l]ike Catholics, American Jews have assimilated into politics and society to such a degree that Presidents may no longer feel the need to offer them 'representation' on the Court."

While Perry does not consider her two-phase analysis applicable to women and African Americans yet, she does explore the "representativeness" of their appointments. Since publication of *A "Representative" Supreme Court* preceded the appointment of Clarence Thomas to the Court, Perry analyzes only the appointments of Justices Marshall and O'Connor. While Perry does not even remotely suggest that either Justice Marshall or Justice O'Connor lacked qualifications for the Court, she argues that race and gender, respectively, were the primary factors in the appointments of both justices. She points to Justice Marshall's work as counsel to the NAACP, as Solicitor General, and as a Judge on the United States Court of Appeals for the Second Circuit. She also reviews Justice O'Connor's credentials: third in her class at Stanford Law School, member of the Stanford Law Review, state judge in Arizona. Yet it is clear that, when President Johnson nominated Thurgood Marshall to the Court, he was looking for an African-American candidate. Similarly, when President Reagan nominated Sandra Day O'Connor, he was looking for a woman. In both of these cases, the nominees were qualified and ideologically acceptable, but it is hard to deny that race and gender were the primary factors in these appointments.

A "Representative" Supreme Court presents a brief, interesting, and very readable historical survey of the role of race, religion, and gender in Supreme Court appointments. It suggests that these factors have played a larger role, especially in the case of religion, than might have been imagined. The author also hints at several potentially provocative theoretical arguments regarding the role of an unelected judiciary in a democratic society. In her conclusion, Professor Perry argues that, when used as a deciding factor among roughly equally qualified candidates, consideration of "representativeness" is a positive factor. It helps to instill public confidence in the Court, and aids in democratizing the least democratic branch of the federal government by paying heed to different demographic groups within the society at large.

The weakness of Perry's work is that it never does more than suggest and hint. Her reliance on anecdotal evidence in her accounts of the nominating processes of the fifteen justices she discusses, and her attempt to lay out her theoretical arguments in the mere eight pages of the concluding chapter, undermine the weight of her text. *A "Representative" Supreme Court* provides an interesting historical survey of the appointment to the Supreme Court of justices from demographic minorities; unfortunately, it does little more.

Randall K. Packer

REFLECTIONS OF AN AFFIRMATIVE ACTION BABY. By Stephen L. Carter. New York, New York: Basic Books, 1991. Pp. xiii, 286. $23.

Increasingly, African Americans are debating the most sacred tenents of civil rights orthodoxy. At the center of this debate is the future of race-conscious remedies devised to counteract the effects of past and present discrimi-

nation. All agree that affirmative action, labeled "race preference" by critics, has created an untold number of opportunities for African Americans in education and employment. However, some beneficiaries assert that as a result of affirmative action, they are stigmatized by negative assumptions about their capabilities. Furthermore, these beneficiaries worry about backlash against their advancement, and its impact on themselves and the African American community overall, as the larger society grows more hostile to the concept of affirmative action. It is this troubling aspect of the affirmative action debate that characterizes much of Stephen L. Carter's analysis in his provocative book, *Reflections of an Affirmative Action Baby*.

Carter, a professor at the Yale Law School, explains early in his book that one of his objectives is to present one voice from the "growing black professional class that tends to be spoken for rather than to" about affirmative action. That there is a burgeoning black middle class is largely due to the educational and employment opportunities affirmative action affords. Carter does not dispute this fact, but he perceives affirmative action to be a decidedly mixed blessing for the black professional class of which he is a member. As Carter observes, "[w]e are who we are, and we are where we are. But no matter who we are or where we are, our lives and careers will always be marked, fairly or not, by the era in which we came of age."

Carter believes that affirmative action reinforces the artificial dichotomy between the "best" and the "best black." According to Carter, the "best black" syndrome relegates the accomplishments of African Americans to a status lower than whites, and thus constrains African Americans in artificially constructed inferior positions. In turn, Carter asserts, the "best black" syndrome reinforces notions of black inferiority.

While Carter is concerned with the internalization by African Americans of limitations and inferiority, he is most attentive to how the beneficiaries of affirmative action are perceived by whites. Indeed, even after a seemingly defiant assertion — "I got into law school because I am black. So what?" — Carter is less concerned with the interests served by race-conscious admissions policies than with the perception others have toward beneficiaries of affirmative action. As a result, his analysis suggests that white resentment, and the sometimes ambivalent perceptions of beneficiaries, should take precedence over other considerations in the affirmative action debate, such as the material benefits race-conscious remedies offer African Americans and other people of color.

In addition to exploring why affirmative action is at best a mixed blessing for its beneficiaries, Carter implies that affirmative action has failed because of the vast number of black people excluded by remedial programs. He indicates that the intended purpose of affirmative action was to provide opportunity to those most in need of assistance, presumably the third of African Americans that live in poverty. However, this has not been realized during the affirmative action era; and instead "middle-class black people are better off and lower-

class black people are worse off." To develop this point, Carter draws from Robert Klitgaard who, in *Choosing Elites*[1] demonstrated that at the nation's elite academic institutions, affirmative action programs are increasingly dominated by the children of the middle class. Referencing his own relatively privileged upbringing, Carter attests to the accuracy of Klitgaard's contentions. He then questions the integrity and usefulness of affirmative action programs that benefit the middle class and fail to reach the neediest African Americans.

Carter, however, fails to consider the status of the African American middle class relative to that of the white middle class. On various economic indices, particularly in earning power, there is still a significant economic disparity between middle class African Americans and middle class whites. Many argue that affirmative action can be justified as an attempt to offset such lingering, present imbalances as these, rooted in our nation's history of racial inequality. Carter's failure to consider such issues represents a significant omission in his analysis of racial justice and affirmative action.

Moreover, the inability of affirmative action to reach the poorest third of Black America does not mean that affirmative action programs should be discontinued. Rather, this demonstrates the need for economic and educational programs that will put poor African Americans in a position to benefit from the opportunities afforded by affirmative action. Thus, Carter's emphasis on the inability of affirmative action to improve the condition of the poorest African-Americans seems strangely misplaced.

Yet *Reflections of an Affirmative Action Baby* involves much more than ideas on the affirmative action debate. It raises important questions about intellectual freedom, ideological hegemony, and the role and future of dissent in the black community. Carter emphasizes that in his book he has offered the reader "opinions as what [he] believe[s], not as to what is to be believed." Moreover, by candidly revealing his own views on affirmative action, Carter has attempted to spark what he feels is a much needed dialogue among African Americans. It is here that Carter's insights are most valuable. For indeed, solutions to the black community's increasingly complex problems depends on unfettered dialogue about a variety of issues, including affirmative action, that will affect our collective future.

Reflections of an Affirmative Action Baby comes at a crucial time of crossroads and choice for the African American community; and Carter's call for an open, honest dialogue represents more than an intellectual exercise. While the reader may disagree with some or all of the author's contentions, the book is, as he states, an act of hope and love.

Elliot Dawes

1. ROBERT KLITGAARD, CHOOSING ELITES (1985.)

RACIAL PREFERENCE AND RACIAL JUSTICE. THE NEW AFFIRMATIVE ACTION CONTROVERSY. Edited by Russell Nieli. Washington, D.C.: Ethics and Public Policy Center, 1991. Pp. xii, 532. N.p.

In *Racial Preference and Racial Justice*, Russell Nieli presents over three dozen perspectives on the affirmative action controversy by various academic, legal, political, sociological, religious, and philosophical commentators. Featuring excerpts from various articles, speeches, books, and the judicial opinions of eleven past and present Supreme Court justices, the book does not, as the author suggests, present for the reader a new affirmative action controversy. However, the text amply illustrates that since its introduction in the 1960s, the fervor over affirmative action has not subsided.

Nieli, a researcher and lecturer in the Department of Politics at Princeton University, divides the book into five sections. Part I, entitled "General Assessments," presents a general overview of perspectives animating the affirmative action debate in America today.

Comprised of excerpts from seminal Supreme Court opinions (*Regents of the University of California v. Bakke*, *United Steelworkers of America v. Weber*, *Fullilove v. Klutznick*, *City of Richmond v. Croson*, *Wygant v. Jackson Board of Education* and *Martin v. Wilks*), Part II illuminates the constitutional issues at stake in the affirmative action controversy. The inconsistent results emanating from the Court in this area shed light on the fundamental differences which have intractably divided it. The views of judicial proponents, who reconcile preferential hiring with the Equal Protection Clause of the Fourteenth Amendment, are contrasted with the views of those who attack the compatibility of such programs with the Constitution. Also discussed in Part II are legislative acts relevant to the debate over "reverse discrimination," the validity of minority set asides, and the legitimacy of race-conscious layoff policies that protect Blacks.

The use of quotas and preferential hiring practices are debated in Part III, entitled "The Civil Rights Act of 1964." Vastly divergent interpretations of the legislative intent of Title VII of the 1964 Civil Rights Act explore whether preferential hiring practices are permissible under the statute (as endorsed by Justice Brennan's dissenting opinion in *Bakke*), or completely proscribed (as suggested by Carl Cohen, former member of the Board of Directors of the American Civil Liberties Union).

Part IV of the book provides a set of conflicting perspectives on the economic and psychological effects that preferential hiring policies have had upon Blacks, the intended beneficiaries of these plans. The fifth and final section of the book contains only one article, co-written by Jeffrey K. D. Au, an Asian American student at Columbia Law School, and John H. Bunzel, former president of San Jose State University and former member of the U.S. Commission on Civil Rights. These authors offer a revealing account of how racial quotas have been used by the nation's most prestigious universities to set ceilings on

admission rates of Asian Americans, despite their equivalent academic scores and their even higher application rates than white counterparts.

In the 532 pages that comprise *Racial Preference and Racial Justice*, Nieli attempts to showcase a spectrum of views. As represented by Carl Cohen, Judge Robert Bork, Justice Antonin Scalia, and others, the ultra-conservative right vehemently opposes racial quotas and preferential hiring. Conversely, supporters of affirmative action programs (including Randall Kennedy, Justice William J. Brennan, and Justice Thurgood Marshall) are adamant that the elimination of such programs would reduce the already nominal representation of Blacks and other minorities in elite educational institutions and selective professions.

Both sides agree that central to the affirmative action debate is one question: is preferential treatment based on race a fair and effective means of eradicating discrimination and ameliorating the unequal status of minorities? However, this appears to be the extent of their agreement on this issue. Opponents like Justice Scalia ("The Disease as a Cure") claim that the use of affirmative action as "restorative justice" wrongly implies that innocent whites owe a "racial debt" to Blacks personally uninjured by past wrongs. In contrast, white male proponents like Paul Spickard ("Why I Believe in Affirmative Action") contend that the use of the emotion-laden term "reverse discrimination," suggests that there is a normal direction for prejudice; and that by upsetting the flow of prejudice, affirmative action programs have compelled white males to react defensively so as to protect their once sacred privileges.

Neither side denies the existence of disparities between the races. Critics however, believe affirmative action is not only an ineffectual means to eradicate discrimination, but argue that it further reinforces race consciousness in society. By institutionalizing race-conscious hiring practices, opponents contend that affirmative action programs merely underscore the salience of racial differences in society. Juxtaposed are the views of proponents of affirmative action like Justice Brennan, who explains in his *Bakke* dissent ("Remedying Past Discrimination") that racial classifications that aid members of racial minority groups victimized in the past by widespread discrimination are justifiable. Moreover, Brennan argued that since there are no practical alternative means to increasing minority representation in medical and professional schools, affirmative action plans are defensible. Ronald Dworkin ("Are Quotas Unfair?") explains that as the inevitable consequence of slavery, repression, and prejudice, America has remained racially stratified. As things stand, existing affirmative action programs are the only effective means of increasing the dearth of Black doctors and professionals in this country. Thus, they serve the long-term social goals of "reducing the degree to which American society is overall a racially conscious society."

Critics charge that affirmative action is a "zero sum" game; whereby gains made by members of one group — namely Blacks — necessarily mean a reduction of opportunities for another group — whites. These opponents

stress what they perceive to be the inherent unfairness of preferential hiring programs that treat candidates as members of racial groups, rather than evaluating "merit" on an individual basis.[1] They contend preferential hiring schemes which accord "unfair advantages" actually hurt rather than help their intended beneficiaries, who inevitably come to internalize a view of themselves as less meritorious than their white counterparts. Opponents allege that affirmative action programs ingrain stereotypes of the beneficiaries as less qualified, and fuel the hostilities of the "innocent victims." Proponents of affirmative action like Charles Krauthammer ("Why We Need Race Consciousness") counter that it strains logic to credit the argument that affirmative action actually harms blacks more than it helps them. In fact, he continues, "[such an] argument is about as (dis)ingenuous as Jerry Falwell's support of the Botha regime out of concern for South African Blacks." Despite some injustice to those who are involuntarily required to bear its costs, Krauthammer believes that the rapid integration of Blacks into American life is an overriding national goal, and that affirmative action is the means to that goal. Harvard Law School professor Randall Kennedy ("Persuasion and Distrust") also believes that any negative stigmatization of its intended beneficiaries is outweighed by all the positive effects that accrue from larger numbers of Blacks participating in the most important institutions of American society. While both sides are firmly entrenched in their respective views and both sides equally unrelenting, the debate rages with no end in sight.

Nieli suggests that the volume is "intended to acquaint the readers with the most salient features of the 'affirmative action' controversy." For the most part, the collection of essays captures the opinions of the most renowned and notorious commentators on the subject. However, a noticeable majority of the opinions represented in the book, twenty-one out of thirty-seven, favor the elimination of affirmative action. Even more ironic is the fact that those selected by the editor are predominantly white males. Only five of the essays are by Blacks; only one piece is authored by an Asian American; and no articles in the anthology are written by women. Notwithstanding the editor's expressed caveat that "gender is not addressed in any systematic way in the articles," critical perspectives on the subject appear to be missing.

This lack of diversity exposes Nieli's own anti-affirmative action slant. However, Nieli's own view is more conclusively demonstrated in his own contribution to the anthology, "Ethnic Tribalism and Human Personhood." Nieli's article, the longest and most unwieldy in the book, attacks affirmative action programs from a moralistic, religious, and philosophical perspective.

Paradoxically, the resulting imbalance in perspectives merely underscores

1. Unfortunately, neither side really offers any insightful commentary on the failure of "objective" criteria and of generally accepted tests of "merit," such as the SAT, to assess adequately minorities' abilities. To the extent that such tests have been shown to be culturally biased instruments, they are not reliable measurements of non-whites' intellectual abilities. Thus, lower scores on these "objective" tests are not necessarily indicative of native intelligence nor potential for academic success, particularly that of minority students.

a fundamental reason for the existence of affirmative action programs: the need for greater representation of minority viewpoints in America today. While the views of white men are overrepresented in the book, there is only a token representation by the most prominent Black commentators in the nation, and minority groups other than Blacks are afforded only a cursory discussion. Native Americans are all but absent from the minds of the commentators, and Hispanics are generally grouped with Blacks. Asians are mentioned by both sides of the debate. To proponents of affirmative action, Asian Americans are a minority that has suffered gross injustice in America and deserve special consideration. Opponents depict Asian Americans as a "Model Minority," exemplary of those who have overcome racial barriers on their own merit and without unfair advantages afforded by affirmative action.

Even the titles Nieli attributed to the five sections and individual articles in *Racial Preference and Racial Justice* convey his own biases and stereotypes. For example, by entitling the final section in the book "Asians at the Head of the Class," he reinforces the popular notion of Asians as superachievers, and reveals a striking insensitivity to the damage caused by such stereotypes. Moreover, the authors of the article that appears in that section never contend that Asians actually out-compete others. Rather, Au and Bunzel discuss the use of racial quotas at colleges and various other elite institutions which limit the admissions rate of Asian Americans. Despite standardized test scores and grade point averages equivalent to whites, and despite their even higher application rates, Asian Americans experience a lower rate of acceptance at these elite institutions — ostensibly because of quotas. By incorporating the findings at various elite institutions, the authors describe how quotas have restrained the achievements of a particular minority group, instead of facilitating their integration into American society. Thus, Nieli's use of the popular stereotype of Asian Americans as superachievers does a great disservice to this particular minority group and underscores his own lack of knowledge.

Insightful commentary of this nature from members of the other "beneficiary groups" would have contributed invaluably to the reader's understanding of affirmative action. Likewise, it would have dispelled some entrenched stereotypes about these groups. Conceivably, such an oversight was the result of benign editorial selectivity for the most cogent arguments. Yet, the inclusion of commentaries by women and minority group members, particularly those minorities not represented in the book, would have enabled Nieli to produce what he claims to have aimed for: a volume "addressing all of the more important aspects of the affirmative action debate."

Jane Kow

A CONFLICT OF RIGHTS: THE SUPREME COURT AND AFFIRMATIVE ACTION. By Melvin I. Urofsky. New York, New York: Charles Scribner's Sons, 1991. Pp. xii, 270. N.p.

The affirmative action debate lends itself to two extreme positions. On one side, opponents of affirmative action argue that it victimizes men from marginal white groups by forcing them to pay an individual price for society's past discrimination. These white men, who may themselves come from disadvantaged backgrounds, are denied their fair share in favor of less qualified minorities and women. On the other side, advocates claim that affirmative action is the only way to fairly compensate minorities and women for centuries of unequal treatment. Equal opportunity cannot by itself eradicate and redress social injustice; therefore, some individuals must bear the costs of redressing these past harms.

Melvin Urofsky, Professor of History and Constitutional Law at Virginia Commonwealth University in Richmond, rejects these two extremes and presents in *A Conflict Of Rights*, the compelling arguments made on both sides of the affirmative action debate. He acknowledges that affirmative action "and the social and economic conditions that are behind it are very complex and not amenable to simplistic and easy answers. It is not a question of good versus evil, an obviously 'correct' policy as opposed to one obviously 'wrong' and certainly not a story of 'good guys' and 'bad guys.' "

A Conflict Of Rights is about two people: Diane Joyce and Paul Johnson. Diane Joyce is a woman who, in 1980 secured a promotion to road dispatcher at the Santa Clara Transportation Agency, in part because she pursued enforcement of the County's affirmative action plan. Paul Johnson, a man with twenty-three years of dispatcher experience, was denied this same position after he was all but promised it by his supervisor.

The book is also about the Title VII lawsuit, *Johnson v. Transportation Agency, Santa Clara County*, which followed Joyce's promotion to dispatcher. In fact, while Urofsky traces the case back to 1974, when both Joyce and Johnson began their efforts to secure the dispatcher position with the Transportation Agency, much of the book is concerned with the ensuing litigation.

The suit was initially brought in the Northern District Court of California, which held that Paul Johnson should be promoted to dispatcher because the County's affirmative action plan was too rigid, too open-ended, and based on unrealistic goals. The Ninth Circuit Court of Appeals reversed the decision of the lower court, and this Ninth Circuit decision was affirmed by the United States Supreme Court.

Urofsky analyzes each step of the litigation and the arguments on which both sides relied. Moreover, he explores the legal barriers and policy considerations that informed these arguments. For example, he explains that, when Santa Clara County prepared to defend its affirmative action plan, it had to be

careful not to acknowledge past discrimination because to do so would have made the County vulnerable to future lawsuits.

Urofsky also provides the reader with an unusual, behind-the-scenes account of the Supreme Court decision-making process in *Johnson*. This was possible because he attained access to the files of Justice William J. Brennan, author of the majority opinion in the case. The initial draft circulated by Brennan emphasized that the County's affirmative action plan satisfied the criteria enunciated in *United Steelworkers of America v. Weber*: it addressed racial and gender segregation or hierarchy; it was narrowly tailored and of a limited duration; and it did not unnecessarily intrude upon the legitimate expectations of other (white or male) employees. Justices Thurgood Marshall and Harry Blackmun, and John Paul Stevens signed on to the opinion shortly after it was circulated. However, Justices Lewis Powell and Sandra Day O'Connor, critical center votes, believed the opinion needed to confront more explicitly the statistical evidence necessary to legitimate a voluntary affirmative action plan. As Urofsky points out, "[n]o judge . . . wants to write an opinion for the Court where he or she cannot even get a majority to go along"; thus, Brennan made changes in later drafts of the opinion so as to meet these concerns from the center. Interestingly, these changes narrowed the opinion more than Justice Stevens believed appropriate; as a result, while joining the majority, Stevens wrote a concurring opinion to explain this disagreement.

Urofsky splices this narrative with helpful explanations of the points upon which these Justices who signed on to the majority's disagreed. He treats the arguments made by Justice Antonin Scalia, author of the dissent, more briefly. However, in his characteristically neutral manner, Urofsky explains in some detail the more salient points of the Scalia dissent.

Urofsky skillfully contextualizes the case within a broader legal and political framework. He briefly discusses Congressional measures of the 1960s and 1970s which were designed to eliminate employment discrimination, such as Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972, Title IX of the Higher Education Act of 1972, and the Age Discrimination Act of 1975. In addition, Urofsky highlights Supreme Court decisions addressing employment discrimination and challenges to affirmative action plans, which informed the *Johnson* decision.

Through extensive interviews with Joyce, Johnson, their lawyers, and others involved in the affirmative action debate, Urofsky reveals a human side to this contentious issue. Joyce's and Johnson's voices are represented more strongly in the first half of the book than they are in the second half; but Urofsky never lets the reader lose sight of the working men and women who are directly affected by the conflict surrounding affirmative action.

Urofsky's ability to provide a human context for the affirmative action debate is his book's greatest strength. In many ways, however, it is the most frustrating aspect of *A Conflict of Rights*. Urofsky provides personal insights that get lost when the conflict is addressed from a more rigid, theoretical per-

spective. His emphasis on the human effects of affirmative action demonstrates the deficiencies of the polemical extreme views of affirmative action. Yet, this emphasis does not reconcile the extreme views, nor does it supply a resolution to the competing value claims about affirmative action. In spite of Urofsky's even-handed approach and his effort to move past a log-jammed debate, the debate over affirmative action, given the stakes, is a debate where not taking a side is not quite good enough.

Sherri Levine