

# THREE MODELS OF AFFIRMATIVE ACTION BENEFICIARIES

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What has caused the affirmative action debate to become so acrimonious? Perhaps some insight may be gained by considering three competing models of affirmative action beneficiaries that underlie this debate: (1) the outsider group model; (2) the interest group model; and (3) what I will call the adversity group model.

The point of considering these understandings of affirmative action beneficiaries is not that one is necessarily correct and the others wrong. For present purposes I will remain agnostic about that. Rather, the point is that in the context of the contemporary affirmative action debate, each of the three models has some claim to plausibility, and each is invoked—either explicitly or implicitly—by different camps in the debate. The outsider theory is the favorite of the left, and has been championed by the most extreme proponents of affirmative action: the critical race theorists and feminist theorists of academia. The interest group theory is the favorite of the right, and is invoked by the most implacable foes of affirmative action. Finally, the adversity group theory is the darling of centrist policy-makers and politicians, including the nine politicians who sit on the U.S. Supreme Court. In effect, these three models of beneficiary groups serve as rival framing devices within the ongoing debate about affirmative action. Once we uncover and examine the underlying group models, perhaps we can better understand why the debate has turned so nasty.<sup>1</sup>

The outsider group theory explains the circumstances of affirmative action beneficiaries in terms of a deficiency of political

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1. For a fuller development of this thesis, and application to issues other than affirmative action, see Thomas W. Merrill, *Toward a General Theory of Minority Groups: Outsider Groups, Adversity Groups, and Transfer Groups*, 3 ANN. REV. L. & ETHICS 69 (1995).

power. According to this perspective, these groups are powerless, or at least have less power than they ought to have in an ideal world, and affirmative action programs are necessary to overcome this power imbalance. The argument is a little bit tricky, because the principal groups benefited by affirmative action in fact enjoy complete equality of political rights today: they have equal voting rights, equal access to the ballot, full freedom of speech, and so forth. Outsider theorists explain that this formal equality is illusory, however, for two reasons.

The first is an empirical assertion about human motivation. According to outsider theory, dominant groups (here read "white males") harbor a deep-seated social-psychological reluctance to share power with historically subordinate groups. The reasons for this have to do with unspoken fears, lack of empathy, or simply a desire to boost the status of the dominant group at the expense of these other groups.<sup>2</sup> This type of entrenched bias means that outsider groups—even if they enjoy formal political equality—cannot wheel and deal in the political process in the same way as competing factions within the dominant group. In effect, outsider groups, by simple reason of their "otherness," are subtly but systematically frozen out of the critical fulcrums of power within the political system.

The second reason why formal political equality does not matter, according to outsider theorists, is because the realm of "the political" is vastly greater than the sphere covered by the rules of formal equality. Instead of focusing on what we ordinarily think of as being political—that is, the government—outsider theorists posit that anything and everything that has to do with the allocation of scarce resources is "political," whether it be hiring decisions, or educational admissions decisions, or decisions to lend money. This expansion of the realm of the political, coupled with the previously mentioned empirical assertion about the entrenched nature of bias against outsider groups, leads to the conclusion that outsider groups continue to face pervasive exclusion from full equality in all walks of social life.<sup>3</sup>

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2. See Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003 (1995).

3. See, e.g., Mary E. Becker, *Needed in the Nineties: Improved Individual and Structural Remedies for Racial and Sexual Disadvantages in Employment*, 79 GEO. L.J. 1659 (1991); Alex M. Johnson, Jr., *Defending the Use of Quotas in Affirmative Action: Attacking Racism in the Nineties*, 1992 U. ILL. L. REV. 1043.

The logical conclusion of the outsider model (though it is not often stated in this bald fashion) is that we ought to have universal affirmative action with respect to every important decision involving the allocation of resources. Further, we will not know that this political exclusion grounded in bias has been eliminated until we can see that outsider groups have achieved complete parity with dominant groups in these coveted positions. Thus, universal quotas that bring outsider groups into parity with dominant groups are the only answer.

The interest group model, by contrast, is the favorite of the most vehement opponents of affirmative action. Here, the thesis is not that affirmative action beneficiaries have too little political power, but rather that they have so much political power that they have been able to seize control of the state and forcibly to transfer scarce jobs, educational placements, and other resources to themselves at the expense of the diffuse majority (here read "white males").

Why might beneficiary groups have all this power? There are a variety of possibilities. Maybe the very discreteness of minority groups—the fact that they are physically distinguishable and easily can identify each other as members of the group—makes it easier for them to organize for political action than it is for the more diffuse mass of white males to organize in opposition.<sup>4</sup> Perhaps the crucial position of many of these beneficiary groups in the Democratic Party, which until recently has controlled the federal and most state legislatures, has something to do with it. Whatever the explanation, the assumption is that affirmative action is a kind of power grab whereby various special interest groups—the civil rights lobby or the women's lobby or what-not—seize control of the state and use its power forcibly to transfer resources from the diffuse majority to these influential groups.<sup>5</sup>

The interest group theory denies both of the key assumptions of outsider group theory. First, although most interest group theorists probably would concede that prejudice exists, they

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4. For discussion of this possibility, see Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985); Daniel A. Farber & Philip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685 (1991).

5. The clearest exposition of this understanding is RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992).

tend to regard it as a much weaker form of human motivation than economic self interest. The incentives for economic gain should quickly root out irrational prejudice.<sup>6</sup> This should hold true for labor markets (employers have an incentive to hire and promote the best workers, regardless of prejudice against traditionally disfavored groups) and the market for educational opportunities (schools have an incentive to admit the best students, regardless of group affiliation).

Second, and relatedly, interest group theorists tend to reject the assumption that all resource allocation decisions are political. Instead, they recognize a sharp distinction between the political and the nonpolitical. The political world is governed by the threat of state coercion. Here, interest groups compete for control of the state, which has a monopoly on the legitimate use of force. The prize for capturing the state is the forcible transfer of resources from poorly organized groups (including majorities) to the better organized groups (typically minorities). There is, however, also a nonpolitical realm, governed by the principle of voluntary consent. Here we find of course the market, but also the sphere of private associations and family life, and various forms of organized competition ranging from sports to college admissions. In these nonpolitical realms, decisions are made on the basis of merit, not political clout.

Needless to say, the logical implication of interest group theory, as applied to affirmative action beneficiaries, is that there should be no affirmative action at all. Affirmative action represents the corruption of traditionally nonpolitical decisionmaking based on merit in favor of political decisionmaking, based on coercion and interest group capture. Outsider group theory and interest group theory thus define two diametrically opposite attitudes toward affirmative action; the one requires its universal extension, the other its universal abolition.<sup>7</sup>

The third understanding of affirmative action beneficiaries I will call the adversity group model. This approach defines the circumstances of affirmative action beneficiaries in terms of their having suffered some disproportionate loss because of dis-

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6. See GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* 35-37 (2d ed. 1971).

7. Richard Epstein, the most influential of the interest group theorists, actually adopts a more subtle position. He would prohibit only affirmative action imposed through the coercive power of the state. Truly voluntary affirmative action plans adopted by the private sector he would leave undisturbed. See EPSTEIN, *supra* note 5.

crete events in the past for which they are not morally responsible. There are lots of examples of adversity groups all around us: FEMA aid for victims of natural disaster, just compensation for victims of government takings, and tort claim or insurance compensation for victims of accidents.

Affirmative action beneficiaries also can be seen through the lens of the adversity group model. The adverse event that describes these groups can be defined in different ways. One, which might be called the cosmic disaster theory, was popular with the Brennan-Marshall-Blackmun wing of the Supreme Court.<sup>8</sup> This posits that the adverse event is an entire social-historical epoch, such as the era of slavery and Jim Crow laws for African-Americans, or the era before women's suffrage and equal employment opportunities for women. The cosmic disaster theory posits that these past cataclysms have left cultural legacies that continue to disadvantage certain groups; affirmative action is conceived of as a kind of rectification or evening of the score for these past injustices. Another more centrist approach would identify the adverse event as specific acts of intentional discrimination against the group by specific bad actor institutions.<sup>9</sup> These identifiable adverse acts of intentional discrimination give rise to a duty on the part of the bad institution to institute an affirmative action program on behalf of other members of the group, as a kind of rectification or evening of the score for the past injury. A third and very narrow approach is that of Justice Scalia, who would limit the adverse event to specific acts of intentional discrimination by specific bad-actor institutions against specifically identified individuals, and would limit any rectification or evening of the score through affirmative relief to those specific victims of discrimination.<sup>10</sup>

There are obviously important distinctions between these different versions of the adversity group conception. For present purposes, however, I am more interested in the underlying

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8. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 324 (1978) (Brennan, J., concurring in the judgment in part and dissenting in part) (joined by Justices White, Marshall, and Blackmun).

9. See *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 610-17 (1990) (O'Connor, J., dissenting), *overruled by Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2111-17 (1995); *id.* at 631-38 (Kennedy, J. dissenting); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498-508 (1989); see also Kathleen M. Sullivan, Comment, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78 (1986).

10. See *Croson*, 488 U.S. at 526-28 (Scalia, J., concurring in the judgment).

common features, and how they differ from the assumptions that underlie both the outsider group model and the interest group model. Both the outsider model and the interest group model depict the relationship between the beneficiary group and the rest of society in terms of power. For outsider theory, affirmative action is a response to majority tyranny; for interest group theory, it is a form of minority tyranny. The adversity group model, in contrast, invokes a consensual model of society. Affirmative action beneficiaries are part of the same moral universe inhabited by the rest of the society; they just happen to have suffered a disproportionate loss through no fault of their own. Affirmative action on this understanding is an act of sympathy for our fellow citizens—a helping hand extended to get them over a difficult hurdle no one should be asked to surmount alone.

If the choice is between the outsider group model, the interest group model, and the adversity group model, there is at least one good thing to be said about the adversity model: this conception bodes far better to restore some modicum of civility to the debate about affirmative action programs. As should be clear from the foregoing discussion, the outsider model (which is the darling of the far left in the academic world these days) and the interest group model (the natural favorite of the right) are polarizing models. They are based on we-they understandings of the affirmative action debate. The outsider group model sees the minority group as the oppressed and the dominant majority as the oppressor. The interest group model sees the minority group as the grasping, rent-seeking interest group and the majority as composed of innocent meritocrats committed to playing by objective rules.

The adversity group model, whatever its other flaws, starts with a premise of a single moral community and, hence, has some prospect of producing mutual understanding and some kind of workable compromise. It also has the virtue of underscoring the temporary nature of affirmative action: it emphasizes that an injury was visited upon the group in the form of past acts of intentional discrimination, and that some kind of collective response to that injury is necessary to restore the group to its rightful status of full equality in the political community.