

EQUAL OPPORTUNITY REVISITED

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Many years ago I recall Daniel Patrick Moynihan saying that in the mid-1960s we had finally gotten to the point where equal opportunity was a reality for virtually all Americans. However, he said, we no sooner achieved this goal when we abandoned it in favor of equal results.

The Harvard professor, presidential advisor and New York Senator was right about that. If he were alive today he would be happy to learn of a resurged interest in equal opportunity.

A little history is in order.

When Jefferson wrote that “all men are created equal” he did not mean that they were created with equal abilities and aptitudes. He meant that everyone was equal before the law.

Yes, slavery existed at that time, but the Declaration and the U.S. Constitution explicitly made provisions for its demise. To be specific, the abolitionist movement could not have gotten off the ground had it not been for the conviction that we are all created equal and our God-given rights are inalienable.

Slavery ended in the mid-1860s, but it was not until the mid-1960s that the Civil Rights Act was passed. Though it was principally aimed at securing equal opportunity for blacks, it covered other Americans as well.

This was the juncture that Moynihan was alluding to when he commented that we no sooner achieved equal opportunity when we opted for equal results. This change was proposed by President Lyndon Baines Johnson in his commencement address at Howard University in 1965.

LBJ knew about the equal opportunity requirements in the Civil

Rights Act, but it was too late, he believed, to rest on them alone. "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then says, 'You are free to compete with all the others,' and still justly believe that you have been completely fair."

He then laid down the principle that is embedded in affirmative action.

"We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory, but equality as a fact, and equality as a result."

This was the official rebuke of equal opportunity that Moynihan referenced. Affirmative action, complete with quotas, followed. The rationale for it, judges said, was the Civil Rights Act. But the language of this legislation never sanctioned this outcome.

Indeed, one of those who championed this historic legislation, Senator Hubert Humphrey, said that critics of the law who said it would lead to preferential treatment were wrong. He even went so far as to say that he would start "eating the pages [of the bill] one after another" if any language could be found that permitted "preferential treatment for Negroes or any other persons or groups" or "any quota system to maintain racial balance in employment."

Humphrey was right about the wording of the bill, but it had no effect on administrative agencies and the courts. They interpreted the Civil Rights Act as ensuring equal results, not equal opportunity.

Affirmative action led to millions of African Americans occupying seats in education and the workplace that had previously been denied to them. But it also led to discrimination against those who were not black.

In more recent times, Critical Race Theory laid the intellectual groundwork upon which Diversity, Equity and Inclusion (DEI) programs have been implemented in many organizations. These ideas are predicated on the notion that the answer to yesterday's discrimination is today's discrimination, with different victimizers and victims.

The backlash against these efforts has been palpable. Two years ago, the Supreme Court weighed in against so-called reverse discrimination at Harvard and the University of North Carolina, effectively ending affirmative action in higher education. DEI initiatives have since been cut back or eliminated.

In June, the Supreme Court ruled that it was unfair to deny a promotion to a heterosexual woman because of her status. Her employer wanted to give the spot to a gay woman, even though she lacked the experience and credentials of the complainant. Things got worse when the straight woman was removed from her existing job and offered a demotion, with less pay. She was replaced by a gay man with less seniority.

Why did her employer discriminate against her? Because she was a member of a majority group. Critical Race Theory and DEI schemes gave birth to this pernicious idea.

It was Supreme Court Justice Ketanji Brown Jackson who wrote the majority opinion. She said the 1964 Civil Rights Act "draws no distinction between majority-group plaintiffs and minority-group plaintiffs." In fact, she said, "by establishing the same protections for every 'individual'—without regard to that individual's membership in a majority or minority group—Congress left no room for courts to impose special requirements on majority-group plaintiffs alone." Humphrey must be cheering.

Brown's comment about every "individual" is striking. She is making the very American case that individuals have rights,

not groups.

In short, we are revisiting equal opportunity for all Americans. Moynihan must be cheering.