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BOOK REVIEW

A CONFLICT OF RIGHTS: THE SUPREME COURT AND AFFIRMATIVE ACTION. Melvin I. Urofsky.† New York: Charles Scribner's Sons, 1991, Pp. ix, 188. $22.95.

Reviewed by Barbara J. Kraetsch*

I. INTRODUCTION

In the midst of the sometimes vitriolic debate over the advisability and effectiveness of affirmative action policies, Professor Melvin I. Urofsky's *A Conflict of Rights: The Supreme Court and Affirmative Action*, is a thoughtful and welcome commentary. Urofsky's primary intent is to make the reader aware of the conflict in human values inherent in affirmative action and sensitive to the impact of policy implementation on real lives. Toward that end, Urofsky provides a thoroughly entertaining look at the story behind the United States Supreme Court decision in *Johnson v. Transportation Agency, Santa Clara County, California.*[1] In addition, he places affirmative action in a historical context and outlines the ongoing dialogue concerning its role in society. Throughout the book, Urofsky's treatment of the topic is that of the historian — he strives to be objective and fair in both presentation and analysis. Rather than opting to take sides in the debate, he views his role as a commentator who continues to press with hard questions — questions that he believes need to be answered.

While Urofsky does not pretend to have those answers, his responsible and balanced treatment of the topic educates the reader to the best of the arguments both for and against affirmative action. In remaining the neutral observer, Urofsky recognizes that there are no easy or quick answers as to how American society should or would attempt to eradicate discrimination and its lingering, foul effects. Other commentators have taken a different stance on affirmative action. In order to provide the reader with greater

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1. 480 U.S. 616 (1987).

perspective, Urofsky's analysis will be contrasted with the views of other recent, but more conservative, commentators in Part V of this review.

II. Affirmative Action History and Debate

Urofsky summarizes the historical development of affirmative action programs so that the reader can fully appreciate the legal and social context of *Johnson*. Prior to passage of federal statutes presidents used executive orders to address fair employment issues because legislators were slow to act despite mounting societal pressures for positive changes in addressing civil rights. Even after Congress passed the Civil Rights Act of 1964, which includes Title VII, presidents continued to issue executive orders. The most notable of these required federal contractors to take affirmative action to recruit, hire, and promote minorities and women and established the Office of Federal Contract Compliance to oversee the mandatory written affirmative action plans required of contractors.[2]

Prior to federal requirements for mandatory written plans, which include statistical work force analyses leading to numerical goals, compliance with affirmative action was voluntary and standards were vague. In a telling comment, Urofsky notes that businesses do not deal well with vague generalities, but respond to specifics. In other words, business managers like numbers, and once statistics were introduced they fell easily into a pattern of hiring by the numbers. This occurred although compliance with federal affirmative action regulations[3] has never required hiring absolute numbers or quotas. Regulations have required only progress toward the inclusion of minorities and females in categories analyzed to be underutilized. Underutilization means that the category contains fewer minorities and women than could be statistically expected based on an analysis of eight factors as outlined in the federal regulations. Most important among these factors are the statistical percentages of qualified minorities and females in the labor pool for the recruitment area and for the geographical area surrounding the employer.

Contractors must explain in narrative analysis their progress, and particularly lack of progress, toward the job category's appropriate utilization goal. This process is time-consuming and the result is uncertain. Once committed to written plans and goals, employers cannot shirk their obligations. If the Office of Federal Contract Compliance deems affirmative action efforts insufficient in the face of lack of progress, penalties will follow.

2. E.O. 12086 effective Oct. 8, 1978, signed by President Carter, amending E.O. 11246 signed by President Johnson on Sept. 24, 1965.

3. 41 C.F.R. § 60 (1991).

Such explanations are not required once the utilization goal is reached. It is not surprising then that many businesses treat affirmative action goals like quotas.

Although affirmative action has become a way of life for major American businesses and government entities,[4] supporters and detractors continue to debate whether such programs have been effective or even helpful. Urofsky's book thoroughly and dispassionately reviews the debate and adds to the existing scholarship with insightful commentary. For instance, Urofsky recognizes that the debate over affirmative action is really not over numbers, but over social philosophy and what the nation, as a whole, is ready to do to eliminate discrimination. All the significant arguments for and against affirmative action are presented, as well as comments from individuals regarding various facets of the debate.

The arguments in favor of affirmative action are summarized as follows: Minorities and women have historically suffered discrimination and been denied opportunities. In order to eradicate vestiges of discrimination, and include groups formerly excluded, society must take affirmative steps to ensure these groups have access to societal institutions, schools, and jobs. Further, what was formerly used to exclude these groups, race and gender, can now be used fairly to include more persons of the formerly excluded groups.[5]

The summary of criticisms of affirmative action is as follows: Race-conscious or gender-conscious programs are as intrinsically objectionable as discrimination. While discrimination has existed against certain groups, goals and "quotas" that benefit these groups disadvantage individual white males in positions targeted for affirmative action. Further, affirmative action does not work for those individuals who are most needy, namely the uneducated and unskilled, because the basic inequalities of American society cannot be cured through affirmative action, but only through the transformation of society itself. Detractors believe that quotas undermine progress toward a society in which only individual merit is considered. Finally, detractors state that innocent individuals cannot morally or lawfully be called upon to compensate groups whose ancestors were the victims of discrimination.[6]

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4. Presently, numerous entities voluntarily adopt affirmative action plans to increase numbers of minorities and females in the workplace. These plans generally comply with federal guidelines for government contractors. *See infra* note 9 and accompanying text.

5. MELVIN I. UROFSKY, A CONFLICT OF RIGHTS: THE SUPREME COURT AND AFFIRMATIVE ACTION 15-38 (1991).

6. *Id.*

Although Urofsky concludes that the debate has thus far produced more noise than insight into solutions, it nonetheless has forced society to ask some hard questions — hard questions which must be addressed.

III. Affirmative Action in the Courts

In a discussion of affirmative action decisions, Urofsky reviews how courts have treated some of the more difficult issues. He explains in a direct and simple manner the theories of proving discrimination, patterns of court holdings, and the impact of those decisions. He uncomplicates and keeps understandable the development of reverse discrimination cases, cases which attempt to settle issues surrounding the question of whether it is possible to discriminate in favor of a minority without discriminating against another individual, who may be either another minority or a member of the white majority.

A number of reverse discrimination cases raised the question of whether a program that consciously favored minorities and as a result discriminated against whites violated Title VII and the Constitution. Such challenges arose in one of two contexts: employment programs and preferential admissions plans for schools. Urofsky notes that the Supreme Court chose to confront the legal and constitutional issues raised by affirmative action in the latter context first.

The first case heard by the Court on its merits, *Regents of the University of California v. Bakke*,[7] was brought by a thirty-seven year old white male who was denied admission to medical school by a university that reserved sixteen slots for disadvantaged minorities. The Supreme Court faced two fundamental questions in *Bakke*: (1) whether race can be a legitimate factor in admissions to training programs (and by implication in employment decisions); and (2) if race is a legitimate factor, whether the utilization of that factor in the case before the Court was a violation of Title VII or the equal protection clause of the Fourteenth Amendment of the Constitution.

Although the *Bakke* plurality opinions did not entirely invalidate the use of affirmative action policies, the issue continued to be a divisive one within the Court. Following *Bakke*, the Court considered voluntary affirmative action programs undertaken by employers to redress workplace discrimination. Those programs generally attempted to comply with federal guidelines for government contractors and took the form of recruitment and promotional programs rather than set-asides[8] for specific groups.

7. 438 U.S. 265 (1978).

8. Certain affirmative action programs allocate a portion of opportunities exclusively to minorities. These are known as set-asides because non-minorities are completely eliminated from

These voluntary programs were allowed under an expansive interpretation of Title VII in *United Steelworkers of America v. Weber*,[9] despite a zealous dissent which argued that Title VII prohibited all racial discrimination. Under *Weber* an affirmative action plan's acceptability depends on whether it meets three criteria: (1) the plan must be temporary; (2) it must only be used for the purposes of eliminating obvious statistical racial disparities in traditionally segregated job categories; and (3) it can only be imposed if the rights of innocent victims are not unnecessarily trammeled.[10] A subsequent splintered decision required substantial evidence of past racial bias in order for an employer to utilize race-conscious remedies by way of a set-aside program.[11] Urofsky concludes that the divided, and in his mind troubling, opinions of the Court reflect the underlying discord present in our society regarding the value of affirmative action.

Urofsky includes the rise of the women's movement in his brief history of employment law regarding affirmative action prior to *Johnson*. He discusses what he believes to be the differences in discrimination between minorities and women, concluding that the Supreme Court has found gender discrimination more acceptable than racial discrimination. This proposition is evidenced by the Court's declaration that racial classifications are subject to strict scrutiny, while gender classifications are subject only to intermediate scrutiny, even though Title VII makes no distinctions between race and gender.[12] Urofsky suggests that under the standards outlined in opinions prior to *Johnson*, affirmative action remedies taking gender into account could have been foreclosed.

IV. *JOHNSON*

After providing this historical backdrop, Urofsky thoroughly entertains the reader with the unfolding drama of the *Johnson* case. The author is a wonderful story teller, and the reader quickly becomes engrossed in the case that many originally thought was simple and uncomplicated. The facts in *Johnson* involve the conflict between two individuals — a hard-working white male, Paul Johnson, who had never considered himself an oppressor, and a hard-working female, Diane Joyce, who had personally suffered past

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consideration from the specified percentage of opportunities. *See, e.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

9. 443 U.S. 193 (1979).

10. *Id.* at 208.

11. Fullilove v. Klutznick, 448 U.S. 448 (1980).

12. For an excellent discussion of the levels of scrutiny applied by the Warren Court see Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Mold for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-24 (1972).

sex discrimination and was looking for a chance to be judged on her merits. Both individuals wanted a dispatcher position at the Santa Clara County Transportation Agency. Seven persons, including Johnson and Joyce, had scores on a county test that certified them as eligible for the job. The county could have chosen any one of the seven. Johnson's score was two points higher than Joyce's, and his male supervisors judged him to be the better candidate based on his experience. No woman had ever held the dispatcher job. Diane Joyce knew that she was also qualified for the position; however, she was discouraged by her supervisor from interviewing. Joyce had previously faced discouragement when she (successfully) attempted to become the first woman to work on a county road crew. Upon learning that the dispatcher position would go to Paul Johnson, and believing that she was being discriminated against because of her gender, Joyce went to the affirmative action director for the county who intervened and requested that she be actively considered.

The county had previously established a voluntary affirmative action plan with short-term goals for increasing the numbers of minorities and women represented in the work force, but which did not impose quotas for hiring or promotion, nor did it contain set-asides for certain groups. In the overall skilled employee category of 238 employees, which included dispatcher jobs, no positions were held by women. The absence of women in this category was contrasted with the fact that women comprised 5% of the county-wide labor pool of skilled workers. The director believed Joyce's qualification for the position presented an opportunity to make progress in having female representation in this category. Joyce received the position, and Johnson filed a reverse discrimination action under Title VII against the county.

By crafting a behind-the-scenes look at the facts and personalities involved, we begin to appreciate how the case truly presented a conflict of both legal and social rights. Urofsky's meticulous attention to detail draws from diverse sources, including the files of Justice William J. Brennan, Jr. (author of the majority opinion), numerous personal interviews, including Johnson and Joyce themselves, and all court transcripts. Ultimately, the tale of the justices' negotiations preceding the *Johnson* opinion is reminiscent of *The Brethren*.[13] In addition to extensive research, Urofksy portrays the human drama of the intertwining lives involved so that it comes alive. The reader understands how Supreme Court cases affect persons whose ordinary lives thereby become extraordinary.

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13. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN (1979).

Urofsky makes the following noteworthy points about the *Johnson* decision, which involved a promotion rather than a hiring decision. First, women were included in the group eligible for affirmative action for the first time; second, it treated public and private employers as having equal standards for voluntary affirmative action plans under Title VII; and third, huge, unexplainable, statistical disparities in traditionally segregated job categories were considered sufficient proof to justify the implementation of affirmative action plans. The opinion followed *Weber* and reiterated the principle that voluntary affirmative action can play an important role in eliminating the lingering effects of workplace discrimination. Notwithstanding the necessary guideposts established by the Court, the author concludes that *Johnson* did not resolve the most difficult questions surrounding affirmative action — questions involving both legal and public policy issues: What classes beyond blacks and women should be included in preference programs because of a past history of discrimination? How do we define "discrimination"? How do we define the group of "innocent victims" whose rights cannot be trammeled? How can we clearly define the "best qualified" individual for a position? How do we know whether affirmative action policies are effective? How do we know whether we should allow the use of affirmative action plans, and if we do allow them, how are they best implemented with appropriate criteria and limitations on assistance bestowed? And finally, can we as a society afford the cost of affirmative action when resources are limited?

Urofsky closes the *Johnson* chapter by noting that the consensus among locals at the Santa Clara Transportation Agency is that the same workplace culture exists today as when Paul Johnson and Diane Joyce vied for the dispatcher position. Urofsky notes that this reality is consistent with the generally diminishing acceptance of affirmative action programs.

V. Other Current Voices in the Affirmative Action Debate

Others have taken a more strident stance in the debate, claiming that preferential treatment destroys the concept of individual merit. Still others decry supporters who are characterized as believing that affirmative action can be used to "achieve" rather than "maintain" racial balances. In *Equality Transformed: A Quarter-Century of Affirmative Action*,[14] Professor Herman Belz discusses affirmative action from a far more conservative perspective than Urofsky. The striking contrast between Urofsky and Belz is one of both substance and tone. Urofsky strives to make us understand

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14. Herman Belz, Equality Transformed: A Quarter Century of Affirmative Action (1991).

that the establishment and implementation of affirmative action plans can result in a conflict of rights between individuals; whereas Belz strives to persuade the reader that the *Johnson* case completed the transformation of Title VII from employment law concerned with equality of opportunity to one undesirably focused on equality of result.

Belz, also a professor of history, takes the position that Title VII and affirmative action are antithetical. From his perspective, employment discrimination law has become unnaturally perverted by the allowance of affirmative action through sentiment rather than discerning legal analysis. This has resulted in nothing more than a legal method for employers to engage in discrimination by exercising race-conscious or gender-conscious preferences. He believes that affirmative action policies force employers to hire blacks and women and thus discriminate against innocent white males. In his opinion, Title VII has been transformed from a remedy for unlawful discrimination against an individual, a concept based on merit, into a guarantee of a "fair share" of jobs for a specific group. By making racial balance an end in itself, race is identified as a component of merit. But to suggest that race *per se* is deserving of reward is the antithesis of the very concept that Title VII was meant to implement.

Moreover, Belz firmly believes that affirmative action subverts the Civil Rights movement, which has long struggled to eliminate race as an irrelevant and superficial qualifier for employment. He states that affirmative action also obscures genuine achievement and denies personal satisfaction following achievement based on one's own ability. Furthermore, affirmative action does not provide a true legal redress for discrimination because it does not remedy an individual injury, but is merely a public policy to compensate a group at the expense of innocent third parties. The Belz theme is far removed from the Urofsky "conflict of rights" theme. Belz takes the stance that affirmative action promotes partisan interest and racial group equality at the expense of the common good or in contradiction of the ideal of "common citizenship" that should guarantee individual rights on an impartial basis.

Whereas Urofsky points to the hard questions, Belz points to hard answers. Belz advocates the elimination of all affirmative action programs because he believes that equality of condition cannot be achieved. However, Belz argues that equality of opportunity, defined as an absence of political and social privilege, can be achieved. He harkens back to early American principles of equality of opportunity and common citizenship, arguing forcefully that bestowing group rights cannot guarantee equality of or for individuals, and that quotas are merely a form of social engineering that attempts to eliminate natural differences between people. As Belz finds

affirmative action to be a coercive and backward-looking solution for eradicating any lingering effects of discriminatory practices, he proposes that individuals should take responsibility for themselves and compete on a hierarchy of merit alone.

Furthermore, Belz adamantly criticizes affirmative action as a social policy to redistribute limited wealth according to "racially proportionate equality." He believes such redistributive policies deny the natural rights of individual citizens that form the very basis upon which prosperous American society rests. Unfortunately, these assertions pander to fears that unqualfied or less qualified blacks may be hired in attempts to satisfy quotas. Further, he insinuates that by the majority's sharing of their opportunities and resources, great injury occurs to them. This stance denies that any future value exists in mainstreaming those groups formerly excluded. Belz proposes no solution to this dilemma, leaving some to believe that he has unfairly transformed the concept of sharing into something pernicious.

Other conservatives in the debate are less strident in their views. In *Reflections of an Affirmative Action Baby,*[15] Professor of Law Stephen Carter, discusses his personal experiences as a beneficiary of affirmative action. A product of generations of black professionals, Carter presents a credible and well written narrative of both the blessings and deficiencies of affirmative action from a special perspective. He states boldly that he would not have been accepted into an elite law school if he were not black, but goes on to make a forceful argument that he was qualified to be judged on his own performance record regardless of race. He rails against the unfairness of judging qualified blacks and whites by different standards, so that the "best black" is presumed unable to perform as well as whites.

Despite being a recipient of affirmative action, Carter has sharp criticisms of the present use of affirmative action policies. He agrees with Belz, that affirmative action is redistributive in nature: It redistributes wealth between the classes for public policy reasons. The problem, he observes, is that affirmative action differs from other social transfer programs because it chooses the favored based on race rather than disadvantaged status. He contends affirmative action has drifted from its original purpose of providing opportunity for the disadvantaged to become a system that operates on the premise that diversity is valuable. Or in other words, the expectation that blacks have different opinions and perspectives than whites is reason enough to utilize affirmative action. His objection is that all blacks are not similarly situated, nor do they think alike.

15. STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY (1991).

Carter counts himself as a black neo-conservative, but he acknowledges that others may consider him not "authentically" black because his conservative views do not fit into the mold of what supporters of affirmative action may consider the "correct" black point of view. He states that some blacks, like himself, are spurred by racial incidents and marked with an insatiable need for achievement. There is a slightly bitter undertone present when he recounts numerous occasions when his superior achievements resulted in being designated "best black," an insulting term by its implication. Carter argues that there are no real differences in intellect or perspective between blacks and whites, and therefore the value of diversity is merely a sham if employment standards are lowered to ensure that optimal numbers of blacks are hired.

Carter explains that his attraction to the conservative's viewpoint is a shared belief in the importance of maintaining standards of excellence and inculcating strong positive values in all individuals, whether black or white. He translates this to mean that blacks aspire to and are certainly capable of being more than "the best black" available to meet affirmative action standards. To continue using racial preferences presumes that blacks cannot compete under the same standards of excellence with whites.

He argues persuasively that race should not be used as an indicator of merit. The same standards and criteria must be used for all. Standards must be fair for all but once selected, everyone should be required to meet them. He argues that affirmative action is a crutch and that we can survive the discontinuance of racial preferences; and further, that the vast underclass of blacks — the true victims of racism — are not in a position to reap any benefit from affirmative action. He believes that racial preference programs are not constructive methods for breaking down barriers that keep minorities excluded from the mainstream. He suggests that blacks should focus on striving for excellence and should take advantage of opportunities instead of expending their energies lamenting that racism is their only barrier to achievement and acceptance.

While discounting the use of affirmative action principles in employment, Carter, believes that racial preferences could still appropriately be utilized for admissions to training programs and educational institutions. He no doubt accepts this distinction because of his own experiences as the beneficiary of such a policy. For Carter, the use of affirmative action in the educational context is closer to providing an equal opportunity for minorities to achieve excellence and prove themselves as individuals of ability.

Carter's special perspective provides a compelling personal account that reminds the reader of affirmative action's impact on individual lives. He presses for continued discussions, as does Urofsky, regarding the appropri-

ate use of affirmative action if we, as a society, intend to continue using these programs in limited ways. Overall, the book brings a very persuasive viewpoint to the debate, while not attempting the "hard sell" of Belz's style of conservatism.

VI. Conclusion

Affirmative action has evolved from a mandate requiring federal contractors to extend equal opportunities to minorities in hiring decisions to a philosophical and social issue of debate that will shape the future of race relations in this country. Supporters and detractors are firm in their positions on whether it is a necessary good or an unnecessary evil. Few remain as neutral as Urofsky. The three authors discussed in this review have contributed to the debate in 1991 with perceptive and stimulating commentary. If one is a serious onlooker or is involved in any way in the affirmative action debate, all three books are must reading.