BRIEFING PAPER FOR THE U.S. COMMISSION ON CIVIL RIGHTS
LEGISLATIVE, EXECUTIVE & JUDICIAL DEVELOPMENT OF AFFIRMATIVE ACTION*

INTRODUCTION

Definition: Affirmative action is a contemporary term that encompasses any measure, beyond simple termination of a discriminatory practice, that permits the consideration of race, national origin, sex, or disability, along with other criteria, and which is adopted to provide opportunities to a class of qualified individuals who have either historically or actually been denied those opportunities and/or to prevent the recurrence of discrimination in the future.[1]

Background: Contemporary usage of the terminology "affirmative action" emanates from President Kennedy's 1961 Executive Order establishing the President's Committee on Equal Employment Opportunity.[2] The concept, however, coincides with passage of the Civil War Amendments.[3] The first major Reconstruction legislation enacted specifically for the benefit of African Americans was the 1865 Freedman's Bureau Act.[4] The Act provided in part for provisions, clothing, and land for lease or sale specifically for descendants of slaves. Since that time, affirmative action plans and policies have emerged in a variety of contexts in aid of historically disadvantaged racial minorities and women. Below is a brief report on the legal status of affirmative action as determined by the United States Supreme Court, followed by a synopsis of the major Executive, Legislative, and Judicial developments of such plans and policies in the areas of employment, contracting, education, and housing.

Legal Status: The legality of affirmative action plans is measured principally pursuant to the equal protection clause of the Fourteenth Amendment[5] or the Civil Rights laws. The Supreme Court's treatment of affirmative action plans or legislation designed to remedy the effects of past discrimination or to diversify a particular entity varies according to the class of individuals

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1 *See generally* U.S. Commission on Civil Rights, *Affirmative Action in the 1980's: Dismantling the Process of Discrimination*, Clearinghouse Pub. 70 (November, 1981); U.S. Commission on Civil Rights, *Statement on Affirmative Action*, Clearinghouse Pub. 54 (October, 1977).

2 *See* Exec. Order No. 10,925, 3 C.F.R. 448 (1959-1963).

3 U.S. CONST. amends. XIII, XIV, XV.

4 Act of March 3, 1965, ch. 90, 13 Stat. 507, 508. The Freedman's Bureau Act of 1865 was part of a series of proposed legislation designed to ameliorate the condition of the newly freed slaves. Proponents argued that the bill was needed "not because these people are negroes, but because they are men who have been for generations despoiled of their rights." CONG. GLOBE, 38th Cong., 1st SESS. 2800 (1864) (statement of Sen. Sumner).

5 The Fourteenth Amendment, by its terms, applies only to the States. *See* U.S. CONST. amend. XIV ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). The equal protection guarantee is applicable to the Federal government through the due process clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

covered by the legislation and the body that enacted the legislation. In other words, presently, State and local affirmative action plans are subject to a different standard of judicial review than are those enacted by Congress. Similarly, race-conscious affirmative action plans are subject to a higher standard than are gender-conscious affirmative action plans. Additionally, all governmental affirmative action plans generally are subject to the strictures of the Fourteenth or Fifth Amendments, and may be governed by applicable Civil Rights laws as well, while affirmative action plans of private employers are evaluated chiefly under the Civil Rights laws. Within these parameters, the Supreme Court has indicated that affirmative action is lawful in the following contexts:

- Court imposed remedies may include affirmative measures following a finding of unlawful discrimination under the Constitution[6] or the Civil Rights laws,[7] and thus, may be properly imposed against both private and public actors.

- Private and public employers may voluntarily institute affirmative action plans, consistent with Title VII of the Civil Rights Act of 1964, to remedy a conspicuous imbalance in a traditionally segregated job category within its workforce if the plan is temporary and does not unnecessarily trammel the interests of nonminorities[8] or males.[9]

- State and local governments may adopt and implement affirmative action plans narrowly tailored to correct the effects of past discrimination in which the specific governmental entity subject to the plan participated.[10]

- Congress may implement affirmative action measures to redress societal discrimination[11] or to promote diversity.[12]

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[6] *Brown v. Board of Educ. II*, 349 U.S. 294 (1955); *Brown v. Board of Educ. I*, 347 U.S. 483 (1954).

[7] *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986).

[8] *United Steel Workers of America v. Weber*, 443 U.S. 193 (1979).

[9] *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616 (1987).

[10] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

[11] *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

[12] *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990).

AFFIRMATIVE ACTION IN EMPLOYMENT

Executive Developments: In 1941, based on "evidence that available and needed workers ha[d] been barred from employment in industries engaged in defense production solely because of considerations of race, creed, color, or national origin, to the detriment of workers' morale and of national unity,"[13] President Franklin D. Roosevelt issued **Executive Order 8802** which required defense contractors to pledge nondiscrimination in employment on the basis of race, creed, color or national origin. The Order directed all departments and agencies of the Federal government "concerned with vocational and training programs for defense production" to "take special measures appropriate to assure that such programs [we]re administered without discrimination, because of race, creed, color, or national origin."[14] Finally, **Executive Order 8802** established the first Committee on Fair Employment Practices which was authorized to investigate complaints and sanction agencies for noncompliance.

Executive Order 9346[15] extended coverage of the nondiscrimination employment provisions of **8802** to all Federal contractors and subcontractors "to promote the fullest utilization of all available manpower, and to eliminate discriminatory employment practices."[16] Under the Order, all Federal contractors were required to include in all contracts with the government a provision obligating each contractor not to discriminate in its employment practices.

Executive Order 10308 created, in 1951, the President's Committee on Government Contract Compliance. The Order was designed to "improve the means for obtaining compliance with . . . nondiscrimination provisions"[17] of the previous Executive Orders. The head of each agency was "primarily responsible for obtaining compliance by any contractor or subcontractor," and was required to "take appropriate measures to bring about . . . compliance."[18] The Committee on Government Contract Compliance was conferred with advisory powers only.

Two years later, "a review and analysis of existing practices and procedures of government contracting agencies" indicated that those practices and procedures needed to be "revised and strengthened to eliminate discrimination in all aspects of employment."[19] President Eisenhower issued **Executive Order 10479** which abolished the Committee on Government Contract

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[13] Exec. Order No. 8,802, 3 C.F.R. 957 (1938-1943).

[14] *Id.*

[15] Exec. Order No. 9,346, 3 C.F.R. 1280 (1938-1943).

[16] *Id.*

[17] Exec. Order No. 10,308, 3 C.F.R. 837 (1949-1953).

[18] *Id.*

[19] Exec. Order No. 10,479, 3 C.F.R. 961 (1949-1953).

Compliance established by Truman. In its place, the Government Contract Committee was formed. The Committee was authorized (1) to make recommendations to the contracting agency for the improvement of compliance methods,[20] (2) to receive and transmit to the appropriate agency, complaints of alleged violations of the nondiscrimination provisions,[21] and (3) to establish and maintain relationships with State and local bodies and nongovernmental entities to facilitate, through persuasion and conciliation, compliance with the nondiscrimination policy.[22]

In 1961, compelled by "the plain and positive obligation of the United States to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color or national origin, employed or seeking employment with the Federal Government and on government contracts,"[23] and responding to "an urgent need for expansion and strengthening of efforts to promote full equality of employment,"[24] President Kennedy issued Executive Order 10925. Under the Order, covered government contractors and subcontractors were mandated to "take *affirmative action* to ensure that applicants [we]re employed, and that employees [we]re treated during employment, without regard to their race, creed, color, or national origin."[25] In addition, the Executive Order generally forbade discrimination throughout Federal employment. Each executive department and agency was directed to initiate immediately a study of their respective employment practices. The studies were to include "statistics on current employment patterns, a review of current procedures, and the recommendation of positive measures for the elimination of any discrimination, direct or indirect."[26] The Order also established a President's Committee on Equal Employment Opportunity which was authorized to make any rules and regulations deemed necessary to effectuate compliance with the nondiscrimination policy. Finally, the Committee was authorized to impose sanctions for non-compliance, including the termination of the contract of any contractor or subcontractor not in compliance with the Order.[27]

In 1963, because "construction under programs of Federal grants, loans, and other forms of financial assistance to State and local governments and to private organizations creates substantial employment opportunities," the terms of President Kennedy's 1961 Executive Order were

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[20] *Id.* § 4.

[21] *Id.* § 5.

[22] *Id.* §§ 6 & 7.

[23] Exec. Order No. 10,925, 3 C.F.R. 448 (1959-1963).

[24] *Id.*

[25] *Id.* § 301 (1).

[26] *Id.* § 202.

[27] *Id.* §§ 312-315.

extended by Executive Order 11114 to encompass Federal construction contracts.[28] Following passage of the Civil Rights Act of 1964, President Johnson, in 1965, issued Executive Order 11246[29] which transferred the duties and functions of the President's Committee on Equal Opportunity to the Department of Labor and several other Federal agencies.[30] In 1966, the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor was created to administer Executive Order 11246. In 1967 and 1974, respectively, women, by Executive Order 11375[31] and veterans, by Congressional legislation,[32] were encompassed by the nondiscrimination/affirmative action requirements of the previous Orders on Federal contractors. In 1978, President Carter issued Executive Order 12086 which transferred or reassigned principal responsibility for the enforcement of Executive Order 11246 from eleven other agencies to the Secretary of Labor.[33]

In addition to those provisions of Executive Orders directed specifically at the employment practices of Federal contractors, several Orders or provisions thereof addressed, more generally, equal opportunity in Federal employment. In 1948, finding it "desirable and in the public interest that all steps be taken necessary to insure that th[e] long-established policy [of fair employment]. . .be more effectively carried out," President Truman issued Executive Order 9980.[34] The Order extended the nondiscrimination principle to employment practices within the Federal establishment. Each department head was held "personally responsible for an effective program to insure that fair employment policies [we]re fully observed in all personnel actions within his [or her] department."[35] On the same day, President Truman also issued Executive Order 9981[36] ordering the desegregation of the Armed Forces. The policy was to

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[28] Exec. Order No. 11,114, 3 C.F.R. 774 (1959-1963).

[29] Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965).

[30] *Id.* § 201.

[31] Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970).

[32] Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub. L. No. 93-508, 88 Stat. 1578 (codified at scattered sections of 38 U.S.C., 50 U.S.C. App. § 459)(1988).

[33] In the same year, the Equal Employment Opportunity Commission, the Civil Service Commission, the Department of Labor and the Department of Justice jointly adopted the Uniform Guidelines on Employee Selection Procedures (UGESP). 29 C.F.R. Part 1607 (1993). A policy statement on affirmative action in the Appendix to the UGESP promotes voluntary affirmative action by public employers to secure "genuine equal employment opportunity for all qualified persons."

[34] Exec. Order No. 9,980, 3 C.F.R. 720 (1943-1948).

[35] *Id.*

[36] Exec. Order No. 9,981, 3 C.F.R. 722 (1943-1948).

be "put into effect as rapidly as possible."[37]

In 1955, a President's Committee on Government Employment Policy was created by Executive Order 10590.[38] The principal function of the Committee was to advise the President on the status of civilian employment practices in the Federal Government. President Kennedy's Executive Order 10925,[39] which first called upon Federal contractors to engage in affirmative action, reaffirmed the policies of Executive Order 10590 generally forbidding discrimination throughout and within government employment.[40]

To facilitate coordination of "the activities of all departments and agencies of the Federal government which [we]re directed toward the elimination of. . .discrimination and the promotion of equal opportunity," President Johnson established the President's Council on Equal Opportunity by Executive Order 11197.[41] Executive Order 11246 committed the administration of the nondiscrimination policy in Federal employment to the Civil Service Commission. Executive Order 11478[42], issued by President Nixon in 1969, directed "[t]he head of each executive department and agency. . .[to] establish and maintain an affirmative program of equal employment opportunity for civilian employees and applicants."[43]

Pursuant, in part, to these Executive Orders, each Federal department and agency has developed its own history of programs, plans and regulations, including affirmative action, designed to effectuate the Federal policy of equal opportunity.

Legislative Developments: Title VII of the Civil Rights Act of 1964[44] is the chief Federal legislative enactment providing for equal opportunity in employment. Affirmative action is not mandated by Title VII, although it is available as a remedy upon a showing of unlawful discrimination under the statute.[45] Title VII applies to public and private employers with a workforce in excess of fifteen employees and, generally, prohibits discrimination on the basis of race, color, religion, sex, or national origin. Affirmative action plans or policies are not *per*

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[37] *Id.*

[38] Exec. Order No. 10,590, 3 C.F.R. 236 (1954-1958).

[39] *See* Exec. Order No. 10,925, 3 C.F.R. 448 (1959-1963).

[40] *Id.* § 203.

[41] Exec. Order No. 11,197, 3 C.F.R. 278 (1964-1965).

[42] Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970).

[43] *Id.* § 2.

[44] 42 U.S.C. §§ 2000e-1 *et seq.* (1988 & Supp. V 1993).

[45] *See infra* Judicial Developments, this section.

se inconsistent with this general prohibition. In a memorandum prepared by the Congressional Research Service (CRS) for Senator Robert Dole, the American Law Division (ALD) of the CRS identified six Federal statutes that relate to the equal opportunity policies of the Federal government or Federal grant and assistance programs.[46]

Title II of the Civil Rights Act of 1991[47] provided for the establishment of a commission to examine a variety of issues including those relating to "the underrepresentation of women and minorities at the management and decisionmaking levels [and in line functions] in the United States work force," and "the lack of access for qualified women and minorities to credential-building developmental opportunities," and "the desirability of eliminating artificial barriers to the advancement of women and minorities to such levels."[48]

In March 1992, the Secretary of Labor, in accordance with the provisions of Title II and the Federal Advisory Committee Act, established the "Glass Ceiling Commission."[49] The Commission was mandated to

> A. focus greater attention to the importance of eliminating artificial barriers to the advancement of women and minorities to management and decisionmaking positions in business, and promote work force diversity;
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> B. study the manner in which business fills management and decisionmaking positions, the developmental and skill-enhancing practices used to foster the necessary qualifications for advancement into such positions, and the compensation programs and reward structures currently utilized in the workplace; . . .[50]

The Commission was to issue a report including recommendations based upon its findings, including recommendations for "the use of enforcement (including such enforcement techniques and litigation, complaint investigations, compliance reviews, conciliation, administrative regulations, policy guidance, technical assistance, training, and public education) of Federal equal employment opportunity laws by Federal agencies as a means of eliminating artificial

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[46] *Congressional Research Service's Compilation and Overview of Federal Laws and Regulations Establishing Affirmative Action Goals*, Daily Lab. Rep. (BNA) No. 56, at E-25 (Feb. 23. 1995).

[47] Glass Ceiling Act of 1991, Pub. L. No. 102-166, 105 Stat. 1076, 1081 (codified at 42 U.S.C. § 2000e note)(Supp. V 1993).

[48] *Id.* § 202 (a)(4).

[49] 57 Fed. Reg. 10,776 (Mar. 30, 1992).

[50] *Id.*

barriers to the advancement of women and minorities in employment."[51]

The Commission recently concluded its study in which it found three levels of continuing artificial barriers -- societal, internal and governmental -- to the advancement of women and minorities in corporate management.[52]

The Civil Rights Act of 1991[53] provides that the amendments to Title VII "shall [not] be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law."[54]

Judicial Developments: There are several key Supreme Court cases in the area of employment discrimination that have considered both directly and indirectly affirmative action plans or policies. These cases involve both public and private employers and voluntary and court-imposed affirmative action remedies.

***Griggs v. Duke Power Co.*, 401 U.S. 424 (1971):**

In *Griggs*, the Court unanimously interpreted Title VII of the Civil Rights Act of 1964 to provide a remedy against a private employer where minorities were denied opportunities on a widescale basis. The Court recognized the existence of an "effects" standard as a means of defining unlawful racial discrimination. Reliance on the existence of a disparate racial impact, rather than evidence of discriminatory intent or purpose, was held to be an appropriate measure of proof of discrimination under Title VII. The rationale of *Griggs* was that the mandate of Title VII could not be fulfilled by simply prohibiting, after years of pervasive discrimination, only intentionally harmful practices.[55]

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[51] *Id.*

[52] *See* Frank Swoboda, "*'Glass Ceiling' Firmly in Place, Panel Finds; Minorities, Women Are Rare In Management*," Wash. Post, March 16, 1995, at A1. The Commission's report is not yet available for distribution.

[53] Pub. L. No. 102-166, 105 Stat. 1076.

[54] *Id.* § 116.

[55] As subsequently explained by the Court in *McDonnell Douglas v. Green*, 411 U.S. 792, 806 (1973):

> *Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives.

***United Steelworkers of America v. Weber*, 443 U.S. 193 (1979):**

In *Weber*, the legality of a collectively bargained affirmative action plan that reserved 50% of the openings in a particular training program for black employees until the percentage in the plant was commensurate with the percentage of blacks in the workforce was at issue. The Court in *Weber* held that voluntary, private, race-conscious affirmative action plans, designed to eliminate racial imbalance in traditionally segregated job categories, were not prohibited under Title VII of the Civil Rights Act of 1964, so long as they were temporary and did not absolutely preclude opportunities for whites. *Weber* remains the standard by which voluntary affirmative action plans of private employers are evaluated under Title VII.

***Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986):**

The Supreme Court considered in *Sheet Metal Workers* the availability of court-imposed race-conscious relief under Title VII. At issue was that portion of the district court's order, following a finding of unlawful discrimination by the union, that established a 29% minority membership goal for the union. The Supreme Court held that Title VII does not prohibit a district court from ordering affirmative race-conscious relief as a remedy for past discrimination when necessary to enforce effectively Title VII. The case established that a private employer may be subject to court-ordered race-conscious relief and that such relief may properly inure to the benefit of members of the disfavored class who were not actual victims of the challenged discrimination.

***Firefighters Local Union 1784 v. Stotts*, 467 U.S. 561 (1984):**

The Supreme Court in *Stotts* considered a court ordered consent decree designed to remedy hiring and promotion practices of a governmental entity with respect to blacks. Part of this decree required the fire department to modify its layoff plan to protect black employees, thus resulting in the layoff of white employees with more seniority. The Supreme Court held that in this case there had not been a finding that any of the blacks protected from layoff had been actual victims of discrimination. Title VII, however, protects bona fide seniority systems, and thus, the Court found that it was inappropriate to deny innocent employees the benefits of seniority absent a finding that there were actual victims of discrimination.

***Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986):**

The question presented by *Firefighters* was whether Title VII precludes a Federal district court from entering a consent decree containing race-conscious components. The Court reaffirmed that Title VII does not prevent the entry of a consent decree that provides relief that may benefit individuals who were not actual victims of the defendant's discriminatory practices. In reaching its conclusion, the Court in *Firefighters* applied the analysis used when considering voluntary affirmative action plans as opposed to that applied to court ordered affirmative relief. The former, subject to *Weber*, may be implemented absent a judicially determined practice of unlawful discrimination, while the latter generally may not.

***United States v. Paradise*, 480 U.S. 149 (1987):**

In *Paradise*, the Supreme Court upheld, against constitutional challenge, a district court order that set a numerical promotion goal for black State troopers in the State police department. Under the order one black was to be promoted for each white promoted. The majority of the Justices of the Supreme Court reasoned that the court ordered one-for-one plan did not violate the equal protection guarantee because it was, alternatively, narrowly tailored to correct past governmental discrimination or in furtherance of a compelling State interest.

***Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986):**

A collective bargaining agreement between the Jackson County, Michigan Board of Education and the local teachers' union was challenged by Wygant, a white teacher, as violative of the equal protection clause of the Fourteenth Amendment. Under the terms of the collective bargaining agreement, minority teachers were provided protection against layoffs. Specifically, the agreement provided that, notwithstanding seniority status, the percentage of minority teachers to be laid off could not exceed their representation in the school district workforce. The agreement was sanctioned at both the district and Court of Appeals levels on the ground that the layoff provision was a valid effort to preserve diversity in the workforce and to provide role models for minority school children as a remedy for the effects of societal discrimination. Applying strict scrutiny analysis, the Supreme Court reversed the lower courts. Distinguishing between hiring and layoffs, the Court reasoned that layoffs imposed too intrusive a burden on non-minority teachers and that the county Board of Education did not have a compelling governmental interest in retaining less senior minority teachers.

***Johnson v. Transp. Agency, Santa Clara County, Calif.*, 480 U.S. 616 (1987):**

In *Johnson*, the Supreme Court upheld governmental affirmative action policies providing promotional opportunities for women in a job category historically occupied by males. The county's transportation agency had implemented an affirmative action plan to advance opportunities for women and minorities. A white male competed for a promotion to the position of road dispatcher. A woman, whose test scores were lower than the male applicant, was selected for the position, partly because of her gender. The Supreme Court found the plan consistent with Title VII and the type of flexible, case-by-case, voluntary action that may be undertaken by an public employer to eliminate discrimination and resulting disparities, and to improve gradually the representation of women and minorities in the workforce. The Court held that the standards articulated in *Weber* were applicable to challenges of affirmative action policies directed towards women. Title VII standards also apply uniformly to public and private employers.

Summary of the Development of Affirmative Action in Employment

Executive Order 11246 is perhaps the paramount source of Presidential sponsored affirmative action in employment, having consolidated and extended to women Executive Orders 10925,

barring employment discrimination by Federal contractors and subcontractors, and 11114, applicable to the construction industry.[56]

Pursuant to the various Executive Orders prohibiting discrimination in employment, the Department of Labor established the Office of Federal Contract Compliance Programs (OFCCP), which today supervises compliance by all government contractors and subcontractors (both construction and nonconstruction) with contracts with the Federal government of $10,000 or more, unless exempted, and construction contractors and subcontractors who have Federally assisted contracts.[57]

Nonconstruction contractors and subcontractors with 50 or more employees and $50,000 or more in Federal contracts are required by OFCCP regulations to develop and maintain affirmative action programs for minorities, women and the disabled.[58] OFCCP endorses goals to correct underutilization, but prohibits rigid and inflexible quotas.[59]

The "Glass Ceiling Commission," established by the Secretary of Labor pursuant to Title II of the Civil Rights Act of 1991, recently concluded that artificial barriers continue to impede equal access of women and minorities to advancement in high level corporate management. President Clinton has established a task force to review all federal affirmative action programs.

Title VII of the Civil Rights Act of 1964 neither requires nor prohibits affirmative action measures.[60] The Civil Rights Act of 1991[61] expressly preserves lawful affirmative action plans, leaving to the courts the determination of the proper parameters of such plans.

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[56] The Nixon Administration adopted and implemented "The Philadelphia Plan" to enforce the Executive Order. The Plan, which provided goals and timetables for the employment of minority construction workers, was upheld by the courts. *See* Contractor's Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971).

[57] Reinforcing the mandate of Title VI of the Civil Rights Act of 1964, Executive Order 11,764, issued by President Nixon in 1974, required the Attorney General to coordinate enforcement efforts within the Federal government. *See* Exec. Order No. 11,764, 3 C.F.R. 849 (1971-1975).

[58] Section 503 of the Rehabilitation Act of 1973 requires government contractors and subcontractors to take affirmative action to employ and advance in employment qualified disabled individuals. OFCCP requires that covered contractors and subcontractors prepare and maintain affirmative action programs for individuals covered by Section 503. *See* 41 C.F.R. § 60-741.5(a) (1994).

[59] *See* 41 C.F.R. §§ 60-2.10, 60-2.12 (1994).

[60] Earlier legislation preventing discrimination in employment without reference to affirmative action includes the Unemployment Relief Act of 1933, ch. 17, § 1, 48 Stat. 22 (1933).

[61] Pub. L. No. 102-166, § 116, 105 Stat. 1076, 1079 (codified at 42 U.S.C. § 1981 note (Supp. V 1993)).

Title VII applies to both public[62] and private employers.[63] Under present Supreme Court caselaw, uniform standards apply to challenges, pursuant to Title VII, against sex[64] or race[65] based affirmative action plans or policies whether, voluntary[66] or court-imposed.[67] Those standards require that voluntary affirmative action plans (1) be supported by a manifest imbalance in traditionally segregated job categories, (2) are flexible in application, temporary in duration, and not intended to achieve or maintain a specified gender or racial balance, and (3) not trammel on rights of non-minorities or males.

Title VII requires similarly that court-imposed affirmative action remedies (1) be preceded by a finding of unlawful discrimination, (2) are necessary to correct the violation, (3) are flexible and of limited duration, and (4) do not trammel on rights of non-minorities or males.[68]

Under the Constitution, voluntary governmental or public race-conscious affirmative action is subject to strict scrutiny analysis and, thus, must be supported by a compelling governmental interest.[69] Combatting *societal* discrimination is not a compelling State interest in this context under Supreme Court precedent. If authorized by an appropriate compelling State interest, the plan must be narrowly tailored to accomplish the legitimate goal, and less burdensome alternatives must be unavailable.

Court-imposed race-conscious affirmative action on governmental entities found to have violated the Constitution is appropriate where narrowly tailored to correct past discrimination and/or in furtherance of a compelling State interest to eradicate a history of discrimination.[70]

Although the Supreme Court has not considered a challenge under the Constitution solely on the basis of implementation of a gender-conscious affirmative action employment plan, in a series

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[62] *See, e.g., Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616 (1987) (county employer); *Local 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986)(city employer); *Firefighters Local Union 1784 v. Stotts*, 467 U.S. 561 (1984)(state employer).

[63] *See, e.g., United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[64] *See Johnson.*

[65] *See Weber.*

[66] *See Johnson & Weber.*

[67] *See Sheet Metal Workers.*

[68] *See Stotts & Sheet Metal Workers.*

[69] *See Wygant.*

[70] *See Paradise.*

of cases involving gender classifications, the Court has indicated that an intermediate level of scrutiny will apply to such challenges.[71] Therefore, gender-conscious affirmative action plans likely need only be supported by an important governmental interest to survive attack under the equal protection guarantee of the Fifth and Fourteenth Amendments.

Under both Title VII and the Constitution, affirmative action remedies may properly benefit members of a protected class who are not proven victims of discrimination.[72]

Finally, in *Martin v. Wilks*, 490 U.S. 755 (1989), the Supreme Court held that white firefighters, who had failed to intervene in an employment discrimination lawsuit in which consent decrees were entered, could nonetheless challenge employment decisions taken pursuant to affirmative action provisions of those decrees. This decision, along with several others not relevant to this briefing on affirmative action, was invalidated by § 108 of the Civil Rights Act of 1991.[73]

AFFIRMATIVE ACTION IN CONTRACTING AND LICENSING

Executive Developments: Title VI of the Civil Rights Act of 1964 generally prohibits discrimination in programs and activities receiving Federal financial assistance. In 1974, President Nixon issued **Executive Order 11764**[74] "to clarify and broaden the role of the Attorney General with respect to title VI enforcement."[75] The Attorney General was authorized to "adopt such rules and regulations and issue such orders" as were deemed necessary to effectuate the goals of the Order.

In 1969, President Nixon issued **Executive Order 11458**,[76] which specifically directed the Secretary of Commerce to coordinate Federal plans and programs that affected minority business enterprise (MBE) and to "[p]romote the mobilization of activities and resources of State and local governments, businesses and trade associations, universities, foundations, professional

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[71] *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980)(state gender-conscious workers' compensation law violated equal protection clause); *Kahn v. Shevin*, 416 U.S. 351 (1974)(property tax exemption for widows but not widowers designed to further state policy of "cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden is constitutional").

[72] *See Sheet Metal Workers & Paradise.*

[73] Pub. L. No. 102-166, § 108, 105 Stat. 1076 (codified at 42 U.S.C. § 2000e-2(n)(Supp. V 1993)).

[74] Exec. Order No. 11,764, 3 C.F.R. 849 (1971-1975). Executive Order 11764 superseded an earlier Order providing for coordination of Title VI enforcement efforts issued by President Johnson in 1965. *See* Exec. Order No. 11,247, 3 C.F.R. 348 (1964-1965).

[75] Exec. Order No. 11,764, 3 C.F.R. 849 (1971-1975).

[76] Exec. Order No. 11,458, 3 C.F.R. 779 (1966-1970).

organizations and volunteer and other groups towards the growth of minority business enterprises and facilitate the coordination of the efforts of th[o]se groups with those of Federal departments and agencies."[77] As necessary, the Secretary was to "[r]ecommend appropriate legislative or executive actions"[78] in furtherance of the Order. Executive Order 11458 also established an Advisory Council for Minority Enterprise to assist and advise the Secretary in achieving the objectives of the Order.[79]

Two years later, President Nixon again addressed the development of minority business enterprises. In Executive Order 11625,[80] President Nixon authorized the Secretary of Commerce to "provide financial assistance to public and private organizations so that they may render technical and management assistance to minority business enterprises."[81] Minority business enterprise was defined by the Order as "a business enterprise that is owned or controlled by one or more socially or economically disadvantaged persons. . . includ[ing]. . . Negroes, Puerto Ricans, Spanish-speaking Americans, American Indians, Eskimos, and Aleuts."[82] Federal agencies were required to "develop and implement systematic data collection processes" in order to enable the Office of Minority Business Enterprise to evaluate and promote effectively the MBE program.

In response to findings of an Interagency Task Force on Women Business Owners, President Carter in 1979 issued Executive Order 12138. Under the terms of the Order, Federal agencies were required to "take affirmative action in support of women's business enterprise."[83] In addition, each agency or department with the authority to issue grants, cooperative agreements, loans or contracts, was directed to issue regulations requiring "recipient[s] of such assistance to take appropriate affirmative action in support of women's business enterprise,"[84] and prescribing sanctions for noncompliance. Women's business enterprise (WBE) was defined as "a woman-owned business or businesses,"[85] which, in turn, meant "a business that [wa]s at

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[77] *Id.* § 1(a)(2).

[78] *Id.* § 1(b)(7).

[79] *Id.* § 2(a), (e)(1)-(3).

[80] Exec. Order No. 11,625, 3 C.F.R. 616 (1971-1975).

[81] *Id.* § 1(a)(4).

[82] *Id.* § 6(a).

[83] *Id.* § 1-101(b).

[84] *Id.* § 1-101(c).

[85] *Id.* §1-602.

least 51 percent owned by a woman or women who also control[led] and operate[d] it."[86] President Kennedy's 1961 Executive Order 10980[87] was the Federal government's first positive effort toward addressing systemic sex discrimination. That Order established the President's Commission on the Status of Women and instructed the Commission to "review . . . and make recommendations as needed for constructive action" in six categories, including, "[e]mployment policies and practices, including those on wages, under Federal contracts."[88]

Finally, "to implement the commitment of the Federal government to the goal of encouraging greater economic opportunity for minority entrepreneurs,"[89] President Reagan issued Executive Order 12432 in July 1983. The Order mandated the development of a MBE development plan by each Federal agency with major procurement or grantmaking authority.[90] Each Federal agency was also required "to develop and implement incentive techniques to encourage greater minority business subcontracting by Federal prime contractors."[91]

Legislative Developments: The Public Works Administration created by Title II of the National Industrial Recovery Act of 1933[92] imposed quotas for ex-servicemen with dependents in employment.

Title VI of the Civil Rights Act of 1964 generally prohibits discrimination in programs and activities receiving Federal financial assistance and permits the development of affirmative action plans in furtherance of its objectives.

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[86] *Id.* § 1-601.

[87] Exec. Order No. 10,980, 3 C.F.R. 500 (1959-1963).

[88] *Id.* § 201(a). The remaining categories included Federal social insurance and tax laws; Federal and State labor laws; differences in legal treatment regarding political and civil rights, property rights, and family relations; education, counseling, training, home and child care services; and Federal employment. With respect to the latter, the Executive Order provided for review of:

> [t]he employment policies and practices of the Government of the United States, with reference to additional affirmative steps which should be taken through legislation, executive or administrative action to assure non-discrimination on the basis of sex and to enhance constructive employment opportunities for women.

Id. § 201(f). The Equal Pay Act of 1963, addressing sex-based wage discrimination, was the ultimate result. Pub. L. No. 88-38, 77 Stat. 56, (codified at 29 U.S.C. § 206(d)(1988)).

[89] Exec. Order No. 12,432, 3 C.F.R. 198 (1984).

[90] *Id.* § 1(a).

[91] *Id.* § 2(b).

[92] Ch. 90, § 2, 48 Stat. 195, 15 U.S.C. § 702, *repealed by*, Act of Sept. 6, 1966, Pub. L. No. 89-554, § 8(a), 80 Stat. 648.

In 1977, Congress amended the Local Public Works Capital Development and Investment Act of 1976[93] by enacting the Public Works Employment Act of 1977.[94] Together with implementing regulations, the Public Works Employment Act required that at least 10% of Federal funds granted for local public works projects be utilized to procure the services of or purchase supplies from businesses owned by statutorily defined or identified minorities.[95]

Current statutory provisions permitting and/or requiring gender-based or minority-based set-asides are included in the ALD memorandum to Senator Dole under the headings "Transportation" and "Small Business."

Judicial Developments: Three major cases involving "minority set-asides" have been decided by the Supreme Court, and certiorari was granted in another which was argued before the Court this term. Each case challenges governmental action under the Constitution. Three of the cases involve the constitutionality of Federal set-aside provisions, while the third considers the constitutionality of State and local set-asides.

***Fullilove v. Klutznick*, 448 U.S. 448 (1980):**

In *Fullilove*, the Supreme Court considered a constitutional challenge to the Federal Public Works Act of 1977. Under the Act and its implementing regulations, a congressional program required that 10% of all Federal funds granted for local public works projects be used to procure services or supplies from minority owned or controlled businesses. The Court noted that any program employing racial criteria, even in the remedial context, required close examination, but that in this instance, appropriate deference had to be given to the decisions of Congress, a co-equal branch of the Federal government. In upholding the measure, the Supreme Court found that Congress had abundant evidence that indicated that minority businesses had been denied effective participation in public contracting opportunities. Thus, Congress had the authority to undertake specific measures to eliminate barriers to minority access by mandating the limited use of racial and ethnic criteria to accomplish its remedial objectives.

***City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989):**

At issue in *Croson* was a Minority Business Utilization Plan adopted by the City of Richmond to increase representation of minority-owned businesses in City awarded construction contracts. Under the plan, prime contractors awarded City construction contracts were required to

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[93] Pub. L. No. 94-369, 90 Stat. 999, (codified as amended at 42 U.S.C. § 6701 *et seq.* (1988 & Supp. V 1993)).

[94] Pub. L. No. 95-28, 91 Stat. 116 (codified as amended at 42 U.S.C. §§ 6701, 6705-6708, 6710 (1988 & Supp. V 1993)).

[95] The minorities included United States citizens who were Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

subcontract at least 30% of the dollar amount of each contract to one or more Minority Business Enterprises (MBEs). A contractor could apply for a waiver of the requirement under the plan. The plan was challenged under the Fourteenth Amendment by a contractor who bid on a project but failed to satisfy the plan's waiver provisions. The Court invalidated the plan finding that there was no demonstrated compelling governmental interest in the set-aside. Nor were the means employed narrowly tailored to advance that interest. *Croson* represents the Court's first unequivocal application of the strict scrutiny standard of review to remedial race-conscious measures adopted by State and local governments.

***Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547 (1990):**

Metro Broadcasting addressed the constitutionality of two minority preference policies adopted by the FCC. One policy awarded an enhancement for minority ownership and participation in management in considering licensing for new radio or television stations. The other policy permitted a suspect broadcaster to avoid FCC sanction if the broadcaster transferred ownership to a minority enterprise meeting certain specifications. The policies were adopted by the FCC in furtherance of its responsibility under the Communications Act of 1934[96] to promote diversification in programming. In considering the constitutionality of the policies, the Supreme Court first reaffirmed the holding in *Fullilove* that race-conscious remedies adopted by Congress are subject to a more lenient standard than such classifications prescribed by State and local governments. The Court held that benign race-conscious measures mandated by Congress, even if not "remedial" in the sense of being designed to compensate victims of past governmental or societal discrimination, are constitutionally permissible to the extent they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those objectives. This standard represents a lower burden than that of strict scrutiny normally applied to constitutional challenges to race-conscious remedies. In this case, the Court held that the FCC minority ownership policies met the requirements of that test. The Court found that enhancing broadcast diversity represented an important governmental objective, which could be achieved through the expansion of minority participation in broadcasting.

***Adarand v. Pena*, 16 F.3d 1537 (10th Cir. 1994), *cert. granted*, 115 S.Ct. 41 (1994):**

The Tenth Circuit Court of Appeals upheld against Fifth and Fourteenth Amendment challenge, a Department of Transportation program under which prime contractors are encouraged to hire small disadvantaged business enterprises (DBEs). DBEs are defined as those businesses that are 51% owned and controlled by women and racial and ethnic minorities. Under the plan, contractors are provided incentive payments for utilizing DBEs as subcontractors. Following the standard articulated in *Fullilove*, the Tenth Circuit upheld the program. The Supreme Court has granted certiorari and heard oral argument in *Adarand* on the following questions:

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[96] 48 Stat. 1064 (1934)(codified as amended in scattered sections of 46 U.S.C. & 47 U.S.C.).

> Questions presented: (1) Does congressional race-based set aside program for awarding highway construction contracts survive as applied constitutional challenge when that program seeks to remedy alleged broad-based societal discrimination, rather than clearly identifiable discrimination perpetuated by governmental entity seeking to remedy discrimination? (2) Is "strict scrutiny," as opposed to "lenient standard, resembling intermediate scrutiny," proper standard of review for determining constitutionality of race-based program by Congress? (3) Does Fifth Amendment require Federal agency, in implementing Federal race-based set aside program and when exceeding goals adopted by Congress, to conduct inquiry set forth in Richmond, Va., v. J.A. Croson Co. . . .?[97]

Summary of the Development of Affirmative Action in Contracting and Licensing

Executive Orders attempting to include minority and women owned businesses in government contracting have been issued since 1969. Legislative and regulatory provisions designed to effectuate that goal have followed.

The Supreme Court has entertained challenges to Federal, State and local initiatives providing business opportunities for women and minorities. Under current caselaw, Federal initiatives may be adopted and implemented more freely than may those proposed by State and local governments. Race or gender-conscious measures adopted by Congress to address societal discrimination experienced by those groups are subject to a lenient standard of review by the courts.[98] Moreover, even non-remedial race-conscious measures adopted by Congress are constitutionally permissible if they are supported by important objectives that are within the power of Congress to regulate.[99]

State and local measures providing business opportunities in government contracting for racial minorities are subject to strict judicial scrutiny. Thus, such measures must be accompanied by a compelling State interest and be narrowly tailored to advance that interest in order to survive constitutional challenge. The Court has indicated that the desire to redress societal discrimination is an insufficient basis upon which to ground State and local measures to enhance minority opportunity and participation in government contracting.[100] Remedial gender-conscious measures adopted by State and local governments are likely subject to the more lenient intermediate standard of judicial review.[101]

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[97] *Adarand, cert. granted*, 63 U.S.L.W. 3213, 3213-14 (U.S. Oct. 4, 1994) (No.93-1841).

[98] *See Fullilove.*

[99] *See Metro Broadcasting.*

[100] *See Croson.*

[101] *See supra* note 72 and accompanying text.

The Court has heard argument in *Adarand v. Pena*, which challenges the Court's current interpretation of Federal authority to adopt and implement race and gender conscious measures in the absence of specific findings of discrimination.

HR 831, introduced by Representative Bill Archer (R-Texas), chairman of the House Ways and Means Committee, seeks to repeal a tax certificate program of the Federal Communications Commission (FCC) aimed at increasing opportunities for women and minorities to own radio and television broadcast facilities. The Ways and Means Committee passed the bill by voice vote on February 8, 1995. A similar measure is expected to be introduced in the Senate.

AFFIRMATIVE ACTION IN EDUCATION

Executive Developments: Following the decision in *Brown v. Board of Educ. I*, 347 U.S. 483 (1954), President Eisenhower issued a Proclamation ordering the termination of all obstruction to desegregation in Little Rock, Arkansas.[102] President Kennedy, in 1962, federalized the National Guard to secure the admission of James Meredith to the University of Mississippi. The National Guard was deployed once again a year later to effectuate desegregation of the University of Alabama.

In his January 1964 message to Congress, President Johnson noted disparities in the status of whites and minorities in various areas including education. The President urged constructive action, beyond civil rights legislation, to eliminate these differences and to eradicate discrimination.[103]

President Nixon created a task force on women's rights upon assuming office in 1969. The task force's report, *A Matter of Simple Justice*,[104] recommended legislative measures to ban sex discrimination in educational programs.

In 1980, President Carter issued Executive Order 12232[105] which sought "to overcome the effects of discriminatory treatment and to strengthen and expand the capacity of historically Black colleges and universities to provide quality education."[106] Toward that end, the Order directed the Secretary of Education to "establish annual goals for each agency. . . [t]he purpose of [which was to]. . . increase the ability of historically Black colleges and universities to

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[102] Proclamation No. 3204, 3 C.F.R. 132 (1957).

[103] 1 Pub. Papers of Lyndon B. Johnson 1963-64, at 165 (Jan. 20, 1964).

[104] Presidential Task Force on Women's Rights and Responsibilities, *A Matter of Simple Justice* (1970).

[105] Exec. Order No. 12,232, 3 C.F.R. 274 (1981).

[106] *Id.*

participate in federally sponsored programs."[107] In addition, the Order provided that each executive agency "initiate new efforts to increase the participation of historically Black colleges and universities in the programs of the agency."[108] Efforts to include historically Black colleges and universities in Federal activity was continued by the Reagan, Bush and Clinton Administrations. In 1981, President Reagan issued Executive Order 12320[109] which required the Secretary of Education to devise, coordinate and supervise an effort to increase the participation of historically Black colleges in federally supported programs. Under the Order, designated executive agencies were to "establish annual plans" which were to consist of "measurable objectives of proposed agency actions to fulfill th[e] Order."[110] A similar Order was issued by President Bush in 1989. Specifically, Executive Order 12677[111] established the President's Board of Advisors on Historically Black Colleges and Universities to advise the President on ways of strengthening these institutions. Under Executive Order 12876,[112] issued by President Clinton, the head of each agency subject to the Order "shall establish an annual goal for the amount of funds to be awarded in grants, contracts, or cooperative agreements to historically Black colleges and universities."[113] Depending upon the availability of funds, "the goal shall be an amount above the actual amount of such awards from the previous fiscal year."[114]

Executive Orders 12008[115] and 12364[116] authorize "such affirmative actions as . . . appropriate to assure equal employment opportunity" in the administration of the Presidential Management Intern Program.

Legislative Developments: As early as 1863 Congress enacted special legislation specifically "to educate and improve the moral and intellectual condition of . . . the colored youth of the

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[107] *Id.* § 1-102.

[108] *Id.* § 1-105.

[109] Exec. Order No. 12,320, 3 C.F.R. 176 (1982).

[110] *Id.* § 2.

[111] Exec. Order No. 12,677, 3 C.F.R. 222 (1990).

[112] Exec. Order No. 12,876, 3 C.F.R. 671 (1994).

[113] *Id.* § 4.

[114] *Id.*

[115] Exec. Order No. 12,008, 3 C.F.R. 141 (1978).

[116] Exec. Order No. 12,364, 3 C.F.R. 185 (1983).

nation."[117] In 1866, legislation was passed which permitted the sale or lease of land of the former confederate states, the proceeds of which were to be used for "the education of the freed people," until the "so-called confederate states . . . shall have made provision for the education of their citizens without distinction of color. . ."[118]

The Civil Rights Act of 1964 included a provision authorizing the Department of Justice to bring suit to enforce public school desegregation orders.[119] The Emergency School Aid Act of 1972[120] was enacted to assist school districts in the process of desegregation.

Title IX of the Civil Rights Act of 1964[121] prohibits discrimination in "any education program or activity receiving Federal financial assistance" on the ground of sex or gender. The Act provides:

> Nothing contained in . . . this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.[122]

A variety of measures, listed in the ALD memorandum to Senator Dole, provide or expand educational opportunities for women and minorities.

The Civil Rights Restoration Act of 1987[123] responded to the Supreme Court's decision in

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[117] Act of March 3, 1863, Ch. 103, 12 Stat. 796 (incorporating The Institution for the Education of Colored Youth in the District of Columbia).

[118] Act of July 16, 1866, Ch. 200, § 12, 14 Stat. 173, 176 (continuing and amending act establishing Freedmen's Bureau).

[119] Pub. L. No. 88-352, § 407(a), 78 Stat. 241, 248 (codified at 42 U.S.C. § 2000c-6(a)(1988)).

[120] Pub. L. No. 92-318, §§ 701-720, 86 Stat. 354, 20 U.S.C. §§ 1601-1619, *repealed by*, Pub. L. No. 95-561, § 601(b)(2), 92 Stat. 2268 (1978).

[121] 20 U.S.C. §§ 1681-1688 (1988).

[122] *Id.* § 1681(b).

[123] Pub. L. No. 100-259, § 2, 102 Stat. 28 (codified at 20 U.S.C. § 1687 note (1988)).

Grove City v. Bell[124] by restoring "the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered."

Judicial Developments: The Supreme Court has consistently recognized the legitimacy of race and gender-conscious remedies to redress past and present discrimination. The Court has devised various standards, discussed below, to evaluate whether particular measures are constitutionally permissible.

***Brown v. Board of Educ. I*, 347 U.S. 483 (1954):**

A unanimous Supreme Court overruled the "separate but equal" doctrine announced by the Supreme Court in *Plessy v. Ferguson*, 163 U.S. 537 (1896) as applied in the realm of public education. The Court, in striking down the discriminatory laws requiring segregation in public schools, held that when the State undertakes to provide an educational opportunity, it must provide this opportunity to all on equal terms. In rejecting segregated educational facilities, the Court implicitly approved the race-conscious remedy of integration.

***Brown v. Board of Educ. II*, 349 U.S. 294 (1955):**

In *Brown II*, the Court considered the proper scope of relief to remedy the effects of school segregation. The Court ordered school boards to comply with the mandate of *Brown I* and directed that affirmative efforts to effectuate equal protection be undertaken with "all deliberate speed." The Court left to the various school boards the precise method of complying with the desegregation decree.

***Green v. Kent County School Bd.*, 391 U.S. 430 (1968):**

In *Green*, the Kent County School Board had developed a free-choice school plan as a means to desegregate the schools. The Court ruled that freedom of choice plans were not a sufficient desegregation technique because the Board had an affirmative duty to convert a historically dual system of education to a unitary system. The challenged plan did not meet the Board's responsibility to eliminate all "vestiges" of a dual school system.

***Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971):**

In *Swann*, a unanimous Supreme Court held that when local school authorities fail in their affirmative obligations, district courts have broad powers to fashion remedies that will assure unitary school systems. These remedies included the limited use of mathematical ratios for the racial composition of the school system, the remedial alteration of attendance zones, and the use of busing.

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[124] *See infra.*

***Keyes v. School District No. 1*, 413 U.S. 189 (1973):**

In *Keyes*, the Court affirmed the use of race-conscious remedies in the context of school desegregation even when statutorily imposed segregation had not existed previously. The Court held that proof of segregation in a substantial portion of a school district would support a finding of a dual system, thus imposing an "affirmative duty" on school authorities "to effectuate a transition to a racially nondiscriminatory school system."

***DeFunis v. Odegaard*, 416 U.S. 312 (1974):**

DeFunis was the first direct challenge to an affirmative action plan. A white student challenged an admissions policy on the ground that minority applicants were considered and admitted in a separate pool with lower standards. The case was dismissed as moot because the applicant was in his third year of law school when the case reached the Court.

***Regents of the University of California v. Bakke*, 438 U.S. 265 (1978):**

The Supreme Court in *Bakke* considered a medical school admissions policy which guaranteed a certain number of places for minority applicants. The Court noted that racial classifications are inherently suspect and thus applied strict scrutiny to evaluate the challenged admissions policy. The Court found that the attainment of a diverse student body was a constitutionally permissible and compelling goal for an institution of higher learning. The Court held, however, that the reservation of a specified number of seats based solely on ethnic diversity was not narrowly tailored to meet that goal. Therefore, the specific admissions plan violated the equal protection clause. The Court acknowledged, however, that the school could legitimately consider race as part of the competitive admissions process.

***Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982)**

The Supreme Court in *Hogan* considered a challenge to the University's School of Nursing, which limited its enrollment to women. The Court found that the program violated the equal protection clause of the Fourteenth Amendment. The Court acknowledged that in limited circumstances gender-based classifications favoring one sex could be justified when the members of the gender benefitted by the classification actually suffered a disadvantage related to the classification. In this case, the Court concluded that the State had made no showing that women lacked opportunities to obtain training in the field of nursing or that women were then deprived of such opportunities.

***Grove City College v. Bell*, 465 U.S. 555 (1984):**

The *Grove City* Court held that Title IX of the Education Amendments of 1972,[125] prohibiting

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[125] 20 U.S.C. § 1681(a)(1988).

sex discrimination in any educational program receiving Federal financial aid, applied to Grove City College, a private institution, because some of its students received Federal education grants. However, the Court held that Title IX only applied to the financial aid program and not to all programs institution-wide at the College. Therefore, Title IX prohibited discrimination on the basis of sex only in the administration of the college's financial aid program. The effect of the *Grove City* opinion was reversed by the Civil Rights Restoration Act of 1987.[126]

***Board of Educ. v. Dowell*, 498 U.S. 237 (1991):**

The Supreme Court reversed the decision of the Tenth Circuit Court of Appeals which had held that evidence of independent, demographic changes in the surrounding population of a school district was insufficient to relieve the school district of its obligations under a desegregation plan. The Supreme Court held that dissolution of a desegregation decree is warranted where a school officials has operated for a reasonable period of time in compliance with the decree.

***United States v. Fordice*, 505 U.S. —, 112 S.Ct. 2727 (1992):**

After decades of litigation to dismantle racially segregative effects of a prior dual system of higher education in Mississippi, the Supreme Court held that the good faith adoption and implementation of race-neutral admissions policies was insufficient to satisfy burden of proving abandonment of prior dual system. The State's affirmative duty to eliminate, root and branch, all vestiges of past de jure segregation was not met under equal protection clause or Title VI, solely by adopting race neutral policies, where policies traceable to past dual system are still in force and produce discriminatory effects.

***Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994):**

The Court of Appeals upheld a challenge to a University of Maryland scholarship program under which only African American students were eligible. The Court of Appeals concluded that the scholarship program was not narrowly tailored to remedy the underrepresentation and attrition rates of African American students at the University.

***Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986):**

The Supreme Court invalidated a collective bargaining agreement between the Jackson County, Michigan Board of Education and the local teachers' union under which the percentage of minority teachers to be laid off could not exceed their representation in the school district workforce. The Court held that less senior minority teachers could not be retained to preserve diversity in the workforce and to provide role models for minority school children absent evidence that remedial action is necessary. The Court reasoned that layoffs imposed too intrusive a burden on non-minority teachers and that the county Board of Education's interest

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[126] Pub. L. No. 100-259, § 2, 102 Stat. 28 (codified at 20 U.S.C. § 1687 note (1988)).

in remedying societal discrimination did not justify the race-conscious provision even in the educational context.

***United States v. Board of Educ. of Piscataway*, 832 F.Supp. 836 (D.N.J. 1993):**

Two teachers employed by the Piscataway Board of Education were subject to layoff due to budgetary constraints. Both teachers were equally qualified; both were hired on the same day. One was white, the other African American. The United States filed suit under Title VII to challenge the Board's affirmative action policy when the white teacher was laid off and the African American retained. The Board justified its decision on the ground that it was a means of promoting racial diversity as an educational goal in a department with an otherwise all white faculty. The district court held that the Board's rationale was not a permissible purpose under Title VII to sustain the affirmative action policy.

Summary of the Development of Affirmative Action in Education

Executive Orders and other presidential documents have addressed racial discrimination in education since the Supreme Court's decision in *Brown v. Board of Educ. I.* Those Orders have sought to prevent obstructive tactics to impede the equal education of African American children and adults. Affirmative military efforts to insure minority access to equal education were ordered by President Kennedy in 1962 and 1963.

Every President since and including Jimmy Carter has issued Executive Orders to increase the participation of historically Black colleges and universities in federally sponsored programs.

Sex discrimination in education was first addressed by the Executive branch in 1969. President Nixon's Task Force on Women's Rights and Responsibilities urged the President to establish "a women's unit in the Office of Education to lead efforts to end discrimination in education because of sex," and to recommend that Congress amend Titles IV and IX "to authorize the Attorney General to aid women and parents of minor girls in suits seeking equal access to public education."[127]

The Civil Rights Act of 1964, as amended, prohibits both race and sex discrimination in public education. The Department of Justice is authorized to enforce desegregation orders of the Federal courts. Early legislative enactments provided specifically for the education of the descendants of slaves.

Gender imbalance may be considered in determining compliance with the Civil Rights Act of 1964, as amended. The Civil Rights Restoration Act of 1987 established that gender or race discrimination is prohibited "all of the operations" of an educational institution receiving Federal funds.

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[127] *See* Presidential Task Force on Women's Rights and Responsibilities, *"A Matter of Simple Justice,"* ¶ 3c, at IV, ¶ 4d at VI (1970).

The Supreme Court has outlawed racial segregation in public education and has found violations of this mandate in the absence of statutorily imposed segregation. It has recognized an affirmative duty on school boards to effectuate desegregation and has authorized race-conscious measures to realize that goal.

The Court has approved the consideration of race in the admission policies of institutions of higher education; however, the Court has disapproved rigid racial quotas as violative of the equal protection clause. The Court also has rejected diversity as a constitutionally permissible goal permitting retention minority teachers with less seniority over more senior white teachers.

The Court has held that gender-based classifications favoring one sex may be constitutionally permissible where proof of a disadvantage related to the classification is demonstrated. Supreme Court precedent suggests that an "important," as opposed to "compelling," governmental interest will be sufficient to overcome a constitutional challenge to a gender-conscious affirmative action plan in educational employment or admissions policy.

Two recent decisions of the lower Federal courts have considered the propriety of affirmative action in educational layoff policy and in the provision of minority scholarships.

AFFIRMATIVE ACTION IN HOUSING

Executive Developments: In the early 1930's, a series of manuals of the Executive agency, Federal Housing Administration (FHA), provided detailed instructions to insurance underwriters on methods to prevent minority integration into white neighborhoods.[128] One manual provided that "infiltration. . . of inharmonious racial groups" into neighborhoods would have a negative impact. The manual continued that "a change in social or racial occupancy generally contributes to instability and a decline in values."[129]

Executive Order 11063,[130] issued in 1962 by President Kennedy, represents the first Executive level effort against housing discrimination. The Order acknowledged that "discriminatory policies and practices result[ed] in segregated patterns of housing and necessarily produce[d] other forms of discrimination and segregation which deprive[d] many Americans of equal opportunity." The Order directed all executive departments and agencies "to take all action necessary and appropriate to prevent discrimination because of race, color, creed, or national origin" in the disposition of property, including, sales, leasing or rental, and in the

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[128] *See* U.S. Fed. Hous. Admin., *Underwriting Manual: Underwriting and Valuation Procedure Under Title II of the National Housing Act*, ¶ 228 (April 1936) (rev. Nov. 1936); U.S. Fed. Hous. Admin., *Underwriting Manual*, ¶¶ 935 & 937 (rev. to Feb. 1938).

[129] U.S. Fed. Hous. Admin., *Underwriting Manual*, ¶ 937 (1938).

[130] Exec. Order No. 11,063, 3 C.F.R. 652 (1959-1963).

lending practices of institutions with monies insured or guaranteed by the Federal government.[131]

President Carter issued Executive Order 12259[132] in 1980. The Order mandated that all programs of the executive branch "relating to housing and urban development . . . be administered in a manner affirmatively to further fair housing."[133] In January 1994, President Clinton issued Executive Order 12892, which revoked Executive Order 12259, but retained the mandate affirmatively to assure fair housing, and expanded Executive Order 11063 to provide protection against discrimination in programs of Federal insurance or guaranty to disabled persons and to families with children.

Legislative Developments: The Fair Housing Act of 1968 and its amendments of 1988 are the principal legislative enactments addressing discrimination in housing and providing a basis for affirmative action policies and programs. Both provisions require administration so as to achieve affirmatively their respective goals.

The Housing and Community Development Act of 1974,[134] as amended in 1983, mandates affirmative efforts by States and localities receiving community development block grants to further fair housing.

Judicial Developments:

Shelley v. Kraemer, 344 U.S. 1 (1948):

The Supreme Court held that judicial enforcement of racially restrictive covenants was discriminatory State action in violation of the equal protection clause of the Fourteenth Amendment.

Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968):

A Black couple was provided relief under a statutory provision whose applicability to their claim had been challenged on technical legal grounds. The couple sued alleging that they had been denied the opportunity to purchase a house solely on the grounds of their race. The Supreme Court construed the statute to prohibit "*all* discrimination, private as well as public, in the sale or rental of property."

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[131] *Id.* § 101.

[132] Exec. Order No. 12,259, 3 C.F.R. 307 (1981).

[133] *Id.* § 1-1.

[134] 42 U.S.C. § 5301-5318a (Supp. IV 1992).

***Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972):**

The Supreme Court interpreted the Fair Housing Act as having as its chief goal to further the elimination of the nation's ghettos and to facilitate fair housing opportunities.

***Hills v. Gautreaux*, 425 U.S. 284 (1976):**

In *Gautreaux*, the Supreme Court upheld a metropolitan-wide remedy, following a finding of unlawful segregative practices by HUD, which required the race-conscious placement of public housing sites and tenants throughout the metropolitan area of Chicago.

Summary of the Development of Affirmative Action in Housing

The Executive branch initially endorsed racial segregation in housing. Beginning in 1962, Executive Orders have espoused nondiscrimination in housing and encouraged affirmative efforts to facilitate fair housing opportunities.

The Fair Housing Act of 1968 and its amendments of 1988 are the principal legislative enactments addressing discrimination in housing. Together they provide for nondiscrimination and positive action to insure fairness in sales and rental, and leasing and lending practices related to housing. The Housing and Community Development Act of 1974[135] requires that recipients of Federal block grants affirmatively pursue fair housing practices.

The Supreme Court has recognized the deleterious effect of housing discrimination and has judicial sanction through enforcement of racially restrictive covenants. The Court also has approved the imposition of race-conscious measures to remedy unlawful segregative practices by the government.

CONCLUSION

The above represents an overview of the major Executive, Legislative and Judicial developments of affirmative action plans, programs or policies in the specified areas. It is by no means a comprehensive assessment of the pervasive discrimination experienced by minorities and women or the scope of the remedies sanctioned by the various branches to redress such discrimination. In addition, there are other areas, not addressed above, where race or gender conscious remedies have been administered, applied or approved by the various branches of government.[136]

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[135] 42 U.S.C. § 5301-5318a (Supp. IV 1992).

[136] *See, e.g.*, United Jewish Orgs. of Williamsburg, Inc. v. Carey, 430 U.S. 144 (1977) (voting).