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THE NATION : RACE

Remedying Past Discrimination: Following the 'Anderson' Model

April 26, 1998 | Ian Ayres | *Ian Ayres, currently a visiting professor at the University of Illinois, is a law professor at Yale Law School*

CHAMPAIGN, ILL. — On Easter morning, 59 years ago, Marian Anderson walked to a microphone at the Lincoln Memorial and began to sing "My Country, 'Tis of Thee." Anderson was a contralto with a voice that conductor Arturo Toscanini said "came once in a hundred years." But a few months earlier, the Daughters of the American Revolution had refused to rent the only large concert hall in Washington to Anderson because she was black. First Lady Eleanor Roosevelt was so outraged by the DAR's action that she not only resigned from the organization, but also prompted the National Park Service to invite Anderson to sing.

More than 75,000 came to hear Anderson that day. Millions listened on radio. Beyond the concert's artistic and emotional impact, the event came to be seen as the first strategic victory of the modern civil-rights movement. Decades later, when Martin Luther King Jr. chose to speak at the Lincoln Memorial, the memory of the crowds at Anderson's concert must have served as a guide. Giving Anderson access to the memorial seemed an appropriate way to make up for the DAR's hateful discrimination.

But, strikingly, a majority of federal appellate judges have interpreted the Constitution in a way that would make Anderson's invitation unlawful. Put simply, there is now a dominant view that the government can use racial preferences to remedy only the government's own discrimination. Thus, for example, the Third Circuit Court recently held that, "under the Constitution a public employer's remedial affirmative-action initiatives are valid only if crafted to remedy its own past or present discrimination."

Even the Clinton administration, which seeks to "mend, not end" affirmative action, has accepted the premise that racial preferences can only be used to remedy government discrimination. A recent Justice Department guideline states: "Affirmative action in federal procurement is not a means to make up for opportunities minority-owned firms may have lost in the private sector."

But the whole purpose of Anderson's invitation was to make up for the opportunities she lost in the private sector. The federal government at that time did not normally open the Lincoln Memorial for public concerts. The invitation to Anderson was a race-conscious preference, a form of affirmative action, to remedy the DAR's private discrimination.

Anderson's invitation was one of the federal government's first attempts in this century to rectify the continuing harms of racial discrimination. Yet, somehow, we've gone from thinking that making up for private discrimination is an appropriate first step to thinking it is illegal. How did we get from there to here?

The stark contrast between earlier thinking and the current attitude of many federal judges and the administration is explained by two changes in the way the U.S. Supreme Court has come to view affirmative action. First, the Supreme Court began to view private discrimination as historically distant, amorphous and therefore hard to prove. The justices increasingly found that generalized assertions of such "societal" discrimination provided "no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."

Second, the court began demanding a closer identity between the harm caused by discrimination and the government benefit offered as a remedy. By 1986, Justice Lewis F. Powell Jr. was comfortable in concluding that the Supreme Court always "has insisted upon some showing of prior discrimination by the government unit involved before allowing limited use of racial classifications in order to remedy such discrimination." Restricting racial preferences to the "government unit involved" in discrimination not only ended government remedies for private discrimination, but also meant that government couldn't use affirmative action in one area—say, public employment—to make up for past discrimination in another—such as public high schools.

Insisting government can use affirmative action only to remedy its own discrimination has far-reaching implications. Writer Jeffrey Rosen has offered this syllogism: "The Supreme Court will only uphold federal racial set-asides in light of convincing evidence of past discrimination by the federal government itself; but, for almost 20 years, the federal government has been discriminating in favor of minority contractors rather than against them." Therefore, Rosen concludes, federal affirmative action in procurement is doomed.

Rosen may be right if we cling to the idea that government cannot use affirmative action—racial preferences in procurement and employment—to remedy private discrimination. As an empirical matter, government discrimination, standing alone, is probably not sufficient to justify the current patterns of affirmative action in state and federal procurement. Yet, while government discrimination may be a thing of the past, this is not true of private discrimination. Private discrimination against minority employees and businesses is still a substantial reality.

But all is not lost. In 1989, Justice Sandra Day O'Connor rejected the notion that affirmative action could only be used to remedy the government's own discrimination. In reviewing the city of Richmond's affirmative-action plan, she concluded that a state "has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction . . . [Richmond] can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the 14th Amendment."

Given the clarity of O'Connor's words, it is odd that so many lower-court judges in the federal system cling to the belief that public affirmative action cannot be a constitutional remedy for private discrimination. It is as if O'Connor's words escaped their notice. O'Connor may not have been thinking about Anderson when she wrote these words, but she understood what Roosevelt understood years before: Eradicating the effects of private discrimination is a compelling government interest.

Aspiring to eradicate the effects of private discrimination is not an open-ended invitation to arbitrary racial preferences. Again, the Anderson example is instructive. To make up for the DAR's discrimination, the government could not have constitutionally granted racial preferences in hiring lawyers or typists or in awarding broadcast licenses. But opening the Lincoln Memorial was precisely designed to make up for Anderson's lost opportunity to sing at Constitution Hall. In the jargon of constitutional law, the scope of the remedy was "narrowly tailored" to eradicate the effects of the private discrimination. Today, government remedies for private discrimination similarly could be limited to continuing discrimination in the same market.

To be sure, using racial preferences to remedy private discrimination does put non-minorities at a disadvantage. The government favored Anderson over non-minority singers because Anderson had been the victim of discrimination. But non-minority singers can hardly claim an undue burden when they had disproportionate access to private venues. More broadly, non-minority applicants unjustly enriched by private discrimination have less grounds for complaint if government then favors minority applicants in allocating procurement or employment opportunities.

For example, government should not be able to use affirmative action in jet-fighter procurement to make up for private discrimination in building construction, but government constitutionally might award race-conscious bidding credits on government construction projects to make up for private discrimination in this same market. Instead of restricting racial preferences to the "governmental unit involved" in discrimination, the Constitution should only require that we restrict public affirmative action to the "same market" involved in the discrimination.

As a legal matter, the rationale of remedying private discrimination rests on a few hundred words in a single 1989 Supreme Court opinion. This is a thin reed to build on. Especially in the civil-rights arena, the Supreme Court of late has been willing to interpret away far more settled precedents. But discrimination against minority enterprises today primarily occurs in private markets and remedies blind to this reality have no hope of creating equal opportunity.

To accept that government can use affirmative action to make up for private discrimination is not to deny the force of independent criticisms. Reasonable people, for example, can still reject certain remedial means, such as fixed quotas. Some might demand that racial preferences for government benefits be limited solely to individuals proved to be the victims of discrimination. Justice Antonin Scalia has been a leading proponent of this approach. But I would hope that even Scalia, when confronted with the DAR's discrimination against Anderson, would agree that the government's remedy was constitutional.

Remedying private discrimination is not a silver bullet that will save affirmative action. But at least this theory forestalls the Rosen syllogism. We should not end affirmative action solely because the government has succeeded in ending its own discrimination.

Almost none of my law students know who Marian Anderson is. But the history of her Easter concert helps resolve whether government can constitutionally award race-conscious benefits to remedy private discrimination. As we remember Anderson today, we should remember there was a time when it seemed only natural to use government power to neutralize private discrimination. We should be proud of our government's invitation to Anderson, not ashamed.