

Affirmative Action for Women: New Twist on an Old Debate

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Last year, in *Associated General Contractors v. San Francisco*, the Circuit reviewed San Francisco's set-aside programs for public contracts and reached a curious judgment. It found the set-aside programs for minorities unconstitutional but upheld a similar program for women. The court's rationale: Gender-based classifications are subject to a lower level of equal-protection scrutiny than racial classifications are.

Rote application of differing constitutional standards was not what was needed, however, in the San Francisco case. What was needed – and what has been largely ignored by courts and commentators in discussing set-asides and other preferential measures – was some appreciation of the marked differences in the nature of racial and gender groups and some exploration of whether all justifications of these measures for minorities also apply to women. There are strong arguments that they do not.

When it is argued that quotas are necessary to ensure fair treatment for certain groups today, there is little reason to distinguish between quotas for minorities and quotas for women.

But most employment quotas considered by the courts have not been intended merely to ensure non-discrimination today. They do not simply require that members of a group be hired at rates consistent with the group's representation in the relevant labor market. Rather, such quotas have generally demanded that minorities or women be hired at rates substantially in excess of their representation in the labor market to remedy somehow the effects of past discrimination.

These quotas thus raise the difficult question of how favoring some people from a particular group can make up for discriminating against others in that group. Whether the answer presents a justification for minority quotas, it is much harder to find a justification for preferential treatment – employment quotas or business set-asides – for women.

Minorities are disproportionately affected by the economic circumstances of other members of their minority group because those with whom they share their economic situation – blood relations and spouses – tend to be members of the same group. Hence, minorities who are not themselves victims of discrimination often experience the economic consequences of past and present discrimination against other members of their group. This provides a

colorable rationale for favoring some individuals to compensate for discrimination against other individuals.

But that rationale does not apply to quotas for women. Women are not more affected by the economic circumstances of other women, either of past or present generations, than they are by the economic circumstances of men. This is true even for single women, who generally have as many male as female relatives; married women are, in fact, more affected by the economic circumstances of men than of other women.

Women not themselves victims of discrimination would not, therefore, seem to experience the economic effects of discrimination against other women in the same way minorities experience the economic effects of discrimination against other members of their minority group.

Mitigating Poverty

This difference in the nature of racial and gender groups also bears on the legitimacy of another significant justification for employment quotas: the mitigation of poverty associated with low-paid jobs and unemployment. Employment quotas do not create new or better jobs; they redistribute the existing ones. They mitigate poverty only if the reduction in the concentration of low-paid jobs and unemployment within a certain group reduces overall poverty.

Because minorities are strongly affected by the circumstances of other members of their group, a reduction in low-paid jobs and unemployment within a minority group will tend to mitigate the total impact of poverty. But because women do not disproportionately share their economic situation with other women, reducing female unemployment will not lessen the overall impact of poverty.

It is true that the preponderance of low paid jobs and unemployment among women tends to concentrate those conditions within the neediest segment of workers, single parents. This might allow an argument for employment preferences for single parents. But it does not provide a basis for the preferential treatment of the 90 percent of working women who are not single parents.

Moreover, there are dangers in accepting need as a standard for favoring certain groups of job-seekers. After single parents, employers would likely perceive the next

neediest applicants to be a much larger, overwhelmingly male group – married parents whose spouses do not work (and the least neediest applicants to be an overwhelmingly female group – married people whose spouses earn more than they do). This is one reason why policies that subordinate the principle of individual fair treatment to that of social utility will rarely expand opportunities for women.

More Male Heirs

Finally, even if it made sense to try to elevate the economic situation of women, either to make up for past discrimination or to mitigate poverty, it would still be harder to justify quotas for women than for minorities simply because such measures are less effective in achieving these ends for women. Preferential treatment of minorities has important transgenerational effects. But women as a group have as many male as female descendants; and those who do not outlive their husbands leave them substantial portions of their wealth. It would seem, therefore, that when a female beneficiary of employment preference dies, the economic rewards from that preference are more likely to be passed on to men than to other women.

The differences in the nature of racial and gender groups are not the whole story of employment quotas for women. But they are important, and more generally they are matters that cannot be ignored in any thoughtful consideration as to whether it makes sense to treat people differently on the basis of group membership.

To understand how the differences fit into the set-aside issue, one needs first to understand what set-asides are supposed to accomplish. In his dissent from the decision in *Fullilove v. Klutznick* (1980, which upheld minority set-asides under the 1977 Public Works Employment Act, Justice John Paul Stevens elaborated the fallacies underlying the putative rationales for set-asides and showed that it is far from clear what socially useful ends such measures advance.

What does seem clear is that in operation, set-asides are group-based measures that, beyond ensuring individual equal treatment, aim toward generally enhancing the economic well-being of historically disadvantaged groups without regard to their particular deserts. As such, they suffer from the same factors that make important justifications of employment quotas for minorities inapplicable to employment quotas for women.

With set-asides, there are even stronger reasons for refusing to assume that preferences justified for minorities can be justified for women as well. We cannot ignore that some female contractors benefiting from set-asides (like male contractors) were able to become contractors because of capital accumulated by a father or spouse. The connection between preferences for such firms and the redressing of past discrimination against women is a mysterious one.

‘Metaphysical Dimensions’

In addition, defining the level of ownership and control that make a business eligible for set-asides, which is often a problematic factual inquiry in the case of minority businesses, can assume metaphysical dimensions in the case of businesses owned by married women – leaving aside questions of how much control may be exercised by male children and other male relatives.

But it is when the implications of the demise of the recipient of such a preference are considered that the anomalies of set-asides for women are most striking. In employment quotas, there is a personal aspect to an individual’s labor that might justify limiting our focus to the jobholder and the job – even if the jobholder gives or leaves some portion of his or her income to other people who are likely to be disproportionately of the same race but also disproportionately of a different gender.

But business preferences peculiarly concern the accumulation and control of capital, which, if the enterprise is successful, may be used and enjoyed more by the survivors of the entrepreneur than by the entrepreneur herself. How much sense does it make for government to sanction the unfairness and inefficiency usually entailed with set-asides so that women can acquire a greater share of capital that there is every reason to believe, they will then pass on more often to men than to other women?

Yet if the rationale of *Associated General Contractors* should prevail in the courts, we may find that set-asides will be exclusively enjoyed by women. This would be an ironic result since it is doubtful that these programs for women would ever have been conceived if they had not first become commonplace for minorities.

In Chicago, the issue of set-asides for women has recently taken on particular significance in connection with the \$210 million reconstruction of the Dan Ryan Expressway. Under the 1987 Surface Transportation and Relocation Act, women are eligible to participate in the 10 percent of federal highway funds set aside for disadvantaged businesses. White women are securing a substantial portion of the 10 percent because their businesses tend to be more competitive than minority firms – in some part, no doubt, due to their access to the resources of the white men. These white men (father, husband, sons), along with her daughters, will be the ultimate beneficiaries of the capital accumulated by the female contractor.

How Much Sense?

So even without the 9th Circuit’s recent ruling, there may be a tendency for most funds that have been reserved for preferential distribution to minority firms, which may make sense, to go to women-owned businesses instead, which makes no sense at all.

This might be even more distressing if it were clearer just how useful set-asides are for minorities. If these programs are supposed to compensate for past discrimination against a minority group, they are making it

up to those individuals who are least suffering from that discrimination. If they are intended to increase minority employment because minority firms may hire minorities at greater rates, that can probably be better accomplished by monitoring the employment policies of all firms. If they are supposed to mitigate poverty through a trickling-down within the group, they are doing so very ineffectively; and it is possible that set-asides not only fail to improve the lot of the most disadvantaged minorities but contribute to the growing gulf between successful minorities and those left behind.

The absence of a clear vision of what a set-aside program is supposed to achieve and of a sound understanding of the mechanisms by which its purposes are accomplished is as evident for minority set-asides as it is for set-asides for women.

In 1985, Chicago staunchly defended the use of contractors from Atlanta to meet a 20-percent minority-contracting requirement because there were not enough qualified local minority contractors.

Perhaps the enhancement of the economic status of Atlanta's black businesses, by increasing black political influence nationally, does remotely benefit Chicago's blacks. But it seems that a more concrete and important result of these contracts is the simple movement of entrepreneurial profits from Chicago to Atlanta. And while minorities are disproportionately affected by the economic circumstances of other members of their group, Chicago's blacks would seem to be far more affected by the economic situation of Chicago's whites than they are by that of Atlanta's blacks.

It seems, therefore, more than a little ridiculous that Chicago should employ preferences to redistribute the tax dollars of its black and white residents to the black residents of Atlanta. It may rival in absurdity the image of a man owning a prosperous business that his mother or wife built up with set-asides for women.