ing, to distinguish between race and color consciousness. First, I must examine the inadequacy of the standard that many thoughtful people take to be *the* answer to racial injustice: the principle of color blindness.

Part 2. Must Public Policy Be Color Blind?

In 1989, the school board of Piscataway High School faced budget cuts that required it to fire one of two teachers of typing and secretarial studies, Sharon Taxman and Debra Williams. Taxman and Williams had equal seniority, having been hired on the same day in 1980. Instead of flipping a coin to decide which teacher to fire, the school board decided to fire Taxman and retain Williams, the only black teacher in the school's department of business education.

This example of color conscious action is an easy target for a color blind perspective. The school board violated Taxman's right not to be discriminated against on grounds of race, and the school board's action should therefore be prohibited. It is beside any moral point admitted by a color blind perspective to say that the board may have acted consistently with the aim of overcoming racial injustice, and that this kind of action can be morally distinguished from race conscious policies that reflect "prejudice and contempt for a disadvantaged group" or increase the disadvantage of an already disadvantaged group.[15] "Discrimination on

[15] Ronald Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985), p. 330. Dworkin asks whether "any race conscious distinction is always and inevitably wrong, even when used to redress inequality." His answer is that race conscious distinctions are not generally wrong because there is a difference between racial distinctions that reflect prejudice against members of a disadvantaged group (and are used to perpetuate the disadvantage) and distinctions that are designed to redress the disadvantage. This distinction is the first step in a response to advocates of color blindness who invoke Justice Harlan's admirable lone dissent in *Plessy v. Fergusson*. "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens," Harlan wrote. His constitutional argument is clearly intended to avoid the legal creation or perpetuation of a caste system in which there is a "superior, dominant, ruling class of citizens" 163 U.S. 537 (1896). Although I am concerned directly with the moral rather than the constitutional question, answers to the two tend to go together.

the basis of race," Alexander Bickel wrote in a famous defense of color blindness, "is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned, and we are told that this is not a matter of fundamental principle but only a matter of whose ox is gored."[16] A contemporary critic echoes Bickel when he associates the Piscataway school board's action with "the most extreme form of racialism."[17]

If we assume an ideal society, with no legacy of racial injustice to overcome, then there is everything to be said for the color blind standard for making public policy. Fair opportunity requires that every qualified applicant receive *equal* consideration for a job on the basis of his or her ability to do the job well, not on some other basis. What counts as qualification for a job may of course be controversial, even in an ideal society (or especially in an ideal society, whose members are fully engaged in thinking through the complex demands of most jobs). But controversy over precisely what talents and attributes of individuals should count as qualifications is perfectly consistent with knowing that *some* attributes are clearly not qualifications (the eye color of doctors) and others clearly are (knowledge of human anatomy). To say that the qualifications for a job are controversial, or open to reasonable disagreement, is not to say they are arbitrary. Qualifications that are not uniquely correct are not arbitrary if they are reasonably well related to the job's social function.

That someone qualifies for a job should not be equated with meriting it, where merit is understood as a moral entitlement to the job.[18] Suppose that I have all the basic qualifications for being a professor of political philosophy, where having all the basic qualifications means being willing and able to carry out the social purposes of the position. Even were you to grant me this supposition, I would still be presumptuous to claim that I am entitled to any professorial position in political philosophy that opens up. On the other hand, I would not be presumptuous to claim that I am

[16] *The Morality of Consent* (New Haven: Yale University Press, 1975), p. 133.

[17] Jeffrey Rosen, "Is Affirmative Action Doomed?" *New Republic*, October 17, 1994, p. 26.

[18] For a more extensive discussion of the meaning of merit and qualification, see Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983), pp. 135–51.

entitled to equal consideration in a fair hiring process for any positions that open up for which I am basically qualified. In short, we are not owed—and we do not necessarily merit—the positions for which we are basically qualified.

To claim the contrary would hold society hostage to the job preferences of qualified people. Instead of filling jobs by what needs to be done, employers would be required to fill jobs by what qualified people wanted to do. If many more people were willing and able to teach political philosophy than to practice medicine, then they would all be entitled to a lectern even if the social need for doctors was far greater than the need for political philosophers. Although individuals do not merit the positions for which they are basically qualified, they are entitled to equal consideration with all other candidates who are basically qualified. This entitlement recognizes the right of individuals to be treated as equals when jobs are filled for social purposes.

Many of us therefore may lose out on a job for which we are fully qualified without any injustice being inflicted on us. We may even be the most qualified for a position by some reasonable but contestable understanding of what should count as the best qualifications, and still not be victim to any injustice. The claim that "I am the most qualified person for this job" is typically the strongest that any qualified person can make, but not even this claim will suffice to support a complaint of being the victim of an injustice. This is the case even if we assume—as we rarely can—that the claimant's confidence in making the claim is warranted.

Why? Qualifications for a job are relative to the social purposes of a job. Consider the example of a doctor in the general practice of medicine. Central among the social purposes of such a physician today are curing the sick, preventing avoidable illness, and alleviating physical suffering even when a cure is impossible. The social purposes of many positions, like those of a general practitioner, are also significantly open-ended. Other social purposes of general practitioners today include educating members of the public about how to live a healthier life and serving as a comfort to families of the terminally ill. This open-endedness is the first factor that contributes to there being a range of qualifications, rather than one unique set, that may reasonably be considered relevant to a job. That range is the first source of reasonable disagreement over qualifications.

The second source of reasonable disagreement is the need to rank the importance of the multiple purposes of any given position. People may reasonably disagree about how much to weigh the wide variety of technical skills that are necessary to being an excellent doctor. Similarly, we may disagree about how much relative weight to give to certain "people skills," such as the ability to communicate well with patients and get along with one's fellow doctors, once a pool of candidates is being considered all of whom have the necessary set of skills and capacities above some commonly agreed upon threshold of adequacy.

Yet a third source of reasonable disagreement lies in locating and assessing the weighted set of qualifications in actual candidates. Suppose we agree on how all the relevant qualifications for being a general practitioner in this particular medical practice should be ranked. How will we now pick the most qualified candidate for the position? Often, depending on whether or not the position is entry-level, by looking at educational credentials such as test scores and grades, letters of recommendations from teachers or past employers, and by interviewing those candidates who look most promising by these indices, which are of course imperfect. These common ways of determining who is most qualified for a position are notoriously inadequate to the task of predicting future performance. Yet this does not constitute a moral indictment of these ways. The aim of hiring—predicting future performance, not merely assessing past performance—is one that imperfect human beings cannot perfectly achieve. Extraordinarily accomplished individuals are appropriately awarded Nobel Prizes on the basis of past performance, quite independently of any expectation that they will continue their excellent work into the future. But a medical group would be not only foolish but socially irresponsible to hire physicians without trying to predict future performance, even though predicting future performance opens up the hiring process to enormous (albeit unavoidable) uncertainty.[19]

Each of these sources of reasonable disagreement is fully consistent with a nondiscriminatory policy of distributing jobs on the basis of qualifications. It is a mistake to presuppose that if only

[19] For an illuminating discussion of the controversial nature of rewards such as the Nobel Prize, see Walzer, *Spheres of Justice*, pp. 264–66.

everyone were reasonable, merit would rule and the best qualified person—by some uniquely objective standard—would be hired. In any job search conducted by fallible human beings (that is, by human beings), people of greater merit or greater qualification by some other reasonable understanding of qualification may well lose out, with no injustice being done them.

Those critiques of preferential hiring that identify the prepreferential status quo with "meritocracy" are therefore wildly misleading. I was fortunate enough not only to qualify for but also to be offered a position in political philosophy at Princeton, but I did not *therefore* merit the position. Qualifications for a job typically do not reflect a person's merit unless we simply define merit as qualifying and being chosen for a job (in which case we settle the issue by definition). Nor do most job qualifications reflect a uniquely correct interpretation of what must count as qualifications for any particular position. Nonetheless, there is likely to be substantial overlap among reasonable interpretations of job qualifications. Setting qualifications for a position is not an exercise in arbitrariness. Rather, it is an exercise in discretion, which operates against a background of considerable uncertainty as to what constitute the correct standards and how best to apply those standards in the practice of searching, identifying, and assessing qualified candidates.

The practice of preferential hiring—whether on the basis of color or some other consideration—entails something other than exercising discretion in searching for, identifying, and assessing qualified candidates. It also entails something more than taking special steps—"affirmative action"—to ensure that members of disadvantaged groups are not subject to discrimination in hiring. (I will return to consider the difference between "affirmative action," strictly speaking, and preferential hiring.) Preferential hiring goes beyond considering the qualifications of applicants. It takes into account something other than the ability of individual candidates to do a particular job well. It considers color, gender, class, family connection, or some other characteristic that is not strictly speaking a qualification for the job. By considering something other than the candidates' qualifications for the job in question, preferential hiring—as its name implies—passes over some better qualified individuals in order to serve some other social

goal that is deemed worthy of pursuit, such as breaking down the racial stereotyping of high status jobs that has been created by past discrimination in society. The act of giving preference to members of the disadvantaged group denies to non-members equal consideration on the basis of their qualifications, strictly understood. Preferential hiring overrides equal consideration on the basis of qualifications in order to serve a worthy social goal. For this reason, preferential hiring is both controversial and worthy of our serious consideration. Whether preferential hiring is, all things considered, justifiable remains to be seen. But even if we cannot settle this issue, we can at least recognize that neither side in the controversy has all that is morally good on its side.

Were preferential hiring to succeed, some advocates claim, it would transfer power, status, and privilege from more to less advantaged members of society, who would then be in a position to set terms of job qualifications that would be more favorable to other, similarly less advantaged members of society. On this view, the idea of hiring people on the basis of their qualifications should be treated with great suspicion, perhaps even dismissed entirely as a moral notion, because qualifications function as a convenient fiction to support the position of already powerful and privileged people. The controversy over preferential hiring would be specious—a mere reflection of power relations—were qualifications irrelevant to carrying out important social purposes such as educating the young or curing the sick. But qualifications cannot consistently be treated as irrelevant by parents whose children would be illiterate or innumerate were it not for the talent of a good teacher, or by patients who would be dead were it not for the expertise of a good doctor.

But the advocates' view is correct in indicating that the moral terms of the debate over preferential hiring are easily skewed toward the already advantaged. Although it is not at all arbitrary to insist that teachers demonstrate literacy and numeracy, and that doctors demonstrate specialized knowledge of human anatomy and medicine, the complete set of qualifications for being a good teacher, doctor, lawyer, law-enforcement official, or corporate manager cannot be set without the exercise of a significant degree of discretionary judgment by employers, and the exercise of such discretion is subject to reasonable disagreement. Within this

realm of reasonable disagreement, those members of society who now have the power to set qualifications may tend to value those qualifications that favor people similar to themselves. This is not a sufficient reason to dismiss the moral controversy over preferential hiring or reduce it to a contest of power of have-nots against haves, but it is a reason to be more suspicious of qualifications that are set by a small, privileged social group than of those that are widely scrutinized and agreed upon after deliberation by a broad spectrum of society. Far from dismissing the controversy over preferential hiring, this suspicion is one that we all can share, and it yields a constructive recommendation for setting qualifications in a way that avoids their misuse by the most powerful members of society.

The controversy over preferential hiring also cannot be dismissed, as it is by the most vehement critics, by saying that preferential hiring violates the right of the most meritorious to the jobs that they merit. Even in an ideal society without a history of racial, gender, or class discrimination, preferential hiring would not violate anyone's right to a particular job. This is because the principle of nondiscrimination, which is commonly accepted by critics and advocates of preferential hiring alike, grants no one a right to a particular job. It grants all of us a right to equal consideration for those jobs for which we are basically qualified. In an ideal society, it would be unjust to pass over individuals for jobs on the basis of something other than their inadequate qualifications (or unavoidable bad luck). In all likelihood, color would not be a qualification for any job in a just society. All hiring and firing would therefore be color blind.

But it is in our context, not the ideal one, that we must ask whether all employers are morally bound to color blindness. Suppose we begin by agreeing that in a just society, public policies would not distinguish among individuals on the basis of their color. This is our common ground, and it is critical to recognize it before we proceed into more controversial territory. A commitment to nondiscrimination underlies any publicly defensible response to racial injustice. The controversy over preferential treatment persists in this country because, despite a widely shared commitment to nondiscrimination, the United States in the 1990s does not satisfy the premise of a perspective that makes

color blindness the obviously correct interpretation of what nondiscrimination—or justice as fairness—among individuals demands. We should also be able to agree that color blindness itself is not a fundamental principle of justice; nondiscrimination or fairness among individuals is.

Another necessary characteristic of our common ground, which cannot be established merely by means of a political philosophy, entails an empirical assessment of the differential life chances of American citizens. I can only summarize here what many excellent empirical studies of this society confirm.[20] Ongoing racial discrimination beginning early in the life of most black Americans compounded by grossly unequal and often inadequate income, wealth, educational opportunity, health care, housing, parental and peer support—all of which are plausibly attributable (in some significant part) to a history of racial injustice—combine to deny many black Americans a fair chance to compete for a wide range of highly valued job opportunities in our society. This observation by itself does not justify—or even recommend—preferential treatment for blacks, but it should lead us to criticize any color blind perspective that collapses the fundamental principle of fairness into a commitment to color blindness. In so doing, a color blind prespective fails to leave room for according moral relevance to the fact that we do not yet live in a land of fair equality of opportunity for all American citizens—let alone in a world of fair equality of opportunity for all persons, regardless of their nationality. (The latter is an equally urgent issue that this essay cannot address.) We will never live in a land of fair equality of opportunity unless we find a way of overcoming our legacy of racial injustice.[21]

[20] See, for example, Douglas S. Massey and Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* (Cambridge: Harvard University Press, 1993); Christopher Jencks and Paul E. Peterson, eds., *The Urban Underclass* (Washington, D.C.: Brookings Institution, 1991); and William Julius Wilson, *The Truly Disadvantaged*: *The Inner City, the Underclass, and Public Policy* (Chicago: University of Chicago Press, 1987).

[21] There is almost no theory of justice—liberal, egalitarian, or libertarian—by which the United States today can be judged a just or nearly just society. My own conception of a just society would secure everybody's basic liberties (regardless of race, religion, gender, or sexual preference, for example) and also secure basic opportunities (such as a good education, adequate health care, and

The principle of nondiscrimination in hiring is a principle of fairness, which remains relevant even in societies like our own that fall far short of justice (as all societies do, although to different degrees and on different dimensions). But the policy implications of nondiscrimination are far more complex than color blindness admits. To take a person's color into account in hiring or firing, even as the decisive factor, is not in itself to engage in the practice of preferential treatment, as we can see by returning to the Piscataway case. In our nonideal context, we can say something principled in the Piscataway school board's favor by invoking the very same principle of nondiscrimination that would require color blindness in an ideal society. Nondiscrimination means that equal consideration should be given to all qualified candidates so that candidates are chosen on the basis of their qualifications, where qualifications are set that are relevant to the legitimate social purposes of the position in question.

Can color be counted as a qualification for a teaching position at Piscataway High? It is certainly reasonable to think so. It is widely accepted among advocates and critics of color blindness alike that highly selective colleges and universities may legitimately (even if not optimally) consider geographical residence as a relevant qualification for admission—being from Iowa is an added qualification for admission, for example. Suppose I think that giving any weight at all to geographical distribution in college admissions is not the best policy. I still can recognize the legitimacy of admissions officials and trustees deciding to do so despite what I believe to be best. This is a determination within the realm of discretionary authority, and a discretionary realm cannot be abolished short of instituting a society governed by an all-knowing, morally perfect philosopher king or queen. If a university like Princeton may legitimately consider the geographical

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physical security) for everyone, provide decent jobs and child care opportunities for all adults who are willing and able to work, a substantial safety net to those unable to work through no fault of their own, and would distribute scarce, highly skilled jobs according to the principle of nondiscrimination. A just society would also empower citizens and their representatives to deliberate about the political decisions that affect their lives. A defense and elaboration of this conception of justice is in Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge: Harvard University Press, 1996).

distribution of its students in admissions, may a school like Piscataway not consider the color of its teachers as a relevant qualification in hiring or firing?

More may be said for the qualification of color in the Piscataway case than for that of geography in the case of university admissions. But let us start with the less controversial case of rare geographical residence as a qualification for university admissions. The idea of considering a student's residence as a qualification is surely not that the student did anything to merit being from Iowa. It is that her residence—along with many other qualifications that make her basically qualified for admission (but do not give her a right to be admitted)—will contribute in some significant way to the university's educational and associational purposes.

Something similar may be said for the more controversial case of counting color as a qualification for university admissions. Despite its being more controversial, the case for counting color is significantly stronger. Were it not for the presence of black students in universities like Princeton, students and teachers alike would have far less sustained contact with significantly different life experiences and perceptions, and correspondingly less opportunity to develop the mutual respect that is a constitutive ideal of democratic citizenship. If educational institutions in a liberal democracy are to fulfill their educational purpose, they must try to cultivate not only tolerance—an attitude of live and let live (which the law enforces)—but also mutual respect (which no law can enforce)—a positive reciprocal regard based on understanding—among people with diverse life experiences and perceptions.[22] Toleration is an important precondition for mutual respect, but without mutual respect, no constitutional democracy or educational institution can live up to its potential, and no student can expect to learn as much as a university has to offer.

We are now in a better position to address the even more controversial case of color conscious firing at Piscataway. Taken at its strongest, this is not a case of preferential treatment. The Piscataway school board thought that being black was a relevant qualifi-

[22] A discussion of the ideal of mutual respect among citizens is found in Amy Gutmann and Dennis Thompson, "Moral Conflict and Political Consensus," *Ethics* 101 (October 1990): 64–88.

cation in a department that had only one black teacher. Why? One reason is captured by the thought that black teachers can serve as role models for both black and nonblack students. This thought is surely reasonable as long as the board did not take color as the *only* relevant qualification, but rather as one among many qualifications, which could turn out to be decisive in some cases. If the two teachers were otherwise equally qualified, as all parties to this case seem to admit, then using color as a tie-breaking qualification is justifiable. Furthermore, the use of color as a tie-breaking qualification is consistent with a policy of nondiscrimination. It is not a matter of preferential treatment precisely because color may reasonably be considered a qualification in a department that would otherwise have no black teachers. In this context, a black teacher can contribute to an educational purpose of schooling in a way that a white teacher cannot by providing a role model that breaks down a social stereotype. Being black, on this view, is directly relevant to carrying out the purpose of the teaching position. It is therefore a qualification, in the strict sense of the term. (If we do not use the term strictly, we eliminate the category of preferential hiring entirely, and thereby fail to take seriously the strongest criticisms leveled against it.)

Taxman lacked the tie-breaking qualification of being black, obviously through no fault of her own. That a qualification is unearned does not discredit it as a qualification. Many applicants to universities lack the qualification of being from Iowa (and many people who might otherwise aspire to play professional basketball lack the qualification of being sufficiently tall) through no fault of their own. Yet few people suggest that universities should not be permitted to prefer Iowans over equally qualified Californians (and the NBA to prefer tall players to short ones), even if their ideal set of qualifications would disregard geographical diversity. To criticize a hiring or admissions policy for not being the best one that could be designed is very different from claiming it to be illegitimate or unjust. Were you to think that geographical diversity should be given less weight, or even no weight, in university admissions, you could still respect the right of universities (including public ones) to use geographical diversity as a qualification. Similarly, critics of the Piscataway school board's decision should be able to recognize the reasonableness of its policy, even

if they can imagine a better policy. A better policy might be one that judged the actual contribution that each teacher had made, and was likely to make in the future, to educating disadvantaged students of different colors.

The dismissive critique of the Piscataway case—as analogous to the most extreme form of racialism—illustrates a common misuse of the principle of nondiscrimination. There is a tendency, on the one hand, to accept as legitimate qualifications those attributes of individuals—including unearned characteristics such as geographical residence—that have long been considered relevant qualifications while, on the other hand, to reject color (or gender) as a qualification because it has long been illegitimately used to discriminate against individuals. This tendency is understandable; the suspicion about the misuse of race (or gender) is even morally useful to a point. But when the tendency is left unchecked, when nondiscrimination is confused with color blindness and is said to prohibit using race (or gender) as a qualification, injustice is far more likely to be served than its opposite. The unchecked tendency insulates long-established hiring and admissions practices—such as counting seniority as a qualification for hiring, or residence and legacy status as qualifications for university admissions—from critical scrutiny at the same time as it erects an insurmountable barrier to careful consideration of cases like that of the Piscataway school board, where being black is at least as relevant as seniority to the purpose of high school teaching, or as being from Iowa is to the purpose of higher education.

We do not undermine the idea of qualifications when we recognize that the set of qualifications for hiring or admissions is typically quite open-ended, even if there are boundaries beyond which it would be unreasonable to claim that someone is basically qualified to be admitted as a student to a selective university or hired as a high school teacher. Within these bounds, the setting of qualifications is rightly subject to the ever-changing results of ongoing deliberation by the broad range of people whom a democratic society legitimately authorizes to decide on admissions and hiring. In some cases, those people will be public employees, in other cases, not. But in all cases, a range of discretion may legitimately be exercised, not without public criticism, but without the results being deemed unconstitutional. The Piscataway school

board's decision that Williams, by virtue of being black, had a qualification for teaching in Piscataway that Taxman lacked falls within such broad constitutional bounds.

This claim is less controversial than the claims of preferential hiring, since taken at its strongest the Piscataway case (despite the overwhelmingly negative publicity) is not a case of preferential treatment, but one in which the qualifications for a position reasonably include a person's color and being black is used to break a tie at the time of firing. The claim of preferential treatment, by contrast, is that employers may legitimately give *preference* to some *basically* qualified candidates over other *more* qualified candidates because of their color (or gender, or some other characteristic that is not tied to superior job performance). If we are considering a case of preferential hiring, then the preference would be based on reasons other than the candidates' qualifications for the job in question. (If the preference is based on a candidate's greater qualifications for the job by virtue of being black, then it is misleading to call the practice preferential hiring.) The practice of giving preference to some basically qualified candidates for a job over other better qualified candidates is what defines a policy or practice of preferential treatment and allows us to distinguish it from cases where color, gender, geographical distribution, or some other characteristic is reasonably considered a qualification for carrying out the social function of this particular job.

It is important not only to use the term "preferential treatment" in this strict sense but also to distinguish it from the more generic term, "affirmative action," which is often misleadingly used to mean preferential treatment. Affirmative action, as originally articulated, entails taking steps that would not have to be taken for members of an advantaged group in order to ensure that members of a disadvantaged group are not discriminated against. How, if at all, can preferential treatment—as distinguished from affirmative action—be justified? Once we collapse affirmative action and preferential treatment, as our contemporary public debate has done, then we cannot pose this question or clarify the controversy that surrounds the very different practices of giving preference to members of disadvantaged groups and taking posi-

tive steps that would not be necessary absent our legacy of racial injustice to prevent discrimination against them.

Many radically different arguments have been offered for and against preferential treatment, and I cannot review them all here. Instead, I focus on the morally strongest case that can be made in the context of our society for preferential treatment of black Americans. That case rests on the ideal of fairness or fair equality of opportunity, which also informs the principle of nondiscrimination. The strongest argument for preferential treatment from the perspective of anyone committed to justice as fairness is that it paves the way for a society in which fair equality of opportunity is a reality rather than merely an abstract promise. By giving preference to basically qualified black candidates over better qualified nonblack candidates, employers—especially those who control large-scale institutions—may help create the background conditions for fair equality of opportunity. How can they do so? By breaking down the racial stereotyping of jobs that has resulted from our racist past. Many scarce and highly valued jobs in our society remain racially stereotyped because of this past. In this context, even institutions that faithfully apply the principle of nondiscrimination in hiring may fail to convey a message of fair opportunity to blacks. Absent this message, hiring practices are also bound to fail the test of fair opportunity.

If preferential hiring of basically qualified blacks can help break down the racial stereotyping of jobs, then employers may legitimately consider not only a candidate's qualifications, which are specific to the job's purpose, but also a candidate's capacity to move society forward to a time when the principle of nondiscrimination works more fairly than it does today. It is reasonable to think that by hiring qualified blacks for stereotypically white positions in greater numbers than blacks would be hired by color blind employers, the United States will move farther and faster in the direction of providing fair opportunity to all its citizens. There are three ways in which preferential hiring may help move our society in this direction: by *breaking down racial stereotypes*, by *creating identity role models* for black children and, as important, by *creating diversity role models* for all citizens. Identity role models teach black children that they too can realistically aspire to

social accomplishment, while diversity role models teach all children and adults alike that blacks are accomplished contributors to our society from whom we all may learn.[23] All three of these considerations—breaking racial stereotypes and creating identity and diversity role models—are of course color conscious.[24]

It is also important to note what defenders of preferential hiring practices share in common with their color blind critics. All stand opposed to hiring candidates who are unqualified, and who therefore cannot carry out their jobs well. (It should be clear that advocates of affirmative action in university admissions—as distinguished from preferential treatment—also stand opposed to admitting students who cannot graduate or remain in good academic standing. Affirmative action does not even entail admitting less qualified over more qualified students. It entails taking special steps to ensure nondiscrimination toward members of disadvantaged and underrepresented groups.) Both affirmative action and preferential hiring are no doubt subject to abuse. (The abuse of affirmative action in some cases may help account for why it is now so frequently assimilated to preferential treatment.) But neither should be dismissed as illegitimate by pointing to institutions that have admitted or hire unqualified blacks. Color blindness could be dismissed as readily by pointing to policies that, while color blind on their face, discriminate by setting qualifications—such as being the child of an alumnus or getting along well with the existing work force, which happens to be predominantly white—that are not essential to the legitimate social purposes of an institution. The abuses of both color blind and color conscious policies are avoidable by good-willed people.

If we need not be color blind, then we may be color conscious. But not all color conscious policies are defensible. By posing two

[23] Diversity role models also can help break down racial prejudice. "It is one thing for a white child to be taught by a white teacher that color, like beauty, is only 'skin-deep,'" as Justice Stevens wrote in his dissenting opinion in *Wygant v. Jackson*. "It is far more convincing to experience the truth on a day-to-day basis." *Wygant v. Jackson Board of Education*, 476 U.S. 287 (1986).

[24] For a defense of a similar set of purposes for affirmative action policies in the context of law school admissions and hiring, and an argument for why, given these purposes, African-Americans are the paradigmatic case that justifies affirmative action, see Paul Brest and Miranda Oshige, "Affirmative Action for Whom?" *Stanford Law Review* 47 (May 1995): 855–900.

questions, we can begin to distinguish more defensible color conscious policies from less defensible ones on the basis of widely shared values. First, how effective is the policy likely to be in moving us in the direction of a society of fair opportunity for all? The more effective a policy is in breaking down racial stereotyping and providing identity and diversity role models, the greater its justification in light of the aim of achieving a color blind society. Second, how fair is the policy, relative to the available alternatives, toward those individuals who are the most adversely affected by it? Where being a member of a disadvantaged and underrepresented minority is a qualification for a valued position, as it often is in university admissions, color conscious policies are more justifiable than where color is used to override qualifications, as it is in preferential hiring policies. Those preferential hiring policies that discriminate primarily against relatively advantaged individuals are more justifiable than those that discriminate primarily against relatively disadvantaged individuals. If a preferential hiring policy requires disadvantaged individuals to bear grossly disproportionate costs of creating a just society, a democratic society should provide some kind of compensation to those individuals. (Here is yet another reason why economic injustice toward the least advantaged individuals, regardless of their color, makes it more difficult to address racial injustice in a fair way. Something similar may be said about addressing gender injustice in a society where many well-qualified men as well as women are unemployed, or at least underemployed.) The most defensible policies that disproportionately burden a few individuals also try to find ways of compensating them for these burdens.

The most justifiable color conscious policies therefore are not likely to be the most piecemeal. The most justifiable would avoid gratuitous unfairness while they would help secure their own demise by bringing black Americans into positions of social status, economic power, and civic standing. The Piscataway plan, although clearly color conscious, is fair by both standards. Like virtually all color conscious policies, it would not bring about a society of fair equality opportunity for all Americans, even if it were generalized. The plan comes into play only in the relatively rare cases of ties in seniority and therefore, if generalized, would have a far from global effect in breaking down racial stereotyping and

creating role models.[25] This surely cannot constitute a critique of the plan, since the alternative of a color blind policy would in all likelihood do even less.

Some critics who say they are otherwise sympathetic to color conscious policies reject them by pointing to all the negative publicity that has increasingly accompanied them. They suggest that color blind policies are more likely to move us in the direction of a color blind society than color conscious policies, however well-intentioned. The publicity received by the Piscataway plan was overwhelmingly negative, as critics not only point out but also help bring about. Should the plan therefore be rejected on the grounds that the negative publicity threatens to set back the cause of racial justice? I think not, because the premise of this case against the Piscataway plan—that opposition to the plan rests on the indefensible claim that it is unfair—turns out to conflict with the very principle of nondiscrimination that the critic must advocate to be consistent. If the Piscataway plan is consistent with fair equality of opportunity, then it does not make sense to set it aside on grounds that it blocks our moving forward to a society of fair equality of opportunity.

Rather than capitulate to negative publicity, it would be far better to expose the mistaken premise—that color blindness is a basic principle of justice—and to defend the common commitments to nondiscrimination and fair equality of opportunity for all that are fundamental to constitutional democracy. These com-

[25] Policies like Piscataway's may be subject to the criticism that "the bottom line on affirmative action is the paltriness of its material benefits." See Carol M. Swain, "A Cost Too High to Bear," *New Democrat*, May–June 1995, p. 19. But the AT&T example, which I shall discuss presently, does not support Swain's conclusion that "whatever else one may say about affirmative action policies, the actual progress they have brought has been meager indeed." We are not constrained by a "love it or leave it" approach to all affirmative action and preferential hiring programs if we can distinguish among different kinds of policies. Swain urges us to address the challenging question that conservatives pose to liberals of "whether the practical gains from these policies outweigh the resentment and pain they have caused." Without pretending to offer a calculus of costs and benefits, we can assess what can be said for and against vastly different kinds of affirmative action and preferential treatment policies. I have only begun such an assessment here. See also the interesting attempt to carve out a "middle ground on affirmative action" by Jeffrey Rosen, "Affirmative Action: A Solution," *New Republic*, May 8, 1995, pp. 20–25.

mitments can justify many color conscious policies, including the Piscataway plan. To reject color conscious policies that would otherwise be defensible because of the negative publicity (and mistaken claims of preferential treatment) that they provoke threatens to make public attacks on those policies, however weak in moral terms, politically self-fulfilling. A morally defensible democratic politics cannot afford to pursue such a strategy of capitulation.

The more citizens who accept the morality of color conscious policies, the more good is likely to come from the best of such policies. But we should not expect preferential hiring policies to become universally accepted in our society. Would we even need such policies were citizens overwhelmingly to accept them? By that time, we might already have become a society of liberty and justice for all individuals, regardless of their color. It would be paradoxical in this sense to capitulate to negative publicity about preferential hiring policies. Were it reasonable to expect little negative publicity, then it would not be necessary to support the policy. The good of overcoming racial injustice would probably have already occurred.

Even in a society where preferential hiring is highly contentious, there is reason to believe that some preferential hiring policies can have beneficial effects, on balance. Any such judgment will no doubt remain controversial, but we have no better choice than to judge the overall effects of preferential hiring on the basis of a close look at particular policies. Let us therefore consider a policy that was recognized by proponents and critics alike to be one of preferential hiring, and a massive one at that.

In the early 1970s, AT&T instituted a "Model Plan," which has been called the "largest and most impressive civil rights settlement in the history of this nation."[26] Ma Bell's mother of all preferential hiring programs was instituted in an out-of-court settlement under governmental pressure. The plan was anything but color blind, and its effects were anything but incremental. The plan applied to eight hundred thousand employees and led to an

[26] *EEOC v. AT&T*, 365 F. Supp. 1105 (1973) at 1108, cited by Robert Fullinwider, "Affirmative Action at AT&T," in *Ethics and Politics*, 2d ed., ed. Amy Gutmann and Dennis Thompson (Chicago: Nelson-Hall, 1990), p. 211. A fuller discussion of the AT&T case can be found in Gutmann and Thompson, *Democracy and Disagreement*.

estimated fifty thousand cases of preferential hiring over a six-year period. It gave preference to basically qualified blacks and women for management positions over white men who (everybody conceded) had better qualifications and (in many cases) greater seniority as well. The plan successfully broke down racial stereotyping of management positions and also helped integrate AT&T's work force by race and gender.[27] The plan set a timetable of six years, after which AT&T instituted a policy of nondiscrimination in hiring and firing. In this six-year period, AT&T transformed its work force, breaking down the racial and gender stereotyping of positions ranging from telephone operators to crafts workers to corporate management.

But should the small number of people passed over for positions at AT&T because of their race, most of whom are not among the most advantaged in our society, be asked to pay the entire price of remedying the effects of racial injustice?[28] Not if we can find an equally effective alternative to preferential hiring that spreads the costs more equitably. Reparations for all those blacks who have suffered from racial discrimination, paid for by a progressive income tax, would probably be a morally better policy, but it has never come close to being adopted in this country. A massive reparations policy for all black Americans coupled with full employment, health care, housing, child care, and educational policies could in all likelihood do much more to overcome racial injustice than the best preferential hiring programs—especially if these programs were designed in ways that strengthen local communities.

But would these policies have been adopted were it not for preferential hiring? (Will they be adopted if the California Civil Rights Initiative, which would outlaw state support for preferen-

[27] The plan also gave preference to men over more qualified women in nonmanagement positions such as telephone operator, and thereby helped break down the gender stereotyping of these jobs.

[28] The costs of preferential hiring, as Michael Walzer points out, are largely borne by the next-weakest group in society. Preferential hiring, Walzer writes, "won't fulfill the Biblical prophecy that the last shall be first; it will guarantee, at most, that the last shall be next to last." Preferential hiring is nonetheless fairer as well as faster than the color blind alternative of burdening the weakest group so as to avoid burdening the next-weakest. Michael Walzer, *Spheres of Justice*, p. 154.

tial treatment programs, becomes law?) Arthur Ashe, himself no advocate of preferential hiring programs, captured the historical context in which they are morally defensible when he wrote: "No one has paid black Americans anything. In 1666, my state, Virginia, codified the conversion of black indentured servants, with limited terms of servitude, into slaves. The Emancipation Proclamation came in 1863. In my time, no one has seriously pursued the idea of making awards to blacks for those centuries of slavery and segregation."[29] In the absence of better alternatives, we can defend those preferential hiring policies that effectively move us in the direction of racially integrating our economy provided they are not gratuitously unfair to the disadvantaged individuals who are passed over. (Adding class to racial preferences is one way of avoiding gratuitous unfairness. Although class preferences are not an adequate substitute for race conscious policies, they are an important supplement to them.) Were this country to expand employment opportunities, improve education, provide health care, child care, and housing opportunities for all its citizens, regardless of their race, some preferential hiring policies might still be justifiable if they were needed to equalize job opportunities in the short run by breaking down the racial stereotyping of jobs and providing role models.[30] Even massive preferential hiring on the

[29] Arthur Ashe and Arnold Rampersand, *Days of Grace: A Memoir* (New York: Ballantine, 1993), p. 168. Ashe goes on to argue that although black Americans may be entitled to something, "our sense of entitlement has been taken too far." He argues that "affirmative action tends to undermine the spirit of individual initiative. Such is human nature; why struggle to succeed when you can have something for nothing?" (p. 170). But preferential hiring plans of the kind implemented by AT&T—and of the kind whose merits we are considering—do not give black Americans something for nothing. They give people jobs for being basically qualified and black, with the expectation that they will successfully carry out the social purposes of the position.

[30] For a counterargument, see Shelby Steele, *The Content of Our Character: A New Vision of Race in America* (New York: Harper, 1991), esp. pp. 11–125. It is hard to know how to evaluate Steele's case that affirmative action (unintentionally) demoralizes blacks and enlarges their self-doubt. We should not deny people otherwise justified benefits because of the paternalistic consideration that the benefits may demoralize them or enlarge their self-doubt. (Many successful people are tormented by self-doubt partly because they are more successful than they believe they deserve to be.) If Steele is right about the psychological effects of preferential hiring programs, there is cause for concern but not

order of AT&T's Model Plan, suitably generalized, will not itself overcome racial injustice, but neither will social welfare policies, taken by themselves. In light of our long history of racial discrimination, we should not be surprised to find that all these policies may be necessary, none alone sufficient to securing fair opportunity for black Americans.

Part 3. Should Public Policy Be Class Conscious Rather than Color Conscious?

We have yet carefully to consider a proposal that promises to go a long way toward securing fair opportunity for black Americans while avoiding the pitfalls of color consciousness by shifting the focus of public policy from race to class. One advocate of "class, not race" argues that "it was clear that with the passage of the Civil Rights Act of 1964, class replaced caste as the central impediment to equal opportunity."[31] If class is the central impediment to equal opportunity, then using class as a qualification may be fairer to individuals than using race.[32] Counting poverty as a qual-

retraction. Without more evidence, it is hard to know whether and to what extent he is right. Steele's claim that blacks are being exempted from taking responsibility for their own educational and economic development is not sustainable against programs that consider only basically qualified candidates and expect successful candidates to perform well in their positions.

[31] Richard Kahlenberg, "Class, Not Race," *New Republic*, April 3, 1995, p. 21: "As the country's mood swings violently against affirmative action. . . , the whole project of legislating racial equality seems suddenly in doubt. The Democrats, terrified of the issue, are now hoping it will just go away. It won't. But at every political impasse, there is a political opportunity. Bill Clinton now has a chance . . . to turn a glaring liability . . . into an advantage—without betraying basic Democratic principles."

[32] Class preferences are sometimes said to be fairer because they are more individualized than race preferences. But the claim that income is an individual characteristic while race is a group characteristic makes little sense. In itself, race is no more nor less a group characteristic than income. Both generalize on the basis of a group characteristic, as do all feasible public policies. As Michael Kinsley puts it: "The generalization 'Black equals disadvantaged' is probably as accurate as many generalizations that go unchallenged, such as 'High test scores equals good doctor' or 'Veteran equals sacrifice for the nation.'" Kinsley, "The Spoils of Victimhood."