EMPLOYMENT DISCRIMINATION AND THE ASSUMPTION OF EQUALITY

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ABSTRACT

The assumption of equality undergirds the American law of employment discrimination. The assumption is that racial and sexual classes are equally qualified for jobs. Although it has sometimes been ignored, and can be rebutted in a specific case, the assumption of equality is fundamental to the law of nondiscrimination. Proof of discrimination in a class action, whether based on disparate treatment or disparate impact, requires the assumption. The assumption is so strong in this context that when the Supreme Court weakened it recently, Congress promptly reinforced it. The assumption of equality is also a crucial element of the law of affirmative action and reverse discrimination. The former is consistent with the assumption and is legal; the latter is inconsistent with the assumption and is illegal. By prohibiting race norming, which violates the assumption, Congress has reaffirmed its commitment to the assumption.

INTRODUCTION

The assumption of equality underlies and supports a great deal of American ideology. The assumption is that racial classes are equal and that, except for physical differences which are usually irrelevant, sexual classes are equal as well. The assumption appears in our fundamental documents. If school children know nothing else of the Declaration of Independence, they know it contains the ringing words, "We hold these truths to be self evident: that all men are created equal." Thomas Jefferson may have meant by equal that "each citizen is endowed with certain unalienable rights," but today these words have grown to mean that we are equal in other ways—for example, that across classes we are equal in our basic abilities and needs. The Fifth and Fourteenth Amendments to the Constitution guarantee to all persons "the equal protection of the laws." I believe these words also mean today that racial and sexual classes of people are equal.

The assumption of equality nourishes our most important institutions. Public education is an example. If we assumed that one class was inferior to another, we would accept, and even demand, that the inferior class receive education "appropriate to its limitations;" instead (at least in principle) we insist on equal educational opportunities for all classes. The criminal justice system is another example. Without the assumption of equality, we would presume that a member of the inferior class was more likely to be guilty if accused of crime and was deserving of different (probably harsher) punishment if convicted. Political participation is a third example. A class thought to be inferior would not enjoy the same rights to vote and to hold office as the superior class. Our right to privacy is a fourth example. Without the assumption of equality, laws against the marriage of superior and inferior beings could be justified.

Perhaps we have honored the assumption of equality as often in the breach as in the observance. In the past, women and people of color were denied education or relegated to second class schools, did not receive equal justice in court, and were forbidden to run for office or vote; and miscegenation was a crime. Today, we acknowledge the assumption in words, but not always in deeds. Education is better for white men than for people of color and perhaps than for women as well. A person of color is more likely to be arrested for and convicted of a crime. Most politicians are white men. Biracial couples are rarely welcomed into monoracial homes.

Nonetheless, few of us believe that segregated schools, biased criminal proceedings, denial of political rights, and laws against intermarriage are just. I believe that the assumption of equality is stronger in America today than ever in the past. If we fall short of achieving the ideal, it remains worthy of our respect. To abandon it would be to deny a major part of this nation's raison d'etre.

One may fairly ask whether the assumption of equality adds anything to the notion of the right to individual treatment. These ideas do lead to the same outcomes in some cases. In regard to criminal justice, for example, both individual treatment and the assumption of equality require that anyone, regardless of race or sex, be presumed innocent until proven guilty; and that, if one is found guilty, group characteristics like race or sex should not influence punishment. Nonetheless, the assumption of equality has independent vitality for two reasons. First, we often think in terms of groups instead of individuals. Thus, the media may report that "women" object to the way that a character is portrayed in a film or that a candidate for office is courting the "Jewish" vote. To the extent that we think and act on a group basis, individual treatment is irrelevant and the assumption of equality is crucial. Second (or, perhaps, a further example of the first reason), the assumption of equality operates in cases in which individual treatment does not. Education is an example. Suppose that a school district provided better

school facilities in white neighborhoods than in African-American and Latino-American neighborhoods. If students were free to attend any school in the district, individual treatment might be satisfied; but the assumption of equality would be violated because the district assumed that white children more than others deserve or derive benefit from better facilities.

THE ASSUMPTION OF EQUALITY AND THE DEFINITIONS OF DISCRIMINATION

In the context of employment, the assumption of equality is that, as classes, men and women, and whites and people of color, are equally able to perform or to learn to perform a job. This assumption is crucial to the American law of employment discrimination. The assumption facilitates proof of discriminatory conduct against classes of people. The assumption also offers guidance on the difficult issue of discrimination in favor of women and people of color.

American law recognizes two principal definitions of employment discrimination, disparate treatment and disparate impact. Except in the small number of cases in which discrimination against only one person is alleged, the assumption of equality is a necessary element of the plaintiffs' proof. That is to say, a class action alleging disparate treatment or disparate impact depends on the assumption of equality.

Disparate treatment is intentional discrimination. An employer deliberately denies an opportunity to a person because of the person's race or sex. In a class action case, disparate treatment is proved with statistics. The plaintiffs demonstrate that so few of them have succeeded in winning the opportunity (such as hiring or promotion) that the employer's motive to exclude them is revealed. For example, in *International Brotherhood of Teamsters v. United States*, a trucking company was accused of discrimination against people of color. The company had two kinds of driving jobs, intra-city and inter-city. The latter were paid better. Statistics showed that, whereas at least nine percent of the company's employees were people of color (many of them intra-city drivers), only one person of color had ever been an inter-city driver prior to the lawsuit; and many of the company's terminals were located in cities with substantial minority populations. The Supreme Court held that these statistics established that the employer intentionally excluded people of color from intercity driving jobs.

The assumption of equality was crucial to the *Teamsters* decision. The assumption was that people of color were as interested in and qualified for inter-city driving jobs as whites were. Without the assumption, the statistics would have been meaningless.

Disparate impact is unintentional discrimination. It occurs when an employment practice is, on its face, neutral as to race or sex, yet disadvantages proportionally more members of one class than another and is not related to job performance. For example, in *Griggs v. Duke Power Company*, an employer hired for certain jobs based on scores on an aptitude test. Thirty-four percent of European-Americans, but only 12 percent of African-Americans, who took the test passed it. Thus, the test had a disproportional adverse effect on a class. Because the test was not job related (it did not predict success on the job), the Supreme Court held the employer was guilty of discrimination.

Once again, the assumption of equality was crucial to the outcome of the case. The assumption was that African-Americans who took the test were as qualified as European-Americans who took the test. Without the assumption—if we believed, for example, that European-Americans were better qualified for the job—the decision would have been unjustified.

The assumption of equality can be rebutted in a given case. Suppose the job in the *Teamsters* case had been aeronautical engineer instead of truck driver; the employer could have proved that almost all of the persons qualified for the job were white. Similarly, the employer in *Griggs* could have proved that the aptitude test was valid, that is, that workers' scores on the test correlated with ratings of their performance on the job. Thus, analysis of a case begins with the assumption of equality, but it can be falsified. This procedure is consistent with the assumption itself. Ability may be distributed equally across classes of people, but discrimination has prevented many individuals from developing their abilities.

In this context, the assumption would be undermined if it could be rebutted too easily. For example, if the employer in *Griggs* could have won the case merely by testifying to a good-faith belief that the test selected the best qualified applicants, the assumption would have been seriously weakened; a judge might begin a trial with the assumption that the racial classes are equal, but the employer's mere belief that they are not would defeat this assumption. After the *Griggs* decision, the courts consistently held that a practice with a disparate impact was justified only if the practice met the standard of business necessity. As a result, the assumption of equality could be overridden only if the practice in question was very important to the business. In *Wards Cove Packing Company v. Antonio*, decided 18 years after *Griggs*, the Supreme Court threatened the assumption by stating a diminished standard. The Court held that a practice with a disparate impact is justified if the practice serves, in a

significant way, the legitimate goals of the business. This standard made it easier to overrride the assumption of equality. But Congress speedily corrected the Court. The Civil Rights Act of 1991 reinstated the business necessity standard and reaffirmed the assumption of equality.

THE ASSUMPTION OF EQUALITY AND NONDISCRIMINATION, AFFIRMATIVE ACTION, AND REVERSE DISCRIMINATION

The law of discrimination in favor of women and people of color also reflects the assumption of equality. Although the courts do not mention the assumption, I believe it informs their decisions. This law can be understood if the issues are divided into three categories: nondiscrimination, affirmative action, and reverse discrimination. I shall discuss some issues which the Supreme Court has decided and others that may be presented in the future.

The first category of issues concerns "nondiscrimination." It means awarding opportunities without regard to race or sex, or, as a practical matter, awarding opportunities according to relevant qualifications. A question at the threshold is whether the laws enforcing nondiscrimination protect white men as well as women and people of color. The Supreme Court decided this issue in *McDonald v. Santa Fe Trail Transportation Company*. Two European-Americans and an African-American were charged with stealing from their employer; the former were fired, but the latter was retained. The European-Americans sued, claiming they had been discriminated against, and they won. The employer argued that the civil rights acts were not intended to protect European-Americans, but the Court rejected this argument because the legislative histories of both the nineteenth and twentieth-century statutes clearly show that Congress intended to protect people of all colors.

The outcome of *McDonald* is fully consistent with the assumption of equality. The assumption applies to all classes. To protect some but not others from discrimination would be tantamount to labeling the protected classes as weaker and, perhaps, inferior. As applied to the facts of the case, the assumption requires us to assume that one class is as likely to steal as another. Evidence that justifies the discharge of European-Americans must also justify the discharge of African-Americans.

Nondiscrimination permits acknowledgment that people of various backgrounds manifest their abilities variously. For example, suppose an employer is choosing between two applicants for an entry-level job in a personnel department. Neither has significant work experience. But whereas one is a

recent graduate of a college program in industrial relations, the other is a woman who has maintained a household and reared a brood of healthy children. The employer could properly recognize that the woman's knowledge of and talent for organization and interpersonal relations may be at least as great as the student's, and the woman's practical experience might well tip the scale in her favor.

People living outside the dominant Euro-American male culture may demonstrate their abilities in ways not readily apparent to European-American men. Learning to appreciate nonstandard signs of ability is laudable and, far from endangering the assumption of equality, reinforces it.

It is not discriminatory to give weight to an applicant's race or sex when these qualities may contribute to performance of the job. For example, a school may take into account national origin in hiring a teacher for a course in Native American studies. Although I do not believe that only a Native American is qualified to teach such a course, I am willing to accept that an applicant's life experience as a Native American can contribute to one's ability to teach the course. Similarly, I can understand that children need role models with whom to identify and counselors who understand their problems. If a faculty has no or very few professors who are women or people of color, sex and color become relevant qualifications for job vacancies.

I recognize the difficulty of knowing the point at which enough women and people of color have been hired that sex and color lose their relevance. I believe most of us are far from that point, and I am sure that white men will alert us as we approach it.

One may reasonably object to the facts of the preceding examples of nondiscrimination, but not, I think, to the principle they are intended to exemplify. One may hold that rearing a family does not prepare one for a job in personnel administration, that being a Native American does not contribute to teaching Native American studies, or that young persons do not need role models and counselors of their sex and color. But one cannot reasonably object that skills can be acquired in varying ways and that, if sex or color is genuinely a qualification for a job, an employer may take such qualifications into account in the hiring decision. The assumption of equality is not offended as long as decisions are grounded on relevant qualifications.

The second category of issues arises from "affirmative action," which means an attempt to help members of disadvantaged classes to meet the standards to which the members of the privileged classes are held. Thus, affirmative action includes advertising jobs in media that are directed at disadvantaged classes and operating training programs that are targeted primarily—and even exclusively—at disadvantaged classes.

I have no objection to affirmative action because it does not challenge the assumption of equality. Indeed, directed advertising and targeted training programs affirm the assumption. It would be a waste of time to advertise in Spanish unless the readers could do the job. Moreover, affirmative action recognizes and attempts to remedy oppression. Men of European provenance have oppressed other classes in American society from the colonial days to the present. Efforts to train African-Americans, therefore, are compassionate attempts to overcome the handicap under which many African-Americans labor. Such efforts affirm the assumption of equality because there would be no point in training people unless they had the ability necessary for the job; oppression has prevented them from developing that ability, and training compensates (in part) for the oppression.

The Supreme Court has taken a similar position in three cases. The one that attracted the most attention was *United Steelworkers of America v. Weber*. An employer and a union agreed to establish a program to train skilled workers. One criterion for admission to the program was seniority. The other criterion was race. The justification for the latter was that African-Americans comprised nearly 40 percent of the workforce in the community surrounding the plant, but less than 2 percent of skilled workers in the plant. Accordingly, the labor management agreement specified that half of the openings in the training program would be reserved for African-Americans. A European-American named Weber would have qualified for the program if seniority had been the only criterion, but he was excluded because of the racial criterion.

Weber lost his case in the Supreme Court. This outcome is consistent with the assumption of equality. A training program that is targeted at a disadvantaged group does not assume the group is unequal to the privileged group. To the contrary, a targeted program assumes that the disadvantaged group can become qualified for the opportunity. If proportionally fewer members of the disadvantaged group are presently qualified, the assumption tells us that the reason is oppression, not inability.

In *Johnson v. Transportation Agency, Santa Clara County*, the Court ruled on whether it is discriminatory to favor a woman or person of color in the case of a tie. An affirmative action plan provided that sex could be considered along with several other factors in making promotions to jobs from which women had long been excluded. No specific number of jobs was reserved for women, but the plan was to endure until their representation approximated the proportion of women in the area labor force. Several applicants for a job that no woman had ever held, including a man named Johnson and a woman named Joyce, were certified as qualified. Johnson slightly outscored Joyce, but she got the job. He sued and lost.

This result is consistent with the assumption of equality. Sex or race may be used to break a tie in selection (Johnson's score of 75 was virtually identical to Joyce's score of 73) because, by hypothesis, the choice must be based on irrelevant criteria. An employer who believes that a member of a disadvantaged class has probably overcome more obstacles in order to reach the same position as a member of a privileged class, or who wishes to use this occasion to achieve a better balanced workforce, does not threaten the assumption of equality. Preferring a woman or person of color over an equally qualified European- American male bespeaks no belief that the latter is less qualified for the job.

The third case on affirmative action is Local 28, *Sheet Metal Workers v. Equal Employment Opportunity Commission*, in which a major issue was whether a court may require a defendant to meet a goal of minority representation. The defendant was a union that had illegally excluded people of color from membership for more than 20 years. As a remedy, the trial court ordered the union to achieve the goal that 29 percent of its members be people of color by a certain date; this figure reflected the percentage of people of color in the area labor force. The union opposed this remedy. The principal route to membership was through an apprenticeship program. As a practical matter, therefore, meeting the goal on time required the union to give priority to people of color seeking apprenticeships. In this aspect, the case resembled *Weber*, and the Supreme Court affirmed the trial court's order.

This decision does no violence to the assumption of equality. An order that a union's membership reflect the racial composition of the area labor force assumes equality of ability across races. If 29 percent of the workers in the union's jurisdiction are people of color, we may assume that people of color are also 29 percent of the workers qualified or qualifiable for the jobs that union members hold.

The third category of issues covers "reverse discrimination," which means conferring an opportunity on a person who is not the best qualified applicant because that person belongs to an oppressed class. Thus, whereas ordinary discrimination operates against women and people of color (at least at the present time; the tables may well turn in the future), reverse discrimination operates, or seems to operate, in their favor. Neither is acceptable.

All discrimination violates the assumption of equality. To *deny* an opportunity to a woman or person of color who *is* the best qualified applicant is to say to that individual, "You are not what you seem. Your class is inferior." To *award* an opportunity to a woman or person of color who is not the best qualified applicant is to say to that individual, "Your class is *not* as good as others. Your people cannot make it on your own."

The effect of reverse discrimination on its "beneficiary" and on others is unhealthy. The truth will out; both the "beneficiary" and one's co-workers will know how one was hired. Unless one is a complete egoist, the "beneficiary" can only construct a self-abasing rationalization, such as, "I would have made it on my own but for discrimination" or "This helps make up for centuries of oppression." Co-workers and superiors are likely to display anger or condescension, neither of which is good for anyone, and force the "beneficiary" to rationalize others' hostility by saying, for example, "They are all racists or sexists." And there remains the probability of failure. Many highly qualified people fail; few unqualified people succeed. Reverse discrimination guarantees that women and people of color will be overrepresented in the class of failures. However difficult it is to rationalize being hired via reverse discrimination, I suspect it is even harder to rationalize one's failure. But even if one can, no one is fooled. Rationalization internalizes the initial discrimination; one becomes evidence to oneself that the assumption of equality is false. Because failure cannot be hidden, one becomes evidence to others as well. We believe what we witness. A woman or person of color who fails in our presence reinforces discriminatory attitudes. In the end, the real victims of reverse discrimination are its "beneficiaries."

The Supreme Court confronted reverse discrimination in *Firefighters Local Union No. 1784 v. Stotts*. The case began when African-Americans sued the city fire department for racial discrimination. The suit was settled by a consent decree that committed the department to the goal of increasing the percentage of African-Americans in the department until it approximated the percentage of African-Americans in the local labor force. Subsequently, budget problems required layoffs. If the usual seniority rules had been followed, the recently hired African-Americans would have been the first to go. But a new decree was negotiated, suspending the seniority system when it would reduce the percentage of African-Americans in certain jobs. The effect of this decree was that some African-Americans kept their jobs at the expense of European- Americans who had greater seniority. The Supreme Court held that the decree was illegal.

The Court's ruling affirms the assumption of equality. The assumption dictates that we assume that quality of job performance is equal across classes. In consequence, the assumption would have permitted the department to spread the reduction in force proportionally across classes, for example, by layoffs at random. But the assumption does not require that layoffs be proportional across classes, for the assumption may be overridden for good cause. One good cause is assessments of individual ability. If the department had laid off the firefighters with the lowest performance evaluations, the assumption would not have been offended, regardless of whether more members of one class than another were affected. Another good cause is seniority. One may fairly believe that senior workers are

more experienced and, therefore, more skillful, or that they are more loyal and, therefore, more valuable to the operation or deserving of protection.

The department used two criteria in deciding whom to lay off. Seniority was observed unless it would have reduced the representation of African- Americans in a job, in which case proportionality was invoked. As they relate to the assumption of equality, these two criteria are inconsistent with one another. Proportionality implements the assumption; seniority overrides it (albeit legitimately). By using inconsistent criteria, the department demonstrated its disregard for the assumption of equality.

The Civil Rights Act of 1991 outlawed another form of reverse discrimination. An employer who uses a test in selection may protect against liability in two ways: use a test that does not have a disparate impact, or use a test that validly distinguishes qualified from unqualified applicants. The law protects so many classes that almost any test is bound to have a disparate impact on one group or another. Yet developing and validating a test, especially one that is valid within and across both sexes and several racial classes, is expensive. Caught in this bind, many employers adjusted the results of tests so as to eliminate any disparate impact. A common adjustment, know as race norming, was to judge an applicant's score on the test, not against all other scores, but only against the scores of applicants of the same race; then the employer would hire in proportion to each race's share of the applicant pool. Thus, if 25 percent of the applicants were African-Americans, 35 percent were Latino-Americans, and 40 percent were European-Americans, and if 100 jobs were available, then the employer would hire the 25 African-Americans, the 35 Latino-Americans, and the 40 European-Americans who scored the highest in their respective classes.

As a practical matter, race norming was indistinguishable from hiring quotas and, therefore, for the reasons stated above, violated the assumption of equality. When the Civil Rights Act of 1991 outlawed race norming, Congress reaffirmed America's commitment to the assumption.

CONCLUSION

I wish to preserve the assumption of equality in public life and in employment. I do not wish to live in a world in which it is proper to believe that people who appear to be different from oneself are inferior. I do not know whether the assumption is in fact correct. I am reasonably certain that we have no sound method to verify the assumption, and I hope we will never develop one. Rather, I hope that, in a few generations, miscegenation of ethnic and racial classes will homogenize the gene pool to the point that we will no longer care, or be able to know, a person's "race;" and I see no benefit in knowing

whether we were different before we became the same. But I do see harm in weakening the assumption of equality. I believe our future as a moral people depends in significant part on maintaining the assumption. We have violated it often in our history, and we must endeavor, not only to end oppression, but also to compensate for its effects. We must encourage women and people of color to pursue goals that have been denied them. We must train them and welcome them when they qualify. But we must not allow their cries for justice or our zeal for it—or our desire to find an easy, inexpensive remedy—to destroy the very ideals we seek to vindicate.

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