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ought to be chosen in partisan elections (as they are in North Carolina), nor is it to say that individual rights should be at the mercy of plebiscites. It is simply to observe that even Federalists like Alexander Hamilton, smarter and much more elite than anybody else, realized that they had somehow to square liberty with popular rule: they appealed from the people angry to the people calm. Constitutions are the higher law precisely because they are the majority's considered opinion.

REFLECTIONS OF AN AFFIRMATIVE ACTION BABY.
By Stephen L. Carter.¹ New York: Basic Books. 1991. Pp. xiii, 286. Cloth, \$23.00.

*Daniel R. Ortiz*²

Despite its press, this is not really a book about affirmative action. To be sure, it swipes at the various arguments used to justify affirmative action programs, challenges many orthodoxies and argues for a major overhauling of racial preferences, but its real concern lies elsewhere—in the contemporary politics of African-American identity. Racial preferences may have sparked these reflections, but racial identity remains the focus of their true concern. To understand this, however, discussion must begin with Carter's ostensible subject: affirmative action.

Carter takes on both the "traditional" and "modern" approaches to racial preferences, by which he means the remedial and diversity justifications, respectively. Although both approaches actually have a long history in the debate and can, for example, be found in *Regents of the University of California v. Bakke*,³ it is true that the diversity rationale, the "modern" approach, has enjoyed increasing prominence with the advent of critical race studies.⁴ The more "traditional" approach captures little of Carter's interest and he dispatches it quickly.

Against those who believe that racial preferences are permissible and sometimes even necessary to remedy racial oppression, Carter makes three primary arguments. First, he notes that racial oppression has not harmed all African-Americans the same way.

1. William Nelson Cromwell Professor of Law, Yale University.

2. Professor of Law and Harrison Foundation Research Professor, University of Virginia.

3. 438 U.S. 265 (1978).

4. See Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 Duke L.J. 705.

Some, including himself, have suffered from it but arrived with nearly all their opportunities intact. Others, he admits, have not. But for him the point remains that oppression has not injured every African-American in equally serious ways and that different forms of oppression have injured members of other classes. Thus, simple racial preferences seem a very rough remedy.

Second, Carter argues that racial preferences cannot effectively compensate for any past disadvantage. The belief that they can is simply a "pretense" we should "abandon." This is true, he argues, because racial preferences help those African-Americans who need help least or, put differently, those who most need compensation are least able to take advantage of the benefits affirmative action programs can bring. In education and the professions, for example, affirmative action is just a form of "racial justice on the cheap" that eases white guilt and benefits middle-class African-Americans while ignoring the misery of the larger number of blacks in the lower class.

In fact, to the extent people believe preferences help remedy inequality they may actually deepen it instead. The more we are lulled into complacency with cheap, cosmetic fixes, the less likely we are to tackle the primary and more intractable obstacles to black advancement, like the "social infrastructure of inner-city communities." Unlike affirmative action, programs that address these real problems do not come cheaply.

Third, Carter argues that the costs of affirmative action to the black community itself clearly outweigh any benefits such programs might bring. Racial preferences, in his view, inevitably marginalize those they aim to help. They limit the range of African-American ambition and success to that of being not the best, but only the "best black." Like any double standard, those implied in racial preferences stigmatize the success of those they help. Under the guise of redressing injury, they reentrench the stereotype of black inferiority more deeply—in the eyes of both whites and people of color.

None of these arguments is new. They represent the standard objections to remedial justifications for affirmative action. The only innovation is that Carter, a self-admitted beneficiary of such programs and leading African-American scholar, is now leading the charge. The importance of this part of the book, in other words, lies not in what is said, but in who says it. This is true in two senses. First, Carter's identity as a beneficiary and a scholar of color may lead people inside and outside the African-American community to take the arguments against such programs more seri-

ously. If people within the community itself speak against preferences, we cannot dismiss the arguments as easily as we might have before. Second, and more important, the hostile reception of Carter's views within the African-American community leads him to explore his place in that community and the notion of racial identity itself. This part of the book more seriously engages him and holds much more interest for the reader.

Racial identity implicates what Carter calls the modern or diversity rationale for affirmative action, which he unequivocally rejects. Unlike the earlier approach, this view makes difference, not injury, central. It holds that African-Americans, regardless of any injury they have suffered, should be represented in many arenas because of their distinctive cultural perspective. Although Carter admits that "history *does* make black people different from white people" he argues both that this history does not make blacks different in "some predictable . . . way" and that blacks' difference should not be valued any more than anyone else's. Holding all three of these beliefs together, however, proves difficult.

Carter's rejection of the diversity rationale represents an oblique attack on critical race theory. Unfortunately, he somewhat misrepresents it. To him, critical race theorists value black difference almost solely because of historical oppression. Only the suffering of African-Americans, he believes, could warrant the privilege diversity theorists would grant the black perspective. This view discomforts him because it creates a "hierarchy of suffering" that "reject[s] . . . the idea that recognizing difference can be a binding force, a form of love." "[M]ak[ing] the fact of suffering the badge of authority defeats the purpose of valuing diversity," for it "make[s] a potentially bitter contest of what ought to be a solemn and shared understanding." The problem with critical race theorists, in other words, is that they divide those who have suffered from each other rather than bringing them together. To avoid this danger, Carter would enforce a parity among marginalized voices, even if the effect is to subordinate them all to majoritarian perspectives.

Critical race theory, however, does not value diversity just because of the suffering that may have defined it. We can privilege a black perspective, if we agree with Carter that one exists, without creating a divisive hierarchy of suffering. In this view, we should recognize difference not because of suffering, though that might make such recognition even more important, but rather because "love," to use Carter's term, requires us to recognize what is centrally important to others we respect. We should value African-Americans' viewpoints and seek to include them in many of the

arenas of culture, in other words, because such perspectives distinctively and centrally characterize a community of importance to us. How can we “love” without granting such respect?

Relational feminism, another diversity perspective Carter discusses, makes this point clear. Unlike Carter’s version of critical race theory, relational feminism does not rest its argument for valuing women’s “different voice” on women’s oppression. Relational feminists argue instead that we should represent this different viewpoint in culture simply because it is different and characterizes many people.⁵ The relationship between representation and oppression is, in fact, just the opposite of what Carter portrays with respect to race. To relational feminists, suffering results from failing to acknowledge difference. It is not the case that difference necessarily stems from suffering.⁶

At bottom, then, Carter fails to engage critical race theory’s concept of identity. Recognizing diversity does not have to create contests of suffering that divide oppressed peoples from each other but can instead represent “a form of love.” Valuing central differences can be the highest form of respect one community can pay another. This does not, of course, solve all the difficulties. We must still determine when a community has a different perspective, how central that perspective is to its identity and whether the community deserves respect. To be sure, these are hard questions. But we cannot ignore them simply because they are hard. Otherwise we put ourselves in the position of having to say that since the Jaycees and African-Americans both have viewpoints over some questions that differ from the rest of society’s we have to respect both their perspectives equally—which, in Carter’s terms, means not at all.

Carter’s ultimate conclusions suggest that he himself distrusts some of his arguments. As he admits, “[g]iven the logic of all that I have said [against affirmative action], I often feel that I should oppose all racial preferences in admission to college and professional school. But I don’t.” Instead, he advocates a return to affirmative action’s “roots.” To him, “the proper goal of all racial preferences is opportunity—the chance at advanced training for highly moti-

5. See Carol Gilligan, *In a Different Voice: Psychological Theory and Women’s Development* 105, 173-74 (Harv. U. Press, 1982).

6. In fact, the view that women’s different voice reflects oppression represents the most powerful radical feminist critique of relational feminism. See Catherine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in *Feminism Unmodified: Discourses on Life and Law* 32, 39 (Harv. U. Press, 1987) (“Women value care because men have valued us according to the care we give them, and we could probably use some. Women think in relational terms because our existence is defined in relation to men.”).

vated people of color who, for whatever complex set of reasons, might not otherwise have it." This sounds innocuous enough, but how can he defend it?

Enhancing opportunity for one group diminishes opportunity for others. Giving opportunity to those who "might not *otherwise* have it" also presupposes the use of a separate standard for people of color. But, according to Carter's own reasoning, such double standards lead to invidious racial stereotyping and the "best black" syndrome. How can we justify either breaching meritocratic standards or placing these kinds of costs on people of color? Carter never answers and for good reason. On some level he would have to resort to exactly the types of justifications he has rejected. Carter's position thus contains a highly charged ambivalence which threatens to undermine his claims.

The root of his ambivalence lies in his notion of black distinctiveness. Although he admits that blacks are different from whites, he argues against any definite sense of difference. Like much bad deconstructive theory, blacks seem to be characterized not so much by particular differences, but by difference itself. Thus, "[racial s]olidarity . . . means not, as the diversity movement would have it, embracing some special perspective gained from our history of oppression; . . . it means rather, embracing our people themselves, in all their wild and frustrating variety."

But can one ground a group identity largely in group members' differences from one another? I think not. First, it would be impossible to define the group's outer boundaries. Are other groups, particularly whites, less internally diverse? Second, internal diversity is at bottom inimical to the very concept of a group identity. The more different people within a group are from one another and the more important those differences are to them, the less likely they are to view themselves as a meaningful group. The more numerous and important the differences, in other words, the thinner the shared identity.

Carter wants to have it both ways. On the one hand, he insists that black group identity is thick enough to be constitutive of his and other blacks' individual identity. Race, he says at one point, defines "all that we are." On the other hand, however, he insists that there can be no "shibboleths" that define one as a black. His call for "[black] unity, not in the sense of groupthink but in the sense of group love," suggests that racial solidarity lies primarily in toleration of difference. African-Americans, in this view, are a people with a shared history but no real shared values. They seem more a bunch of classical liberals who happen to be black—just an-

other caucus in the liberal community—than a people with a special culture.

So deep does Carter's belief in liberalism run, moreover, that he thinks "identification with an ethnic group" should be "a conscious decision." Even community affiliation should reflect autonomous choice. Thus, in his fantasies, he muses over the possibility of purely voluntaristic communities: "What I envision is the possibility that each of us might make a choice about which racial group we prefer to join." He recognizes, of course, that race is not now a choice, but it "should ideally be [one], a decision one makes to claim a people, a culture, a history, as one's own."

I must admit that, as a cranky liberal myself, I have some sympathy for this unrealistic position. But I do not think you can have it both ways. Either the community is special, rich, and constitutive of individual identity or it is not. The problem may be that Carter finds himself trying to straddle a divide within the African-American community itself. Carter quite honestly describes himself as different in many respects from most African-Americans. He is "a middle-class professional living in the suburbs," one of affirmative action's success stories. His success, however, places him across a class divide from most of the people he shares a history with, a divide which, he believes, now more than race determines the life opportunities of people of color.

At times Carter acknowledges these limits to his experience and carefully narrows his arguments to the black middle and professional classes. Thus, in a footnote, for example, he states that many of his arguments against affirmative action do not extend to nonprofessionals. At other times, however, Carter speaks as an "intellectual" whose black experience qualifies him to speak to all parts of the African-American community. He realizes his own difference from most of the people he speaks to but still finds it necessary to be considered part of the group. This causes him to stretch group identity very thin, thin enough to cover both the middle and poorer classes.

His own belief that class, more than race, now defines people's opportunities should lead him to question this strategy. If he is right, there are several black communities, not just one, and on some particular issues some of them may identify more with members of other groups, including some whites, than with other black communities. Carter suggests, moreover, that the success of affirmative action may itself be partly responsible for this community division. Insofar as his own views of preferences represent a classically liberal, middle-class outlook, they reflect the success of those civil

rights programs, including preferences, that enabled him to reach or stay in the middle-class. Thus, affirmative action may in one sense be self-limiting. Its very success may be partially responsible for calls from within some quarters of the black community to limit it.

This is not, however, a simple case either of majoritarian cooption or of some victims pulling up the ladder before others have a chance to escape. It instead reflects the importance of economic status to self-definition in our culture. As Carter says: "The day is gone when large numbers of black students see themselves as the vanguard of a revolution; what students want now, and with reason, is a piece of the action. So do I." Perhaps one effect of the civil rights movement's success is the development of such class fissures within the African-American community. Carter's reflections, then, are ultimately not about affirmative action, but about what it means to be both black and traditionally successful in a world that still limits many blacks' chances of success. The book's importance, in other words, lies not in its arguments, but in its ambivalences.

JOHN MARSHALL HARLAN: GREAT DISSENTER OF THE WARREN COURT. By Tinsley E. Yarbrough.¹ New York: Oxford University Press. 1992. Pp. xvi, 395. Cloth, \$29.95.

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As Earl Warren and his Court moved aggressively in the late 1950s and early 1960s to eradicate racial segregation and to extend the Bill of Rights to the states, the first Justice John Marshall Harlan became a patron saint to Hugo Black, William O. Douglas and other of its more liberal, activist members. The former slave owner from Kentucky, mocked by Justice Holmes as "my lion-hearted friend," had dissented in *The Civil Rights Cases*,³ *Plessy v. Ferguson*,⁴ *Hurtado v. California*,⁵ and *Twining v. New Jersey*,⁶ all of which established his claim to being the jurisprudential progenitor of those who battled to expunge racism from the Constitution and to incorporate the Bill of Rights into the guarantees of the Fourteenth Amendment.

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 2. Professor of History, University of California, San Diego.
 3. 109 U.S. 3 (1883).
 4. 163 U.S. 537 (1896).
 5. 110 U.S. 516 (1884).
 6. 211 U.S. 78 (1908).