

# Employment Quotas for Women?<sup>[1]</sup>

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In *Equal Employment Opportunity Commission v. American Telephone and Telegraph Company* (1977), a federal appeals court upheld the constitutionality of race and gender-conscious employment quotas in a much-publicized consent decree. Although no party had addressed whether affirmative action remedies that may be legal for minorities would necessarily also be legal for women, the court gave the issue passing attention. After briefly discussing the constitutional principles whereby gender classification are subject to a lower standard of judicial scrutiny than are racial classifications, the court concluded: "The present classifications are permissible in the case of race, and are thus permissible *a fortiori* with respect to sex."

This has been the only court decision to touch upon a possible difference in the constitutional analyses of employment quotas for minorities and those for women. The court's view that quotas for women were subject to less

careful scrutiny- that is, could be justified by a less important governmental interest- clearly accorded with prevailing constitutional law. In arriving so easily at its conclusion, however, the court apparently did not consider whether there may be material differences in the ways various governmental interests are served by employment quotas for each type of group. Yet, because of substantial differences in the relationships among members of minority groups and those among women, certain important governmental interests that are served by quotas benefiting members of minority groups are served not at all by quotas benefiting women. Consequently, even though certain justifications of quotas may apply equally in either case, the ultimate determination of the appropriateness of most employment quotas is necessarily more difficult when the quota is for women.

There are two kinds of employment quotas. "Preventive quotas," which require that members of a certain group be selected in the same proportion they comprise of the relevant labor pool, seek merely to ensure future non-discrimination, not to remedy past discrimination. While such quotas may raise difficult issues of their own, their appropriateness is unaffected by whether the group is minority or female.

Most court-imposed employment quotas, however, are "enhance quotas," which seek not only to ensure future non-discrimination but to make up for the past as well. For example, assume that a particular race or gender group comprises 20 percent of the labor force from which an employer hires, but due to past discrimination that group comprises only 10 percent of the employer's work force. As a remedy a

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<sup>1</sup> There are two published further developments of the ideas in this article, the most comprehensive of which is "[The Curious Case of Affirmative Action for Women](#)," *Society* (Jan.-Feb., 1992) (reprinted in *Current* (June 1992)). The other is "[Affirmative Action for Women: New Twist on an Old Debate](#)," *Legal Times* (Dec. 5, 1988) (reprinted in *The Corporate Board* (July-August, 1989)).

court might require the employer to hire the previously excluded group at a rate something in excess of 20 percent (say 40 percent) for a certain number of years or until the group comprises a designated figure closer to 20 percent of the employer's work force.

The purpose of such remedies has been variously stated as "the correction of the effects of past discrimination" or "the accelerated elimination of underutilization." In plainer English, it is to integrate the work force faster than would be achieved if discrimination simply ceased. The AT&T decree was (in large part) such a remedy, as have been most of the other employment quotas upheld by the courts. In another context, the minority contractor set-aside in federally-funded construction projects upheld by the Supreme Court in *Fullilove v. Klutznick* (1980) is the same sort of quota, since the 10 percent reserved for minorities is considerably higher than the minority proportion of competitively-qualified bidders for such projects.

Two features of enhanced quotas are critical here. First, because they call for persons of the benefited group to comprise a greater proportion of selections than of the pool, such quotas necessarily require a preference. The gradations of skills among persons qualified to perform a particular will determine the extent to which the preference involves selecting a less-qualified over a more-qualified candidate; in any case, however, persons who ordinarily would not be selected are selected over persons who ordinarily would be. Second, the persons who are benefited by the preferences generally are not persons who were victims of the employer's discrimination. These features raise a difficult question: Does

it make sense to prefer persons not themselves victims of discrimination to make up for the discrimination against other members of their group?

The answer may depend on whether those involved are minorities or women. It is, of course, simply unfair to make either race or sex the basis for preferring a person who is not a victim of the employer's discrimination over another. If this apparent individual unfairness is to be justified, the justification must be found in the way the quota serves larger social purposes. And, because the individual unfairness affects persons in very serious ways, those purposes must be sound and important. There are a number of plausible justifications which have been or could be asserted in support of enhanced employment quotas. Not all of them, however, apply to such quotas for women.

Consider two important social purposes that may be served by favoring a member of a minority group because other members of that group have been discriminated against. Because these purposes depend on the economic interrelatedness of members of the group, they do not apply to women.

*Reparations.* Only in Justice Steven's dissent in the *Fullilove* case has an enhanced quota benefiting minorities been specifically discussed in terms of reparations for past wrongs. Notwithstanding the limited attention to such theory in the courts, it deserves emphasis simply because it is the country's history of racial injustice, and the collective guilt associated with it, that have created the climate in which it is possible to subordinate the interests of the majority to those of an underprivileged minority.

One need hardly belabor that history to make the disadvantages borne by

whites as a result of all the affirmative action programs ever implemented seem, while not inconsequential to those affected, of exceedingly limited scope. Still, legally or morally, why is it fair to recompense some people for what happened to other members of their group? One answer is: because minorities not themselves victims of discrimination experience concrete and substantial economic harm as a direct consequence of discrimination against other members of their minority group.

Discrimination against past generations of women has deprived many women of the opportunity to accumulate wealth that would have been passed on to their descendants; the economic circumstances of female descendants, however, are no more affected than are those male descendants. Often women also have experienced relatively deprived childhoods because of discrimination against their mothers, particularly when the mother was the principal or sole wage earner; but male children experienced similar deprivation.

Nor do women tend to be harmed economically by present discrimination against other women. Even single women have approximately as many male as female relatives. Thus there is no reason to believe their economic circumstances are more harmed than helped by discrimination against other women. Married women- and marriage is the relationship in which adults engage in the most significant sharing of economic circumstances- clearly tend to be more benefited economically by discrimination against other women than harmed by it. Thus, according married women who are not themselves victims of discrimination preferences in order to make up for discrimination against other

women seems particularly inappropriate. Yet, given that a substantial majority of the female labor force is or has been married, with an enhanced quota this anomaly can be expected to occur with considerable frequency.

*Mitigation of poverty.* Government has a legitimate role in alleviating the poverty associated with unemployment and low-paying jobs. Enhanced employment quotas may change the race or gender composition of groups in those circumstances; they do not create new or better jobs. They can thus alleviate the poverty existing in society only if the consequences of low income and unemployment are more serious when these conditions are concentrated within certain groups. Such consequences are more serious when the group is a minority; they are not when the group is women.

If a minority group is disproportionately unemployed or relegated to low-paying jobs, that is a more serious situation than if unemployment and low-paid individuals because the persons whose economic circumstances touch them in some way tend to be similarly disadvantaged. Second, the concentration of economic disadvantaged in a close-knit community can lead to a general demoralization of that community. In the case of blacks, diminishing the concentration of low-paying jobs and unemployment in an interrelated group and mitigating the poverty associated with such jobs and unemployment, enhanced employment quotas can serve a legitimate and important social purpose warranting serious consideration in the evaluation of the wisdom and fairness of such remedies for minority groups.

The situation is different with women. They too are disproportionately

relegated to low-paying jobs (unemployment is less a factor). But they are not more affected by the economic circumstances of other women than by those of men; in fact they are less so. Nor do significant numbers of women live together in communities with the compounded debilitating consequences of impoverished minority communities.

Even though these implications of the concentration of economic disadvantage do not apply to women, the concentration of low-paying jobs among women necessarily concentrates them among the neediest group in society. Almost six million women comprise the overwhelming majority (almost 90 percent) of single working parents, all of whom have child care obligations and expenses but no spouse to assist personally or to contribute an additional income. Since government has a legitimate role in alleviating extreme need, the situation of such persons warrants its attention, and assuring that they have well-paying jobs is one possible response. But single working parents comprise only 12 percent of all working women. Thus, even if their special need could justify preferential treatment in the job market, they would provide scant justification for enhanced quotas primarily benefiting the much larger group of working women not in similar need.

Thus, whatever weight one accords to the fact that consequences of economic disadvantage are exacerbated when concentrated in a minority group to justify enhanced quotas, similar considerations do not apply to such quotas for women.

Finally, even if either of the foregoing justifications did in some way apply to quota remedies for women, it

would have less force in supporting such measures for women than for minorities simply because the remedies for women would be less effective. There are obvious transgenerational effects of efforts to redress injuries to some minority persons by compensating other members of their minority group, or to abate the concentration of poverty in a minority group. However, because women have roughly as many male as female heirs in the next generation (and rather more in the same generation), such efforts for women have no similar effects. The process must begin anew for each generation.

Certain arguments that are independent of the economic effects of discrimination against other persons might also be used to justify enhanced employment quotas. In principle, these apply to minorities and women alike.

*Indirect benefits of integration.* An integrated work force may provide role models for previously excluded groups and the amelioration of discriminatory environments. Also, certain occupations with power and influence, such as government and the media, may improve their ability to justly and effectively serve society if they are integrated. These considerations provide some justification for enhanced quotas to achieve that integration as soon as possible.

In most respects these considerations apply equally to quotas for women and for minorities. (There are exceptions: For example, the argument that a racially integrated police force can more effectively control a minority community has no apparent counterpart for women, although there may be other benefits of having substantial numbers of women in such highly visible positions of authority.)

But while these considerations may carry considerable weight in particular contexts and with regard to the most powerful and influential positions in society, they do not alone justify the general availability of enhanced quotas for any group.

*Rough justice.* There is one argument which might be asserted for the general availability of enhanced quotas for both minorities and women. It can be argued that minorities and women who were not the victims of discrimination at the hands of that employer were probably victims of discrimination at the hands of another employer. Thus the relief simply achieves rough justice for individual members of the group. In principle, this justification applies equally to enhanced quotas for minorities and women.

Although the argument has not been seen in the courts, it has practical appeal. Few question the fairness of subordinating the interests of third parties to make employers recompense identified victims of discrimination. Why then should relief be denied simply because it is impossible to match all the victims with the particular jobs from which they have been excluded?

The argument has certain difficulties, however. Even regarding minorities and women who have been in the labor market for some time, many may question the assumption that most beneficiaries of preferences have in fact been victims of some employer's discrimination. More significant, persons just entering the job market tend to benefit disproportionately from enhanced quotas. They have not faced employment discrimination in the past and they have prospects for equal treatment materially different from those of minorities and women entering the

labor market a decade ago. Hence, if the rough justice rationale is sufficient to support enhanced quotas for any group, it would seem that the preferences involved in such quotas should go to persons who have been in the labor market for some time. In the common situations where an employer is permitted to meet his quota obligations primarily by hiring persons just entering the job market, few of whom have seriously suffered from employment discrimination, rough justice is not served.

These considerations should lead courts and policy-makers to consider carefully whether the approach they take to preferences for minorities ought to be carried over to similar measures for women. There is, however, another side to this matter. In *Connecticut v. Teal*, the Supreme Court recently faced the issue known in employment discrimination law as the "bottom-line defense." Under this defense, an employer would be permitted to use in a selection process a non-job-related element with a discriminatory impact—for example, a test which disproportionately disqualified women—as long as the employer nevertheless selected enough persons from the affected group so that the overall selection rate was nondiscriminatory. In effect, the defense would permit employers to use selection criteria which discriminate against certain members of a group, usually the most disadvantaged ones, as long as they make up for it by favoring other members of the group. By a five-to-four vote the Supreme Court rejected the bottom-line defense, at least where the discriminatory element in the process is an absolute barrier to further consideration. (The issue remains alive where the discriminatory

element is only accorded a certain weight.)

With respect to minorities there is this to be said for the bottom-line defense: Whatever the impact of the discriminatory devices on certain members of a group, the employer's satisfactory bottom-line performance does tend to elevate the economic status of the group, and thereby even benefit the persons disqualified by the device. That these ends are served in a remote and unsatisfactory manner and at the expense of individuals' rights to be considered without regard to race-related characteristics is one reason why, at best, the bottom-line represents a severely flawed form of expedient justice. But at least it makes theoretical sense as a means of alleviating the concentration of poverty within an economically-interrelated group, while sparing employers the cost of ensuring the job-relatedness of their selection procedures.

But because women are not more affected by the economic circumstances of other women than they are by the economic circumstances of men, the bottom-line defense does not make even theoretical sense for women. A minority denied a position because of a discriminatory test may derive some indirect economic benefit if a minority who passed the test is hired; a woman 5'3" derives no similar benefit if a woman 5'7" is hired in her place. A woman must be treated fairly as an individual, for, in economic terms, that is the only form of justice that affects her.